PROTECTING GENETIC IDENTITY WITH THE RIGHT OF PUBLICITY: APPLYING CALIFORNIA'S COMMON LAW RIGHT OF PUBLICITY TO DIRECT-TO-CONSUMER GENETIC TESTING

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The completion of the Human Genome Project has and will continue to spur extraordinary innovation in the realm of genetics. One such innovation was the rise of commercial, direct-to-consumer (DTC) genetic testing, which allows consumers to learn about their origin, family, and disease predisposition, all by paying a modest sum and providing a tube of saliva. But the hidden cost is more severe: forfeiture of control over one's genetic identity. DTC genetic companies have exploited this vulnerability, entering into data-sharing agreements worth hundreds of millions of dollars.

This Comment argues that DTC genetic testing companies who sell and share consumers' genetic information violate the right of publicity. Specifically, they violate California's common law right of publicity, which affords broad protections for indicia of identity. Because genetic information reveals not only the identity of a sample provider, but more importantly, myriad details both intimate and mundane, it is part of each person's identity. Rapidly evolving science and technology further enable re-identification of even anonymized data sources. These companies' electronic consent agreements, though complex, are insufficient to enable the identity appropriation these companies commit. Therefore, these companies are liable for violating their consumers' right of publicity.

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TABLE OF CONTENTS

INTRODUCTION

Commercial genetic testing has rapidly become a booming industry; in 2007, 23andMe was one of the first providers of direct-to-consumer (DTC) genetic tests[1] and, in a little over a decade, is now worth an estimated $2.5 billion.[2] Traditional genetic testing that scientists and doctors use for criminal trials, research, and medical diagnoses typically require a medical professional to order a test, but 23andMe provides access directly to consumers; all one has to do is sign up, provide a saliva sample, and ship that sample back to 23andMe.[3]

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1. *About Us*, 23ANDME, https://mediacenter.23andme.com/company/about-us [https://perma.cc/7ZRQ-5EES].

2. Biz Carson & Kathleen Chaykowski, *Live Long and Prosper: How Anne Wojcicki's 23andMe Will Mine Its Giant DNA Database for Health and Wealth*, FORBES (June 6, 2019, 6:00 AM), https://www.forbes.com/sites/bizcarson/2019/06/06/23andme-dna-test-anne-wojcicki-prevention-plans-drug-development [https://perma.cc/PR6B-V84C].

3. *How Is Genetic Testing Done?*, U.S. NAT'L LIBR. OF MED., https://ghr.nlm.nih.gov/primer/testing/procedure [https://perma.cc/U2YV-CG2M]; *How It Works*, 23ANDME, https://www.23andme.com/howitworks [https://perma.cc/R6LX-DYU2].

Today, many companies provide DTC genetic testing services, each claiming to offer insights into heritage, health risks, and genetic conditions, among other information.[4]

The convenience and novelty of such services have given rise to their popularity, but some have criticized DTC genetic testing due to privacy concerns and the potential for testing companies to commercialize their consumers' genetic information.[5] With the value of genetic information climbing ever higher, DTC genetic testing companies have partnered with pharmaceutical and biotech firms to sell customers' genetic information.[6] DTC genetic testing companies may choose to sell, share, or publicize users' data because they are not governed by federal medical disclosure rules such as the Health Insurance Portability and Accountability Act[7] (HIPAA).[8] Even if companies de-identify genetic information before distributing it, companies may still be exposing their consumers' identities because of DNA's unique association with its origin.[9]

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4. *Which Direct-to-Consumer Genetic Test to Choose?*, MED. FUTURIST (Mar. 20, 2018), https://medicalfuturist.com/which-direct-to-consumer-genetic-test-to-choose [https://perma.cc/Q2WU-TGM2].

5. *E.g.*, Jayshree Pandya, *The Rise of Genetic Testing Companies and DNA Data Race*, FORBES (Apr. 1, 2019, 1:06 AM), https://www.forbes.com/sites/cognitiveworld/2019/04/01/the-rise-of-genetic-testing-companies-and-dna-data-race [https://perma.cc/YKS4-DYPE] (highlighting important security questions including the fate of genomic data in genomic marketplaces and whether the emerging DNA data race will exacerbate security concerns).

6. Matthew Herper, *Surprise! With $60 Million Genentech Deal, 23andMe Has a Business Plan*, FORBES (Jan. 6, 2015, 9:58 AM), https://www.forbes.com/sites/matthewherper/2015/01/06/surprise-with-60-million-genentech-deal-23andme-has-a-business-plan [https://perma.cc/NA3E-URME]; *see also GlaxoSmithKline Is Acquiring a $300 Million Stake in Genetic-Testing Company 23andMe*, FORTUNE (July 25, 2018, 11:36 AM), https://fortune.com/2018/07/25/glaxosmithkline-23andme-gsk [https://perma.cc/X2Z8-BQVX] (reporting a four-year data-sharing partnership in exchange for a $300 million investment).

7. Pub. L. No. 104–191, 110 Stat. 1936 (1996).

8. Brian Hedgeman & Alaap Shah, *Privacy Concerns Loom as Direct-to-Consumer Genetic Testing Industry Grows*, HEALTH L. ADVISOR (June 28, 2019), https://www.healthlawadvisor.com/2019/06/28/privacy-concerns-loom-as-direct-to-consumer-genetic-testing-industry-grows [https://perma.cc/Y8YF-SALN].

9. *See* Amy L. McGuire & Richard A. Gibbs, *No Longer De-Identified*, 312 SCIENCE 370, 370 (2006) (warning that even a modicum of anonymized genetic information can be used to re-identify an individual); Kerstin N. Vokinger et al., *Lost in Anonymization — A Data Anonymization Reference Classification Merging Legal and Technical Considerations*, 48 J.L. MED. & ETHICS 228, 229 (2020) (describing how technical advances are increasing the likelihood of re-identification).

Customers, concerned with privacy as well as their inability to benefit from the commercial value of their genetic identity, may choose to protect their genetic information by claiming that this type of sale constitutes a violation of the right of publicity.[10] The right of publicity is a property right to benefit from one's identity.[11] In California, the right of publicity is both a common law and statutory property right that has evolved to protect not only names and likenesses, but also voices and even interpretive depictions.[12] While commonly thought of as a way for celebrities to profit from their fame, the right of publicity also protects a person's "decision not to use his name or identity for commercial purposes."[13] The right of publicity developed from the right to privacy, which provides the context to determine whether a right of publicity claim is appropriate for the unwanted use of one's genetic information.

This Comment examines the significance of genetic information as it pertains to identity and analyzes whether California's right of publicity provides consumer protections for unauthorized uses of a person's genetic information. Part I provides background on recent developments in genetic testing and its implications for the privacy of consumers. In addition, this Part also summarizes important case law pertaining to genetic information. Next, Part II discusses the right of publicity and its development as a cause of action independent of privacy doctrine. Part II also examines the common law right of publicity's development in California and explores the expanded nature of its protection. Finally, Part III analyzes whether California's right of publicity, specifically as developed under the common law, protects against the unauthorized use of one's genetic information. This Part argues that because genetic information is an immutable element of one's identity and is uniquely capable of identifying its provider, even when a company has de-identified the information, its unauthorized use constitutes an appropriation of identity under California

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10. *See infra* Section II.A (describing the right of publicity).

11. 1 J. Thomas McCarthy & Roger E. Schechter, Rights of Publicity and Privacy § 6:2 (2d ed. 2020).

12. *See, e.g.*, Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 790, 803 (N.D. Cal. 2011) (protecting names and likenesses); Midler v. Ford Motor Co., 849 F.2d 460, 461 (9th Cir. 1988) (protecting voice); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1396 (9th Cir. 1992) (protecting a depiction of a game show hostess as a robot).

13. Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 415 (9th Cir. 1996).

law. Accordingly, this Part concludes that both the sale and subsequent use of genetic information violate the right of publicity.

I. GENETIC INFORMATION

Understanding how California's right of publicity might protect genetic identity first requires exploring what genetic information is and how it might implicate a person's identity and thus be protected under the right of publicity. Section I.A begins by providing a foundational background on genetic information and some of the historic achievements that have enabled DTC genetic testing as it currently exists. Next, Section I.B analyzes how genetic information has significant implications on a person's privacy. Finally, Section I.C provides insight into legal precedents that have shaped legal principles involving genetic information.

A. *The Human Genome: Humanity's Blueprint*

The human genome is the complete set of cellular instructions needed for a person to live and grow.[14] While a person's genetic makeup is not solely responsible for traits and attributes, genes play a crucial role in both outward appearances and internal bodily functions.[15] Genes are the encoded expression of the way we grow, how we look, our temperament, and our likelihood of major illness.[16] Genes are made up of base pairs, which are comprised of only four different proteins;[17] some genes contain only a few base pairs, while others may have tens of thousands.[18] Any human genome is 99.9% identical to any other person's, but because the human genome is approximately three billion base pairs long, even the minute difference

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14. *Introduction to Genomics*, NAT'L HUM. GENOME RSCH. INST., https://www.genome.gov/About-Genomics/Introduction-to-Genomics [https://perma.cc/3ZKM-HXH9].

15. *See id.* (explaining that environmental and lifestyle factors, such as smoking and eating habits, contribute to a person's health and characteristics as well).

16. *See id.*

17. *Gene*, NAT'L HUM. GENOME RSCH. INST., https://www.genome.gov/genetics-glossary/Gene [https://perma.cc/F4JW-RKQX]; *Base Pair*, NAT'L HUM. GENOME RSCH. INST., https://www.genome.gov/genetics-glossary/Base-Pair [https://perma.cc/98EX-8JYL]. The four base proteins, adenine (A), cytosine (C), guanine (G), and thymine (T), bond exclusively with one other protein (A with T and C with G) to form one "rung" of the famous double helix "ladder" structure of DNA. *Base Pair*, *supra*.

18. *Gene*, *supra* note 17.

between human genomes manifests as millions of single base pair variations.[19]

The Human Genome Project (the "Project") is largely responsible for the explosion of innovation in and insight into human genetics and genomics.[20] The Project culminated in 2003 with mapping an entire human genome from beginning to end.[21] The finished genome was representative, taking samples from a diverse group of individuals and using various sequences from an anonymous subset of those providers.[22] The Project helped identify the more than 20,000 genes in the human genome and mapped those genes to their physical locations on each chromosome.[23] These discoveries facilitated cost reductions in genetic testing,[24] paving the way for DTC genetic testing to become viable and cost-effective.[25]

Much like other personal health information, genetic information can be of immense benefit to a person's health and the treatment of disease, whether by revealing a genetic disorder that may be responsible for illness[26] or by providing insight into how patients might respond to a particular drug treatment.[27] The Precision Medicine

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19. *Introduction to Genomics*, *supra* note 14.

20. *See Human Genome Project Produces Many Benefits*, NAT'L HUM. GENOME RSCH. INST., https://www.genome.gov/27549135/nov-2011-human-genome-project-produces-many-benefits [https://perma.cc/5325-XX4D] (highlighting advancements the Project has made in areas such as cancer diagnosis and treatment as well as treatments for other common diseases like heart attacks).

21. *Human Genome Project FAQ*, NAT'L HUM. GENOME RSCH. INST., https://www.genome.gov/human-genome-project/Completion-FAQ [https://perma.cc/HNQ5-QBHH].

22. *Id.* (selecting from volunteers responding to advertisements placed near the laboratories preparing the DNA "libraries").

23. *Id.*

24. *DNA Sequencing*, NAT'L HUM. GENOME RSCH. INST., https://www.genome.gov/genetics-glossary/DNA-Sequencing [https://perma.cc/4UKM-TLBV].

25. *See Human Genome Project FAQ*, *supra* note 21 (analogizing the results of the Human Genome Project as "having all the pages of a manual needed to make the human body" that enables others to make new discoveries by "read[ing] the contents of all th[ose] pages").

26. *See Genetic Disorders*, NAT'L HUM. GENOME RSCH. INST., https://www.genome.gov/For-Patients-and-Families/Genetic-Disorders [https://perma.cc/AA6Q-BH8J] (providing an overview of how variation in genetic code may cause disease and listing genetic disorders).

27. *Pharmacogenetics*, NAT'L HUM. GENOME RSCH. INST., https://www.genome.gov/genetics-glossary/Pharmacogenomics [https://perma.cc/SQ8D-8DK8] (describing the field of pharmacogenomics as the study of how genes may impact the effectiveness of some drug therapies).

Initiative (the "Initiative"), which the Obama Administration enacted in 2015, encouraged drug makers and medical practitioners to tailor treatments to individuals, with an emphasis on how genetic makeup determines the effectiveness of a particular treatment.[28] The Initiative aims to use increased knowledge of genetic information and cancer biology to find more effective treatments for various forms of cancer.[29] In a panel discussion about the Initiative, President Barack Obama stated,

> I would like to think that if somebody does a test on me or my genes, that that's mine . . . . [H]ow do we make sure that if I donate my data . . . that it's not going to be misused, that it's not going to be commercialized in some way that I don't know about[?][30]

The former President's statements reflect the commonly held view that individuals undergoing genetic testing should have control over the intimate, personal information that genetic testing reveals.[31] As explained in the next Section, the personal nature of genetic information therefore implicates significant privacy concerns, especially when that information is placed in the possession of DTC genetic testing companies.

B. Genetic Information's Privacy Implications

While increasing access to genetic information has led to myriad scientific and medical breakthroughs, genetic testing may also pose significant privacy risks for those undergoing testing.[32] One such risk

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28. *See What Is the Precision Medicine Initiative?*, U.S. NAT'L LIBR. OF MED., https://ghr.nlm.nih.gov/primer/precisionmedicine/initiative [https://perma.cc/9XJT-5L5Y] (describing the short- and long-term goals of the Precision Medicine Initiative).

29. *Id.*

30. Barack Obama, *Remarks by the President in Precision Medicine Panel Discussion*, WHITE HOUSE OF PRESIDENT BARACK OBAMA (Feb. 25, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/02/25/remarks-president-precision-medicine-panel-discussion [https://perma.cc/H95Y-QY4G].

31. *See* Samuel A. Garner & Jiyeon Kim, *The Privacy Risks of Direct-to-Consumer Genetic Testing: A Case Study of 23andMe and Ancestry*, 96 WASH. U. L. REV. 1219, 1222 (2019) (claiming that concerns over genetic privacy are not new).

32. *See generally id.* at 1248 (discussing various privacy risks associated with DTC genetic testing). While beyond the scope of this Comment, certain uses of the results of a genetic test may violate one's constitutional right to privacy. *See* Christine Guest, Comment, *DNA and Law Enforcement: How the Use of Open Source DNA Databases Violates Privacy Rights*, 68 AM. U. L. REV. 1015, 1015–16 (2019) (arguing that law enforcement's use of open-source DNA databases violates a suspect's and her family's constitutional right to privacy).

is employment discrimination: refusing to hire candidates based on their genetic test results.[33] In 2008, Congress passed the Genetic Information Nondiscrimination Act[34] (GINA) to protect individuals from employment discrimination based on their genetic information.[35] Congress found that the significant benefits genetic information confers also give rise to "the potential misuse of genetic information to discriminate in health insurance and employment."[36]

Disclosure of genetic information may also cause distress or embarrassment—for example, by revealing a high likelihood or certainty of future onset of disease, such as Huntington's, or by disclosing mismatched paternity.[37] Some may also have personal or religious objections to the subsequent use of tissue or genetic information without their knowledge.[38] These implications may cause emotional distress for both the procurer of a genetic test as well as for her progeny.[39] In this way, genetic information differs from other types of medical information. Mutations in the BRCA1 and BRCA2 genes,[40] for example, may increase a woman's chances of becoming ill with breast cancer by about seventy percent, and that risk may very well be passed to her daughter.[41] Receiving such news may drastically alter

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33. *See* Sarah Zhang, *The Loopholes in the Law Prohibiting Genetic Discrimination*, ATLANTIC (Mar. 13, 2017), https://www.theatlantic.com/health/archive/2017/03/genetic-discrimination-law-gina/519216 (describing legislative efforts to curb genetic employment discrimination when genetic testing was still a nascent technology).

34. Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified at 42 U.S.C. § 2000ff).

35. *Id.* at 882.

36. *Id.*

37. Natalie Ram, Assigning Rights and Protecting Interests: Constructing Ethical and Efficient Legal Rights in Human Tissue Research, 23 HARV. J.L. & TECH. 119, 130 (2009).

38. *Cf.* Lori B. Andrews, *Harnessing the Benefits of Biobanks*, 33 J.L. MED. & ETHICS 22, 25 (2005) (discussing the Orthodox Jewish community's objection to use of body tissue and the community's tradition of burying the deceased whole, including with any body parts the deceased may have had amputated while alive).

39. *Id.*

40. "BRCA1 and BRCA2 are human genes that produce tumor suppressor proteins . . . . When either of these genes is mutated . . . DNA damage may not be repaired properly. As a result, cells are more likely to develop additional genetic alterations that can lead to cancer." *BRCA Mutations: Cancer Risk and Genetic Testing*, NAT'L CANCER INST., https://www.cancer.gov/about-cancer/causes-prevention/genetics/brca-fact-sheet [https://perma.cc/5AWD-VV24].

41. *See id.* ("[A] recent large study estimated that about 72% of women who inherit a harmful BRCA1 mutation . . . will develop breast cancer by the age of 80.").

the course of a person's life,[42] while other people may prefer to forgo such testing altogether.[43]

Genetic information obtained through medical care or for research falls under HIPAA rules that require informed consent from the individual for the use and disclosure of genetic information that can personally identify her.[44] However, HIPAA does not require informed consent for the disclosure of de-identified data, which is "information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual."[45]

In the context of DTC genetic testing, privacy concerns may be heightened for several reasons.[46] DTC genetic testing companies typically do not fall under the purview of HIPAA regulation because they are not considered health care providers.[47] These test results may not be as accurate as the results of conventional genetic testing, which can lead to false or inaccurate information.[48] Privacy harms may also occur through lax security protocols, which may increase the

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"Each child of a parent who carries a mutation in [BRCA1 or BRCA2] has a 50% chance . . . of inheriting the mutation." *Id.*

42. *See* Kate Barasz, *Don't Touch My Breasts, Hon*, SALON (Oct. 8, 2012, 1:00 AM), https://www.salon.com/2012/10/08/dont_touch_my_breasts_hon [https://perma.cc/CP4L-F8PZ] (describing the author's changes to lifestyle and decision to undergo a prophylactic double mastectomy after finding out she carried a BRCA1 genetic mutation).

43. Stewart A. Laidlaw et al., *Genetic Testing and Human Subjects in Research*, 24 WHITTIER L. REV. 429, 460 (2002) ("Just the fact that a member is seeking [genetic] testing may cause family strife, with some members protesting the test itself so as not to open an investigation into the family's genetic reality.").

44. 45 C.F.R. § 46.116 (2018).

45. *Id.* § 164.514.

46. *See* Garner & Kim, *supra* note 32, at 1248 (discussing three primary harms that may occur through DTC genetic testing: knowledge harms, trust harms, and data misuse harms).

47. *See* Linnea Laestadius, *Transparency and Direct-to-Consumer Genetic Testing Companies*, BILL OF HEALTH (Nov. 22, 2016), https://blog.petrieflom.law.harvard.edu/2016/11/22/transparency-and-direct-to-consumer-genetic-testing-companies [https://perma.cc/UN3V-VM4L] (reporting that "the vast majority of DTC firms . . . are not currently considered to be 'covered entities'" under HIPAA); Eric Ravenscraft, *How to Protect Your DNA Data Before and After Taking an at-Home Test*, N.Y. TIMES (June 12, 2019), https://www.nytimes.com/2019/06/12/smarter-living/how-to-protect-your-dna-data.html (discussing lowered data privacy requirements for DTC genetic testing companies).

48. Garner & Kim, *supra* note 32, at 1257 (noting that one study found a 40% false-positive rate in genetic data results from DTC genetic testing companies).

risk of re-identification of an individual's genetic information.[49] Unlike security breaches that reveal credit card information or social security numbers, which a person may remedy by obtaining new cards or numbers, a security breach of one's genetic information is irreversible; one cannot simply change her genetic code.[50] Because of the immutable connection between genetic information and its provider, and the ever-expanding realm of medical and personal insights that genetic information provides, legislators and judges alike have begun to consider the legal implications around genetic testing and information.

C. Laws and Precedent Involving Genetic Information

As genetic testing has taken a more prominent role in medical, scientific, and commercial contexts, some legislatures have enacted genetic privacy laws, and courts have begun answering legal questions pertaining to human tissue and the genetic information it contains. A handful of states have passed statutes that expressly protect the results of a genetic test as property belonging to the person tested.[51] While many of the statutes proclaim a property right in the genetic information of the person tested, most of the statutes provide exceptions for anonymous data, criminal forensics, and paternity testing, and the statutes may further restrict liability to insurance companies' unauthorized uses or disclosures.[52] Some states have passed these protections for genetic information to supplement the protections that GINA already provides.[53] California, whose

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49. *Id.* at 1258.

50. Although outside of the scope of this Comment, gene-altering technologies are also rapidly advancing. For an interesting analysis of whether a fundamental parental right to alter a child's genes exists, see Fernando Montoya, Comment, *Intergenerational Control: Why Genetic Modification of Embryos via CRISPR-Cas9 Is Not a Fundamental Parental Right*, 69 AM. U. L. REV. 1015, 1019 (2020).

51. *See, e.g.*, COLO. REV. STAT. § 10-3-1104.7(1)(a) (2020) ("Genetic information is the unique property of the individual to whom the information pertains"); ALASKA STAT. § 18.13.010(a)(2) (2020) ("[A] DNA sample and the results of a DNA analysis performed on the sample are the exclusive property of the person sampled or analyzed."); GA. CODE ANN. § 33-54-1(1) (2020) ("Genetic information is the unique property of the individual tested"); LA. STAT. ANN. § 22:1023(E) (2020) ("An insured's or enrollee's genetic information is the property of the insured or enrollee."); FLA. STAT. § 760.40(2)(a) (2020) ("[T]he results of . . . DNA analysis . . . are the exclusive property of the person tested").

52. *See* Anya E.R. Prince, *Comprehensive Protection of Genetic Information: One Size Privacy or Property Models May Not Fit All*, 79 BROOK. L. REV. 175, 195–96 (2013) (describing various exceptions and limitations of states' genetic property statutes).

53. *Id.* at 177.

law this Comment focuses on, has passed legislation protecting its citizens from discrimination based on genetic information, but it has not statutorily established property rights in genetic information.[54]

While legislators have begun taking action to protect their citizens' genetic information, recent court decisions have also illustrated some of the legal complications of human tissue and the genetic information they contain. Courts have found that human tissue cannot be converted,[55] for example, and that tissue donors do not maintain the rights to control the donated samples aside from the rights for which they have contractually bargained.[56] This Comment explores these cases in more detail below.

Prior to the passage of GINA and other state protections of genetic information, the California Supreme Court decided in *Moore v. Regents of the University of California*[57] that a person does not have a personal property interest in tissues that are voluntarily excised from her body.[58] Moore claimed that doctors converted his tissue when they removed his spleen and used the excised cells to develop and patent a cell line for medical research.[59] The plaintiff posited that the property right he was seeking to enforce was established in cases addressing the right of publicity, but the court found that the cases were irrelevant to a conversion claim.[60] The court noted that the lymphokines the defendants manufactured with their developed cell line were identical not only to Moore's but also to all other humans' lymphokines, and therefore did not have a "likeness" to Moore's particular lymphokines.[61] The relevant genetic material that was allegedly converted was "the same in every person" and "no more unique to Moore than the number of vertebrae in the spine or the chemical

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54. *See id.*, app. at 225 (citing CAL. CIV. CODE § 51(b) (West 2020)) (including genetic information among personal attributes entitled to full and equal protection under the law in all California business establishments); CAL. GOV'T CODE § 12926(i)(2) (West 2020)) (indicating that California provisions protect employment and health insurance discrimination based on genetic information but do not provide explicit property or privacy rights).

55. *See, e.g.*, Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 480 (Cal. 1990) (en banc) (rejecting the plaintiff's claim that his cells were converted by his surgeons).

56. *See, e.g.*, Wash. Univ. v. Catalona, 490 F.3d 667, 670 (8th Cir. 2007) (finding that donors of tissue samples did not retain any proprietary interest in the materials).

57. 793 P.2d 479 (Cal. 1990) (en banc).

58. *Id.* at 493.

59. *Id.* at 126–27, 487.

60. The *Moore* court referred to these cases as "addressing privacy rights." *Id.* at 489.

61. *Id.* at 490.

formula of hemoglobin."[62] The California Supreme Court held that Moore had neither possession of nor ownership rights in his excised cells, and, therefore, the defendants were not liable for conversion of his personal property.[63]

Other courts have held similarly regarding conversion of tissue samples and genetic information, despite the supposed protections of a genetic property statute. *Greenberg v. Miami Children's Hospital Research Institute, Inc.*[64] applied *Moore* in dismissing a claim for conversion of tissue samples and genetic information.[65] The court noted that a Florida genetic testing statute that allows the subject to retain ownership of the results of the test was inapplicable because it merely provides penalties for disclosure or lack of informed consent, and thus does not apply to a conversion claim.[66] The *Greenberg* court, echoing *Moore*, made clear that the use of tissues constituted a donation that would not support liability for conversion, and that to hold otherwise would "cripple medical research as it would bestow a continuing right for donors to possess the results of any research conducted by the hospital."[67] Although the court dismissed the conversion claim, it held that the plaintiff sufficiently stated a claim of unjust enrichment because the defendants used the genetic information and tissue samples for an unauthorized purpose when it patented the genetic material and thereby commercialized it.[68]

Tissue donors also do not retain any rights in the tissue they donate, except for those rights assigned through contractual agreement.[69] In a case similar to *Greenberg* in its consideration of donors' rights in the tissue they donated, *Washington University v. Catalona*[70] found that providers of tissue samples to Washington University did not retain broad property rights in the samples they donated.[71] When a prominent doctor and cancer researcher left the University and asked sample providers to authorize him to transfer their samples to his new employer, Washington University filed for a declaratory

62. *Id.*
63. *Id.* at 489.
64. 264 F. Supp. 2d 1064 (S.D. Fla. 2003).
65. *Id.* at 1074.
66. *Id.* at 1075.
67. *Id.* at 1076.
68. *Id.* at 1072.
69. Wash. Univ. v. Catalona, 490 F.3d 667, 675 (8th Cir. 2007).
70. 490 F.3d 667 (8th Cir. 2007).
71. *Id.* at 677.

judgment to establish ownership of the samples.[72] On appeal, the Eighth Circuit affirmed the district court, holding that the tissue providers conveyed an inter vivos gift of their cells to the University.[73] The consent forms created a conditional gift that allowed providers to withdraw consent and either request that their samples not be used in further research or order the University to destroy their samples.[74] This condition did not invalidate the gift made, but also did not require any more than the recourse specified in each consent form; such recourse was limited to the right to revoke voluntary participation in or consent to the research study and thus did not allow participants to repossess or transfer their samples from the University to another entity.[75]

As of 2013, Supreme Court precedent considers isolated genes a product of nature that cannot be patented.[76] In *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*,[77] the Court struck down a patent of the typical BRCA1 and BRCA2 genes, whose mutations are associated with significantly heightened risk of breast cancer.[78] However, the Court upheld a separate patent for BRCA-1 in cDNA, a synthetic DNA created by copying the natural gene and removing the non-coding base pairs.[79] At the time, an estimated 4,300 patents for various genes existed, which the ruling invalidated.[80]

The cases above illustrate that ownership of genetic information (and the tissue samples that hold such information) is not a straightforward issue. Even though a person does not maintain property rights in tissue excised from her body, those rights may exist for the doctors who remove them,[81] and donors of tissue samples retain only those rights which they withhold contractually.[82] Some

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72. *Id.* at 670.
73. *Id.*
74. *Id.* at 675.
75. *See id.* (noting that the tissue donors' rights were limited to discontinuing their participation or allowing further research using those samples).
76. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576, 596 (2013).
77. 569 U.S. 576 (2013).
78. *Id.* at 583, 596.
79. *Id.* at 594–95.
80. *Can Genes Be Patented?*, U.S. NAT'L LIBR. OF MED., https://ghr.nlm.nih.gov/primer/testing/genepatents [https://perma.cc/8K9V-FL7W].
81. Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 493–94 (Cal. 1990) (en banc) (reasoning that characterizing the use of samples and cell lines in medical research as conversion would be counter to public policy).
82. Wash. Univ. v. Catalona, 490 F.3d 667, 675 (8th Cir. 2007).

scholars have suggested alternative frameworks that directly assign property rights in tissue samples and the genetic information they contain.[83] Others argue that property rights in genetic information would overly encumber medical research.[84] This Comment proceeds by examining the right of publicity and its roots in privacy doctrine, then by analyzing California's right of publicity as it applies to genetic information obtained through DTC genetic testing.

II. THE RIGHT OF PUBLICITY

With a cursory background on the privacy implications and legal significance of genetic information, this Comment turns to the right of publicity. Section II.A discusses the historical background of the right of publicity and its origins in privacy doctrine. Next, Section II.B examines California's path to recognizing the right of publicity as both a common law and statutory claim. Finally, Section II.C highlights how California's common law right of publicity provides expansive and flexible protections of a person's identity. This Part lays the groundwork for Part III to apply California's common law right of publicity to DTC genetic testing companies' use of their consumers' genetic information.

A. *What is the Right of Publicity?*

The right of publicity is the property right to benefit from the commercial value of one's identity.[85] The right of publicity has its roots in the right to privacy, or as Justice Louis Brandeis famously said, "the right to be let alone."[86] Two early state supreme court cases were critical in establishing the right to privacy: *Roberson v. Rochester Folding Box Co.*[87] and *Pavesich v. New England Life Insurance*.[88]

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83. *See generally* Ram, *supra* note 37, at 142 (presenting an informational property model that would allow tissue providers to license samples for research); Pamela Samuelson, *Privacy as Intellectual Property*, 52 STAN. L. REV. 1125, 1130, 1155 (2000) (advocating for genetic and personal information to be viewed as trade secrets to allow patients' and providers' privacy to be maintained).

84. *See* Jorge L. Contreras, *Genetic Property*, 105 GEO. L.J. 1, 6 (2016) (arguing that current informed consent doctrine endows tissue providers with property-like rights today and pointing out its harmful effects on medical research).

85. 1 MCCARTHY & SCHECHTER, *supra* note 11, § 6:2.

86. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

87. 64 N.E. 442 (N.Y. 1902).

88. 50 S.E. 68 (Ga. 1905).

The *Roberson* court expressly declined to find a right of privacy in the common law.[89] Although the case involved the use of the plaintiff's image in an advertisement for a flour company, which she alleged caused her embarrassment and humiliation,[90] the court affirmed the defendant's demurrer on appeal.[91] Public outcry after the ruling led to the passage of section 51 of the New York Civil Rights Law, which allows a cause of action against those who "use[] for advertising purposes, or for the purposes of trade, the name, portrait[,] or picture of any living person without having first obtained the written consent of such person."[92] The Georgia Supreme Court reached the opposite conclusion of *Roberson* and recognized a common law right of privacy, finding that the use of the plaintiff's name and likeness impinged on his freedom to control his identity.[93] The court focused on the dignitary and personal autonomy harms that arise out of an unconsented use of a person's identity.[94]

As prominent persons began bringing claims for invasion of privacy for the use of their name or likeness in advertising, though, judges were faced with a contradiction: how can a public figure suffer an injury to privacy when he or she is already well-known?[95] The phrase "right of publicity" first appeared in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[96] The enforcement of damages for economic loss, as opposed to damages for "having [one's] feelings bruised," was the

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89. *Roberson*, 64 N.E. at 447.

90. *Id.* at 442 (explaining that the plaintiff claimed to be humiliated "by the scoffs and jeers" of people recognizing her face in an advertisement).

91. *Id.* at 442, 447.

92. N.Y. CIV. RIGHTS LAW § 50 (McKinney 1903).

93. *Pavesich*, 50 S.E. at 80 (recognizing a right of privacy of the plaintiff when a newspaper advertisement used the plaintiff's image without his consent).

94. *See* Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 216–17 (1999).

95. 1 MCCARTHY & SCHECHTER, *supra* note 11, § 1:25; *see also* O'Brien v. Pabst Sales Co., 124 F.2d 167, 169 (5th Cir. 1941) (involving a famous college football player claiming unauthorized appropriation of likeness to sell beer who was denied relief on the basis that his fame precluded his privacy claim).

96. 202 F.2d 866, 868 (2d Cir. 1953) ("This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players) . . . would feel sorely deprived if they no longer received money for authorizing advertisements . . . ."). *Haelan Laboratories, Inc.* was about the exclusive use of a baseball player's photograph for baseball cards. *Id.* at 867. The court decided that the player's initial contract was an exclusive grant of the legal interest in publishing his image, rather than a mere waiver of liability for invasion of privacy. *Id.* at 868.

basis for finding a property interest in the right of publicity.[97] While the most common controversies involve the use of prominent personalities in advertising, many states that recognize the right of publicity allow recovery for both celebrities and non-celebrities alike, at least in theory, even though celebrities are typically able to prove much greater damages.[98]

A person need not be famous to bring a right of publicity claim, but they must at least be identifiable.[99] In *Bullard v. MRA Holding, LLC*,[100] the plaintiff sued a video production company that had purchased, sold, and publicized videos of the plaintiff and used a still photo of her on the video's packaging.[101] The court allowed the right of publicity suit to proceed despite the plaintiff's failure to show that her identity had celebrity value because the economic value would be a question of damages for the jury.[102] Similarly, in *Cohen v. Herbal Concepts, Inc.*,[103] a nonparty photographed the non-celebrity plaintiff's nude back without her consent.[104] The photograph later appeared in an advertisement published in three different magazines, and the New York court held that the issue of identifiability precluded summary judgment specifically because the plaintiff's husband and friends recognized her based on distinct but non-facial features.[105] Right of publicity protections vary across states,[106] but California

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97. *Id.*; *see also* Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553, 557 (1960) (examining distinctions between privacy interests and property interests and suggesting some cases may have come out differently if the plaintiffs asserted a property interest without addressing privacy as well).

98. *See* 1 MCCARTHY & SCHECHTER, *supra* note 11, § 4:3. *Compare* Eastwood v. Superior Ct., 198 Cal. Rptr. 342 (Ct. App. 1983) (appropriation of name and likeness of a celebrity in a news publication), *with* Bullard v. MRA Holding, LLC, 740 S.E.2d 622 (Ga. 2013) (non-celebrity appropriation of likeness used in video and on its packaging), *and* Cohen v. Herbal Concepts, Inc., 473 N.Y.S.2d 426 (App. Div. 1984) (non-celebrity appropriation of nude back in a photo used in an advertisement).

99. *Cohen*, 473 N.Y.S.2d at 182; *Bullard*, 740 S.E.2d at 628.

100. 740 S.E.2d 622 (Ga. 2013).

101. *Id.* at 624.

102. *Id.* at 628.

103. 473 N.Y.S.2d 426 (App. Div. 1984).

104. *Id.* at 427–28 (Kassal, J., concurring).

105. *Id.* at 428, 431.

106. Not all states have expressly recognized the right of publicity, though: seventeen states, including Alaska, Colorado, Delaware, and Wyoming do not have a statutory right of publicity and have yet to recognize the right in the common law. *See* 1 MCCARTHY & SCHECHTER, *supra* note 11, § 6:2. *See generally* Jennifer E. Rothman,

stands out for both its common law and statutory recognition of the right and its expansive protection of identity under the right of publicity doctrine.[107]

B. California's Right of Publicity Jurisprudence

Before establishing a right of publicity, California recognized a right to privacy that was grounded in the California Constitution.[108] While a contemporary court's analysis of *Melvin v. Reid*[109] would categorize the harm that the plaintiff asserted as a public disclosure of private information according to Dean William Prosser's definitions,[110] later cases would develop the common law privacy tort of misappropriation of identity.[111] In *Fairfield v. American Photocopy Equipment Co.*,[112] the court held that when the defendant published the plaintiff's name in an advertisement without his consent, it commercially appropriated his identity and violated his right to be free from unwanted publicity.[113] Notably, the plaintiff was not required to show more than nominal damages to state a cause of action.[114]

Right of Publicity State-by-State, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, https://www.rightofpublicityroadmap.com [https://perma.cc/4ME4-LX7U] (providing an interactive map to explore rights of publicity state-by-state).

107. *See infra* notes 119–21 and accompanying text; *infra* Section II.C.

108. Melvin v. Reid, 297 P. 91, 93–94 (Cal. Dist. Ct. App. 1931). More recently, California bolstered its statutory privacy protections with the passage of the California Consumer Privacy Act. *See* Kiran K. Jeevanjee, *Nice Thought, Poor Execution: Why the Dormant Commerce Clause Precludes California's CCPA from Setting National Privacy Law*, 70 AM. U. L. REV. F. 75 (2020) (arguing that the dormant commerce clause renders the law unconstitutional).

109. 297 P. 91 (Cal. Dist. Ct. App. 1931).

110. *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (describing four distinct privacy torts); 1 MCCARTHY & SCHECHTER, *supra* note 11, § 6:17 (indicating that California, along with most other states, has adopted Dean Prosser's four distinct privacy torts). The four privacy torts are (1) intrusion upon a plaintiff's seclusion, (2) public disclosure of embarrassing private facts, (3) publicity placing the plaintiff in false light, and (4) appropriation of the plaintiff's name or likeness for the defendant's advantage. Prosser, *supra*, at 389.

111. *See, e.g.*, Kerby v. Hal Roach Studios, 127 P.2d 577, 581 (Cal. Dist. Ct. App. 1942) (finding name appropriation where advertiser mailed letters that inadvertently used a performers name); Fairfield v. Am. Photocopy Equip. Co., 291 P.2d 194, 197 (Cal. Dist. Ct. App. 1955) (finding similar name appropriation in a print advertisement).

112. 291 P.2d 194 (Cal. Dist. Ct. App. 1955). *Fairfield* involved the unauthorized use of a Los Angeles attorney's name in an advertisement claiming he was a satisfied customer, even though he was not. *Id.* at 197.

113. *Id.* at 200.

114. *Id.*

Fairfield recognized a privacy violation in the commercial appropriation of identity that resulted in an injury to feelings—"a direct wrong of a personal character"[115]—but courts applying California law did not immediately recognize the right of publicity as the economic injury companion to the right to privacy.[116] Sixteen years later, in 1974, the Ninth Circuit had occasion to recognize the common law right of publicity in California and did so in *Motschenbacher v. R.J. Reynolds Tobacco Co.*[117] Despite a lack of California precedent acknowledging the right of publicity, the court inferred based on other acts of commercial appropriation that involved only injury to feelings that California would recognize the economic right of publicity.[118] Importantly, California had enacted section 3344 of the California Civil Code in 1971, which, despite its designation as "relating to invasion of privacy,"[119] provides the statutory cause of action for the unauthorized appropriation of, inter alia, one's name or likeness.[120] The new statute declared that the cause of action it established existed in addition to others already provided by law.[121]

The Ninth Circuit's recognition of the right of publicity in *Motschenbacher* was an accurate interpretation of California law; in 1979, the Supreme Court of California recognized the common law right of publicity in *Lugosi v. Universal Pictures*.[122] The widow and son of Bela Lugosi, a famous actor, claimed that Universal Pictures violated Bela Lugosi's right of publicity by appropriating his name and likeness after his death.[123] At trial, the plaintiffs contended they inherited Lugosi's right of publicity, and that Universal's unauthorized

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115. *Id.* at 197.

116. *See* Strickler v. Nat'l Broad. Co., 167 F. Supp. 68, 70 (S.D. Cal. 1958) ("This Court does not feel it wishes to blaze the trail to establish in California a cause of action based upon the right of publicity.").

117. 498 F.2d 821, 825 (9th Cir. 1974).

118. *Id.* at 825–26.

119. 1971 Cal. Stat. 3426.

120. CAL. CIV. CODE § 3344 (West 2020).

121. *Id.* § 3344(g).

122. 603 P.2d 425 (Cal. 1979) (en banc); *see also* Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454 (Cal. 1979) (en banc) (citation omitted) ("In *Lugosi v. Universal Pictures*, we hold that the right of publicity protects against the unauthorized use of one's name, likeness or personality, but that the right is not descendible and expires upon the death of the person so protected.").

123. 603 P.2d at 427 (explaining that the plaintiffs asserted a property interest in Lugosi's unique likeness and that the defendants used that likeness without consent in the merchandising of Count Dracula, a role for which Lugosi became famous).

use of Lugosi's name and likeness violated the right that descended to them.[124] Although the court determined that Lugosi did have the right to exploit his likeness, it ultimately reversed the trial court, finding that the right of publicity was not descendible.[125] In arriving at this conclusion, the court surmised that the distinction between a property violation and a tort was "pointless" and that the legislature, not the judiciary, was better suited to enact a rule to make a person's right of publicity descendible.[126] Only five years later, in 1984, the California legislature did exactly that: it made a person's right of publicity descendible and protectable for seventy years after death.[127]

Although the *Lugosi* court thought that distinguishing the right of publicity as sounding in tort rather than property was moot,[128] subsequent California jurisprudence would tilt the judicial scales toward a property right. The California Supreme Court found that "[t]he right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility."[129] Some courts justify the right of publicity as a property right due to the effort a person may expend in developing her reputation.[130] However, the right of publicity retains property-like characteristics without labor input; it protects those who are relatively unknown, and who may not have developed their reputations at all.[131] In this way, the right of publicity differs from other forms of intellectual property justifications due to its protection of identity; one is not required to have cultivated aspects of her identity to maintain a right of publicity action in California.[132]

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124. *Id.* ("The trial court concluded that: Lugosi . . . had a protectable property or proprietary right . . . [that] did not terminate with Lugosi's death but descended to his heirs . . . .").

125. *Id.* at 428, 430.

126. *Id.* at 430–31.

127. 1984 Cal. Stat. 1704 § 1.

128. *See Lugosi*, 603 P.2d at 431 (arguing that Dean Prosser was correct in asserting that a distinction between privacy tort or property is irrelevant).

129. Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 804 (Cal. 2001).

130. *See id.* (citing *Lugosi*, 603 P.2d at 425) (explaining that plaintiffs may develop their reputations for years before seeing an economic return).

131. *See, e.g.*, KNB Enters. v. Matthews, 92 Cal. Rptr. 2d 713, 718 (Ct. App. 2000) (enforcing models' rights of publicity that were assigned to the plaintiff despite the models' obscurity).

132. *See id.* (noting that the plaintiff alleged that the models' obscurity was a valuable asset); 1 MCCARTHY & SCHECHTER, *supra* note 11, § 6:25 ("The requirement

C. *California's Expansive Protection of Identity*

California recognizes both a statutory and common law right of publicity that complement each other.[133] The statutory right of publicity in California only protects against certain enumerated aspects of a person's identity: name, voice, signature, photograph, and likeness.[134] While the statutory provision protects against direct uses of certain indicia of identity, courts define the common law right of publicity more broadly, finding appropriation through representations, such as illustrations and "sound-alike" voices.[135]

Eastwood v. Superior Court[136] described the necessary elements for a claim of violation of the right of publicity as "(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."[137] *Eastwood* was about a tabloid's use of a celebrity's name and photograph in a publication without his permission.[138] Indeed, the most common claims for right of publicity violations involve the use of a person's name or likeness.[139]

Subsequent cases expanded the common law right of publicity, interpreting *Eastwood* as merely describing two possible scenarios in which the defendant might have violated the plaintiff's right of publicity, not as a requirement that either name or likeness appropriation must

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of some injury does not disqualify non-celebrities from asserting . . . a common law . . . right of publicity.").

133. *Comedy III Prods., Inc.*, 21 P.3d at 799 ("In this state the right of publicity is both a statutory and a common law right."); *see* CAL. CIV. CODE § 3344 (West 2020) (defining California's statutory right of publicity).

134. § 3344.

135. 1 MCCARTHY & SCHECHTER, *supra* note 11, § 6:33; *see also* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1399 (9th Cir. 1992) (finding a right of publicity violation in a cartoon depiction of plaintiff Vanna White because the depiction readily identified her, even though it was not her "likeness" under the statutory meaning); Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (finding a right of publicity violation in the imitation of the plaintiff's unique and distinctive voice, even though the voice used was not the plaintiff's).

136. 198 Cal. Rptr. 342 (Ct. App. 1983).

137. *Id.* at 347.

138. *Id.* at 344–45.

139. *See, e.g.*, *id.* (name and photograph); Miller v. Collectors Universe, Inc., 72 Cal. Rptr. 3d 194, 196 (Ct. App. 2008) (name); KNB Enters. v. Matthews, 92 Cal. Rptr. 2d 713, 715 (Ct. App. 2000) (photograph).

have occurred.[140] Basketball star Kareem Abdul-Jabbar used the right of publicity to protect his *former* name when an automobile advertisement used it without his authorization.[141] Even though Abdul-Jabbar had officially changed his name several years earlier, the court found that he was sufficiently associated with his former name and that the defendant's use of that name was an appropriation of his identity.[142]

The common law right of publicity also protects against imitations of a person's voice.[143] Although section 3344 was amended in 1984 to protect one's voice as an aspect of identity, the *Midler* court found that the statute only protected actual uses of an individual's voice, not impersonations or "sound alikes."[144] The common law right protects even imitations of a person's distinctive voice, so long as that person may be identified by it.[145] Likeness is also protectable even when a human is not depicted.[146] The court in *White v. Samsung Electronics America, Inc.*[147] found an appropriation of the plaintiff's likeness through the depiction of various aspects of Vanna White's persona as the hostess of the game show "Wheel of Fortune," even though the depiction was a robot with White's distinctive features.[148] Plaintiffs have also found refuge in the right of publicity for the appropriation of their identities in video games.[149] Where the defendant's alleged use is a depiction and not an actual photograph, identifiability of the plaintiff in the alleged use creates an issue of fact.[150] Even if the

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140. *See White*, 971 F.2d at 1398 (noting that "the common law right of publicity reaches means of appropriation other than name or likeness").

141. Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407 (9th Cir. 1996) (applying California law).

142. *Id.* at 409, 415–16.

143. Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (applying California law); *see also* Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1096 (9th Cir. 1992) (applying California law).

144. *See Midler*, 849 F.2d at 461, 463 (concluding that a voice imitation was not covered by the statutory right of publicity but was covered by its common law counterpart).

145. *Id.*

146. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1399 (9th Cir. 1992) (determining that a robotic depiction of a human's likeness can be a right of publicity violation).

147. 971 F.2d 1395 (9th Cir. 1992) (applying California law).

148. *Id.* at 1396, 1399.

149. *See* No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397, 402 (Ct. App. 2011) (using band members' likenesses in video game avatars outside of the contractual limitations).

150. Davis v. Elec. Arts, Inc., No. 10-cv-03328-RS, 2018 WL 3956212, at *3 (N.D. Cal. Aug. 17, 2018); *see also* Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607, 614 (Ct.

plaintiff herself is not recognizable in a particular use, the plaintiff may have a cause of action if sufficient distinctive aspects of her identity are present.[151]

Consent may be a straightforward issue to resolve in cases where defendants fail to obtain any form of agreement.[152] Subsequent third party uses may be similarly uncomplicated; *KNB Enterprises v. Matthews*[153] is useful in illustrating this point. *KNB Enterprises* involved electronic distribution of models' photographs that one of the recipients subsequently used without permission.[154] The models assigned their rights of publicity to the plaintiff, who then distributed the photographs.[155] The court found the defendant liable for violating the models' rights of publicity by reposting the photographs on his website, for which he charged a subscription fee.[156] Even though the plaintiff willingly disseminated the photographs, the company did not consent to the defendant's subsequent use of the photographs' on his website.[157]

When an agreement already exists between parties, courts look to the scope of the agreement to determine whether the accused use was outside its bounds.[158] If a court determines the use falls outside of the agreement's scope and the other elements of a right of publicity violation are satisfied, it must hold that the using party has violated the other's right of publicity, so long as the use is not sufficiently transformative to be protected as First Amendment speech.[159]

App. 2006) (finding that, despite some differences between the plaintiff's characteristics and those of the defendant's video game character, other visual similarities created an issue of fact).

151. *White*, 971 F.2d at 1399.

152. *See, e.g.*, *id.* at 1396 ("Unlike the other celebrities used in the campaign, White neither consented to the ads nor was she paid.").

153. 92 Cal. Rptr. 2d 713 (Ct. App. 2000).

154. *Id.* at 716.

155. *Id.*

156. *Id.*

157. *Id.* at 721; *see also* Bullard v. MRA Holding, LLC, 740 S.E.2d 622, 624, 627 (Ga. 2013) (holding that the plaintiff's consent to be filmed in public did not extend to the subsequent sale of the footage to a third party, or that third party's publication of the footage).

158. *See* No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397, 406 (Ct. App. 2011) (emphasis added) (explaining that "hold[ing] a valid license to use [parties'] likenesses *in the manner in which they are used*" is an affirmative defense to a right of publicity claim).

159. *See id.* at 405–06.

Because California's common law right of publicity encompasses distinctive aspects of a person's identity, and not simply name and likeness, it protects against the unauthorized use of a person's genetic identity. This Comment will proceed by focusing on the elements of a common law right of publicity claim for appropriation of genetic identity.

III. CALIFORNIA'S COMMON LAW RIGHT OF PUBLICITY PROTECTS GENETIC IDENTITY

Genetic information contains immutable characteristics and identifying features of the person to whom it belongs, and, therefore, California's common law right of publicity protects genetic information from unauthorized uses. In California, a common law claim for right of publicity must show four elements: "(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."[160] In addition, courts applying California's right of publicity must also determine whether the accused use adequately identifies the plaintiff.[161] Although the *Eastwood* court identified use of names and likenesses that the right of publicity protects against, subsequent cases, particularly *White* and *Midler v. Ford Motor Co.*,[162] demonstrate that the right of publicity protects more than just appropriation of names and likenesses.[163] At the heart of the majority's logic in *White* was the idea that a formulaic approach to appropriation of identity, for example requiring the use of name or likeness, would frustrate the very purpose of the right of publicity because advertisers would find new and innovative ways to circumvent such formulas.[164] This theory focuses on the appropriation of identity as a tort that can cause dignitary and autonomy harms, economic harms, or both.[165]

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160. Eastwood v. Super. Ct., 198 Cal. Rptr. 342, 347 (Ct. App. 1983).

161. Davis v. Elec. Arts, Inc., No 10-cv-03328-RS, 2018 WL 3956212, at *3 (N.C. Cal. Aug. 17, 2018).

162. 849 F.2d 460 (9th Cir. 1988).

163. *See supra* notes 140–50 and accompanying text (examining cases that illustrate how the right of publicity protects more than name and likeness).

164. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992); *see also* Kahn, *supra* note 94, at 263–64 (discussing cases and scholarly arguments regarding the economic and dignitary nature of modern appropriation of identity cases).

165. 1 MCCARTHY & SCHECHTER, *supra* note 11, § 5:63 (comparing invasion of privacy by appropriation of identity to the right of publicity and noting that "[t]he difference is in the nature of the injury").

Applying this concept illustrates that unauthorized uses of a person's genetic information, perhaps acquired through the use of DTC genetic testing services, amounts to a violation of California's common law right of publicity. To demonstrate this, the following sections analyze the elements of a right of publicity claim for appropriation of genetic identity.

A. *Genetic Information is Part of a Person's Identity*

Because genetic information is a unique schematic to the way each human grows and functions,[166] it is a part of identity that the right of publicity protects. California's common law right of publicity requires a plaintiff to prove that the defendant has used the plaintiff's identity.[167] In a typical case involving the use of a person's name or photograph, the implication of that person's identity is obvious; humans recognize one another by names and faces.[168] Genetic information is something different, though; in its totality, the human genome is a vastly long schematic of the human body, which makes readily identifying a person associated with that genome nearly impossible.[169] Nevertheless, a person's genome, taken as a whole, is unique even between identical twins.[170] Therefore, when a company uses a person's genetic information, it *implicates the person's identity* as contemplated by the right of publicity in California common law.

Even without the use of a provider's name, genetic information is "as individually identifying as a fingerprint."[171] Fingerprints and genetic information may implicate someone in a crime based on preexisting information—that is they may *identify*—but the common consensus is that fingerprints do not implicate *identity* because they are incapable of revealing anything more than to whom those fingerprints belong.[172] Unlike fingerprints, embedded within the vast

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166. *See Introduction to Genomics*, *supra* note 14.

167. *See supra* text accompanying note 137.

168. See, for example, *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983), in which Clint Eastwood's name and photograph were used in a tabloid's story about his love life.

169. *See supra* Section I.A. (discussing genetic information as a blueprint to life and its uniqueness to each person).

170. Ellen Wright Clayton et al., *The Law of Genetic Privacy: Applications, Implications, and Limitations*, 6 J.L. & BIOSCIENCES 1, 2 n.1 (2019).

171. Ram, *supra* note 37, at 131–32.

172. *See* Ken M. Gatter, *Genetic Information and the Importance of Context: Implications for the Social Meaning of Genetic Information and Individual Identity*, 47 ST. LOUIS U. L.J.

amounts of all genetic code are heritage, personality, appearance, and disease predisposition—in short, many aspects of a person's identity.[173] *White*'s analysis is informative because the advertisement implicated White's identity through the combination of many indicia, which, taken individually, would not have amounted to an appropriation.[174] By analogy, courts can apply the same approach to genetic information; all genomes, human and otherwise, consist of the same proteins, but when viewed from a broader perspective, each person possesses a code that is unique.[175]

The use of a person's whole genome may implicate her genetic identity, but even a small subset of a person's genetic code may implicate genetic identity as well. DTC genetic testing companies have proliferated in recent years and have even started offering whole genome sequencing,[176] making the possibility of genomic appropriation a reality. On the other hand, other DTC genetic testing companies that offer genotyping services, like 23andMe, can only use as much genetic information as they have sequenced and stored, which is significantly less than the whole genome.[177] Yet even this limited amount of information may capture distinctive features of a person's identity.[178]

423, 458 (2003) (arguing that a fingerprint may implicate one's identity only if it has become well-known as her fingerprint).

173. *See Introduction to Genomics*, *supra* note 14 (discussing how genes influence biological traits and can predict predisposition to disease).

174. *See* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1399 (9th Cir. 1992) ("Viewed separately, the individual aspects of the advertisement in the present case say little. Viewed together, they leave little doubt about the celebrity the ad is meant to depict.").

175. Clayton et al., *supra* note 170, at 2 & n.1.

176. *See, e.g.*, NEBULA GENOMICS, https://nebula.org/whole-genome-sequencing [https://perma.cc/98VJ-9V8D] (offering whole genome sequencing and related services); DANTE LABS, https://us.dantelabs.com [https://perma.cc/ES8F-6QNF] (same).

177. *See* NEBULA GENOMICS, *supra* note 176 ("We use Whole Genome Sequencing to decode 100% of your DNA and produce 10,000 times more data than other DNA tests . . . ."); *Difference Between DNA Genotyping & Sequencing*, 23ANDME, https://customercare.23andme.com/hc/en-us/articles/202904600-Difference-Between-DNA-Genotyping-Sequencing [https://perma.cc/9LA9-XUL5] (explaining that 23andMe uses genotyping to determine whether an individual's DNA matches a particular, previously known genetic variant and does not sequence an individual's entire genome); *23andMe and AncestryDNA Genotyping vs Whole Genome Sequencing*, GENETIC GENIE (Dec. 16, 2019), https://geneticgenie.org/article/23andme-and-ancestrydna-vs-whole-genome-sequencing [https://perma.cc/8H5K-CKF5] (explaining the differences between genotyping and whole-genome sequencing).

178. *See* Suzanne Clancy, *Genetic Mutation*, NATURE EDUC. (2008), https://www.

Much like the voices in *Midler* and *Waits v. Frito-Lay, Inc.*,[179] which those courts viewed as a distinctive aspect of the plaintiffs' identities,[180] certain genes may also be a distinctive part of one's identity. The courts in *Midler* and *Waits* held that "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California."[181]

While the test of whether an identifying trait is distinctive and widely known would not be directly applicable in a right of publicity case involving the use of genetic information, its underlying justification is instructive. *Midler* illustrates the concept that a seemingly ordinary characteristic, if distinctive, can become associated with a person's identity, and thus enable another to exploit that characteristic through appropriation.[182] The *Midler* court commented that voice is "one of the most palpable ways identity is manifested," recognizing the commercial value of Midler's voice because of how identifiable and distinctive it was.[183]

Similarly, researchers may realize the commercial value of a rare gene variant by using it to create a new cell line for further research or new drug therapies.[184] Because only a relatively small amount of genetic information

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nature.com/scitable/topicpage/genetic-mutation-441 (last visited Jan. 27, 2021) (discussing how a single base pair variation can cause diseases such as sickle cell anemia or lead to other beneficial traits); *What Are Single Nucleotide Polymorphisms (SNPs)?*, U.S. NAT'L LIBR. MED., https://ghr.nlm.nih.gov/primer/genomicresearch/snp [https://perma.cc/QW9K-2YMA] (describing how a single base pair variation within an entire genome can predict disease risk and response to drug treatment).

179. 978 F.2d 1093 (9th Cir. 1992).

180. *Id.* at 1098–100 (upholding the jury's finding that Waits' voice was sufficiently distinctive for a right of publicity claim and rejecting the defendant's arguments to rethink *Midler* as an inaccurate statement of the law); Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) ("To impersonate [a singer's] voice is to pirate her identity.").

181. *Waits*, 978 F.2d at 1098 (quoting *Midler*, 849 F.2d at 463).

182. *Midler*, 849 F.2d at 463; *cf.* Gatter, *supra* note 172, at 458 (suggesting that appropriation of identity through the use of an individual's genetic information can occur when the information is unique and has sufficient connection to the individual, but noting that not all genetic information is unique).

183. *Midler*, 849 F.2d at 463.

184. A conversion claim may fail on similar facts, see Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 490 (Cal. 1990) (en banc), but a right of publicity claim to protect genetic identity would not. *See infra* notes 191–96 and accompanying text for further discussion of *Moore*.

is capable of being used to identify its provider, entities with access to a person's genetic information could identify that provider.[185] Although the provider may not have become widely known because of this rare gene, he or she may still have a sufficient connection to it. Further, the *Midler* test, which requires that a plaintiff be widely known, would not apply because the gene used is the provider's and is not an imitation.[186] DTC genetic testing companies use their customers' genetic information, and this use constitutes an appropriation of those customers' genetic identities, as the following Section explains.

B. Appropriation of Genetic Identity—Not Conversion, or Trespass to Chattels

By appropriating their consumers' genetic identities, DTC genetic testing companies give themselves an immense commercial advantage. While California common law does not require that an appropriation provide a *commercial* advantage,[187] a plaintiff can more easily demonstrate a testing company's commercial advantage in the DTC genetic testing context than in other contexts. For example, 23andMe leveraged its extensive database of its consumers' genetic information by brokering a sixty million dollar partnership to share that data with Genentech, a pharmaceutical research company.[188] In general, prospective research partners evaluate DTC genetic testing companies in large part based on the size of their genetic information databases, strongly indicating the commercial advantage such information provides.[189] The immense value of genetic information, as DTC genetic

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185. McGuire & Gibbs, *supra* note 9, at 370; *see also infra* notes 216–18 and accompanying text (discussing re-identification standards).

186. *See Midler*, 849 F.2d at 463; *see also* Cohen v. Herbal Concepts, Inc., 473 N.Y.S.2d 426 (App. Div. 1984) (finding a violation of the right of publicity in a photograph of a non-celebrity's nude back without other identifying features). Conversely, it has been suggested that some gene variations may be so ubiquitous that they do not implicate a single person's identity at all. Gatter, *supra* note 172, at 458.

187. *See* Eastwood v. Super. Ct., 198 Cal. Rptr. 342, 347 (Ct. App. 1983) (emphasis added) ("A common law cause of action for appropriation of name or likeness may be pleaded by alleging . . . the appropriation of plaintiff's name or likeness to the defendant's advantage, commercially, *or otherwise* . . . .").

188. Herper, *supra* note 6; *see also GlaxoSmithKline Is Acquiring a $300 Million Stake in Genetic-Testing Company 23andMe*, *supra* note 6.

189. Herper, *supra* note 6 (suggesting that 23andMe's genetic information database are an attractive asset to research companies due to its size and scale); Megan Molteni, *23andMe's Pharma Deals Have Been the Plan All Along*, WIRED (Aug. 3, 2018 3:28 PM), https://www.wired.com/story/23andme-glaxosmithkline-pharma-deal

testing companies' commercial dealings with research entities demonstrate, provides an obvious commercial advantage for those companies as it pertains to California's right of publicity.

Although some courts have refused to enforce personal property claims for uses of human tissue,[190] those cases are distinguishable from a right of publicity claim for the appropriation of genetic identity. Perhaps the most important case to distinguish is the California Supreme Court's decision in *Moore*, in which the court found that a patient's cells were not converted because that patient did not have a property right in his excised cells.[191] In rejecting Moore's invocation of several right of publicity cases as support for his conversion claim, the court commented that:

> Lymphokines, unlike a name or a face, have the same molecular structure in every human being . . . . Moreover, the particular genetic material which is responsible for the natural production of lymphokines . . . is also the same in every person; it is no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin.[192]

In other words, the nature of the genetic material at issue was so common that it could not implicate Moore's identity for a conversion claim.[193]

The *Moore* court's analysis of the genetic information at issue largely side-stepped whether Moore's doctors appropriated his genetic identity. According to the court, the usefulness of Moore's cells—their overproduction of lymphokines—was caused, not by Moore's genetic information, but by the viral RNA that was also responsible for his hairy-cell leukemia.[194] The court oversimplified its analysis by assuming that every person's genetic material is the same,[195] but Moore's cells were clearly valuable because of the way they overproduced lymphokines. It also under-simplified its analysis by focusing on the lymphokines themselves instead of the genetic

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[https://perma.cc/3QWH-92NR] (arguing that "23andMe's future success is . . . dependent on growing its database," not on the test results it provides to consumers).

190. *See supra* notes 57–63 and accompanying text (explaining early case law concerning personal property claims of tissue and genetic information).

191. Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 490 (Cal. 1990) (en banc).

192. *Id.*

193. *See id.*; Gatter, *supra* note 172, at 458.

194. *Moore*, 793 P.2d at 490 n.30.

195. *See id.* ("By definition, a gene responsible for producing a protein found in more than one individual will be the same in each.").

information responsible for their production, as well as the genetic information responsible for their rate of production.[196] Ultimately, though, if Moore's viral infection was solely responsible for his lymphokine overproduction, it was not part of his identity that provided value but the virus that infected him, and therefore the court may have reached the same conclusion under a proper right of publicity claim.

Importantly, *Moore* left open the idea that a person's genetic information is part of her identity under the right of publicity; rather, it found that conversion was not available as a cause of action for the plaintiff.[197] Had Moore brought a right of publicity claim to protect his genetic information, though, it is still unclear whether he would have succeeded. Assuming Moore's viral infection was truly responsible for the usefulness of his cells, it is unlikely that his genetic identity significantly contributed to the economic value of the patented cells. Even if Moore's genetic materials were responsible, his claim might be limited because of the substantial innovation attributable to the doctors and scientists involved.[198] Even though Moore's conversion claim was too attenuated from the right of publicity case law he used as support, the discoveries brought on by the completion of the Human Genome Project and subsequent research would be persuasive if a right of publicity claim were brought today.[199]

Another important development in genetics that supports a viable right of publicity claim involving genetic information was legal rather than scientific: the Supreme Court's rejection of isolated DNA sequences as patentable in *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*[200] Of course, one major impact of the Court's decision in *Myriad* was the invalidation of thousands of gene patents held by

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196. *See id.* at 490 (explaining that lymphokines are molecularly the same in every person).

197. *See id.* at 497 ("[W]e hold that the allegations of Moore's . . . complaint state a cause of action for breach of fiduciary duty or lack of informed consent, but not conversion.").

198. *Id.* at 505 (Broussard, J., concurring and dissenting) ("If . . . the great bulk of the value of a cell line patent . . . is attributable to the efforts of medical researchers . . . the patient's damages will be correspondingly limited . . . .").

199. *See supra* Section I.A. (providing background on genetic information).

200. 569 U.S. 576, 580 (2013).

genetics and biotechnology companies.[201] But patent eligibility does not dictate property rights eligibility. The *Myriad* holding rejected the notion that genes are an invention, but it did not preclude a finding that they are an aspect of identity.[202] The *Myriad* holding rightly protects the role of genes as an aspect of identity—similar to the *Midler* court's observation that, while copyright may not protect a person's voice, a voice may still receive protection insofar as it implicates a person's identity.[203] Were genes still patentable, a court could refuse any right of publicity claim because ownership of a person's genetic identity would belong to the holders of the relevant patents.

Scholars have surmised that genetic information is just that—information—and as such, does not carry property rights.[204] Although some cases have dismissed claims involving property interests in personal information,[205] more recent trends show that courts are beginning to recognize the significant value of personal information.[206] While personal identifiable information, such as credit card and Social Security numbers, are replaceable, each person's genetic identity is immutable. Genetic information not only contains intimate personal details but also is inextricably tied to its owner and is therefore identifying, in addition to being part of each person's identity.[207]

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201. *Can Genes Be Patented?*, *supra* note 80. *Myriad* did not invalidate all gene patents, however; the Court found that patents for synthetically created DNA were not naturally occurring and therefore remained patent eligible. *Myriad*, 569 U.S. at 595.

202. *Myriad*, 569 U.S. at 590–94.

203. *See* Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

204. *See* Contreras, *supra* note 84, at 53 ("Under U.S. law, there is no cognizable property interest in facts.").

205. *See, e.g.*, *In re* JetBlue Airways Corp. Priv. Litig., 379 F. Supp. 2d 299, 327, 329 (E.D.N.Y. 2005) (denying a claim of trespass to chattels of airline passengers' personally identifiable information when it was sold to a data mining company). The court in *In re JetBlue* found that the passengers' personal information had no "compensable value in the economy at large," but that transfer of said data did not diminish its value for a trespass to chattels claim. *Id.* at 327–29. The merit of a right of publicity claim for the unauthorized use of personal information presents an interesting parallel to the discussion of appropriation of genetic identity but is beyond the scope of this Comment.

206. *See In re* Marriott Int'l, Inc., Customer Data Sec. Breach Litig., 440 F. Supp. 3d 447, 462 (D. Md. 2020) ("[T]he Court [should not] ignore what common sense compels it to acknowledge—the value that personal identifying information has in our increasingly digital economy.").

207. *See supra* Sections I.A–B (discussing genetic information's uniquely identifying qualities and its privacy implications).

C. Identifiability of the Defendant's Use

A person's genetic identity is unique and immutably connected to that person, and, because of this, DTC genetic testing companies' unauthorized uses of genetic information identify those consumers. Courts applying California law have found that identifiability is a central aspect of a right of publicity claim[208] and that it presents a factual question.[209] Appropriation of genetic identity may be more nuanced than, for example, appropriation of likeness, because of the inherent difficulty in identifying the owner of a genetic code by simply looking at it. With 3.1 billion base pairs in the human genome, it would seem near impossible to do so. Given the different contexts in which likeness and genetic information are used, an appropriate test for identifiability may be to perform a forensic analysis to determine a match. In certain scenarios, though, a genetic test might be unnecessary. Those with rare genetic disorders may find their DNA for sale alongside a family history and other aspects that may allow for identification.[210] Just as friends and family of the plaintiff in *Cohen* identified her simply by seeing a photo of her back, without any other, more conventionally identifying features,[211] those familiar with an individual's genetics and family history may logically deduce whose genetic information is for sale based on the personal and genetic information listed.[212]

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208. *See, e.g.*, Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1102 (9th Cir. 1992) ("Identifiability is . . . a central element of a right of publicity claim.").

209. *See* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1399 (9th Cir. 1992) (finding error on summary judgment dismissal for no triable issue of fact as to whether the plaintiff was identifiable); 1 MCCARTHY & SCHECHTER, *supra* note 11, § 3:10 ("It is clear that 'identifiability' is a question of fact.").

210. *See Privacy Highlights*, 23ANDME, https://www.23andme.com/about/privacy [https://perma.cc/8NV6-UBE6] (noting that 23andMe uses genetic information as well as self-reported information for research, which includes "disease conditions, other health-related information, personal traits, ethnicity, family history," and other information collected through surveys).

211. Cohen v. Herbal Concepts, Inc., 473 N.Y.S.2d 426, 427–28 (App. Div. 1984).

212. For example, some organizations offer tissue samples containing rare genetic mutations of the BRCA1 gene along with information about the sample provider. *See GM16105*, CORIELL INST. FOR MED. RSCH., https://www.coriell.org/0/Sections/Search/Sample_Detail.aspx?Ref=GM16105&Pgid=166 [https://perma.cc/2SK8-RKSS] (selling a tissue sample for $146.00 and listing pertinent personal and familial medical history as well as the relevant genetic mutation). Clinics or research organizations can obtain tissue samples with informed consent and then donate them to another entity which then offers the samples for sale. *See supra* notes 44–45

Companies such as 23andMe claim that the genetic information they share with other entities is considered aggregated or de-identified.[213] Assuming DTC genetic testing companies follow the same or similar guidelines as set forth in HIPAA,[214] the "de-identified" label may be more comforting to consumers than how its definition truly impacts (or fails to impact) the privacy protections it provides regarding genetic information. HIPAA, which does not govern DTC genetic testing companies' interactions with their customers, requires removal of certain identifiers before the data set can be deemed non-identifiable; alternatively, an expert can review it and simply declare it anonymized.[215] But advances in technology have led to increased risk of re-identification even though researchers have removed identifying information.[216] Re-identification is even more likely where that person has undergone whole genome sequencing.[217] The usefulness of genetic information for research is inversely correlated with its level of anonymity; that is, the more anonymized the data, the less useful it will be for research.[218] Therefore, companies engaged in

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and accompanying text (explaining informed consent). If the provider did not give consent for resale, and the purpose of the transaction is to provide access to genetic information, the provider's genetic identity may be at stake, in violation of her right of publicity. *See infra* Section III.D (discussing lack of consent in a right of publicity claim).

213. *See Privacy Highlights*, *supra* note 210 (defining de-identified information as being "stripped of . . . Registration Information . . . and other identifying data").

214. 23andMe is not a covered entity under HIPAA, and thus is not required to adhere to its guidelines for de-identified data, Laestadius, *supra* note 47, but HIPAA's standard provides a useful guide due to the lack of specificity given by various DTC genetic testing companies and their privacy policies. *See Privacy Policy*, *supra* note 210 (defining de-identified information as that which has been stripped of registration information "and other identifying data" without providing more specificity); *see also* Hedgeman & Shah, *supra* note 8 (noting that consumers may have expectations that DTC genetic testing companies follow HIPAA rules regarding privacy and genetic information).

215. *See* 45 C.F.R. § 164.514(b)(2)(i) (2018) (setting forth eighteen identifiers that may be removed from a dataset that would render it de-identified); *see also* Vokinger et al., *supra* note 9, at 228–29 (comparing de-identification standards in different countries and discussing the heightened risk of re-identification in genetic research).

216. *See* McGuire & Gibbs, *supra* note 9, at 370 (reporting that, using a reference sample, an individual may be identified using only seventy-five single-nucleotide polymorphisms); Vokinger et al., *supra* note 9, at 229 (finding that lax standards for de-identified genetic information can increasingly lead to re-identification).

217. Vokinger et al., *supra* note 9, at 230.

218. *Id.*

secondary uses of customers' genetic information maintain incentives to keep that information intact to preserve its usefulness.

Fast-paced changes in technology are enabling more and more information to be gleaned from the human genome, regardless of whether a particular data set has been designated as de-identified. When a sufficient amount of genetic information has been sequenced, it can be used "to predict traits, such as hair and eye color."[219] A court should apply the logic in *White*, where the cumulative indicia of identity was sufficient to find appropriation, to find a parallel appropriation of genetic information in use of results from DTC genetic testing.[220] Indeed, as companies and researchers apply increasingly complex algorithms to genetic information, they may even predict owners' observable traits using genetic sequences without any other information.[221] These ideas demonstrate that appropriation of genetic identity by DTC companies is an identifiable use that satisfies a claim under California's right of publicity.

D. Lack of Consent

DTC genetic testing companies fail to obtain adequate consent for the subsequent use of their consumers' genetic identities because the consent given is not particularized to the sale or disclosure of that information. Like many internet services today,[222] DTC genetic testing companies often rely on long and complex privacy policies and terms of service.[223] Most users probably understand that the service provided will involve genetic testing and analysis, so 23andMe does not fail to obtain *any* form of consent. However, 23andMe

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219. *Id.*

220. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1399 (9th Cir. 1992) ("Viewed separately, the individual aspects of the advertisement in the present case say little. Viewed together, they leave little doubt about the celebrity the ad is meant to depict.").

221. *See* Christoph Lippert et al., *Identification of Individuals by Trait Prediction Using Whole-Genome Sequencing Data*, 114 PROC. NAT'L ACAD. SCI. U.S. 10,166, 10,166, 10,169 (2017) (discussing use of artificial intelligence to predict observable traits using whole-genome sequencing data).

222. Kevin Litman-Navarro, *We Read 150 Privacy Policies. They Were an Incomprehensible Disaster.*, N.Y. TIMES (June 12, 2019), https://www.nytimes.com/interactive/2019/06/12/opinion/facebook-google-privacy-policies.html.

223. *See, e.g.*, *Privacy Highlights*, *supra* note 210 (nine pages); *Your Privacy*, ANCESTRY, https://www.ancestry.com/cs/legal/privacystatement [https://perma.cc/NK4V-AQMA] (eight pages).

concedes it "won't be able to contact [the customer] every time [it] would like to share [the customer's] data," even when customers consent to more than its basic user agreement, such as by providing research and data-sharing consent.[224] Furthermore, 23andMe provides little information about who may be performing the research and what those research goals are.[225]

DTC genetic testing companies and the entities to whom they sell and share genetic information may violate consumers' rights of publicity by acting outside of the scope of their user agreements and failing to obtain subsequent consent.[226] Despite, for example, 23andMe's obtaining consent to deliver services, perform research, and even share genetic information with external parties, those consent and privacy documents do not include provisions about selling access to customers' genetic information.[227] Furthermore, when third parties do not obtain subsequent consent, they may also be liable for a right of publicity violation.[228] DTC genetic testing companies have made some attempts to assuage consumer anxiety by altering consent guidelines, but these changes were voluntary;[229] because these companies also maintain the right to alter their terms of service, customer protection of genetic identity might be short-lived.[230] Right of publicity case law suggests that more particularized

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224. *Individual Data Sharing Consent*, 23ANDME, https://www.23andme.com/about/individual-data-consent [https://perma.cc/KJ64-NJRQ].

225. *Id.* (indicating that genetic information may be shared with "approved" external researchers without providing insight into the approval process or what they may be researching); *see also* Erin Brodwin, *DNA-Testing Companies like 23andMe Sell Your Genetic Data to Drugmakers and Other Silicon Valley Startups*, BUS. INSIDER (Aug. 3, 2018, 11:45 AM), https://www.businessinsider.com/dna-testing-ancestry-23andme-share-data-companies-2018-8 [https://perma.cc/45H3-2LPM] (suggesting 23andMe's agreement to share data with a pharmaceutical company may include data from customers who opted in to research before the partnership was formed).

226. *See supra* notes 152–58 and accompanying text (explaining consent violations in rights of publicity cases).

227. *Privacy Highlights*, *supra* note 210.

228. *See, e.g.*, KNB Enters. v. Matthews, 92 Cal. Rptr. 2d 713, 721–23 (Ct. App. 2000) (holding that the defendant's failure to obtain consent for a subsequent use of photographs violated the plaintiff's right of publicity).

229. *See* James Vincent, *23andMe and Other DNA-Testing Firms Promise Not to Share Data Without Consent*, VERGE (Aug. 1, 2018, 8:55 AM), https://www.theverge.com/2018/8/1/17638680/genetic-data-privacy-consumer-rights-guidelines-23andme-ancestry (reporting on changes to DTC genetic testing companies' consent guidelines).

230. *Terms of Service*, 23ANDME, https://www.23andme.com/about/tos [https://perma.cc/G6V8-YRCU] ("23andMe may make changes to the TOS from time to time.").

consent is necessary to avoid liability,[231] and some scholars have argued that, while consent documents may be construed as licenses, the two should be distinguished because of the significant purposes they serve, namely, to educate participants or to obtain permission.[232] DTC genetic testing companies' failure to obtain adequate consent therefore presents liability for the injury to their consumers under the right of publicity.

E. Injury

Companies transacting in the sale or disclosure of their customers' genetic information deprive those customers of the economic value inherent in each individual's genome. The common law right of publicity in California requires showing that an injury has occurred as a result of identity appropriation.[233] The rapid growth of the DTC genetic testing industry exemplifies the economic value of genetic information, not only to the individuals using these services, but also to the pharmaceutical companies and researchers who obtain subsequent access to it. As societal views on the commodification of personal data evolve, courts increasingly recognize the value of such data.[234] Taken in aggregate, some large data-sharing agreements between DTC genetic testing and pharmaceutical companies are worth

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231. *See* No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397, 402 (Ct. App. 2011) (detailing the particularized consent the plaintiffs required for a video game's depiction of the plaintiffs); *see also id.* at 416 (Epstein, J., concurring) (concluding that the defendant had not contracted for the content it included in its video game in violation of the limited consent it received from the plaintiffs).

232. *See* Ram, *supra* note 37, at 145–46, 145 n.140 (discussing licensing of genetic information as a framework for enabling research and other uses and noting the differences between more restrictive licensing, which may withhold substantial uses and subsequent disclosures, and more liberal, "copyleft" licensing that would allow free use and distribution).

233. *See* Slivinsky v. Watkins-Johnson Co., 270 Cal. Rptr. 585, 589–90 (Ct. App. 1990) (noting that "[r]esulting injury is the sine qua non of a cause of action for misappropriation of name" and finding that no injury occurred from the use of plaintiff's name in a positive letter); Eastwood v. Super. Ct., 198 Cal. Rptr. 342, 347 (Ct. App. 1983) (enumerating elements of a right of publicity claim).

234. *Compare In re* JetBlue Airways Corp. Priv. Litig., 379 F. Supp. 2d 299, 327 (E.D.N.Y. 2005) ("There is . . . no support for the proposition that an individual passenger's personal information has or had any compensable value in the economy at large."), *with In re* Marriott Int'l, Inc., Customer Data Sec. Breach Litig., 440 F. Supp. 3d 447, 462 (D. Md. 2020) ("Neither should the Court ignore what common sense compels it to acknowledge—the value that personal identifying information has in our increasingly digital economy.").

hundreds of millions of dollars, reinforcing the value that this genetic information holds.[235] Genetic information on the individual level has demonstrated value as well, particularly where rare or beneficial mutations may be found.[236] Even without these specific price tags, in California, courts may presume the economic value of genetic identity if appropriation can be proven.[237]

Because California's privacy and publicity misappropriations arise "under a single tort which affords two separate types of relief,"[238] plaintiffs bringing right of publicity claims may also add the dignitary and autonomy harms that may arise out of those uses. Given the size and resources of DTC genetic testing companies and the potential number of consumers affected, a class action may be the best approach for relief.[239] Despite the significant injury inflicted upon consumers of DTC genetic testing services, courts will also likely weigh policy considerations when determining the merit of a right of publicity claim involving genetic identity because of the novelty of such a claim.[240]

F. Policy Concerns

The actions of DTC genetic companies likely amount to violations of the right of publicity because of its immutable status as part of humans' identities and those companies' unconsented sale or disclosure of such information; however, there may be significant concerns in finding property interests in genetic information. Justice Arabian, concurring in *Moore*, expressed his reticence toward recognizing Moore's conversion claim because of "the effect on human dignity of a

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235. *See* Herper, *supra* note 6 (detailing an agreement between 23andMe and pharmaceutical company Genentech).

236. *See GM16105*, *supra* note 212 (selling a tissue sample containing a rare genetic mutation for $146.00).

237. Del Amo v. Baccash, No. CV 07-663-PSG, 2008 WL 4414514, at *6 (C.D. Cal. Sept. 16, 2008) ("[I]t . . . appears as if courts generally presume that the fourth element of the applicable test has been established if there is sufficient evidence to prove the first three elements.").

238. Sagan v. Apple Comput., Inc., 874 F. Supp. 1072, 1079 (C.D. Cal. 1994).

239. *See* Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 790–92 (N.D. Cal. 2011) (bringing class action for appropriation of members' names and photographs for use in "Sponsored Stories," which asserted to other users that they "liked" certain advertisers).

240. *See* Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 493 (Cal. 1990) (en banc) (citations omitted) ("Moore's claim demands express consideration of the policies to be served by extending liability rather than blind deference to a complaint alleging as a legal conclusion the existence of a cause of action.").

marketplace in human body parts."[241] But no such marketplace of body parts could come about because the right of publicity in California protects an intellectual property right.[242] Finding that the right of publicity protects genetic identity would simply preserve the valuable insights that human genomes provide and promote a more comprehensive and mutual understanding of the nature and consequences of genetic testing for both consumers and providers of such services.

Courts and scholars have commented with some frequency about the economic dilemmas and the "chilling effect on . . . medical research" that might occur if individuals owned their genetic identities.[243] Individually owned genetic information would create a "tragedy of the anticommons" because owners may be resistant to reasonable terms.[244] But one study has shown that consumers who openly share their genetic information are motivated to do so because they are interested in contributing to the advancement of medical research.[245] This finding suggests that the right to control one's genetic identity does not foreclose that consumers will exercise the right universally. Those who decide to purchase DTC genetic testing kits may continue to allow their genetic information to be used for research, just as those undergoing cancer treatment may feel motivated to allow free use of their genetic information to promote medical advances.[246]

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241. *Id.* at 498 (Arabian, J., concurring).

242. Comedy III Prods., Inc., v. Gary Saderup, Inc., 21 P.3d 797, 804 (Cal. 2001) ("The right of publicity, like copyright, protects a form of intellectual property . . . .").

243. *See, e.g.*, Ram, *supra* note 37, at 121–22 (discussing *Moore* and the commodification of tissue); *Moore*, 793 P.2d at 493–94 (speculating that extending conversion law would hinder research by restricting raw materials). *See generally* Contreras, *supra* note 84, at 7 (arguing that expanding informed consent policies in medical research have created property-like interests in genetic information that "may stymie socially valuable biomedical research").

244. Contreras, *supra* note 84, at 7.

245. Tobias Haeusermann et al., *Open Sharing of Genomic Data: Who Does It and Why?*, PLOS ONE 7 (May 9, 2017), https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0177158&type=printable [https://perma.cc/9DSZ-N8WQ] (reporting that contributing to the advancement of medical research was relevant or very relevant to about eighty percent of respondents in their motivation to share their genetic information).

246. *Id.*; *see also* Rebecca Fisher, *A Closer Look Revisited: Are We Subjects or Are We Donors?*, 14 GENETICS IN MED. 458, 458 (2012) (explaining that the author, a cancer patient, and her siblings were motivated to share their genetic information "in hopes

A property right assigned to individual genetic identity through the right of publicity would also allow individuals to bargain to receive updated findings resulting from subsequent uses of their genetic information. Currently, tissue sample providers may not have any assurances that they will receive new information or findings that could have profound impacts on their health and well-being;[247] likewise, there is no guarantee that research findings will make their way back to a DTC genetic testing participant whose information has been sold to a third party. A licensing protocol for genetic information would facilitate contracting for this type of interaction as part of the bargain.[248]

Furthermore, significant distributive impact can be achieved through property interests in genetic information. Professor Jessica Roberts points out that legally recognized ownership in genetic information may facilitate trust and predictability, thus "assuag[ing] anxieties about misuse and exploitation."[249] These dignity and autonomy concerns are at the core of the privacy doctrine from which the right of publicity evolved. "The right to be let alone," a fundamental tenet of privacy doctrine,[250] has persisted in the right of publicity as well; it is embodied in a person's choice to forgo economic opportunities to exploit her identity—genetic identity included. Because of the immutable connection between an individual and her genetic identity and the intimate details it reveals, genetic identity should be afforded the same protections as name, likeness, and other indicia of identity.

CONCLUSION

Science and technology are rapidly changing the world. With the completion of the Human Genome Project and the introduction of

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that [the] information would shed light on possible interventions . . . that would help [them] survive").

247. *See Ram*, *supra* note 37, at 135–36 (discussing the difficulty of delivering research results to anonymized tissue providers); *see also* Fisher, *supra* note 246, at 458–59 (describing the author's difficulty in obtaining insights from researchers after providing tissue samples for cancer research).

248. *See* Ram, *supra* note 37, at 147–48 (noting that an open-source style licensing system might allow for parties to negotiate for information to be relayed back from researchers to tissue providers).

249. Jessica L. Roberts, *Progressive Genetic Ownership*, 93 NOTRE DAME L. REV. 1105, 1163 (2018).

250. Warren & Brandeis, *supra* note 86, at 193.

the Precision Medicine Initiative, insights into and access to genetic information are becoming commonplace. Genetic testing has become widely available at a fraction of what it once cost, enabling direct-to-consumer sequencing of a person's entire genome. But with this newfound access have also come privacy concerns and economic exploitation in the form of DTC genetic testing companies' sharing and selling access to their customers' genetic identities.

Although courts have not yet clearly recognized a property interest in genetic information, the right of publicity protects individuals from the misappropriation of their genetic identity. In California, the common law right of publicity has expanded to include indicia of identity outside of conventional name and likeness. The development of the right of publicity in California enables individuals not only to exploit the economic value of their identities but also to forgo such opportunities. Furthermore, California's common law right of publicity concerns itself not with *how* identity has been appropriated but *whether* it has occurred.

While each person's genome is similar to that of the next, within the 3.1 billion base pairs lie myriad characteristics and traits that set each person apart. And genetic information is immutably identifying; it is inextricably tied to its provider. In this way, genetic information acts as a facet of individual identity and as such is protected under the California common law right of publicity.