

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

APPEAL NOS. 10-56400 and 10-56311

**ANNA MARIA ALBERGHETTI,
and BONNIE POINTER, on Behalf of
Themselves and All Others Similarly
Situated**

Plaintiffs-Appellants-Cross Appellees

v.

CORBIS CORPORATION,

Defendant-Appellee/Cross-Appellant.

**On Appeal from the United States
District Court for the Central District of California, Eastern District
Case No. 09-cv-05735-SVW**

APPELLANTS' THIRD CROSS APPEAL BRIEF

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I. THE DISTRICT COURT RULED CORRECTLY THAT PLAINTIFFS' CLAIMS ARE NOT PREEMPTED BY THE COPYRIGHT ACT

A. States' rights of publicity laws should be a part of our way of life.

As we understand the Cross-Appeal of Corbis, it appears to seek elimination of rights of publicity presently in effect in all fifty states by arguing federal copyright preemption. Corbis suggests that if a celebrity allows his or her picture to be taken while merely walking down a street or appearing at the Academy Awards, it is perfectly permissible for a photographer or the party who purchases that photograph to exploit the subject at its choosing for commercial purposes and without the subject's consent.

We therefore review the historical background behind Rights of Publicity law to address this Corbis position. Amici Curiae Screen Actors Guild, Inc., American Federation of Television and Radio Artists, AFL-CIO, Writers Guild of American, et al. in case number 10-15387 presently pending before this Court has given us an excellent background:

“In 1953, the Second Circuit formally coined the term ‘right of publicity’ recognizing an economic and publicity value exists in one’s photograph ‘in addition to and independent of [the] right of privacy.’ *Haelan Laboratories, Inc. v. Topps Chewing Gum*, 202 F.2d 866, 868 (2nd Cir. 1953).

...
[In] *O'Brien v. Pabst Sales. Co.* 124 F.2d 167, 170 (5th Cir. 1941) (Holms, C.J. dissenting), Circuit Judge Holmes recognized the right to

control the commercial use of one’s persona ‘ is a property right that belongs to everyone; it may have much or little, or only nominal, value; but it is a personal right, which may not be violated with impunity.’”

...

The ‘rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of goodwill. No social purpose is served by having a defendant get free some aspect of the Plaintiff that would have market value for which he would normally pay. *Zacahini v. Cripps – Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977) (quoting Kalven, *Privacy in Tort Law Were Warren and Brandeis Wrong?* 31 *Law Contemp Prob.*, 326 331 (1966).

...

Recognizing the significance of an individual’s right of publicity, the Court proclaimed that the infringement at issue – ‘ the appropriation of the very activity by which the entertainer acquired his reputation in the first place’ – presented ‘what may be the strongest case for a ‘right of publicity’, *Id.* at 576. Nor was its analogy to copyright and patent unusual. As illustrated *supra*, federal and state courts around the country had previously used similar analogies in equating the right of publicity to copyright law.

...

[U]sing a celebrity’s name or likeness in connection with a commercial product is not *necessarily* expressive. Celebrity merchandise proves the point. There is nothing inherently expressive about a Kobe Bryant jersey, a baseball imprinted with Derek Jeter’s signature, or a mug with a picture of Peyton Manning. The seller or manufacturer of such merchandise does not intend to convey any message, but instead to enhance the product’s commercial value by exploiting the goodwill created by the celebrity. ***The celebrity’s identity is used for purely commercial purposes.***

...

See 1 J. Thomas McCarthy, *The Rights of Publicity & Privacy*, ch. 2 (2d ed. 2010)”

So, the question here raised by Corbis’ cross-appeal is whether Plaintiffs’ rights of publicity are preempted by the Copyright Act. They are not. Corbis uses

the identities of Plaintiffs for one and only one purpose, a commercial purpose to make money off their identities. Corbis is not a newspaper, magazine or media outlet. It sells Plaintiffs' pictures to these media outlets for which it charges a substantial amount of money. When it sells these pictures to its customers who are not newspapers, magazines, or media outlets, it merely charges more money! Indeed, a report by the Register of Copyright in 1965 stated that a copyright claim not preempted "might include, depending upon the particular circumstances in the case...[the] unauthorized exploitation of a person's name or photograph for commercial advertising..."¹

Corbis' "licensing of its copyrights" has nothing to do with what Plaintiffs' claims are about. Plaintiffs' claims are about Corbis' selling or soliciting for sale, Plaintiffs' photographs – which are tangible merchandise or goods. Most, if not all, right-of-publicity cases involve some tangible item – a photograph, a t-shirt, a lithograph, a product, which can be copyrighted. Corbis has conceded that Plaintiffs' right of publicity is a separate right.² Indeed, Corbis expressly tells its potential customers on its websites that acquiring a "copyright license" in

¹ Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, at 85 (1965), reprinted in 4 Omnibus Copyright Revision Legislative History (1966). See also Copyright Law Revision Part 5, 1964 Revision Bill with Discussion and Comments, at 318 (1965) comments of professor Melville B. Nimmer) Urging that the bill "[i]nclude in state rights which are preserved...the right of publicity.

² Corbis Opening Brief ("OB") at page 13.

Plaintiffs' photographs does not give the "licensee" any right to violate Plaintiffs' right of publicity. Corbis cannot ignore its own factual admissions. Indeed, Corbis' sale ("license") of its photograph copyright is itself a product.

Ironically, the son of a celebrity once wrote:

"The commercial value of celebrity identity is a side effect of celebrity status, but that does not mean that a celebrity's good fortune must be shared freely with the public at large or relinquished to some opportunist with no connection to the celebrity. Celebrities have invested years of time and effort to hone the skills that earned them their celebrity status. In recognition of this fact,...state laws provide celebrities with the right to exclusively control and benefit from the use of their own images and identities." *California Expands the Statutory Right of Publicity for Deceased Celebrities While its Courts are Examining the First Amendment Limitations of that Statute*, 10 DePaul-LCA J. Art & Ent. L. & Pol'y 259 (2000)."

Who was the author of this insightful article? Corbis' attorney, Bela G. Lugosi Jr.!

In the Cook County Illinois case of *James Brown vs. Corbis*, case number 02 L 5872, Bela Jr., son of the famous Dracula Actor, and attorney for Corbis, stated that Corbis tells the user if an image depicts a person, many states and countries have a right of publicity law that requires the user to obtain permission from the person depicted before they use the image in certain ways. [SER 648]

Corbis also attempts to portray itself as merely a distributor for photographers³ and sets forth what the District Court characterized as a "parade of

³ Corbis OB at pages 3 and 12 claims Corbis "stands in the shoes" of photographers and media outlets. Based upon what authority? Its own? Hardly.

horribles” were Plaintiffs’ publicity rights maintained. (Corbis’ Brief page 1) But Corbis’ own website, www.corbisimages.com, (ER 603) belies this contention:

“Are the collections open to the public?”

The collections’ prints and negatives *have never been available for the general public to access. From its very beginning, the Bettmann Archive⁴ and all the collections within it have been private entities used by their owners as moneymaking assets.* (emphasis added)

...

Rights Managed, or RM, in photography and the stock photo industry, refers to a copyright license which, if purchased by a user, allows the *one time use* of the photo as *specified by the license. If the user wants to use the photo for other uses an additional license needs to be purchased.* (Emphasis added)

...

Corbis is a creative resource for advertising, marketing and media professionals, providing a comprehensive selection of stock photography, illustration, footage, fonts, merchandize, and rights clearance and rights representation services. Through its branded websites Corbis Images, Corbis Motion, Veer and GreenLight, the company helps the creative community produce distinctive work for websites, magazines, newspapers, books, television and films.

...

Customers

Corbis brands serve hundreds of thousands of clients in leading advertising agencies, direct marketing and graphic design agencies, corporations, publishers and media companies, and small and medium sized businesses, as well as consumers.”

Corbis charges a separate fee under “rights Managed or RM” to a Corbis customer for a different use at a different time. This Corbis admitted business model is just another reason the District Court committed reversible error

⁴ Corbis purchased this inventory of pictures from Kraus-Thomson Organization in 1995 who purchased it from Bettmann in 1981. Bettmann died in 1998. (Corbis website, www.corbis.com)

granting summary judgment. Corbis knowingly allows its customers to republish for an additional fee: thus commencing a new statute of limitations period. (See page 18 *infra*)

B. Corbis' admissions as to no preemption.

Corbis concedes state publicity rights are distinct (“hardly equivalent”) and not generally pre-empted by the Federal Copyright Act. *Zacchini v. Scripps-Howard*, 433 U.S. 652 (1977) and the Seventh Circuit’s strong statement upholding the right-of-publicity against a pre-emption attack in *Toney v. L’Oreal USA, Inc.*, 406 F.3d 905 (7th Cir. 2005) maintain this distinction.

Plaintiffs live in California, home of many celebrities and public figures. Its Supreme Court give us rights of publicity guidance. In *Comedy III Productions, Inc. v. Gary, Saderup Inc.* 25 Cal. 4th 387, 21 P.3d 797 (2001), the defendant printed and sold original sketches of the Three Stooges on t-shirts and as lithographs, without the permission of their estates. After discovery and a trial on stipulated facts, the Court ruled for the owner of the Stooges rights and condemned Defendant’s conduct as a plain violation of the California right-of-publicity statute. Said the California Supreme Court:

“Saderup’s lithographic prints of the Three Stooges are themselves tangible personal property, consisting of paper and ink, made as products to be sold and displayed on walls... [Saderup] ...thus used the likeness of the Three Stooges on products, merchandise or goods: within the meaning of the statute. [Saderup’s business] ...was a

commercial enterprise designed to generate profits solely from the use of the likeness of the Three Stooges which is the right of publicity...
Id. At 810.

Just as Saderup's lithographs (which were his original works which could be copyrighted by him) were deemed "paper and ink" products to be sold and displayed, so are Corbis' Plaintiffs' photographs "paper and ink" products to be sold ("licensed") and displayed. That Corbis acknowledges its photographs do not extinguish Plaintiffs' right of publicity in these photographs, it is with considerable chutzpah that Corbis argues total pre-emption ("express or conflict") to this Court. If Plaintiffs' right of publicity claims are preempted, the logical inquiry becomes: where in Plaintiffs' complaint are there copyright claims against Corbis? Alternatively, where in the Copyright Act are Plaintiffs' claims against Corbis negated? The answers are: none and nowhere. Corbis' Brief emphasizes how it warns its buyers that its sale of a license for an image does not include any rights of publicity and is "*subject to...rights of publicity*". Obviously, if Corbis' alleged "copyright" rights in the photos pre-empted Plaintiffs' right of publicity, then Corbis would not have to warn its customers about Plaintiffs' right of publicity.

Corbis "warnings" to its commercial buyers to be aware of Plaintiffs' rights-of-publicity aggravates, rather than ameliorates, Corbis' liability. Corbis advises its users "of the need to obtain permission from the owner of the right of publicity

before putting the image to commercial use.” But including such a “disclaimer” is a hollow and cynical gesture. It’s like Napster telling its internet “song-sharers” that they must of course agree not to share songs in any manner that violates the Copyright Act! The law looks to conduct, more than self-serving words, in determining facts. Corbis’ analogous arguments have been rejected by this Court in on-line music piracy cases. (*See A & M Records, Inc. v. Napster, Inc.* 239 F.3d 1004 (9th Cir. 2001).

In *Napster*, defendant internet music server was held to be preliminarily liable for direct, contributory, and vicarious infringements of recording artists’ rights. Said the *Napster* Court: “Turning a blind eye to detectible acts of infringement for the sake of profit gives rise to liability.”⁵

The Opinion of Circuit Judge Goldberg in Illinois denying Corbis’ Motion to Dismiss on similar facts and law may also be helpful. [SER 651]. Corbis’ responsibility to police its sales of photographs and images was addressed and wrote that Court:

“...[T]his Court finds that Corbis would be in a more logical position to enforce their own customers’ usage of the pictures. Requiring [Plaintiffs] to police such sales would either force [Plaintiffs] to continually probe the market place for illegal use of [their] image, or would require that Corbis give [Plaintiffs] access to the names of their commercial customers so that [Plaintiffs] can police the customers [themselves]. If all commercial sales involve a right of publicity

⁵ In *MGM v. Grokster* 545 U.S. 913 (2005), the U.S. Supreme Court confirmed.

anyway, Corbis should be able to easily remedy the problem of illegal commercial use of [Plaintiffs'] pictures by requiring all commercial customers to obtain [Plaintiffs'] permission to use the pictures prior to purchasing the pictures from Corbis. Corbis could also obtain [Plaintiffs'] permission itself in cases where its customers ...[buy] the picture for personal use and Corbis becomes the commercial seller. [SER 651]

Judge Goldberg was affirmed in *James Brown v. Corbis* , 873 N.E.2d 954 (1st Dist. 2007) and the Illinois Supreme Court denied the Corbis Petition for Leave to Appeal.

Moreover, Corbis' sales or offering for sale of Plaintiffs' photographs without their permission competes with Plaintiffs' own commercial exploitation of their photographs from which they derive revenue.⁶ Obviously, when a fan or collector buys a Plaintiff photo from Corbis, that sale diminishes the market for Plaintiffs' own sales of their photos to fans and collectors. Indeed, Corbis deposed Shirley Jones in her case pending before this Court, number 11-5608, and the Corbis attorney was told of "signings" by celebrities where the public is invited to purchase autographed pictures from these celebrities.⁷ Nowhere in the Corbis brief does it deal with this obvious [and damning to Corbis] reality, whether or not Corbis attempts to shoehorn this reality into its "express" or "conflict preemption."

⁶ In a June 28, 2011 column of "Stella" in the *Chicago Sun Times*, the following is found: "Mariah Carey and hubby, Nick Cannon are busy trying to sell the pictures of their twin babies, Moroccan Scott and Monroe Cannon, born in early May. They were hoping they would get millions, like the first photos of Brad Pitt and Angelina Jolie's twins, which raked in millions for that couple. However, so far the highest offer they have received is \$200,000.

⁷ At the filing of this Brief, her appeal has been consolidated with this one.

Rather, Corbis' brief urges this Court to accept Corbis' website warning as a defense: "Horrors! But we are not responsible!" But to its customers who it knows intend to use Plaintiffs' photos commercially, Corbis says something quite different: "Just pay us more money!"⁸ Shame on Corbis. [ER 604-05]

Nothing in California law insulates Corbis from liability for sales to fans, collectors, and known commercial users. Nothing in Corbis' Brief even argues for such insulation. This should be the end of the debate.

The Copyright Act's pre-emption (17 U.S.C. § 301) may operate to bar a Plaintiff's state claims (a) for which the Plaintiff can sue in copyright, or (b) for which the copyright act precludes any claims by a Plaintiff – such as a work's being in the copyright public domain. "Congress intended that the evolving common law rights of 'privacy,' 'publicity,' and trade secrets... would remain unaffected" so long as such claims remain different in kind from copyright infringement. *Baltimore Orioles Inc. v. Major League Baseball Players Association*, 805 F.2d 663, 678 (7th Cir. 1986). The Seventh Circuit noted that "... the right of publicity protects against the unauthorized exploitation of names, likeness, personalities, and performances that have acquired value for the very reason that they are known to the public." *Id.*, citing *Zacchini*, at 573. *Orioles*

⁸ Corbis website as cited in complaint, p. 5-6.

fleshed out the pre-emption doctrine, and, with *Toney*, 406 F.3d at 910, “dooms” its application to Plaintiffs’ claims against Corbis.

Orioles’ analysis requires that for a claim to be pre-empted by the federal Copyright law, it must be “equivalent” to a copyright claim. Here, Plaintiffs did not make or authorize the photos, and could not sue for any copyright violation. And Plaintiffs did not produce the photos for Corbis as “works-for-hire” or otherwise cause Corbis to acquire the photos (as in *Orioles*). They were not fixed in tangible form by the party suing (Plaintiffs). If a copyright or licensing lawsuit were brought by a photographer (who claimed a copyright) against Corbis; or by Corbis against one of its buyer “sub-licenses”, then copyright questions might be in issue. Not here.

Corbis’ argument that it is in the business of “licensing copyrights”, an intangible, should not be accepted. We repeat what should be absolutely clear to this Court: Corbis is in the business of selling or soliciting for sale Plaintiffs’ photographs, without their consent. Period. This is a prima facie violation of the plain language of California Civ Code § 3344. Plaintiffs’ right of publicity is not equivalent to any relevant copyright – because they have no copyright at stake.

As to Defendant’s argument on conflict preemption, “Conflict preemption applies when there is no express preemption but (1) it is impossible to comply with both the state and federal law or when (2) the state law stands as an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress." *Davidson & Associates v. Jung*, 422 F.3d 630, 638 (8th Cir. 2005) (citing *Pacific Gas & Elec. Co. v. Energy Res. Conservation and Dev. Com'n*, 461 U.S. 190, 204 (1983)). But for the same reasons that the subject matter of the right of publicity is not "within the subject of copyright," State law does not stand as an obstacle and is not impliedly preempted by conflict law. *See Davidson* 422 F.3d at 638, (reasoning express preemption cases apply to a conflict preemption analysis "with equal force"); *see also Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007 (3d Cir. 2008) (federal copyright law, under conflict preemption doctrine, did not impliedly preempt professional football player's estate from asserting state right of privacy claims against defendant).

Finally, *Toney* is definitive. 406 F.3d at 910. In *Toney*, the plaintiff model had consented to the use of her photograph for a certain period of time on a copyrighted hair-care product advertisement. *Id.* at 907. The Seventh Circuit held that *Toney's* Illinois Right of Publicity Act (IRPA) claim was not preempted by the federal copyright act. 406 F.3d at 910:

"What is protected by the right of publicity is the very identity or persona of the plaintiff as a human being.' J. Thomas McCarthy, 2 Rts. Of Publicity & Privacy § 11:52 (2d Ed. 2004). A photograph 'is merely one copyrightable 'expression' of the underlying 'work', which is the plaintiff as a human being. There is only one underlying 'persona' of a person protected by the right of publicity.' *Id.* In contrast, '[t]here may be dozens or hundreds of photographs which fix

certain moments in that person's life. Copyright in each of these photographs might be separately owned by dozens or hundreds of photographers.' *Id.* A persona, defined in this way, 'can hardly be said to constitute a 'writing' of an 'author' within the meaning of the copyright clause of the Constitution.' *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003-04 (9th Cir. 2001) (quotation omitted); *See also Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 623 (6th Cir. 2000), *Brown v. Ames*, 201 F.3d 654, 658 (5th Cir. 2000).

Corbis' OB in a footnote at page 34 attempts to place this Court at odds with the 7th Circuit suggesting that *Laws v. Sony*, 448 F. 3rd 1134 (2006) conflicts with *Toney* arguing that "the Illinois state court failed to appreciate the inapplicability of *Toney* here, where the claim alleged is not the taking of the plaintiff's persona for any promotional or other use independent of licensure of the copyrighted work." Corbis thinks that *Toney* differs from Plaintiffs' case because in *Toney* the copyrighted photograph was used "to endorse a product". Here Plaintiffs' photographs *are the product* when Corbis sells ("licenses") them. And under California law, both "*advertising or selling, or soliciting purchases of products* are equally culpable violations. Cal. Civ. Code § 3344. *Toney* is dispositive. In fact, Plaintiffs' case is far stronger than *Toney's*, because Plaintiffs, unlike *Toney*, *never* consented to Corbis' sale and offering for sale of their identity and image, for any use and Corbis' use of Plaintiffs' identities and photos further promote and advertise *its* products

Toney and *Laws*, also do not conflict with *Fleet v. CBS, Inc.* 50 Cal. App. 4th 1911, (1996). In *Laws* the plaintiff had voluntarily given up, contractually, control and copyright in the work, to another. Singer Laws authorized the taping of her song “Very Special”, with Elektra Records, and granted to Elektra the exclusive right to copyright and license the song. 448 F.3d at 1136. Elektra then licensed Sony Music Entertainment Inc. to use a sample of Laws’ song as part of a Jennifer Lopez/LL Cool J album. *Id.* Laws sued Sony for, inter alia, violation of her right-of-publicity. *Id.* at 1138. This Court found this claim to be pre-empted by the federal Copyright Act, and noted that Law’s remedy was for a simple breach of contract if she felt that the terms of her consent had been violated (this contract claim was not pre-empted). *Id.* at 1145. Here Plaintiffs *never* authorized or consented to Corbis’ sale of their photographs, and Plaintiffs never created or licensed the photographs nor do they have any copyright in the photos.

In *Fleet* the plaintiff actors had agreed to perform in a motion picture copyrighted by CBS, but their employer failed to fully pay them. 50 Cal. App. 4th at 1913. A right-of-publicity claim was pre-empted by the copyright act, but the plaintiffs still had a breach-of-contract claim for non-payment of their salary. *Id.* at 1924. Plaintiffs’ publicity claim had sought to stop the distribution of the film by CBS, but Plaintiffs lost, because they had voluntarily contracted away any copyright interest in the film. *Id.*

Corbis also cites to this court's decision in *Jules Jordan v. Video, Inc.*, 144 F.3d 942 (9th Cir. 2004) to support its preemption argument. But Senior District Judge Robert W. Gettleman of the Northern District of Illinois sitting by designation (Judge Gettleman sits in the same building in Chicago as does the 7th Circuit) in his opinion clearly establishes that both *Plaintiffs sued on their copyright claims* yet the individual Plaintiff also sued claiming a violation of a right of publicity:

“Although California law recognizes an ascertainable interest in the publicity associated with one's voice, we think it is clear that federal copyright law preempts a claim alleging misappropriation of one's voice *when the entirety of the allegedly misappropriated vocal performance is contained within a copyrighted medium.*” (emphasis added)

As stated above, Plaintiffs have no copyright claim and, again, Corbis' conduct as to Plaintiffs is totally unrelated to the elements of copyright infringement.

Lastly, Defendant asserts that uses of individuals' likenesses are preempted only when a use of “something more” than the photograph is involved. (Corbis Brief at 22 and 27) citing *Downing* for use by retailer Abercrombie in a promotional catalog to sell a product.) But Corbis ignores what is its business model: selling photographs to 3rd party users to promote their product and while at the same time using Plaintiffs' photos without their permission to promote sale of its own product: the sale of copyright licenses. Moreover, the *Fleet* court noted,

one "who has *merely had his picture taken* has not engaged in a 'dramatic work' or other 'work of authorship'" and thus the picture has no protection under the federal copyright law from the Right of Publicity Act. *Fleet*, 50 Cal. App. 4th at 1920 (emphasis added).

II. THE DISTRICT COURT ORDER FOR SUMMARY JUDGMENT BASED ON THE STATUTE OF LIMITATIONS WAS ERROR.

A. Plaintiffs had no way of knowing that the statute of limitations would bar their claims.

Initially, we need to correct what is apparently a misunderstanding by Corbis of Plaintiffs' contention that only Corbis, and not those whose publicity rights are being violated by Corbis under California law, was aware of *when* Plaintiffs unauthorized pictures were *first posted* on Corbis websites. Corbis argues at page 58 of its Opening Brief:

“At bottom, Plaintiffs' lament is that they did not see the statute of limitation issue coming, claiming that only Corbis could have known their claims were time barred. POB at 20. Apart from providing no basis to reopen the judgment, this plea, too, is demonstrably false. The date that *each photograph was taken* is readily available on Corbis' website by simply opening the thumbnail display of the image. ER 383, 551-52 (explaining availability of enlarged photographs on Corbis' website, and *displaying date of photographs*). If Plaintiffs did not anticipate the statute of limitations defense or react to *Christoff* in the ten months after its publication, they have only themselves to blame; this is not an entitlement to reopen and prolong a lawsuit through a new proxy.” (emphasis added)

Of course Plaintiffs' contention all along has been that they *could not* discover the *date of posting* of their pictures before filing suit. They argued before the District Court to no avail that the date of *posting* is the triggering date not the date the picture *was taken*. Corbis buys millions of pictures from various collectors over many years. Most pictures it *posts* after purchase were taken many years in the past: more than the 2 year statute of limitations before *posting*. The date the picture *was taken is totally irrelevant*. Plaintiffs' plea is *not* "demonstrably false". The District Court's statute of limitations ruling was centered on the date of *first posting* [ER 43-46]

To determine if there was any merit to the Corbis argument that Plaintiffs' "have only themselves to blame", Plaintiffs did follow the instructions given at page 58 of Corbis' OB. When doing so, no date of *first posting* is disclosed. Perhaps Corbis may now understand Plaintiffs' contention. The non-disclosure on Corbis' websites of Plaintiffs' pictures *first posting* was a fact the District Court ignored: *only Corbis knows that date*. It ignored this fact when considering Plaintiffs' argument that on August 17, 2009, 12 days after this case was filed, the California Supreme Court eliminated the "discovery rule" relative to the statute of limitations. As demonstrated in our opening brief commencing at page 18, the unfairness is obvious: no reasonable person could have discovered the Corbis non-

disclosed date of *first posting*. But the District Court refused to acknowledge this inequitable situation and instead made a Draconian ruling.

B. The District Court erred in its application of the “Single Publication Rule”.

Corbis’ method of doing business makes the “single publication rule” inapplicable. As quoted partially at page 25 of our OB, Corbis Vice President D. Drew MacLean’s Declaration in ¶ 10: (ER 279) states:

... “The client then reports to Corbis *the intended use of the image*, the size of the use, the industry, and other identifying information, and, on the website, is able to calculate a price for the license. Once the license transaction is completed, the licensed image is immediately downloadable by the client either directly from the website (in the case of a web order), or from a secure FTP site. If an image is licensed over the web, the license invoice will reflect that it was made via a “web order.” (emphasis added)

So Corbis enters into a series of separate sales transactions, each of which governs the use of the image. After Corbis’ sale to the end user, that end user of course *republishes* the image. The *replication* commences the running of the statute of limitations. Republication violates these Plaintiffs’ rights of publicity. Illustrative examples appear in Maclean Declaration’s Exhibit G, [ER 305] describing a license expiration date of March 1, 2013, Exhibit K, [ER 343] describing a license expiration date of October 31, 2011, and Exhibit J, [ER 341] describing an expiration date of December 27, 2007. Other exhibits, have no expiration date. Thus, a purchaser could use one of Plaintiffs’ pictures in any of a *number of*

different products. That's republication past the date this lawsuit was filed and Corbis was the triggering force. (See section II B of Plaintiffs' OB.)

Miller v. Collectors Universe, Inc 159 Cal. App. 4th 988, 999 (4th Dist. 2008) cited in our Opening Brief made it clear that the "single-publication rule does not apply to [a] series of *separate* transactions," and applies only to "identical communication or display of identical content to multiple persons." In *Miller*, the defendant issued thousands of identical certificates of authenticity bearing a plaintiff's printed name authenticating collectibles which were *not* identified on the certificate. Despite the similarity in the certificates, other than just a number, the Court ruled that the defendant's "conduct involved a series of separate transactions rather than the identical communication or display of identical content to multiple persons" and refused to allow the single publication rule to support a statute of limitations defense. Obviously, here, Corbis enters into a series of individual transactions with each customer end user encouraged to republish for which Corbis charges increased prices. Indeed, these types of different individualized transactions are more severe than those referred to in *Miller*.

Kanarek v. Bugliosi, 108 Cal App. 3rd 327, 333 (1980) also demonstrates that each republication restarts the statute of limitations. Corbis encourages its customers to republish since it prices the sale of these pictures higher, based upon

the number of republications. As Corbis' Maclean explains in paragraph _____ of his Declaration:

If a customer decides to buy a license to a photograph, the price paid depends on a combination of, among other things, (i) the nature of the use of the photograph, (ii) the size/resolution of the image, (iii) the location where the image is placed, (iv) geography or territory of the use, (v) the industry involved, (vi) the duration of the license, (vii) the relative exclusivity of the license, and (viii) whether the licensing model is RM or RF. For example, if an image is going to be placed on an internal page of an internet site, it typically costs less than for a home page. If it is going to be used internationally, it typically costs more than in the United States only. If it is going to be used for multiple years it costs more than one year. Prices for use in periodicals, book or gallery displays may all be priced differently.

[ER 383].

As referenced, the exhibits to the Maclean Declaration illustrate that the particular use may change up to dates of March 31, 2013, October 31, 2003, February 27, 2009 or forever (no end date) depending on the desire of the Corbis customer and the price the customer pays. The republication use may vary from Corbis customer to Corbis customer or by the same customer. Of course it is impossible to make that determination on Corbis sales with future end dates or no end dates.

As the moving party, Corbis must establish the absence of a genuine issue of material fact. *Carrett v. Johns-Mansville Sales Corp.* 474 U.S. 944 (1985). Corbis was required to submit evidence in any form that republication had not occurred of

Plaintiffs' pictures posted on its websites by its customers at any time after August 5, 2007. If it could have, it would have. It did not. The inference is that Corbis customers have exploited Plaintiffs' pictures within the applicable statute of limitations and continue to do so.

III. THE DISTRICT COURT ERRED IN DENYING CLASS CERTIFICATION.

Corbis' Brief argues that providing a remedy to class members is impossible because of Corbis' largesse. As best we are able to discern this position, Corbis concedes it has wronged a multitude of people, yet it would be too harmful for Corbis to have this Court right the wrong. *Napster* and *Grokster* effectively ended the unauthorized mass distribution of audio recordings despite the dramatic change brought to Napster's and Grokster's business models. Why should the wrongful sale or exploitation of pictures be treated differently than recordings? The option for Corbis' industry is easy, don't *sell* the pictures without the subject's permission, or compensate the subject or the subject's successor interest. As to the media outlets who Corbis claims would be deprived of Corbis' archives, *United Press*, *Wall Street Journal*, etc. have substantial archives of their own and have their own photographers!

A. Class Members Are Readily Identifiable.

The stated name search on the Corbis website that is clicked, leading to the purchase, is easily ascertainable from Corbis' records. Unknown individuals have no listed names on which to click. Corbis names the individuals on which to click and purchase their unauthorized pictures. As a result, Corbis' own records offer a way to readily identify the individuals whose names, images, or likenesses it is exploiting. *See* Complaint [ER 605] at ¶22. As to the Corbis argument relative to the putative class' non-California residents, should this Court reverse the District Court and remand, Plaintiffs would adopt the class definition in the Shirley Jones case, number 11-56082 eliminating non-residents. Any class definition problems would be easily solved.

B. Plaintiffs Are Adequate Representatives and Have Claims Typical of the Class.

Rule 23 does not mandate that the named plaintiffs' interests be *identical* to the class they represent. Rule 23 directs that the named representative's interests "*align* with the interests of the class." *Hannon v. Data products Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (emphasis added). Individuals become class representatives because they are victims, just the same as the members of the class they seek to represent. That they may have supposed "shortcomings" is irrelevant.

That class certification should be denied because the outcome of the litigation might be contrary to the desires of certain class members (or those who opted out of the class) makes no sense in the class action arena. It is possible some musicians did not want to see *Napster* and *Grokster* become barred from facilitating the free distribution of music, but such did not prevent the Courts from putting an end to the wrongful conduct of those companies. *Napster*, 284 F.3d 1091; *Grokster*, 545 U.S. 913. We have already addressed Corbis' argument as to unidentified individuals in pictures as not being class members. Any concern that Anna Maria Alberghetti or Bonnie Pointer do not wish to represent an unidentified person on the street is really a non-concern.

Lastly, Corbis almost ignores the opt-out right potential available to every class member. If a class member does in fact desire a wide distribution of his or her name and likeness, he or she can simply opt out of the class action – or even give Corbis consent to exploit his or her name, image, and/or likeness. Moreover, in light of the recent U.S. Supreme Court decision on June 20, 2011 in *Wal-Mart Stores Inc. v. Dukes et al.*, No. 10-277, if this Court reverses the District Court, we would eliminate any request for injunctive relief as we already did prior to *Wal-Mart* in the Shirley Jones case.

IV. NO ATTORNEYS' FEES SHOULD BE GRANTED TO CORBIS

A. The judgment for attorneys' fees against Plaintiffs is inequitable.

Corbis lost its motion to dismiss. It prevailed on summary judgment due primarily to changes in the law eight months after the litigation commenced. The District Court's view of the statute of limitations failed to consider that Plaintiffs had no way to determine the date of Corbis' first posting of their pictures. The District Court also failed to acknowledge that Unjust Enrichment is a separate and distinct common law cause of action. Unfortunately, judgment for \$219,001.83 was entered against Plaintiffs Anna Maria Alberghetti and Bonnie Pointer who initiated this action on the behalf of similarly-situated individuals. The judgment was entered with the merits yet to be reached.

This Court is requested to find *Plaintiffs* were the prevailing party given the unique importance and circumstances of this case. Plaintiffs prevailed on the issue of no copyright preemption as the District Court denied the Corbis 12(b)(6) motion to dismiss on this issue. That there is no copyright preemption for Corbis' business model is the most practical and significant finding in this litigation for Plaintiffs and those they seek to represent. Allowing the judgment against Plaintiffs to stand given this District Court ruling is not an exercise of true justice.

In a diversity case, state law governs the availability of attorney's fees. *Page v. Something Weird Video*, 960 F. Supp. 1438, 1445 (C.D. Cal. 1996) (applying

California law in determining availability of attorney's fees under §3344); *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir. 2000) (applying Hawaii law concerning attorney's fees).

"In California, the presumption is the 'American rule,' in which each side pays its own attorneys' fees," absent a statute or agreement of the parties to the contrary. *Int'l Marble & Granite of Colo., Inc. v. Congress Fin. Corp.*, 465 F. Supp. 2d 993, 1001 (C.D. Cal. 2006) (citing *Santisas v. Goodin*, 17 Cal. 4th 599, 614, 951 P.2d 399, 71 Cal. Rptr. 2d 830 (1998)). Section 3344 provides in relevant part: "The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."

As a threshold matter, §3344(a) requires a court to determine whether there is a "prevailing party" in an action brought under the statute. It is well recognized that this determination rests within the discretion of the court. *Cusano v. Klein*, No. 97-4914 AHM (AIJx), 1999 WL 34834936, *3 (C.D. Cal. Dec. 15, 1999) ("What this Court does have discretion to determine is whether there is a prevailing party on the section 3344 cause of action.") *aff'd in part, vacated in part by*, 264 F.3d 936 (2001); *accord Kona Enters.*, 229 F.3d at 883

Although §3344 does not define "prevailing party," courts evaluating §3344 and similar California statutes have examined whether a party has prevailed on a "practical level." *Gilbert v. Nat'l Enquirer, Inc.*, 55 Cal. App. 4th 1273, 1277, 64

Cal. Rptr. 2d 659, 661 (1997); *see also Heather Farms Homeowners Ass'n v. Robinson*, 21 Cal. App. 4th 1568, 1573-74, 26 Cal. Rptr. 2d 758 (1994) (where fees sought under California Civil Code section 1354, following California cases refusing a rigid interpretation of the term "prevailing party" but analyzing "which party had prevailed on a practical level"); *Galan v. Wolfriver Holding Corp.*, 80 Cal. App. 4th 1124, 1129, 96 Cal. Rptr. 2d 112 (2000) (interpreting California Civil Code section 1942.4 to give trial court discretion to determine prevailing party "on a practical level") (citations omitted).

In *Gilbert v. Nat'l Enquirer*, the California Court of Appeals affirmed an order denying a motion for fees and costs under §3344 where the plaintiff voluntarily dismissed the action without prejudice. 64 Cal. Rptr. 2d at 660. The court noted the issue at the trial court "was not whether the initial discovery tended to favor one side or the other, but whether it was even possible to determine, only a few months beyond the demurrer stage, whether either side had prevailed on a practical level." *Id.* at 662.

Plaintiffs brought this action on behalf of a class of similarly situated individuals whose names, images, or likenesses were or are being exploited by Corbis. They brought this case to benefit artists who received no compensation and will receive no compensation for the Corbis exploitation. They should not be penalized for their efforts to challenge Corbis' admitted use of names, images, and

likenesses without permission. Plaintiffs prevailed in the single most important issue: no copyright preemption.

Notably, the District Court, in granting summary judgment based upon the statute of limitations substantially relied on case law that post-dates the filing of Plaintiffs' original complaint. *See generally* April 29, 2010 Order (citing *Christoff v. Nestle USA, Inc.*, 213 P.3d 132, (2009), and *Yeager v. Bowlin*, No. Civ. 2:08-102 WBS (JFM), 2010 WL 95242, at *12-*14 (E.D. Cal. Jan. 6, 2010)). [ER 40-43] Plaintiffs believe that this later case law changed the application of the discovery rule, upon which Plaintiffs relied when filing their complaint on August 5, 2009.

Corbis has already benefited from the *Christoff* change in case law and now the District Court's ruling on the parameters of the statute of limitations bars virtually all claims based upon pictures posted before August 5, 2007. At present no celebrity whose picture was posted by Corbis before August 5, 2007 without their permission can ever make a claim against Corbis for compensation. Plaintiffs believe the further award of any attorney's fees to Corbis results in an unjust windfall not contemplated under the statute and certainly not by the common law that formed the basis for two of the three counts in Plaintiffs' complaint. Moreover, due to the unique circumstances of this case, any judgment against Plaintiffs will have a chilling effect, in general, on the enforcement of publicity rights under §3344.

B. Even if this Court affirms the District Court on summary judgment and on the attorneys fees and costs award, it still should reduce the judgment.

The District Court's skepticism [ER 20, page 18] as to Corbis' excessive charges was evident when it said:

“Defendant’s counsel asserts that counsel spent 0.2 hours – i.e., 7 to 12 minutes – reviewing this order. (Fritz Decl. Ex. B at 65.) This is not a “reasonable” use of counsel’s time, and it raises serious questions about the accuracy and reasonableness of Defendant’s submissions. There are countless other questionable time entries. (See, e.g., Fritz Decl. Ex. B at 24 (8.4 hours spent cite-checking 12-page reply brief for Motion to Dismiss); *id* at 25 (11.8 hours spent gathering materials and preparing binders for Motion to Dismiss hearing).)”

Corbis sought fees at rates far higher than average and substantial portions of Corbis' firm time was billed in block format. As a result, if the judgment stands, those fees should be discounted. "Although block billing is certainly not prohibited, when block billing is used, the trial court may 'exercise its discretion in assigning a reasonable percentage to the entries, or *simply cast them aside*.'" "[B]lock billing makes it more difficult to determine how much time was spent on particular activities." *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007) Here, between half to three-fourths of Fenwick's entries were block billed. *See generally* Fritz Decl., Ex. B at 9-68. [SER 58-59] Thus, this Court, because of the unique circumstances in this case, should reduce the judgment by 75% if it does not vacate it in total.

Defendant Corbis seeks \$141,068.25 for its attempt at dismissing the action pursuant to Rule 12(b)(6). Fritz Decl. at 4. [SER 41] Time unreasonably spent by a successful party in advancing unsuccessful theories should be excluded from a fee award under California law. *Sundance v. Mun. Court*, 192 Cal. App. 3d 268, 274-75, (Cal. Ct. App. 1987).

Finally, contrary to Corbis' assertion, its requested fees relating to unjust enrichment and the common law right of publicity are not inextricably intertwined with those of §3344. In granting summary judgment in favor of Corbis on the basis of the statute of limitations, the Court's ruling applied to two counts on common law claims for which an award of attorney's fees is not authorized.

CONCLUSION

For all the above reasons, Plaintiffs respectfully request this Court to reverse the District Court in this case and in the case of Shirley Jones v. Corbis and remand both to the District Court for consolidation and further proceedings consistent with this Court's ruling.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Local Rule 28-2.6, counsel certifies that there is a related case pending and consolidated with this case, *Shirley Jones v. Corbis Corporation*, case number 10-8668 before this Court.

CERTIFICATE OF CONFORMITY

I certify under penalty of perjury that Appellants' Third-Cross Appeal Brief is proportionally spaced, has a typeface of 14 points or more.

Executed on July 5, 2011 at Chicago, Illinois.

 s/Arthur S. Gold
Arthur S. Gold