Court of Appeals Docket No. 11-56082

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIRLEY JONES, on Behalf of Herself
and All Others Similarly Situated,

Plaintiff-Appellant,

vs.

CORBIS CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, HON. STEPHEN V. WILSON
USDC NO. 10-cv-08668-SVW

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF BY THE PICTURE ARCHIVE COUNCIL OF AMERICA, INC., AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC. AND ZUMA PRESS, INC.

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Pursuant to Federal Rule of Appellate Procedure 29(b), the Picture Archive Council of America, Inc., the American Society of Media Photographers, Inc., and Zuma Press, Inc. (collectively, "Movants") respectfully request leave to file their concurrently lodged *Amicus Curiae* Brief in the above-entitled case in support of Defendant/Appellee Corbis Corporation ("Corbis")'s opposition to the Appeal of Plaintiff/Appellant Shirley Jones. Corbis consented to the filing of this *amicus* brief. Plaintiff/Appellant denied Movants' request.

IDENTITY AND INTEREST OF MOVANTS

The Picture Archive Council of America, Inc. is a not-for-profit trade association which represents the interests of entities who license images (still and motion) to editorial and commercial users. Founded in 1951, its membership currently includes over 100 content libraries globally that are engaged in licensing millions of images, illustrations, film clips and other content on behalf of thousands of individual creators. Members include large general libraries, such as Getty Images, and smaller specialty libraries that provide the media and commercial users access to in-depth collections of images and film footage on news, current events, nature, science, art, architecture, history, and culture, among other topics.

The American Society of Media Photographers, Inc. represents the interests of professional photographers whose photographs and film footage are created for

publication and has approximately 7,000 members. It is the oldest and largest organization of its kind in the world.

Zuma Press, Inc., a California corporation, is an independent press agency and wire service that produces award-winning news, sports and entertainment content and represents over 3,000 photographers, 60 picture agencies, 100 newspapers and the daily feed and archive of 33 publishing companies worldwide. Zuma Press features a diverse library of over 8.5 million original pictures online, with upwards of 5,000 new images posted daily.

Together, Movants possess practical insights on the business of licensing images, photographs, illustrations, footage and other visual content (collectively, the "image licensing industry"). As a reversal of District Court's May 25, 2011 decision granting Corbis' motion for summary judgment (the "Decision") would have serious and damaging effects on the members of the image licensing industry, Movants have a strong interest in the outcome of this appeal.

REASONS WHY AN *AMICUS* BRIEF IS DESIRABLE

In their concurrently filed *amicus* brief, Movants provide a practical perspective of the serious and damaging effects that a reversal of the Decision will have on the image licensing industry, and why an image licensor's display of images for potential licensing is an activity protected by the First Amendment and otherwise does not implicate an individual's right of publicity.

In short, Movants' *amicus* brief explains how a reversal of the Decision jeopardizes the ability of image and film licensors, large and small, photographers and other content licensors (collectively, "image licensors") to make the contents of their collections available and known to potential licensees. If the Decision is reversed, it would impair legitimate uses of copyrighted images in a way that is contrary to long-standing industry practice and would expose image licensors to liability for violations of a person's right of publicity for merely displaying the images they are offering to license. Reversal of the Decision will not only affect images taken now and in the future, but also could open image licensors to liability for images, film and other visual content that have been held in their archives and that they have licensed for years without complaint.

Accordingly, the issues raised in the Movants' *amicus* brief are relevant and would assist the Court in its disposition of the above-captioned appeal.

CONCLUSION

For the foregoing reasons, this Court should grant the motion for leave to file its *Amicus Curiae* Brief.

Dated: New York, New York
January 25, 2012

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BRIEF OF *AMICI CURIAE* PICTURE ARCHIVE COUNCIL OF AMERICA, INC., AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC. AND ZUMA PRESS, INC. IN SUPPORT OF APPELLEE CORBIS CORPORATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* Picture Archive Council of America, Inc., the American Society of Media Photographers, Inc. and Zuma Press, Inc. hereby state that none have a parent corporation, and that no publically held corporation owns 10% or more of their respective stock.

Dated: New York, New York
January 25, 2012

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Pursuant to Federal Rule of Appellate Procedure 29(b), the Picture Archive Council of America, Inc., the American Society of Media Photographers, Inc., and Zuma Press, Inc. are concurrently requesting leave to file this *Amicus Curiae* Brief in the above-entitled case in opposition to the appeal of Plaintiff/Appellant Shirley Jones ("Jones"). Corbis Corporation ("Corbis") consents to *Amici's* filing of the brief. Plaintiff/Appellant Jones did not consent.

IDENTITY AND INTEREST OF THE *AMICI CURIAE*

The Picture Archive Council of America, Inc. ("PACA") is a not-for-profit trade association which represents the interests of entities who license images (still and motion) to editorial and commercial users. Founded in 1951, its membership currently includes over 100 content libraries globally that are engaged in licensing millions of images, illustrations, film clips and other content on behalf of thousands of individual creators. Members include large general libraries, such as Getty Images, and smaller specialty libraries that provide the media and commercial users with access to in-depth collections of images and film footage on news, current events, nature, science, art, architecture, history, and culture, among other topics.

The American Society of Media Photographers, Inc. ("ASMP") represents the interests of professional photographers whose photographs and film footage are

created for publication and has approximately 7,000 members. It is the oldest and largest organization of its kind in the world.

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Together, *Amici* possess practical insights on the business of licensing images[1], photographs, illustrations, footage and other visual content (collectively, for purposes of this brief, the "image licensing industry"). Accordingly, *Amici* respectfully submit this brief in opposition to Jones' appeal of the District Court's May 25, 2011 decision granting Corbis' motion for summary judgment (the "Decision") in order to inform this Court of the serious and damaging effects that reversing the Decision will have on the members of the image licensing industry. Reversing the Decision would jeopardize the ability of image licensors and news wire services, both large and small, as well as photographers to make the contents

[1] As used herein, the terms "image" or "images" are intended to include not only photographs, but also videos, film footage, illustrations and other forms of visual content. Likewise, the term "image licensor" is intended to include licensors of all types of visual content, not only photographs.

of their collections available and known to potential licensees; thus, the *Amici* herein have an immediate interest in this appeal.

ARGUMENT

Corbis' Answering Brief to this Court explains why, as a matter of law, the Decision granting summary judgment was properly decided and why its alternate defenses are legally sound. Rather than repeat those arguments, *Amici* will explain why, as a practical matter, reversal of the Decision would impair legitimate uses of copyrighted images in a way that is contrary to long-standing industry practice and would expose image licensors to liability for merely displaying images in an online catalog of images available for potential license. *Amici* will also explain why, as a legal matter, an image licensor's inclusion of images of people in its database of offerings and display of such images to enable licensing is protected by the First Amendment and otherwise not a right of publicity violation.

I. THE IMAGE LICENSING INDUSTRY SERVES AN INTEGRAL FUNCTION IN MAKING IMAGES AVAILABLE TO PUBLISHERS AND THE PUBLIC AT LARGE.

Aside from images created specifically for a client by a photographer on an assignment, published images either in print or on-line generally have been licensed for use from either an image library, a news wire service or a photographer's library. Image licensors run the gamut from large image libraries with collections of millions of images covering a myriad of subjects, such as the

library maintained by Getty Images; to niche libraries specializing in discrete subjects such as nature, science, history, or entertainment; to news wire services such as Zuma Press which solely licenses editorial content such as news, sports and entertainment content; to the individual photographers represented by ASMP who offer their images on their personal websites.

Regardless of size or subject matter, image licensors serve the same essential function: they offer to newspaper, magazine, website and textbook publishers, broadcasters, documentary filmmakers, networks, media companies and others visual content that illustrates and illuminates our society, both historically and culturally. Instead of retaining staff photographers and videographers around the country or around the world to capture every event – which is a practical impossibility – publishers can search through image licensor databases to find the images which best suit their needs. Indeed, current shifts in the media and newspaper industries have resulted in ever-increasing reliance upon these licensors to provide content that can no longer be provided by staffers.

Although the Internet has changed the medium by which copyrighted images are made available to potential licensees, image licensors have displayed their images to potential licensees for more than seventy years. Before the advent of the Internet, image libraries aggregated or organized physical transparencies and prints by subject matter in file cabinets. In-house or freelance researchers would search

the files of individual photographers or image libraries in response to requests by publishers and other users, and then deliver to publishers or end-users samples of relevant images for possible licensing. Image libraries also published large glossy catalogs containing a sampling of their image inventory, which they sent to publishers and creative directors throughout the country and the world.

The Internet has offered efficiencies in aggregating, searching, displaying and delivering samples of images to prospective clients, while also increasing the burdens on image licensors by requiring them to create searchable databases of images through scanning, keywording and specialized search functions. Now, image licensors maintain large databases of images, stored in a digital format, which can be searched online using keywords to find appropriate images. These image sources allow publishers and other end-users to search and select a desired image, purchase a license to use the image (pursuant to the terms of a license agreement), and download a high-resolution digital file of the image to their computer, all within minutes. Given the speed at which news now travels, in order to serve their customers, image licensors must now be able to provide publishers and other end-users the ability to search, access and license the best images documenting news, arts, science, nature, and historical, political and cultural events throughout the world at a moment's notice on a 24/7 basis.

No one, including the Plaintiff herein, ever challenged the industry's use of hard copy files and catalogs to display images of people in order to make such images available to potential users. That is because the image licensor clearly is not making any use that implicates the right of publicity. That image licensors now must display images on the Internet in order to offer them to potential licensees should not lead to a different result. The physical file cabinet has simply been converted into a digital database to meet the requirements of business today.

II. THE FIRST AMENDMENT CONSIDERATIONS IN PERMITTING IMAGE LICENSORS TO OFFER IMAGES TO THE PUBLIC OUTWEIGHS AN INDIVIDUAL'S RIGHT OF PUBLICITY.

While *Amici* concur with the ultimate holding below, *Amici* respectfully assert that the District Court's focus upon whether or not Ms. Jones gave consent to Corbis to display and offer for licensing images of her avoids the heart of the issue. Corbis' use was not a "use for which consent is required" under California's common law or statutory right of publicity. The First Amendment interest in permitting Corbis and other image licensors to display images to potential licensees far outweighs an individual's publicity rights to control the publication of any image in which that individual is identifiable. Unlike Corbis, whose First Amendment arguments focuses on the fact that the images of Ms. Jones concern matters of public interest, *see* Corbis' Answering Br. at 46-52, *Amici* assert that an image licensor's act of displaying images online to offer such images for licensing

is, in the first instance, expressive, non-commercial speech protected by the First Amendment. Otherwise, *Amici* assert that an image licensor's act of offering images in a searchable database is a transformative use protected by the First Amendment.

A. Corbis' Inclusion of Photographs in its Database is Expressive, Non-Commercial Speech Protected by the First Amendment.

It is well settled that the right of publicity must be balanced against the First Amendment right of free speech. *See Comedy III Prods. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 401 (2001) ("[T]he state law interest [in the right of publicity] and the interest of free expression must be balanced, according the relative interest at stake."). "Hence, an action for infringement of the right of publicity can be maintained only if the proprietary interests at issue clearly outweigh the value of free expression in [the particular] context." *Gugliemi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 871 (1979). In weighing the proprietary interests in the right of publicity against the value of the free expression, a court must consider the value of the information or expression conveyed against the economic interests of the plaintiff. *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 410 (1st Dist. 2001); *see also Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 544 (2d Dist.1993).

Images in and of themselves, when merely displayed, are expressive works of authorship. Corbis' and other image licensors' display of images for purposes

of making them available for licensing is an expressive use of the images. When Corbis and other image licensors include an image in its database, it is displaying the image as expressive speech; it is not engaging in commercial speech with respect to any of the images. The fact that some end-users may license an image for an expressive, noncommercial use while other end-users may license an image for a commercial use, such as for advertising and other forms of commercial speech, does not diminish the expressive nature of Corbis' use – the mere display of the images for others to view and determine whether they want to license them.

Such expressive and newsworthy uses, *i.e.*, displaying images for their expressive value and making them available for newsworthy purposes, are clearly entitled to First Amendment protection. Indeed, if such image licensors were unable to make the newsworthy images in their collection available for licensing, the images would be locked up, news organizations would be unable to acquire them, and the public would be deprived of the important information the images convey. When balanced against an individual's economic interest in the right of publicity, particularly as in the case here where the Plaintiff has not and cannot demonstrate any economic harm from the licensing of her images, the value of these First Amendment considerations vastly outweigh an individual's right of publicity interests. *See, e.g., Gionfriddo*, 94 Cal. App. 4th at 415 (historical information about former professional baseball players found to be noncommercial

speech which prevailed over right of publicity); *Winter v. DC Comics*, 30 Cal. 4th 881, 885 (2003) (use of characters in comic book that resembled two popular musicians was expressive First Amendment speech that prevailed over right of publicity).

The fact that image licensors may engage in licensing for profit does not remove their display of images depicting people from First Amendment protection. Indeed, courts have long accorded First Amendment protection to material published in books, newspapers and magazines, even though all of those media earn profits from transactions involving the depiction of personal identity. *See, e.g.*, *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501-02 (1952); *accord Gugliemi*, 25 Cal. 3d at 868 ("The First Amendment is not limited to those who publish without charge. Whether the activity involves newspaper publication or motion picture production, it does not lose its constitutional protection because it is undertaken for profit.") Likewise, the display of the images for the purpose of offering them for license does not rise to the level of commercial speech, subject to a lesser degree of First Amendment protection. Even the display of a particular image to advertise that the image is available for licensing cannot be deemed commercial speech, as a person's image may be used to advertise a product related to the image. *See Montana v. San Jose Mercury News, Inc*., 34 Cal. App. 4th 790, 796 (6th Dist. 1995) (use of celebrity's likeness in posters advertising the

newspaper in which the images appeared was found not to violate publicity rights); *Gionfriddo*, 94 Cal. App. 4th at 414 ("Courts have consistently held that the news media may use celebrity photographs from current or prior publications as advertisements 'for the periodical itself, illustrating the quality and content of the periodical without the person's written consent.'") (citing *Montana*). Similarly, advertisements about an interview with a celebrity that appeared in *Forum* magazine were protected by the First Amendment and thus found not to violate publicity rights. *Cher v. Forum Intern*., Ltd. 692 F.2d 634, 639 (9th Cir. 1982) ("Advertising to promote a news medium, accordingly, is not actionable under an appropriation of publicity theory so long as the advertising does not falsely claim that the public figure endorses that news medium."). The fact that many thousands, if not millions, of images may be available in an image licensor's database to view for potential licensing further eliminates the notion that any particular photograph can be deemed an advertisement of the image licensing service. S*ee Medic Alert Foundation U.S., Inc. v. Corel Corp.*, 43 F. Supp. 2d 933, 939 (N.D. Ill. 1999) (in Lanham Act context, finding that that it is "highly doubtful that the reasonable consumer would think that each image [among thousands in a clip art software program] is an endorsement of [that] software.")

In sum, the display of images for purposes of making them available for copyright licensing is expressive, non-commercial speech in the public's interest,

which is entitled to First Amendment protection and unquestionably prevails when weighed against the economic interests attached to an individual's right of publicity.

B. Corbis' Offering of Photographs in its Searchable Database is a Transformative Use Protected by the First Amendment.

Even if the Court does not consider Corbis' display of images to be an expressive use, Corbis and other image licensors should still be entitled to First Amendment protection. As explained by the court in *Comedy III Prods.*, "when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as [an] affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame." 25 Cal. 4th at 387. The "transformative use" defense to right of publicity claims is based loosely on the intersection between the First Amendment and copyright law found in the fair use doctrine. *See Hilton v. Hallmark Cards*, 599 F.3d 894, 909 (9th Cir. 2009).

This Circuit has held that the display of thumbnail images by a search engine is a transformative fair use under copyright law. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 816 (9th Cir. 2003). In both the *Perfect 10* and *Kelly* cases, this Court found that the copies made and displayed by the search engines, Google Images and Arriba Soft, respectively, were made for the purpose of enabling users to find images and not

for their original purpose – aesthetic appeal and enjoyment. *Perfect 10*, 508 F.3d at 1166; *Kelly*, 336 F.3d at 816. Finding that the search engine use did not "supersede" the original, but was for a different purpose, one that was beneficial to the public, the Court concluded in both cases that the uses were sufficiently transformative that they were necessarily fair, notwithstanding that several other of the fair use factors weighed slightly in the other direction. *Perfect 10*, 508 F.3d at 1164-68; *Kelly*, 336 F.3d at 818-21. An image licensor's display of images pursuant to a search of the database by a potential licensor is akin to and no less transformative than the display of images by search engines described above.

Just like Google Images, an image licensor's aggregation and display of images to potential licensees should be considered a transformative use protected by the First Amendment. Corbis and other image licensors provide a similar service and technology as any image search engine. Where Google Images crawls the web and creates server copies from which it creates and displays thumbnail copies in the search results, Corbis and other image licensors create a searchable database of images provided to them by copyright owners, adding keywords and other elements to make it easier for publishers and end-users to quickly find images that suit their needs, and display search results as thumbnails and low-resolution images. Thus, even if an image of a celebrity was initially created for a certain purpose, the inclusion of such image in an image licensor's searchable

database serves a very different purpose. *See Perfect 10*, 508 F.3d at 1165. As explained throughout this brief, providing publishers and end-users with access to a searchable database of images has a great social benefit that far outweighs one celebrity's right of publicity in a red carpet image of her. Accordingly, the display of images by Corbis and other image licensors is a transformative use protected by the First Amendment against right of publicity claims.

III. IMAGE LICENSORS WHO DISPLAY AND OFFER IMAGES FOR POTENTIAL LICENSING BY THIRD PARTIES DO NOT USE SUCH IMAGES IN A MANNER THAT VIOLATES AN INDIVIDUAL'S STATUTORY OR COMMON LAW RIGHT OF PUBLICITY.

Even if the aforementioned First Amendment considerations are rejected, an image licensor's mere display of images for the sole purpose of offering such images to third parties for potential licensing is not an appropriation of Ms. Jones' identity and does not meet the elements necessary for a right of publicity violation under either the statute or the common law. Corbis' use simply falls outside of the right of publicity.

A. Elements of a Right of Publicity Claim under California Common and Statutory Law.

Under common law, the elements of a right of publicity claim are: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 417

(2d Dist. 1983) (citations omitted). Similarly, under California's right of publicity statute, "Any person who knowingly uses another's … photograph, in any manner, 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 by the person or person's injured as a result thereof." CAL. CIV. CODE § 3344(a).

B. An Image Licensor Displaying Images for Potential Licensing Does Not Use the Image in a Manner That Implicates the Right of Publicity.

The plain language of the right of publicity statute contemplates that uses which infringe upon a person's right of publicity will involve uses of a person's name, voice, photograph or likeness (1) "on or in" a product, or (2) in "advertising or selling a product" *See Comedy III Prods*, 25 Cal. 4th 387 (examining the 1984 Legislative amendments to CAL. CIV. CODE §§ 990 (now CAL. CIV. CODE §§ 3344.1) and 3344 and finding the foregoing was the "plain meaning" of the statute). Here, image licensors do not use the images they offer for licensing on or in products, merchandise, goods or services as contemplated by the statute. Instead, they offer copyright licenses in images to end-users to enable those end-users to use such images on or in the end-users' products, merchandise, goods or

services. The image licensors' display of such images is solely to enable that licensing.[2]

As explained in its Answering Brief, Corbis licenses the copyright in images; it does not portend to license publicity or other rights. As is standard in the industry, Corbis requires the end-user to determine whether its intended use implicates an individual's publicity rights, and requires the end user to take full responsibility for obtaining any necessary permissions. Corbis' Answering Br. at 11. The fact that Corbis must display images in order to offer copyright licenses in such images does not mean that Corbis is using the images on or in a product or service in a manner that implicates the right of publicity. Moreover, the mere fact that Corbis or other image licensors charge money to license images does not transform their actions into the type of commercial use disfavored by the statute.

C. An Image Licensor Does Not Appropriate the Persona of the Individuals Depicted in the Images It Offers for Potential Licensing.

Both Plaintiff and her *amici* assert that in offering images of Plaintiff to the public, Corbis has appropriated and is exploiting her image for profit. Appellant's Opening Br. at 4; Pl. Amicus Br. at 17. However, image and film licensors do not,

[2] Jones disingenuously claims that the mere fact that Corbis offers photographs of her for potential licensing affects her ability to sell autographed photos at signing events. However, Jones is comparing apples and oranges. At such signing events, people purchase Jones' image because she signed the photograph. It cannot be credibly argued that people would license images from image licensors as a substitute for an autographed picture.

and cannot, impinge upon an individual's persona and right of publicity merely by displaying a copy of an image to potential licensors.

The question of whether a certain use is a prohibited use in violation of a person's right of publicity is a question that can only be answered by examining the context in which the image is used. For example, if a publisher uses an individual's or a celebrity's image on the cover of a book about that individual or celebrity, that use is a "news" or "editorial" use and no consent is required. *See Dallesandro v. Henry Holt and Co.*, 166 N.Y.S.2d 805, 806 (N.Y. App. Div., 1st Dep't 1957) (finding display of plaintiff's image on book cover did not come within prohibition of New York's Right of Publicity statute because book concerned plaintiff and image was illustrative of a matter of legitimate public interest.) However, if a publisher uses a picture of the same individual or celebrity on the cover of a different book that bears no relation or connection to the individual or celebrity, that use would likely violate the right of publicity because the image is being used to promote the book. *See Yasin v. Q-Boro Holdings, LLC*, 27 Misc.3d 1214A, 910 N.Y.S.2d 766, 38 Media L. Rep. 1734 (N.Y. Sup. Ct. Apr. 23, 2010) (finding book publisher's use of plaintiff's image without consent on book cover violated right of publicity because there was no relationship between the picture and book's subject matter). Thus, the context in which a

putative defendant uses an image is key to determining whether such use runs afoul of the right of publicity.

An image licensor's mere display of an image for potential licensing, among thousands if not millions or tens of millions of other images (with thousands of new images added every day), does not run afoul of an individual's right of publicity. The sole purpose of displaying the image is in order to enable the licensing of such image for an end-use. Likewise, to the extent that a celebrity's name is used as a keyword, it is done so to permit potential licensees to search and find images of that person. However, nothing in the search for or display of images of a certain celebrity on an image licensor's website implicates that celebrity's right of publicity. For example, a hypothetical author writing a "*Where Is She Now?*" article about Shirley Jones would not search for an image of Jones on Corbis' website because the author believes that she endorses Corbis. The author would go to Corbis because it has a searchable database that allows him to search by the name of a subject, and because it likely offers the image he is looking for.

D. The Actual Use Made By Image Licensors Falls Within the Defenses and/or Exceptions to Right of Publicity Claims.

Even if it is determined that the manner in which Corbis and other image licensors use an image implicates an individual's common law or statutory right of publicity, that use should fall under one of the exceptions and/or defenses to right

of publicity claims. In its Answering Brief, Corbis has addressed the Public Affairs Exemption, CAL. CIV. CODE § 3344(d), and *Amici* will not repeat those arguments here. *See* Corbis' Answering Br. at 55-57.

The California Legislature also enacted a statutory defense to right of publicity claims to exempt from liability "the owners or employees of any medium used for advertising" that publishes or disseminates an advertisement or solicitation that violates someone's right of publicity "unless it is established that such owners or employees had knowledge of the unauthorized use of the person's….photograph … as prohibited by this section." CAL. CIV. CODE § 3344(f). In other words, the legislature did not want to hold innocent publishers liable for unknowingly publishing advertisements or solicitations created by a third party that violate someone's right of publicity. There is no logical reason for treating image licensors differently. Image licensors, like publishers, should not be held liable for merely displaying images that an end-user, like a third-party advertiser, may use in a manner that violates someone's right of publicity.[3]

[3] Plaintiff's *Amici* also seek to temporally limit whether a photograph should be considered newsworthy to the time in and around when a certain event occurs. However, it is well settled under California law that "a matter in the public interest is not restricted to current events, but may extend to the reproduction of past events." *Montana*, 34 Cal. App. 4th at 793; *Carlisle v. Fawcett Pub., Inc.*, 201 Cal. App. 2d 733, 746 (5th Dist. 1962); *Eastwood*, 149 Cal. App. 3d at 421.

In sum, the mere display of images by Corbis and other image licensors does not violate either the common law or statutory right of publicity because their use in displaying images solely for potential licensing either does not implicate the right of publicity or because their use falls within one of the enumerated defenses.

IV. REVERSAL OF THE DECISION WOULD HAVE REPURCUSSIONS ON THE IMAGE LICENSING INDUSTRY THAT WOULD EXTEND FAR BEYOND PHOTOGRAPHS TAKEN ON THE RED CARPET

A. Permitting Individuals Depicted in Images to Bring Right of Publicity Actions Will Have a Severe Impact on Image Licensors and Their Ability to Provide Images to the Public.

Reversing the Decision granting Corbis' motion for summary judgment will have a chilling effect on the image licensing industry because it would greatly impact the licensing of images for editorial uses. Under First Amendment principles, and as discussed herein, rights of publicity never have extended to "editorial" uses in publishing, news broadcasting, documentary filmmaking, or educational materials; thus, for these uses, media company licensees need not seek the subject's consent or pay the subject depicted in a photograph. *See* 2 J. Thomas McCarthy, THE RIGHTS OF PUBLICITY AND PRIVACY, §§ 8.46, *et seq*. (2d Ed. 2011).

If Corbis and other image licensors could be held liable for right of publicity violations for displaying images merely to offer licenses in such images to end-users, image licensors would not be able to display or offer any images with

identifiable individuals. Indeed, Plaintiff seeks to penalize image licensors because there is a chance that an end user might ignore the terms of a licensing agreement or might fail to obtain publicity rights if that end-user itself uses the image for a commercial use. This Court should not reverse the Decision based upon mere possibilities. If it does, the effect would be devastating to the image licensing industry.

Indeed, Jones' interpretation would lead to absurd results because publishers could only use images created by staff photographers or videographers that would not require licensing through third parties. This is thoroughly impractical as not even the largest publishers would be able to hire enough staff photographers and videographers to enable them to get images from around the country and the world. The amount of newsworthy material available to the media, the press, and the public will be severely limited. Further, most news outlets have significantly shrunk their photojournalist ranks in the last decade and rely ever more heavily upon the image libraries and news feeds for content.

Moreover, neither the individual photographers nor many of PACA's members, who are small photography archives, could afford to defend themselves against the slew of right of publicity claims that could be brought by anyone depicted in a photograph based on the mere display of an image. Even in the absence of litigation, smaller companies and individuals cannot afford the time and

expense to ensure that each and every individual depicted in each image taken of individuals in their catalogs and archives, even if originally taken for a newsworthy purpose, have provided releases for non-newsworthy purposes.

Because the right of publicity is not limited to celebrities, but includes all identifiable persons, if the Decision is reversed, *Amici* may have little choice but to limit, or even forbid, access to images depicting people.

B. Reversal of the Decision Below Will Affect How Images and Other Forms of Content are Licensed Nationwide from the Perspective of Both Licensors and Licensees.

Eighteen states have right of publicity statutes, and twenty-one have recognized a common law right of publicity. 1 J. Thomas McCarthy, THE RIGHTS OF PUBLICITY AND PRIVACY §§ 6:3 *et seq.* (2d Ed. 2011). While all states that recognize a right of publicity addresses the use of an individual's likeness for a commercial purpose without permission, *see generally id.* at §§ 6.3 and 6.4, we are aware of no holding which held that the mere display of an image or other form of visual content for the purpose of licensing violates a right of publicity in and of itself.

As a practical matter, it is simply impossible to license visual works without a right to display them because a textual description is no substitute for a visual image. For example, merely describing Joe Rosenthal's 1945 photograph of soldiers raising the flag on Iwo Jima as "U.S. soldiers raising a flag" fails to

capture the emotion and patriotic sentiment that looking at the photograph provides. A licensee simply cannot possibly rely upon textual descriptions of images or film footage because it needs to see whether the image or footage is appropriate for its needs.

Moreover, a holding that an image licensor's display of images for potential licensing violates the publicity rights of any individuals depicted in such images would cripple the ability of not only image licensors, but also any other licensor of visual content, to license their images or content anywhere in the United States. Nationwide licensing provides the major revenue source for visual content licensors. A decision in California holding that an image library can violate a person's right of publicity merely by displaying an image for licensing purposes would frustrate the image licensing industry's efforts to offer its content for licensing. Given that image and visual content licensing is primarily conducted online on a nationwide basis, the questionable status of an image in California would discourage the display of images in all states.

It is no answer to say that the image licensing industry could revert to industry practices in place before the advent of the Internet, for that would ignore the digital and new media environment that we inhabit and lead to absurd results. Clients, including publishers, news broadcasters and others, expect to be able to search and select images from anywhere at any time, and they require that instant

access to meet tight publishing deadlines. Nothing about the display of the likenesses of individuals on a website, among the many thousands or millions of images available in any image library's database and archive of images, justifies requiring the consent of the subjects of the images before a display can be made.

According to Plaintiff and her *amici*, however, merely offering a client the ability to review images to determine whether such images would be suitable for licensing amounts to a violation of a person's right of publicity. If image licensors have to remove all images depicting people from their databases, all of the time and money invested in archiving, scanning and uploading images and in creating their websites and databases will be wasted. Moreover, if the court were to reverse the Decision, any publicly identifiable person will be able to thwart and censor the use of his or her image, even for the myriad of lawful purposes described above that do not require consent. That is plainly contrary to the California Supreme Court's goal in balancing a celebrity's right of publicity against the First Amendment.[4]

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[4] As explained by the court in *Comedy III Prods.*,

> It is admittedly not a simple matter to develop a test that will unerringly distinguish between forms of artistic expression protected by the First Amendment and those that must give way to the right of publicity. Certainly, any such test must incorporate the principle that the right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity's image by censoring disagreeable portrayals. Once the celebrity thrusts himself or herself forward into

Indeed, both publicly known personalities, ranging from politicians to pop stars, as well as individuals could censor media or academic access to any images of them (whether flattering or not), simply by claiming that image licensors are violating their right of publicity by displaying their images for licensing purposes. There is no legal basis for such an absurd result.

Finally, the loss of these images being available for licensing would be a blow to the preservation of our national and historical heritage. If the Decision were reversed, the legal status of the display of large portions of photography archives that depict the nation's cultural heritage would be thrown into a legal grey area merely because they have images that contain identifiable individuals. We use images to tell our history and to educate our children. If the Decision is reversed, we would lose access to the images that inspire or incense us; images of our favorite sports teams' victories and defeats; images of ticker tape parades and

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> the limelight, the First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope. The necessary implication of this observation is that the right of publicity is essentially an economic right. What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity's fame through the merchandising of the "name, voice, signature, photograph, or likeness" of the celebrity.

25 Cal. 4th at 403 (emphasis added).

red carpet dresses; images of war and of peace—all because these images depict people.

Accordingly, the *Amici* herein ask this Court to reject Plaintiff's appeal and affirm the time-honored understanding that the mere act of displaying an image for licensing purposes does not violate an individual's right of publicity.

C. Celebrities and Other Individuals Who Wish to Control the Commercial Use of Their Images and Likenesses are Not Without Remedies.

Finally, it must be emphasized that celebrities and individuals whose images and likenesses are used for unauthorized commercial purposes are not without remedies. However, those remedies are properly asserted against the end-user of the image, not the image licensor from whom the image is licensed.

Reversal of the Decision would essentially impose primary liability upon image licensors simply because an end-user might breach a contract with the image licensor and not obtain permission for a commercial exploitation of the image. As explained herein, historically, the licensing agreements between image libraries and licensees expressly state that the end-users bear the responsibility to comply with the licensing terms and to obtain additional permissions for publicity rights if necessary depending on the end-user's use.

Placing the responsibility and liability for obtaining the proper consent for all planned uses upon the end-user – and only upon those end-users – satisfies the

privacy and economic concerns underlying the right of publicity without placing an impossible practical and financial burden on image licensors.

CONCLUSION

For the reasons set forth above, *Amici* PACA, ASMP and Zuma Press respectfully request that this Court deny Plaintiff's appeal and affirm the May 25, 2011 Order granting Corbis' motion for summary judgment.

Dated: New York, New York
January 25, 2012

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CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 32(a)(7)(C) AND CIRCUIT RULE 32-1

U.S. COURT OF APPEALS CASE NO. 11-56082

Pursuant to Fed. R. Civ. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points and contains 6,223 words.

Dated: New York, New York
January 25, 2012

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CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 29(c)(5)

U.S. COURT OF APPEALS CASE NO. 11-56082

Pursuant to FRAP 29(c)(5), *amicus curiae* confirms that no counsel for any party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person, other than the *amicus curiae*, its members or its counsel, contributed money that was intended to fund preparing or submitting this brief.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF BY THE PICTURE ARCHIVE COUNCIL OF AMERICA, INC., AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC. AND ZUMA PRESS, INC. and BRIEF OF *AMICI CURIAE* PICTURE ARCHIVE COUNCIL OF AMERICA, INC., AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC. AND ZUMA PRESS, INC. IN SUPPORT OF APPELLEE CORBIS CORPORATION with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 25, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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