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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHIRLEY JONES, on Behalf of)	
Herself and All Others Similarly)	Case No. 10-8668 SVW (CW)
Situated,)	
)	Order Granting Defendant's
Plaintiffs,)	Motion for Summary Judgment
)	[32] and Denying Plaintiff's
vs.)	Motion for Partial Summary
)	Judgment [26]
CORBIS CORPORATION,)	
)	JS6
Defendant.)	

I. Introduction

On November 12, 2010, Shirley Jones ("Plaintiff"), an actress and vocalist, filed a class action complaint against Corbis Corporation ("Defendant"). Defendant is a Nevada Corporation and an online provider of copyright licenses for images. Defendant maintains a library of millions of images and it offers copyright licenses for sale by displaying sample images on its websites. Plaintiff alleges that Defendant's act of displaying sample images violates her common law and statutory rights of publicity by exploiting her name, image, and likeness for purposes of financial gain without her consent.

Plaintiff has now moved to certify a class of similarly situated

1 individuals and for summary judgment on her individual claims.
2 Defendant has also moved for summary judgment, arguing that (1)
3 Plaintiff consented to the use of her image; (2) Defendant's use is
4 protected by the First Amendment; or (3) Plaintiff's claims are
5 preempted by the Copyright Act. Defendant also argues that class
6 certification is improper.

7 **A. History**

8 The Court has addressed similar claims in a prior case against
9 Defendant in Alberghetti v. Corbis, 263 F.R.D. 571 (C.D. Cal. 2010).
10 In that case, the plaintiff put forth similar allegations of violations
11 of common law and statutory publicity rights against Defendant. The
12 Court denied class certification because it found that individual
13 plaintiffs were not adequate representatives of class members with
14 respect to injunctive relief and Court noted issues with providing
15 notice to class members. Id. at 577-78. Subsequently, the Court
16 granted Defendant's Motion for Summary Judgment as to the individual
17 plaintiffs because the plaintiffs' claims were barred by the statute of
18 limitations. Alberghetti v. Corbis, 09-05735-SVW (AJWx), Doc. No. 99
19 (C.D. Cal. May 20, 2010).

20 **B. Facts**

21 **(1) Defendant's Business**

22 The facts are uncontroverted.¹ Defendant maintains several
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24 ¹Plaintiff has not put forth a separate statement of genuine disputes
25 of material fact in opposition to Defendant's statement of
uncontroverted facts. Local Rule 56-2 states:

26 Any party who opposes [a motion for summary judgment]
27 shall serve and file with the opposing papers a
separate document containing a concise "Statement of
28 Genuine Disputes" setting forth all material facts as
to which it is contended there exists a genuine

1 websites that contain a library of millions of images available to
2 prospective end-users. (Defendant's Statement of Uncontroverted Fact,
3 "DSUF" ¶ 1). The images depict a variety of scenes, products, current
4 events, celebrities and entertainers. (DSUF ¶ 2). Defendant obtains
5 these images by entering into representation agreements with cultural
6 institutions, news wire services, and professional photographers.
7 Typically, the photographers and institutions from whom Defendant
8 obtains images retain copyright ownership over the images and license
9 Defendant to distribute sublicenses on their behalf. In exchange for
10 this license to distribute additional copyright licenses to end-users,
11 Defendant agrees to share a portion of licensing revenues with the
12 institutions and photographers. (DSUF ¶¶ 3-5). Defendant's customers
13 include news services, educational institutions, magazines, and media
14 users.

15 In order to market and provide access to images to its customers,
16 Defendant maintains several websites. Website users can type search
17 terms in a search box to view available images that match these search
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19 dispute necessary to be litigated.

20 As such, the Court finds the facts are uncontroverted. See
21 Sullivan v. Dollar Tree Stores, Inc., 623 F.3d 770, 779 (9th Cir.
22 2010) (Federal Rule of Civil Procedure 56(e)(2) requires a party to
23 "set out specific facts showing a genuine issue for trial."). If the
24 non-moving party fails to identify the triable issues of fact, the
25 court must treat the moving party's evidence as uncontroverted.
26 Local Rule 56-3; see also International Longshoremen's Ass'n, AFL-CIO
27 v. Davis, 476 U.S. 380, 398 n.14 (1986) ("[I]t is not [the Court's]
28 task *sua sponte* to search the record for evidence to support the
[parties'] claim[s]."); Carmen v. San Francisco United School
District, 237 F.3d 1026, 1029 (9th Cir. 2001) ("A lawyer drafting an
opposition to a summary judgment motion may easily show a judge, in
the opposition, the evidence that the lawyer wants the judge to read.
It is absurdly difficult for a judge to perform a search, unassisted
by counsel, through the entire record, to look for such evidence.").

1 terms. For example, users can type names of celebrities, events, or
2 items. Low quality sample images matching those terms will appear on
3 the website. (DSUF ¶¶ 6-9). If a user wishes to purchase a copyright
4 license for an image, Defendant provides the copyright license for a
5 price. The price depends on the nature of the use of the photograph,
6 the resolution of the image, the location where the image is placed,
7 the territory of the use of the image, the duration of the license, the
8 exclusivity of the license, and whether the licensing model is rights-
9 managed or royalty-free. (Feduff Decl. ¶¶ 55-56).

10 Defendant expressly states to its customers that it licenses only
11 the copyright in its images and not any other rights such as trademarks
12 or the rights of publicity. Defendant's license agreements state that
13 licensees are responsible for determining whether additional consents
14 are required for use. (DSUF ¶ 15). After the purchase of a license
15 has been completed, Defendant provides the user a digital version of
16 the image. Defendant does not sell any tangible products containing
17 the images.

18 (2) Images at Issue

19 Plaintiff alleges that Defendant violated her statutory and common
20 law rights of publicity by using her name, image, and likeness without
21 her consent. Essentially, Plaintiff alleges that Defendant is
22 violating these rights by displaying sample images of her likeness on
23 its website. According to Plaintiff, the search feature on the
24 websites matches her name ("Shirley Jones") with these images.
25 Plaintiff asserts that displaying these sample images associated with
26 her name helps Defendant sell its product - a copyright license for the
27 images.

1 Defendant's display of ten sample photographs of Plaintiff is
2 specifically alleged to have violated Plaintiff's rights of publicity.
3 It is undisputed that the ten photographs were taken by individual
4 photographers who then licensed the images to Defendant for the purpose
5 of selling additional licenses to end-users. Each of the ten
6 photographs were taken on "red carpets." It is custom and practice in
7 the entertainment industry for celebrities to walk down a red carpet
8 surrounded by professional photographers and video crews before
9 entering an event. Celebrities may generally choose to walk down the
10 red carpet or enter the event through another way where they will not
11 be photographed. Celebrities who walk down the red carpet generally
12 pose for photographers and respond to their requests to smile, or to
13 look in their direction. Jones Depo. 144: 9-14. Notices are sometimes
14 posted at these events stating that the celebrities entering the red
15 carpet consent to being photographed and recorded, and also to having
16 their name or likeness used in connection with the event. (DSUF ¶¶ 26-
17 36).

18 It is undisputed that Plaintiff posed for and consented to the
19 taking of each of the ten photos at issue. Plaintiff testified that
20 she knew one photographer, Frank Trapper, who took four of the photos
21 at issue. Plaintiff testified that she knew that Frank Trapper
22 distributed his images to the press, but was not aware how he did so.
23 However, Plaintiff understood that a photographer such as Trapper would
24 have to display his images to prospective buyers to allow the buyers to
25 select a desired image. Plaintiff stated that she would not be
26 surprised if photographers such as Trapper worked with other people to
27 make his images available to the press. Plaintiff has not placed any
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1 limits on the distribution of photographs taken at red carpet events
2 over her 40 year career.

3 **II. Legal Standards**

4 **A. Summary Judgment**

5 Rule 56(c) requires summary judgment for the moving party when the
6 evidence, viewed in the light most favorable to the nonmoving party,
7 shows that there is no genuine issue as to any material fact, and that
8 the moving party is entitled to judgment as a matter of law. See Fed.
9 R. Civ. P. 56(c); Tarin v. County of Los Angeles, 123 F.3d 1259, 1263
10 (9th Cir. 1997).

11 The moving party bears the initial burden of establishing the
12 absence of a genuine issue of material fact. See Celotex Corp v.
13 Catrett, 477 U.S. 317, 323-24 (1986). The moving party may satisfy its
14 Rule 56(c) burden by "'showing' -- that is, pointing out to the
15 district court -- that there is an absence of evidence to support the
16 nonmoving party's case." Celotex, 477 U.S. at 325. Once the moving
17 party has met its initial burden, Rule 56(e) requires the nonmoving
18 party to go beyond the pleadings and identify specific facts that show
19 a genuine issue for trial. See id. at 323-24; Anderson v. Liberty
20 Lobby, Inc., 477 U.S. 242, 248 (1986). A scintilla of evidence or
21 evidence that is merely colorable or not significantly probative does
22 not present a genuine issue of material fact. Addisu v. Fred Meyer, 198
23 F.3d 1130, 1134 (9th Cir. 2000). Only genuine disputes "where the
24 evidence is such that a reasonable jury could return a verdict for the
25 nonmoving party" over facts that might affect the outcome of the suit
26 under the governing law will properly preclude the entry of summary
27 judgment. See Anderson, 477 U.S. at 248.

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1 **B. Class Certification**

2 The District Court has broad discretion to grant or deny a motion
3 for class certification. See Zinser v. Accufix Research Inst., Inc.,
4 253 F.3d 1180, 1186 (9th Cir. 2001), *amended by* 273 F.3d 1266 (9th Cir.
5 2001); see also Molski v. Gleich, 318 F.3d 937, 947 (9th Cir. 2003).

6 In a motion for class certification, the burden is on the moving
7 party to make a prima facie showing on each of the elements of Rule
8 23(a) and at least one of the class types under Rule 23(b). See
9 Zinser, 253 F.3d at 1186. Under Rule 23(a), a plaintiff must
10 demonstrate numerosity, commonality, typicality, and adequate
11 representation of the class interest. Fed. R. Civ. P. 23(a). Under
12 Rule 23(b), the moving party must also show that (1) denying class
13 certification would create a risk of inconsistent adjudications or
14 would substantially impair or impede the interests of other class
15 members; (2) injunctive or declaratory relief is appropriate respecting
16 the class as a whole; or (3) questions of law or fact common to class
17 members predominate over any individualized questions and that a class
18 action is superior to other available methods of adjudicating the
19 controversy. Fed. R. Civ. P. 23(b).

20 **III. Discussion**

21 **A. Evidentiary Objections**

22 Defendant Corbis objects to statements made in two declarations in
23 support of Plaintiff's Motion for Summary Judgment. The first
24 statement is Plaintiff's statement that she did not "authorize or
25 consent to Corbis' use of the ten photographs." Jones Decl. ¶ 5. The
26 ultimate determination of consent is a legal conclusion. United States
27 v. Toribio-Lugo, 376 F.3d 33, 38 (1st Cir. 2004) ("Whether the facts as
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1 found add up to consent is a legal determination."). Defendant argues
2 that while Plaintiff may testify to facts relevant to the legal
3 determination of consent, she may not testify as to the legal
4 determination itself. See Fed. R. Civ. P 56(c)(4); Civil L.R. 7-7;
5 Nationwide Transport Finance v. Cass Information Sys, Inc., 523 F.3d
6 1051, 1059-60 (affirming district court's decision to exclude witness'
7 legal conclusion as to violation of UCC); See also Sullivan v. Dollar
8 Tree Stores, Inc., 623 F.3d 770, 779 (9th Cir. 2010) ("Federal Rule of
9 Civil Procedure 56(e)(2) requires a party to "set out specific facts
10 showing a genuine issue for trial."). The Court agrees, and SUSTAINS
11 Defendant's objection.²

12 Defendant also objects to the Declaration of Arthur Gold,
13 Plaintiff's attorney, who states that "[c]elebrities and professional
14 models usually sign a limited release or 'model release' that specifies
15 the particular ways their image and name may be used. If a use exceeds
16 what's permitted under the limited release, the person can sue for
17 breach of the agreement." Gold. Decl. ¶ 5 n.1. Defendant argues that
18 there is no foundation or personal knowledge for Gold's assertion. The
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20 ²To the extent that Plaintiff intends to introduce this evidence to
21 show that she did not *expressly* state in writing, or otherwise, that
22 she consented to Defendant's use of the photographs, it is
23 admissible. However, Defendant does not suggest that Plaintiff
24 *expressly* consented, but argues instead that Plaintiff manifested her
25 consent through her conduct and inaction. As discussed below, even
26 if Plaintiff subjectively believed she did not consent, she did not
27 manifest this belief. Consent is determined from the reasonable
28 viewpoint of another person, not from Plaintiff's unexpressed
subjective beliefs. Restatement Second of Torts § 892 ("Consent is
willingness in fact for conduct to occur. It may be manifested by
action or inaction and need not be communicated to the actor. [] If
words or conduct are reasonably understood by another to be intended
as consent, they constitute apparent consent and are as effective as
consent in fact."); CACI § 1302 (same).

1 Court agrees, and SUSTAINS Defendant's objection.

2 **B. Cross Motions for Summary Judgment**

3 Defendant argues that summary judgment is appropriate because (1)
4 Plaintiff consented to Defendant's distribution of copyright licenses;
5 (2) Defendant is entitled to First Amendment protection from
6 Plaintiff's right of publicity claim; or (3) Plaintiff's claim is
7 preempted by the Copyright Act. The Court GRANTS Defendant's Motion
8 for Summary Judgment because Plaintiff consented to Defendant's
9 distribution of copyright licenses.

10 "To sustain a common law cause of action for commercial
11 misappropriation, a plaintiff must prove: (1) the defendant's use of
12 the plaintiff's identity; (2) the appropriation of plaintiff's name or
13 likeness to defendant's advantage, commercially or otherwise; (3) lack
14 of consent; and (4) resulting injury." Downing v. Abercrombie & Fitch,
15 265 F.3d 994, 1001 (9th Cir. 2001) (internal citations and quotations
16 omitted); Newcombe v. Adolf Coors Co., 157 F.3d 686, 692 (9th Cir.
17 1998) (same); Cal. Civ. Code § 3344(a) ("Any person who knowingly uses
18 another's name, voice, signature, photograph, or likeness, in any
19 manner...without such person's prior consent...shall be liable for any
20 damages sustained by the person or persons injured as a result
21 thereof.").

22 Furthermore, California Civil Code § 3344 provides a statutory
23 remedy for commercial misappropriation. "Under section 3344, a
24 plaintiff must prove all the elements of the common law cause of
25 action. In addition, the plaintiff must allege a knowing use [without
26 consent] by the defendant as well as a direct connection between the
27 alleged use and the commercial purpose." Id.

1 **(1) Lack of Consent**

2 Consent to use a name or likeness need not be express or in
3 writing, but it may be implied from the consenting party's conduct and
4 the circumstances of the case. See Newton v. Thomason, 22 F.3d 1455,
5 1461 (9th Cir. 1994) (granting summary judgment to defendant in right
6 of publicity suit because plaintiff failed to show a lack of consent
7 even though plaintiff never expressly consented but expressed
8 excitement about the use of his likeness and never objected to the use
9 of his likeness over several months); Hill v. National Collegiate
10 Athletic Assn., 7 Cal.4th 1, 26, Cal.Rptr.2d 834, 849 (Cal. 1994)
11 ("[T]he plaintiff in an invasion of privacy case must have conducted
12 himself or herself in a manner consistent with an actual expectation of
13 privacy, i.e., he or she must not have manifested by his or her conduct
14 a voluntary consent to the invasive actions of defendant."); Rest. 3d
15 Unf. Comp. § 46, cmt. f. ("In the absence of an applicable statute
16 requiring consent in writing, consent can also be implied from conduct
17 or inaction reasonably interpreted as manifesting consent."); Cal. Civ.
18 Code § 3344 (not requiring consent in writing).

19 Here, Plaintiff does not dispute that she consented to having
20 individual photographers at red carpet events photograph her likeness
21 and distribute the images. Jones Depo. 153:12-155:10; 163:7-12.
22 Plaintiff concedes that for the ten photographs at issue, she chose to
23 walk down the red carpet knowing photographers would take her picture.
24 Plaintiff also does not dispute that it is the custom and practice in
25 the entertainment industry that red carpet photographs are widely used
26 and disseminated. Trapperl Decl. ¶ 6; Teetzel Decl. ¶ 6. When
27 Plaintiff is on the red carpet, it is Plaintiff's practice to pose for
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1 photographers and agree to their requests to smile or to look in their
2 direction. Jones Depo. 144: 9-14. Finally, Plaintiff does not dispute
3 that for at least one of the events at which the pictures were taken, a
4 notice was posted at the entrance of the red carpet. Teetzel Decl. Ex.
5 A. The notice stated that by entering the premises, Plaintiff
6 consented to being photographed, and her name, voice and likeness being
7 exploited by any and all means in connection with the event without
8 limitation. Id.

9 Plaintiff's only argument is that she did not consent to
10 Defendant's placement of sample images on its websites for the purpose
11 of soliciting customers to sell copyright licenses for the images.
12 However, as discussed earlier, Plaintiff's subjective beliefs as to her
13 consent are not determinative; consent is measured from Plaintiff's
14 manifested action or inaction.³ Restatement of Torts § 892; CACI §
15 1302. It is undisputed that Plaintiff voluntarily posed for
16 photographers, who she knew would display her images to prospective
17 buyers, for over 40 years without objection. It was well understood in
18 the entertainment industry that potential customers would not purchase
19 images they could not see before the purchase. Jones Depo. 153:21-25;
20 154:1-3; Trapper Decl. ¶¶ 10, 14. Prior to the use of the internet to
21 display images to prospective customers, photographers would hand
22 deliver catalogues of sample images so potential customers could select
23 images to purchase. Trapper Decl. ¶ 14. Thus, not only did Plaintiff
24 understand that her red carpet photographs would be displayed to
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26 ³ In any case, Plaintiff acknowledges that she understood at the time
27 that individual photographers taking her pictures would have to
28 display their photographs to sell them. Jones Depo. 153:21-25;
154:1-3.

1 potential customers to solicit sales and do nothing for over 40 years,
2 but the undisputed record shows it would be contrary to well-
3 established industry practices for a celebrity to consent to the sale
4 and distribution of her photographs but not consent to the display of
5 the photographs to potential customers to facilitate sales.

6 Newton v. Thomason, 22 F.3d 1455, 1461 (9th Cir. 1994), is
7 directly applicable to the facts discussed above. In Newton, the Ninth
8 Circuit granted summary judgment to defendants because the plaintiff
9 asserting a violation of its right of publicity failed to show a lack
10 of consent. The court noted that the plaintiff did not expressly
11 consent to the use of his name, nonetheless, it concluded that no
12 "fair-minded jury could find non-consent based on [the plaintiff's]
13 July 18, 1990 letter and subsequent conduct." Id. In the July 1990
14 letter to the defendants, the plaintiff stated that he and others were
15 excited that the defendants were using his name. Further, the
16 plaintiff never objected to the use of his name until December 1990,
17 several months after he found out his name was being used. Plaintiff
18 attempted to show that the defendants did not believe there was consent
19 by pointing to the fact that the defendant's lawyer later requested
20 consent in writing. However, in rejecting this argument, the Ninth
21 Circuit found that the lawyer's cautiousness in seeking express consent
22 did not override the plaintiff's failure to object. This fact coupled
23 with Plaintiff's expression of excitement in his letter made it obvious
24 that the plaintiff did consent. Id. As in Newton, Plaintiff
25 voluntarily posed on the red carpet for photographers who she knew
26 would sell her likeness and name. Plaintiff has not objected to such
27 sales and the record makes clear that any objections would be contrary
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1 to industry custom given the circumstances. Additionally, even further
2 damaging than the facts in Newton where the defendants later sought
3 express consent from the plaintiff, Plaintiff can point to no evidence
4 showing photographers had a reason to believe she did not consent to
5 their use of her name and likeness in selling red carpet photographs.
6 Thus, Plaintiff does not attempt to argue that individual photographers
7 would be unable to post her photographs on websites to solicit sales.

8 Instead, Plaintiff argues that the scope of her consent to allow
9 the use and distribution of her likeness is limited only to the efforts
10 of the individual photographers who took the photographs to distribute
11 their photographs. She contends that her consent does not extend to
12 Defendant's display of her images to solicit sales of the image.
13 However, Plaintiff does not show that a genuine dispute of material
14 fact exists as to lack of consent.⁴ Moreover, Plaintiff's legal
15 authority is entirely distinguishable.

16 Plaintiff cites to Perfect 10, Inc. v. Talisman Communications,
17 Inc., 2000 U.S. Dist. LEXIS 4564 (C.D. Cal. 2002). In Perfect 10, the
18 district court entered default judgment against a website operator,
19 finding the defendant liable under § 3344(a) for posting images of
20 models on its website. The models had expressly consented to the use
21 and display of their images with the plaintiff, Perfect 10. However,
22 defendant took the images from Perfect 10's website and posted them on
23 its own website. Plaintiff argues that Perfect 10 stands for the
24 proposition that "the mere act of assigning rights to publicity to one
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26 ⁴As discussed above, even if Plaintiff's conclusory legal conclusion
27 as to her consent were admissible (which it is not), Plaintiff's
28 unexpressed subjective beliefs are irrelevant to whether
photographers reasonably believed Plaintiff had consented.

1 entity does not allow an unrelated third party to appropriate the
2 pictures without prior consent." Opp'n at 3. However, the case
3 contains no discussion of this general proposition. Nowhere does the
4 court state that the models' consent was required, instead the court
5 expressly states only Perfect 10's consent, as the models' assignee,
6 was required to post the images. Id. at *9 ("All of the Defendant's
7 acts were performed without the permission, license or consent of
8 Perfect 10."). In this case, Plaintiff contends that Defendant needs
9 *her consent*, not just individual photographers' consent as assignors,
10 to place sample images on its website. Even if Perfect 10 is
11 applicable to the issues in this case, it is distinguishable because
12 the photographers taking her photos gave Defendant consent to display
13 sample images. In Perfect 10, there was no relationship between
14 Perfect 10, the entity to which consent was given by the models, and
15 the defendant. In fact, the parties were competitors and the defendant
16 appropriated the images from Perfect 10 without permission. By
17 contrast, the undisputed record in this case establishes that Defendant
18 is the assignee of the photographers that took Plaintiff's photos.
19 Individual photographers retain copyright ownership over their photos
20 in exchange for Defendant's promise to distribute additional
21 sublicenses and to share a portion of the proceeds. The photographers
22 assign all of their rights in the images to Defendant, which in turn
23 sublicenses copyrights to end-users with the express limitation that
24 end-users must obtain additional rights (such as the right of
25 publicity) on their own.

26 For the reasons discussed above, Plaintiff's remaining authority
27 is also inapplicable. KNB Enterprises v. Greg Matthews, 78 Cal. App.
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1 4th 362, 373 (2000) ("In this case, although the models consented to
2 have plaintiff display, copy, publish, or assign the photographs as he
3 pleased, *plaintiff* did not assign those rights to defendant.")
4 (emphasis added); Phole v. Cheatham, 724 N.E. 2d 655, 661 (2000)
5 (finding wife's consent to being privately photographed by her husband
6 could not be extended to cover husband's public distribution of
7 photographs); Mihail Simeonov v. Albert Ashforth, Inc., 159 Misc.2d 54,
8 602 N.Y.S. 2d 1014 (1993) (finding defendant did not consent to public
9 distribution of plaster casting of her face when defendant hired
10 plaintiff to produce casting of her face for the limited purpose of
11 showing casting had no harmful effects to select individuals).

12 Furthermore, Plaintiff never indicated that her consent was
13 contingent on the individual photographers distributing the photos
14 themselves. In fact, the undisputed factual record shows that
15 Plaintiff knew and understood that photographers on the red carpet
16 could employ third parties to assist them in distributing her photos.
17 However, Plaintiff made no objection. Further, undisputed custom and
18 practice evidence supports a finding of consent. Defendant merely
19 maintains a modern-day version of the catalogues of sample images that
20 would be hand-delivered to potential buyers in the past. Defendant
21 published sample images as an assignee in place of the photographers.
22 Plaintiff testified that customers would not buy images without seeing
23 what they were buying and also that she consented to the sale of her
24 image by photographers. In light of these undisputed facts, no
25 reasonable jury could find that Defendant's display for this purpose
26 was not consensual. Any other holding would require that individual
27 photographers themselves market their photos or obtain express consent
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1 from each subject prior to utilizing a third party distributor to
2 market their red carpet photos.⁵ Plaintiff presents no basis for such a
3 requirement.

4 It is important to note that the Court's reasoning does not
5 broadly restrict Plaintiff's right of publicity. Here, Defendant sells
6 only the copyright license to the images taken by the photographers -
7 Plaintiff's likeness is not used to advertise any other product but the
8 copyright license to the image itself. The Court's holding is thus
9 limited to the fact that Plaintiff consented to the display of her
10 likeness for the purpose of distributing the images themselves.
11 Further, the Court has found that Plaintiff consented to this display
12 whether or not the displaying parties are the photographers or third
13 parties like Defendant that merely act as distributors for the
14 photographers. The Court's reasoning does not address whether
15 Plaintiff's consent encompasses any other type of display. For
16 example, the Court's holding leaves Plaintiff's rights of publicity
17 undisturbed in cases where a defendant uses Plaintiff's image to
18 advertise an unrelated product such as a food item or if a defendant
19 transforms Plaintiff's image into a separate product.

20 For the reasons discussed above, Defendant's Motion for Summary
21 Judgment is GRANTED.

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26 ⁵As discussed earlier, this express consent would be in addition to
27 notices already posted at the entrance to some red carpet events, the
28 general industry knowledge that red carpet photographs are
distributed widely, and Plaintiff's knowledge that photographers may
use other persons in helping them distribute their photos.

1 **C. Motion for Class Certification**

2 Having granted summary judgment to Defendant on Plaintiff's common
3 law and statutory right of publicity claims, Plaintiff's Motion for
4 Class Certification is moot. However, the Court notes that even if
5 Plaintiff's claims survived summary judgment, Plaintiff did not meet
6 her burden to show that the claims are susceptible to a class action
7 lawsuit.⁶ The Court's consent analysis above is highly individualized
8 and depends on the circumstances surrounding each photograph,
9 Plaintiff's knowledge of the circumstances, Plaintiff's past industry
10 experience and conduct, and other evidence of Plaintiff's conduct that
11 would reasonably imply consent. Thus, Plaintiff's claims are atypical,
12 and questions of law and fact common to members of the class do not
13 predominate over questions affecting individual members under Rule
14 23(b)(3). See In re N.D. Cal., Dalkon Shield Prods. Liab Litig., 693
15 F.2d 847, 855 (9th Cir. 1982); In re Wells Fargo Home Mortgage Overtime
16 Pay Litig., 571 F.3d 953, 959 (9th Cir. 2009); see also Gartin v. S&M
17 Nutec LLC, 245 F.R.D. 429, 434 (C.D. Cal. 2007) ("Where the substantive
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19 ⁶The Court also notes that Plaintiff is an inadequate representative
20 because she does not fall within the class definition, which
includes:

21 All California residents, whose names, images, or
22 likenesses, without their permission, have been
23 exploited by Corbis, **by selling licenses** for
24 these names, images, or likenesses which are
25 accessed by consumers through a name search on
26 the Corbis websites, during the applicable
27 statute of limitations time period **and then sold**
28 **to these consumers** via Corbis' websites,
including www.corbis.com, www.corbismotion.com,
or www.corbisoutlines.com.
(Emphasis added).

Here, the undisputed evidence establishes that licenses to the ten
photos at issue were never sold by Defendant. Plaintiff is not
included in the purported class.

1 claims depend on individual permutations ... the claims of the named
2 plaintiffs who have the same general complaint against the defendant as
3 the class are not typical.") (quoting Jones v. Allercare, 203 F.R.D.
4 290, 299 (N.D. Ohio 2001) (quotations omitted).

5 **IV. Conclusion**

6 Defendant's Motion for Summary Judgment is GRANTED and Plaintiff's
7 Motion for Summary Judgment is DENIED.

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11 IT IS SO ORDERED.

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13 DATED: May 25, 2011



14 STEPHEN V. WILSON
15 UNITED STATES DISTRICT JUDGE
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