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Most people, hearing that a famous actress had received an offer for a particular role, would not think twice about the information. Most actresses would not think twice about hearing that they, themselves, had been offered a particular position, whether or not the information was true. Most people would shrug their shoulders, and figure that this was nothing more than the same type of information that is published every day in the *Hollywood Reporter* and *Daily Variety*.

What if you heard that said actress received *an offer* to act as a "consultant" on a movie about her own life? Would you be offended? Would she?

Add to those facts that the information is 100% true, that the actress did, in fact, receive an offer to act as a consultant on the movie, and that the people who made the offer told the press that they were making the offer. Is anyone offended yet?

Well, Priscilla Presley *was*, and, not a stranger to the courtroom, she sued the people that allegedly made the offer and the statement to the press. And a 12-person jury of her peers in Santa Monica, California awarded her $1.6 Million for her trauma. Now, *that's* offensive!

The case is *Priscilla Presley v. Third Coast Entertainment*.[1] This case is a perfect example of a good, necessary, important right of publicity law that has been distorted beyond any hope of recognition. The potential ramifications of this decision, if upheld on appeal, are monumental; what the decision suggests is that *any* use of another person's name, whether or not the name is being used in a true statement, irrespective of whether or not the story is newsworthy and about a public figure, whether or not it is used to endorse a "product, merchandise, good, or service," is actionable.

The facts underlying the case are as follows: In 1997, a biography entitled "Child Bride: The Untold Story of Priscilla Beaulieu Presley" was written by an author named Suzanne Finstad. Quite remarkably, Presley reportedly cooperated with Finstad in connection with the Book, and gave

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1. Los Angeles Superior Court Case No. SC 049 628.

several hours of interviews, most of which were apparently on tape. In that same year, Defendant Third Coast Entertainment, Inc. purchased an option to obtain the world-wide television and motion picture rights to the Book.

Substantial controversy surrounded the ultimate publication of the Book, including considerable press, generated both by the Book's publisher and by Presley herself. This self-generated publicity also included a defamation lawsuit[2], which was filed by Presley against one of the sources of the Book, Currie Grant. Grant had been an army buddy of Elvis Presley, who supposedly introduced the King to his bride-to-be. Grant apparently claimed in the Book that Priscilla was so anxious to meet Elvis that she slept with Grant as payment for the future introduction.[3]

Throughout the *Presley v. Third Coast* lawsuit, Third Coast maintained that, when it purchased the option, it did not want its film to focus on the sexual episodes described in the Book, and intended to "take the high road" with respect to the Project. In fact, at the time that Presley sued, and her attorney claimed quite vociferously in the press that the movie was "*all lies*," Third Coast did not even have a treatment written, let alone a full script.

Nevertheless, prior to these statements, the principals of Third Coast (who were also eventually sued) allegedly wanted to ensure as much truth and accuracy as possible in their film. In that regard, they thought that the best way to assure accuracy would be to hire Presley, herself, as a consultant on the film.

In October of 1997, Bud Grant[4], one of the principals of Third Coast, who had worked with Presley while he was at CBS, allegedly contacted Presley's attorney in the *Currie Grant* case, and asked whether Presley would be interested in serving as a consultant on the project. Although Presley's attorney said that he would ask his client, neither Presley nor her attorney ever responded to the request.

Third Coast's publicist, Lee Solters, prepared a Press Release concerning the Project, in Milan, Italy at MIFED.[5] The Press Release correctly and accurately stated that Third Coast was offering Presley a consulting position

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2. *Priscilla Presley v. Laverne Gurrie Grant*, Los Angeles Superior Court Case No. SC 044 46. Significantly, Presley never sued the publisher of the book or Finstad herself.

3. Nobody claimed that Grant was any Boy Scout; Priscilla was only 14 at the time.

4. Bud Grant is not related to Currie Grant.

5. Although the press release was apparently prepared the day *before* Grant asked Presley's attorney for her participation Third Coast testified that it was not released until after the conversation.

on the Project. Significantly, the Press Release did *not* state that Presley had either accepted or rejected the offer; nor, according to Third Coast, did any of the defendants ever express or imply that the offer had been accepted.

Three days later, Presley sued Third Coast, its principals, and Solters, alleging that each defendant violated her statutory and common law right of publicity by stating that Third Coast had made the offer to her, and that she had accepted the offer. However, the only evidence of the latter statement was the original press release.

Meanwhile, during the initial stages of that lawsuit, Presley subpoenaed and deposed Bud Grant and Lee Solters in connection with the *Currie Grant* case, which was much further along. During his questioning of Bud Grant, Presley's attorney asked Grant if the project had agency representation. Grant responded in the affirmative, and, upon further questioning, indicated that William Morris was representing the project.

On the very next day, the William Morris Agency telephoned Grant, and advised him that William Morris was no longer interested in representing the project. Third Coast thereafter filed a cross-complaint against Presley for tortious interference with contract, tortious interference with economic advantage, and slander.

I. C.C.P. §425.16 (SLAPP)

Early in the case, counsel for Third Coast filed a SLAPP Motion[6] to challenge Presley's complaint. The California anti-SLAPP statute is codified in Section 425.16 of the Code of Civil Procedure. The statute sets forth a procedure by which the court may summarily dispose of suits "brought primarily to chill the valid exercise of the constitutional [right] of freedom of speech,"[7] by way of a special motion to strike. Section 425.16(b)(1) provides:

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6. "SLAPP" is an acronym for Strategic Lawsuit Against Public Participation. SLAPP suits have been defined to be "meritless action[s] filed primarily to chill the defendant's First Amendment rights." *Los Carneros Community Associates, Inc. v. Penfield & Smith Engineers, Inc.*, 65 Cal. App. 4th 168, 76 Cal. Rptr. 2d 396 (1998).

7. The statute itself, in subpart (a), expressly acknowledges the purpose of the statute: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process."

A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Section 425.16(e) defines an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" to include "any written or oral statement or writing" made: before, or in connection with an issue under consideration or review by, "a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law"; "in a place open to the public or a public forum in connection with an issue of public interest"; or "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

Section 425.16 requires a defendant to make a *prima facie* showing that the suit arises from an act in furtherance of the defendant's right of free speech, in connection with a public issue.[8] "The defendant may meet this burden by showing . . . a statement was made in . . . a public forum in connection with an issue of public interest."[9]

Third Coast argued that this burden could easily be satisfied in its case. It claimed that its press release was published to the entertainment community in Milan, and was subsequently printed and broadcast in the United States only when Presley's counsel, himself, republished the statement to several publications and television programs. Accordingly, the statement at issue was made in a public forum, both by Defendants and by Presley.

Third Coast further argued that the statement clearly related to a "matter of public interest", the second prong of the SLAPP test. Such matters (of public interest) have been defined as "[t]he privilege of printing an account of happenings and of enlightening the public . . ."[10]

The argument continued that the activities of Presley, particularly in connection with films about her own life, are clearly matters of public inter-

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8. *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 820 (1994).

9. *Id.*

10. *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 421 (1983), *quoting Carlisle v. Fawcett Pub., Inc.*, 201 Cal. App. 2d 733, 746 (1962).

est. As discussed in *Dora v. Frontline Video*,[11] "Public interest attaches to people who by their accomplishments or mode of living create a *bona fide* attention to their activities." Third Coast noted Presley's own concession/allegation in her complaint that she is "a well known actress and entertainment personality" whose "name, image and likeness are recognized instantly by the public and have substantial commercial value." Presley further conceded/alleged that she has "developed and cultivated her image and persona to create her celebrity and universal recognition."[12]

Presley alleged in her first cause of action, for violation of Civil Code Section 3344, that Defendants violated her statutory right of publicity through the "knowing and unauthorized use . . . of Presley's name, for commercial purposes" by implying that "Presley promotes and/or endorses the Child Bride Project."[13] Section 3344 provides the following:

> Any person who knowingly uses another's name . . . *on or in products, merchandise, or goods*, or for purposes of advertising or selling, or soliciting purchases of, *products, merchandise, goods or services*, without such person's prior consent . . . shall be liable for any damages sustained . . .

Third Coast argued that Presley did not even *allege* in her complaint that Third Coast used her name in connection with the endorsement of any "products, merchandise, goods, or services". Absent such an endorsement, the statute seems to preclude any recovery by Presley.[14]

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11. 15 Cal. App. 4th 536, 542 (1993).

12. Third Coast argued that there was no better proof that the lawsuit involved a matter of public interest than the fact that Presley, herself, previously wrote an autobiography entitled "Elvis and Me", which was published and promoted heavily by Presley. Third Coast also argued that "there is substantial public interest in Presley's background, her relationship with Elvis Presley, and her current involvements and projects. In short, there would be no Project and no Book if there were no "public interest". (Defendant's Brief in Support of Motion to Strike).

13. Complaint, ¶¶ 23, 25.

14. In *Estate of Presley v. Russen* (D.N.J. 1981) 513 F.Supp. 1339, 1357-58, the court noted that, "[i]n cases finding the expression to be protected the defendant's activity has consisted of the dissemination of such information as "thoughts, ideas, newsworthy events . . . matters of public interest, and fictionalizations . . . . On the other hand, *most of those cases finding that the right of publicity or its equivalence prevails have involved the use of a famous name or likeness predominantly in connection with the sale of consumer merchandise or "solely for purposes of trade . . .*"

II. Civil Code Section 3344

According to the cases, in order to prevail on a cause of action under Civil Code Section 3344, Presley had to establish the following: (1) the defendants' use of Presley's identity; (2) the appropriation of Presley's name or likeness to the defendants' advantage; (3) lack of consent; (4) resulting injury; (5) the defendants' knowing use of Presley's name, photograph or likeness for purposes of advertising or solicitation of purchases; and (6) a *direct connection* between the use and the commercial purpose.[15]

However, "[p]ublication of matters in the public interest, which rests on the right of the public to know, and the freedom of the press to tell it, cannot ordinarily be actionable."[16] In fact, Civil Code Section 3344(d) expressly states that the use of a name . . . in connection with any *news, public affairs*, or sports broadcast or account . . . shall not constitute a use for which consent is required . . . ."[17]

Further, "when news or public affairs publications are involved, the balance [between undesired publicity and the public interest in the dissemination of news and information] must be drawn strongly in favor of dissemination."[18]

"The *purpose* of the . . . use of a person's identity is central. If the purpose is 'informative or cultural', the use is immune."[19] The purpose of the subject statements, according to Third Coast, was merely to inform the public that such an offer had been made,[20] presumably rendering the "use" of Presley's name to be immune, and thus not violative of Presley's statutory right of publicity.

Although there are no cases dealing with a statement as seemingly innocuous as Third Coast's, some guidance can be obtained from *Cher v.*

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15. *Eastwood, supra*, 149 Cal. App. 3d at 417.

16. *Id.* at 421; *See also, Montana v. San Jose Mercury News, Inc.* (1995) 15 Cal. App. 4th 790, 793 (where defendant's commercial use of a photograph of plaintiff previously used in a news story was held not to infringe upon plaintiff's right of publicity).

17. *See also, New Kids On The Block v. New Am. Pub., Inc.* 971 F.2d 302, 309 (9th Cir. 1992) (where the court recognized that it is a complete defense to misappropriation claims if the celebrity's name is used in connection with any news, public affairs or sports broadcast which was true in all material respects).

18. *Baugh v. CBS, Inc.* 828 F.Supp. 745, 754 (N.D. Cal. 1993).

19. *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) (emphasis added), *cert. denied*, 503 U.S. 951 (1992).

20. Even if such a statement could be otherwise be construed as an advertisement for a film, and the film could be construed as a "product, merchandise, good, or service," there *was* no film at that time and, in fact, there was no *script*.

Forum International, Ltd.,[21]

In that case, the plaintiff gave an exclusive interview, which she expected to appear in "Us" magazine. When *Us* did not publish the interview, the interviewer sold the interview to *Star* and *Forum* magazines.

Star subsequently published the article, and advertised it on the cover with the headlines: "Exclusive Series" and "Cher: My Life, My Husbands and My Many, Many Men." The plaintiff argued that the publication's use of such terms constituted a false representation that she had given an exclusive interview to the magazine, and that she had endorsed the same.

The court held that the plaintiff failed to state a cause of action, ruling that the words used, as a matter of law, did not "constitute a false claim that Cher endorsed [the] magazine."[22] The court further explained that the magazine "would have been entitled to use Cher's picture and to refer to her truthfully in subscription advertising for the purpose of indicating the content of the publication . . . because such usage is protected by the First Amendment."[23]

III. Common Law Right of Publicity

Presley's second cause of action sought to recover damages for a violation of her common law right of publicity. The case law cited above certainly seems to suggest that Third Coast's statements were not actionable under a common law right of publicity theory either. "Any other conclusion would allow reports and commentaries on the thoughts and conduct of public and prominent persons to be subject to censorship under the guise of preventing the dissipation of the publicity value of a person's identity." *Cher*, 692 F.2d at 638, quoting *Guglielmi v. Spelling-Goldberg Productions* (1979) 25 Cal. 3d 860, 873.

IV. Constitutional Protection for Theatrical Films

Third Coast's Press Release, which was made in the context of Third Coast's public discussion of an upcoming film project about Presley's life, did nothing more than truthfully refer to an offer made to Presley, through her counsel.

Even Presley did not dispute that Third Coast had the right to produce a

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21. 692 F.2d at 639.
22. *Id.* at 638.
23. *Id.*

film about Presley's life, and to use Presley's name continuously throughout the film, as long as the film is not defamatory. The press release did not contain any false statements[24]; nor did it claim that Presley *endorsed* the Project. At worst, the statement could be construed as an advertisement for the film.

Theatrical film is a "significant medium for the communication of ideas", which is protected by the First and Fourteenth Amendments of the United States Constitution and by Article I, Section 2 of the California Constitution.[25] When an unauthorized use of a person's name or likeness occurs in a work of artistic speech such as a film, the First Amendment and Article I, Section 2 of the California Constitution generally prevail over a plaintiff's misappropriation claims.[26]

"Our Courts have often observed that entertainment is entitled to the same constitutional protection as the exposition of ideas . . . "[27] "Because the films themselves are protected by the First Amendment, the incidental advertising is also protected."[28] Nor does it matter that the film is to be made for profit. In *Guglielmi, supra*, the court found that "any interest in financial gain in producing the film did not affect the constitutional stature of respondent's undertaking."

The fact that the advertisements may have increased the profitability of the film was determined to be irrelevant, the court noting that it would make no sense to allow the defendants to exhibit the film but "preclude any advance discussion or promotion of their lawful enterprise." The court ultimately held that, because the use of the plaintiff's name and likeness in

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[24] It has long been established that "Constitutional protection extends to the truthful use of a public figure's name and likeness . . ." *Cher v. Forum International, Ltd.*, *supra*, 692 F.2d at 639.

[25] *Guglielmi v. Spelling-Goldberg Prods.* 25 Cal. 3d 860, 865, 160 Cal. Rptr. 352 (1979).

[26] *See also*, Restatement of the Law 3rd, Unfair Competition, (1995) §§ 46 and 47, which requires that the use of a name or likeness be "for purposes of trade" before it can be actionable. Section 47 expressly provides that the use of a person's identity in entertainment, works of fiction or advertising incidental to such uses is not considered to be "for purposes of trade". Moreover, in *Guglielmi, supra*, the court, in discussing *Lugosi*, noted that, *Lugosi* involved the use of Bela Lugosi's likeness in connection with the sale of such commercial products "as plastic toy pencil sharpeners, soap products, target games, candy dispensers, and beverage stirring rods." These objects, unlike motion pictures, are not vehicles through which ideas and opinions are regularly disseminated. *Id.* at 874.

[27] *Guglielmi*, 25 Cal. 3d at 867.

[28] *Page v. Something Weird Video* (C.D. Cal. 1996) 960 F.Supp. 1438, U.S. Dist. LEXIS 16744 11, 12-14, 42 U.S.P.Q. 2d 1196.

the film "was not an actionable infringement of [his] right of publicity," such use in advertisements for the film cannot be actionable."

It is also significant to note that most of the aforementioned cases were decided before the Legislature codified its mandate to "limit more severely" the abridgment of First Amendment rights resulting from SLAPP suits. In an attempt to further clarify its intent, the Legislature recently amended the statute to add the following: "To this end, this section [425.16] shall be construed broadly."

V. "Incidental" Use

Presley's first and second causes of action were based upon the premise that *any* non-consensual use of her name is a violation of her common law and statutory right of publicity. This is simply not the law. As discussed in *Dora v. Frontline Video, Inc.*,[29] "[E]very publication of someone's name or likeness does *not* give rise to an appropriation action." Moreover, it is well established that a claim for misappropriation does not arise out of an "incidental" use of another's name:

[T]o state a cause of action for invasion of privacy by appropriation, something more than incidental publication of name or likeness must be alleged. Rather, "*defendant must have appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness.*"[30]

The purpose of Third Coast's press release was allegedly to advise the entertainment community that an offer had been extended to Presley to serve as a consultant on the project. It is difficult to understand how such a reference could be construed as anything more than an *incidental* use of Presley's name, particularly in the context of a project in which the defendants' use of her name appears to have been both necessary and protected.

Third Coast further argued that it never represented that Presley agreed to act as a consultant or that she supported the project in any way, and it did nothing that could be construed as a misappropriation of her *reputation.* Third Coast appeared to have made an accurate statement concerning its legitimate offer to Presley. The reference to the offer was nothing more than an *incidental* use. Because incidental uses are not actionable, Presley, in theory, could not, for the purposes of the SLAPP motion, even establish a

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29. 15 Cal. App. 4th at 536, 542, 18 Cal. Rptr. 790 (1993).

30. *Jackson v. Playboy Ents., Inc.* 574 F.Supp. 10,13 (S.D. Ohio 1983).

probability of prevailing on the merits of her claims.

VI. Commercial Purpose

Related to the notion of "incidental use" is the concept that, to maintain an action for misappropriation, a plaintiff must show that the alleged use was *directly* related to a purely commercial purpose.[31] Presley claimed that the use of her identity was for commercial purposes because the press release was intended to advertise the project, and the project was a commercial undertaking. Third Coast claimed that its "use" was merely *informational* and, although certainly related to a commercial undertaking, was not *directly* and *exclusively* related to a commercial purpose. California courts have consistently supported Third Coast's position.[32] As discussed in *New Kids On The Block v. New Am. Pub., Inc.*:[33]

[T]he appropriate test for misappropriation claims under California law is that the First Amendment provides immunity unless the defendants' use of the . . . name . . . constituted *pure* commercial exploitation and was *wholly unrelated* to news gathering and dissemination.

Moreover, because the production of the Project is Constitutionally protected activity, statements intended to publicize the Project are similarly protected. "It would be illogical to allow [defendants] to exhibit the film but effectively preclude any advance discussion or promotion of their lawful enterprise."[34]

In short, publicly referring to the offer that Third Coast made to Presley appeared to be no more a misappropriation than the initial writing of the biography, for which Presley did not sue (and could not sue, at least for

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31. Cal. Civ. Code § 3344(e); *See also, Fleet v. CBS, Inc.* 50 Cal. App. 4th 1911, 1918 (1996).

32. *See, e.g., Guglielmi, supra,* 25 Cal.3d at 868 (where the California Supreme Court rejected the argument that a fictionalized movie about Rudolph Valentino was a misappropriation because it was intended to generate profit, stating that "[t]he First Amendment is not limited to those who publish without charge .... [An activity] does not lose its constitutional protection because it is undertaken for profit"); *Leidholdt v. L.F.P. Inc.* (9th Cir. 1988) 860 F.2d 890, 895, *cert. denied,* (1980) 489 U.S. 1080 (where plaintiff failed to state a misappropriation claim against a magazine that published an image of the plaintiff, because the image was not used exclusively for the magazine's commercial gain).

33. 745 F.Supp. 1540, 1542 (C.D. Cal. 1990) (emphasis added), *aff'd,* 971 F.2d 302 (9th Cir. 1992).

34. *Guglielmi, supra,* 25 Cal. 3d at 873; *See also, Bolger v. Youngs Drug Prods. Corp.* 463 U.S. 60, 67 (1983) (where the Supreme Court recognized that promotional speech is non-commercial if it advertises an activity itself protected by the First Amendment).

violation of right of publicity).

VII. Court's Rejection of SLAPP Motion

The court reviewed Third Coast's SLAPP Motion and Presley's Opposition to the Motion. The Opposition included an argument that appeared to be almost tongue in cheek. Presley's counsel argued that this type of speech was not the type of speech that the Legislature intended to protect, because the speech was not made in an "*official proceeding*."

The judge in the case, quite remarkably the former general counsel to the *Los Angeles Times*,[35] denied the motion, ruling that the speech was not made in an "official proceeding," and therefore was not the proper subject of a SLAPP motion.

Ultimately, the court rejected all of Third Coast's legal arguments, and allowed all of the issues go to the jury, which apparently determined not only that Third Coast violated the law when it said that an offer had been made to Presley, but also that she had been severely damaged by the statement -- to the tune of $1.6 Million.

The case is now, not surprisingly, on appeal in the Second Appellate District of the California Court of Appeal, Case No. B133520. The case is an excellent example of how a good and valuable right of publicity law can be severely distorted and misused as a result of some bad judicial decisions and a star-struck jury.

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35. The same judge denied a motion by Suzanne Finstad to quash a subpoena by Presley demanding all of her source material for the book, ruling that the California reporter's "shield" law did not apply to book authors.