

2014

Fame, Property & Identity: The Purpose and Scope of the Right of Publicity

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Recommended Citation

Daniel Gervais and Martin L. Holmes, *Fame, Property & Identity: The Purpose and Scope of the Right of Publicity*, 25 Fordham Intell. Prop. Media & Ent. L.J. 181 (2014).
Available at: <https://ir.lawnet.fordham.edu/iplj/vol25/iss1/4>

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Cover Page Footnote

The Authors are very grateful to Professors Tyler Ochoa and Marshall Leaffer for their suggestions on an earlier version of this Article and to the Editors for their excellent work on the manuscript.

Fame, Property, and Identity: The Scope and Purpose of the Right of Publicity

Daniel Gervais* & Martin L. Holmes[†]

[I]n addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made ‘in gross,’ i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a ‘property’ right is immaterial; for here, as often elsewhere, the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth. This right might be called a ‘right of publicity.’¹

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¹ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

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INTRODUCTION

The right of publicity is not a trademark right. While the right of publicity often overlaps with rights granted by trademark law and other deception-based restrictions on the use of names and symbols,² the right of publicity creates a more expansive right rooted in a variegated normative soil with elements of privacy, personhood, and property.³ This has a number of significant impacts. First, while consumer welfare is a key rationale for trademark law, it is an after-the-fact justification—not a compelling motivation—for the right of publicity. Second, an incentive to produce the object of the law’s protection—a musical composition protected by copyright, a new molecule protected by a pharmaceutical patent, or a quality brand protected by a trademark—can be offered as a rationale for the existence of most intellectual property rights. But is incentivizing the creation of a public persona or notoriety really the goal of the right of publicity? We think not.

² See 28 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 28:8 (4th ed. 2014).

³ See *id.*

The different rationales behind the right of publicity and trademark law matter. A trademark owner alleging trademark infringement must prove not that his rights in a particular trademark are affected—as would be the case in a copyright or patent context—but rather that the defendant’s use of a similar trademark is likely to cause confusion among relevant, reasonably prudent potential purchasers of the product or service related to the trademark.⁴ The right of publicity gives an individual something akin more to a property right in his name or likeness. It allows individuals to assert a right in their identity. It allows famous individuals to monetize their identity. As the Article explains, fame need not be lasting or even acquired deliberately to trigger the publicity right.

The right of publicity is in its infancy, and the right will be tested with new and evolving uses of individuals’ names and likenesses. Online uses, and use of celebrities in posts in social media are likely to escalate attempts to use the right to bar or restrict online speech. Particularly relevant to the development of the right of publicity is the impact that the digital age has on both a celebrity’s desire to maintain privacy and, conversely, opportunities for celebrities to monetize their likeness (and fame)—from Facebook pages and likes, to Tweets, and many other forms not yet in commercial use, such as projections of three-dimensional celebrity holograms.⁵ Because of shaky theoretical underpinnings, “judges . . . expand the content of persona [to avoid] creating arbitrary distinctions” between who may assert the right of publicity.⁶ This paper seeks to solidify those theoretical underpinnings.

The evolution of the right should be guided towards a right that neither overprotects nor underprotects the commercial use of one’s name or likeness. This crucial balancing act is arguably the target in all areas of intellectual property law. However, the object of protection in the right of publicity—a person’s name and like-

⁴ See *id.* § 28:12.

⁵ See Evelyn M. Rusli, *New Chip to Bring Holograms to Smartphones: Ostendo’s Tiny Projectors Are Designed to Display Crisp Video, Glasses-Free 3-D Images*, WALL STREET JOURNAL, June 2, 2014, <http://on.wsj.com/1zR0jyY>.

⁶ George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443, 466 (1991).

ness—seems the most “personal” of all forms of intellectual property law,⁷ leading to an intuitive notion that the right of publicity should grant powerful protections to individuals. Conversely, celebrities are also objects of social discourse. They fascinate us. Paparazzi hunt them for pictures taken while in public places but also in intimate settings.⁸ We must be allowed to speak about them, but up to what point?⁹

Protection granted by the right of privacy disposes of a number of arguments that the right of publicity is the sole protector of certain dignitary interests in one’s name and likeness. The expectation of privacy does not disappear just because someone is famous—though it may limit the scope of the reasonable expectation. Fame creates a distinct object of protection: the ability to use and monetize one’s likeness.¹⁰ When the likeness is directly associated with the sale or promotion of a commercial product or service, the law is fairly straightforward. Unfair competition law and other deception-based restrictions, such as the Lanham Act and false endorsement

⁷ This Article assumes, but does not argue or endorse, that the right of publicity is a form of protection of intangible property that broadly fits under the banner of intellectual property law.

⁸ See Richard J. Curry, Jr. *Diana’s Law, Celebrity And The Paparazzi: The Continuing Search For A Solution*, 18 J. MARSHALL J. COMPUTER & INFO. L. 945, 946 (2000) (“Celebrities and the media possess a unique relationship. Many celebrities skillfully use the media to market and advertise their movies, television shows, books, and records. They use the media to propel their careers and create a marketable celebrity image. Society is celebrity crazed and magazines, tabloids and other media forms such as Entertainment Tonight and Access Hollywood have combined to feed that craze. Our society’s hunger for celebrities has spawned the existence of photographers known as the paparazzi. Armed with zoom lenses, high-powered microphones, and the promise of huge cash rewards for an exclusive celebrity exposé, the paparazzi have become more intrusive and aggressive than ever in their pursuit of private celebrity information.”).

⁹ See Stacey Dogan, *Haelan Laboratories v. Topps Chewing Gum: Publicity as a Legal Right*, in INTELLECTUAL PROPERTY AT THE EDGE 17, 37 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., 2014) (“Because the right of publicity has no coherent normative objective, the process of balancing celebrity rights against speech interests can appear rudderless and ad hoc.”).

¹⁰ In fact, one of the main arguments to justify an inquiry into the right of publicity was its direct impact on the value of the estates of famous people. See Larry Moore, *Regulating Publicity: Does Elvis Want Privacy?*, 5 DEPAUL-LCA J. ART & ENT. L. & POL’Y 1, 8 (1995) (“Thus, the debate concerning the nature of publicity is more than an academic argument among legal scholars. The manner in which this issue is resolved can, and will, have great economic impact on celebrities as well as their estates.”).

laws, protect against the use of one's identity in a false, deceptive, or confusing way. In such cases, the goal is to protect members of the public against the deception of purchasing a good or service they believe to be endorsed by a celebrity.¹¹ The domain that remains for the right of publicity to protect *exclusively* is revealing: the right of publicity alone protects the commercial use of non-deceptive, non-private references to an individual. The questions that emerge are: who benefits from this and why?

The thesis of this Article is that the right of publicity exists to protect rights in an individual's identity, not for the benefit of consumers. Those rights should die with the individual (or very shortly thereafter), extend only to the name and likeness of the individual, and must succumb to the First Amendment in certain contexts. First, this Article examines the genesis of the right of publicity and the manner in which certain courts have defined the boundaries of the right and how it differs from the right to privacy. Then, the Article turns to arguments for and against the right of publicity. Most importantly, it discusses the overlap between the right of publicity and trademark law and explicates the key normative differences between the two types of right. Next, the Article discusses the dangers of overprotection and underprotection in the context of the right of publicity, along with First Amendment limitations. Finally, the Article argues that the *current* breadth of the right of publicity is not supported by compelling motivations, and suggests limiting the scope of actionable identity to certain enumerated natural characteristics.

¹¹ See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (The "evidence was sufficient to support the jury's finding that consumers were likely to be misled by the commercial into believing that Waits endorsed SalsaRio Doritos."); see also *Allen v. Men's World Outlet*, 679 F. Supp. 360, 368–69 (S.D.N.Y. 1988) (likelihood of consumer confusion established where advertiser intentionally used a look-alike of well-known celebrity and where audience to whom commercial was directed intersected with celebrity's audience).

I. THE ROOTS OF THE RIGHT OF PUBLICITY

A. *The Genesis of the Right of Publicity*

“The principal historical antecedent of the right of publicity is the right of privacy.”¹² Warren and Brandeis first introduced the right of privacy in a law review article¹³ in 1890 as a theory “focusing upon the affront to human dignity caused by public disclosure of embarrassing private facts.”¹⁴ Over the next seventy years, the right of privacy came to encompass four torts, as laid out by William Prosser: “unreasonable intrusions upon another’s seclusion, public disclosure of private facts, publicity placing another in a false light, and the appropriation for the defendant’s advantage of the plaintiff’s name or likeness.”¹⁵ The modern day right of publicity grew out of Prosser’s appropriation tort.¹⁶

It was not clear at first whether the right to privacy would include a cause of action for the commercial misappropriation of a person’s name or likeness. In 1902, the New York Appellate Division, in *Roberson*, refused to extend the right of privacy to recognize injury for emotional distress resulting from the unauthorized use of a previously nonfamous plaintiff’s photograph in an advertisement.¹⁷ However, in 1905, the Supreme Court of Georgia did find nearly identical conduct actionable in *Pavesich*,¹⁸ based largely on the theories of “the right to be let alone” advanced in the Warren and Brandeis article.¹⁹

¹² RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995).

¹³ See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹⁴ 1 J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 1:25 (2d ed. 2014).

¹⁵ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). See William Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

¹⁶ 1 MCCARTHY, *supra* note 14, § 1:25.

¹⁷ See *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 448 (N.Y. App. Div. 1902) (milling company made unauthorized use of plaintiff’s likeness in advertisement along with the words “flour of the family”).

¹⁸ See *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68, 79–80 (Ga. 1905) (holding that defendant insurance company made unauthorized use of plaintiff’s likeness in an advertisement).

¹⁹ *Id.* at 78; see Warren & Brandeis, *supra* note 13, at 193.

The public outrage from the *Roberson* decision led to the enactment of a statute in New York imposing criminal and civil penalties for the unauthorized use of a person's name, portrait, or picture.²⁰ But the *Roberson* decision hinted at problems to come with using the right of privacy as a cause of action for the commercial misappropriation of one's identity; the injury in privacy is to "mental distress," not to the commercial interests of an individual.

As Professors Westfall and Landau noted in 2005:

[P]ublicity rights may have stemmed from privacy rights, but they are clearly also independent of those rights—the right question to ask is not simply which aspects of plaintiff's identity are most personal, but rather which aspects have value to an advertiser based on appropriating the celebrity's image. Publicity rights, according to most courts and commentators, seem to be based at least as much on pecuniary value as on human dignity concerns.²¹

The publicity right reifies fame; it allows famous persons to commoditize the value of their public persona, or in other words to transform their persona into a market-based, tradable commodity.²²

While some judges have pinned the right not to this economic realm but rather to the apparent distress caused by the unauthorized use of a famous person's likeness, most courts have been unable, to see how a celebrity—someone who has intentionally placed himself in the public realm²³—could suffer from "mental dis-

²⁰ Prosser, *supra* note 15, at 385 (asserting that the majority opinion in *Roberson* created "a storm of public disapproval In consequence the next New York legislature enacted a statute making it both a misdemeanor and a tort to make use of the name, portrait, or picture of any person for 'advertising purposes or for the purposes of trade' without his written consent").

²¹ David Westfall & David Landau, *Publicity Rights As Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 94 n.115 (2005).

²² See Margaret Jane Radin, *Justice and the Market Domain*, in NOMOS XXXI, MARKETS AND JUSTICE 167 (1989) ("Universal commodification implies that all things can and should be separable from persons and exchanged through the free market.").

²³ In Japan, mental distress is generally not recognized as a form of damage for celebrities because they have voluntarily placed themselves in the public eye. See Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] June 29, 1976 817 HANJI 23 (Japan.) For an English translation, see Doi, *Character Merchandising in Japan: Protection of Fictional Characters*

trespass”²⁴ due to a nondeceptive, nonprivate commercial use of their name or likeness.²⁵ This distinction is partly what led Judge Jerome Frank to create a new label—“the right of publicity”²⁶—a cause of action that recognized a person’s entitlement to profits resulting from the commercial use of that person’s name or likeness.²⁷ Other states followed the lead of New York and Judge Frank, recognizing a similar right in the common law or statutorily. Today, at least thirty-one states recognize the right of publicity in some form.²⁸

and Well-Known Personalities as the Basis for Merchandising Activities, ANNUAL OF INDUS. PROP. LAW 283 (1978).

²⁴ See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–60 (1982) (“One may gauge the strength or significance of someone’s relationship with an object by the kind of pain that would be occasioned by its loss. On this view, an object is closely related to one’s personhood if its loss causes pain that cannot be relieved by the object’s replacement. If so, that particular object is bound up with the holder . . . The opposite of holding an object that has become a part of oneself is holding an object that is perfectly replaceable with other goods of equal market value. One holds such an object for purely instrumental reasons.”).

²⁵ *O’Brien v. Pabst Sales Co.*, 124 F.2d 167, 170 (5th Cir. 1941) (rejecting plaintiff’s “complaint . . . that he was damaged by the invasion of his privacy in so using his picture as to create the impression that he was endorsing beer”). See 1 MCCARTHY, *supra* note 14, § 1:25 (“[W]hen a plaintiff whose identity was already well known sued under [the right of privacy appropriation tort] approach, the courts could not see how there could be ‘indignity’ or ‘mental distress’ when plaintiff’s identity was already in widespread use in the media.”). *But see* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1103 (9th Cir. 1992) (“The defendants argue that in right of publicity actions, only damages to compensate for economic injury are available. We disagree. Although the injury stemming from violation of the right of publicity ‘may be largely, or even wholly, of an economic or material nature,’ we have recognized that ‘it is quite possible that the appropriation of the identity of a celebrity may induce humiliation, embarrassment, and mental distress.’”).

²⁶ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (“For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways”); 1 MCCARTHY, *supra* note 14, § 1:26 (“Judge Jerome Frank in 1953 was the first to coin the term ‘right of publicity.’”).

²⁷ A number of commentators have noted that the economic harm rationale for the right of publicity is circular. See 1 MCCARTHY, *supra* note 14, § 2:2 (arguing that it is circular reasoning to base legal protection upon economic value when economic value depends upon legal protection (citing Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935))).

²⁸ 1 MCCARTHY, *supra* note 14, § 6:3 (“At the time of this writing, courts have expressly recognized the right of publicity as existing under the common law of 21 states. Of those, eight also have statutory provisions broad enough to encompass the right of

B. The Overbreadth of the Right of Publicity

One case that claimed a violation of privacy, the Lanham Act, and the right of publicity came in 1983 when the Sixth Circuit found that the defendant's "Here's Johnny" portable toilet violated Johnny Carson's right of publicity.²⁹ The phrase "Here's Johnny" was used to introduce Johnny Carson each night on his wildly successful late night variety show.³⁰ The business name "Here's Johnny Portable Toilets" was used in conjunction with the catchphrase "The World's Foremost Comedian."³¹ The court found that the portable toilet company did not create a likelihood of confusion that consumers would think Johnny Carson was affiliated with the company.³² Interestingly, the court also held that Johnny Carson's right of privacy had not been infringed.³³ However, the court did find an infringement of the right of publicity,³⁴ noting the many other licensed commercial uses of the phrase "Here's Johnny"³⁵ and the corporation's knowledge of the notoriety of Carson and his show.³⁶ Then, Carson was "harmed" only because the court recognized the right of publicity in this instance. The public was not harmed at all. The dissent noted that he did not believe "the common law right of publicity may be extended beyond an individual's name, likeness, achievements, identifying characteristics or actual performances, to include phrases or other things which are merely associated with the individual, as is the phrase 'Here's Johnny.'"³⁷

publicity. In addition, ten states have statutes which, while some are labeled 'privacy' statutes, are worded in such a way that most aspects of the right of publicity are embodied in those statutes. Thus, at the time of this writing, under either statute or common law, the right of publicity is recognized as the law of 31 states.").

²⁹ See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 836 (6th Cir. 1983).

³⁰ *Id.* at 832.

³¹ *Id.* at 833.

³² See *id.* at 834.

³³ See *id.*

³⁴ See *id.* at 836.

³⁵ See *id.* at 833.

³⁶ See *id.*

³⁷ *Id.* at 837 (Kennedy, J. dissenting).

White v. Samsung Electronics America, Inc. is a case finding an infringement of the right of publicity in extreme circumstances.³⁸ In *White*, an “advertisement . . . for Samsung video-cassette recorders (VCRs) . . . depicted a robot, dressed in a wig, gown, and jewelry which [defendants] consciously selected to resemble [Vanna] White’s hair and dress.”³⁹ “The robot was posed next to a game board which is instantly recognizable as the Wheel of Fortune game show set, in a stance for which White is famous.”⁴⁰ This advertisement was one in a series of advertisements making future predictions, and accordingly, the ad included the caption “Longest-running game show. 2012 A.D.”⁴¹ “The gag here . . . was that Samsung would still be around when White had been replaced by a robot.”⁴²

Dissenting from an order rejecting the suggestion for rehearing en banc in *White*, Judge Kozinski said:

The panel’s opinion is a classic case of overprotection. Concerned about what it sees as a wrong done to Vanna White, the panel majority erects a property right of remarkable and dangerous breadth: Under the majority’s opinion, it’s now a tort for advertisers to *remind* the public of a celebrity. Not to use a celebrity’s name, voice, signature or likeness; not to imply the celebrity endorses a product; but simply to evoke the celebrity’s image in the public’s mind.⁴³

In *Waits v. Frito-Lay, Inc.*, the Ninth Circuit once again recognized an expansive right of publicity.⁴⁴ Tom Waits, a singer known

³⁸ *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) (Kozinski, J., dissenting).

³⁹ *Id.* at 1396.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993) *denying petition for reh’g.*

⁴³ *Id.*

⁴⁴ Although technically referred to as a “[v]oice misappropriation” claim in the opinion, the court recognized that “[t]he *Midler* tort [of voice misappropriation] is a species of violation of the ‘right of publicity,’ the right of a person whose identity has

for his raspy voice, maintained a policy throughout his career that he would not do endorsements because he did not want to detract from his artistic integrity.⁴⁵ After an advertising company conceptualized an advertisement based off of a Tom Waits song, the court concluded the advertising agency felt “that no one would do but a singer who could . . . imitate Tom Waits’ voice.”⁴⁶ To that end, the defendants engaged a performer who had “perfected an imitation of Waits’ voice” to sing in the advertisement.⁴⁷ In finding that the advertising agency and Frito-Lay “acted with malice” and violated Waits’ right of publicity, the court focused on the defendants’ knowledge of Waits’ policy against endorsements and legal concerns that the sound-a-like singer sounded too much like Tom Waits.⁴⁸ The apparent harm of Frito-Lay’s use was that Waits realized “immediately that whoever was going to hear this and obviously identify the voice would also identify that [Tom Waits] in fact had agreed to do a commercial for Doritos.”⁴⁹

The facts in *Waits* clearly show a likelihood of confusion as to a false endorsement from Waits, extended beyond the more typical visual likeness to include aural confusion. The Court did find a violation of the Lanham Act.⁵⁰ However, the court vacated damages awarded under the Lanham Act because those damages were duplicative of damages received for the right of publicity violation.⁵¹ Thus, it appears that the right of publicity is not necessary to allow a celebrity to assert a cause of action against an advertiser who intentionally mimics the voice of the celebrity and causes confusion

commercial value—most often a celebrity—to control the commercial use of that identity.” *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1098 (9th Cir. 1992) (citing *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 825 (9th Cir. 1974)).

⁴⁵ *See id.*

⁴⁶ *Id.* at 1097.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1105.

⁴⁹ *Id.* at 1098.

⁵⁰ *See id.* at 1111 (“Th[e] evidence was sufficient to support the jury’s finding that consumers were likely to be misled by the commercial into believing that Waits endorsed SalsaRio Doritos.”).

⁵¹ *See id.* (“The jury awarded Waits \$100,000 on [the Lanham Act] claim. It also awarded Waits \$100,000 for the fair market value of his services on his voice misappropriation claim. The damages awarded under the Lanham Act, therefore, are duplicative. Accordingly, we vacate this portion of the judgment.”).

among consumers as to endorsement or sponsorship.⁵² *Waits* is the aural equivalent to a long line of look-alike cases—where look-alike actors are hired to stand in place of a celebrity.⁵³ The plaintiffs in those cases, as in *Waits*, have a cause of action under false endorsement and other deception-based restrictions.

In *Hart*, the likeness of Ryan Hart, a former all-star quarterback for Rutgers, was used by Electronic Arts in their *NCAA Football* series of videogames without a license.⁵⁴ The likenesses of countless other collegiate football players were also used in the same manner in making the video games.⁵⁵ As a condition of participation in NCAA athletics, Mr. Hart agreed to not accept “any remuneration or permit[] the use of his . . . name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind.”⁵⁶ Although Mr. Hart’s name was not used in the videogame, the players in the game “are populated by digital avatars that resemble their real-life counterparts and share their vital and biographical information. . . . [F]or example, in *NCAA Football 2006*, Rutgers’ quarterback, player number 13, is 6’2” tall, weighs 197 pounds and resembles Hart.”⁵⁷

In what reads more like a treatise than a judicial opinion,⁵⁸ the Third Circuit adopted the transformative use test—whether the defendant made significant contributions in the use to make the use her own expression⁵⁹—for balancing the right of publicity with the First Amendment in *Hart*. Despite the addition of many creative elements to the videogame, the Court found that the video games “do not sufficiently transform Appellant’s identity to escape the

⁵² *But see* *Midler v. Ford Motor Co.*, 849 F.2d 460, 462–63 (9th Cir. 1988) (rejecting unfair competition claim because “Midler did not do television commercials. The defendants were not in competition with her.”).

⁵³ *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254, 257 (N.Y. Sup. Ct. 1984) *aff’d*, 488 N.Y.S.2d 943 (N.Y. App. Div. 1985) (involving a Jacqueline Onassis look-alike used in a Dior advertisement).

⁵⁴ *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 146 n.5 (3d Cir. 2013).

⁵⁵ *See id.* at 168.

⁵⁶ *Id.* at 145.

⁵⁷ *Id.*

⁵⁸ The opinion surveys the right of publicity case law and the merits of the different tests proposed by courts and scholars. *See id.* at 152–65.

⁵⁹ *Infra*, Section IV.A.

right of publicity claim.”⁶⁰ The dissent in *Hart* would have also applied the transformative use test, but would have reached a different conclusion: “Hart’s ‘likeness is one of the ‘raw materials’ from which [the] original work is synthesized . . . [rather than] the very sum and substance of the work in question.’”⁶¹ Thus, the dissenting judge, applying the transformative use test, would have found that the First Amendment shielded Electronic Arts from Hart’s right of publicity claim.

Hart presents a most difficult set of facts. However, wherever the appropriate line is in balancing the right of publicity with the First Amendment, *Hart* is near it.⁶² In the dissent, Judge Ambro noted that Hart’s case is a sympathetic one because Hart and other college football players are huge economic engines that are uncompensated.⁶³

Are *White*, *Hart*, *Here’s Johnny*, and *Waits* beyond the scope of a right of publicity that conforms to the First Amendment and the compelling motivations for the existence of the right? Those cases ask the right basic factual inquiries, but whether the results are based on the right balance of interests is the real question. Does granting Vanna White a monopoly in being a blond co-host or sidekick on *Wheel of Fortune* benefit the public? Does merely reminding consumers of Ms. White go far beyond infringing the rights she might possess in her likeness? Does the public benefit from Johnny Carson preventing the use of “Here’s Johnny” in an arguably humorous way? Is a phrase like “Here’s Johnny” properly within the scope of the right of publicity? Why does Tom Waits need to be able to assert a right of publicity when false endorsement prohibitions achieve the same result?

⁶⁰ *Id.* at 170.

⁶¹ *Id.* at 175 (Ambro, J., dissenting).

⁶² *See generally id.*; *see also* No Doubt v. Activision Publ’g, Inc., 122 Cal. Rptr. 3d 397, 400–01 (Cal. 2011) (“[W]e conclude that the creative elements of the *Band Hero* videogame do not transform the images of No Doubt’s band members into anything more than literal, fungible reproductions of their likenesses. Therefore, we reject Activision’s contention that No Doubt’s right of publicity claim is barred by the First Amendment.”).

⁶³ *See Hart*, 717 F.3d at 171 (Ambro, J., dissenting) (“The burn to Hart and other amateur athletes is that, unlike their active professional counterparts, they are not compensated for EA’s use of their likenesses in its video games.”).

II. THE RATIONALES FOR AND AGAINST THE RIGHT OF PUBLICITY

A. *Compelling Motivations for the Right of Publicity*

The right of publicity's historical roots in privacy show the nexus between the right of publicity and the natural rights many believe a person has in his name and likeness. "The courts have uniformly held that the right of publicity is a 'property' right."⁶⁴ According to some commentators, human identity is a self-evident property right and the law should protect a person's identity just as the law protects any other property right.⁶⁵ Others say that a human possesses a natural right of "autonomous self-definition."⁶⁶ Both of these theories are grounded in "the notion that my identity is *mine*—it is my property to control as I see fit."⁶⁷ In the words of John Proctor,⁶⁸ an individual should be able to control the use of his name simply "because it is my name!"⁶⁹ Accordingly, many of those who believe that the right of publicity is supported by natural or property rights feel that, in the absence of sufficient countervailing considerations, no other justification for the right of publicity is necessary.⁷⁰

⁶⁴ 2 MCCARTHY, *supra* note 14, § 10:7.

⁶⁵ *See* 1 *id.* §§ 2:1–2:2 ("Perhaps nothing is so strongly intuited as the notion that my identity is *mine*—it is my property to control as I see fit.").

⁶⁶ M.P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 285 (2005) ("Since all individuals share the interest in autonomous self-definition, every individual should be able to control uses of her identity that interfere with her ability to define her own public character . . . [E]ven uses that do not suggest endorsement may disrupt the message an individual seeks to portray by competing with meaning the individual has tried to project."); *see also* 1 MCCARTHY, *supra* note 14, § 2:9.

⁶⁷ 2 MCCARTHY, *supra* note 14, §§ 2:1–2:2.

⁶⁸ The authors expressly disclaim any endorsement, sponsorship, affiliation, relationship, reminder, association, or any other authorization—implied or otherwise—from Arthur Miller, Arthur Miller's Estate, Daniel Day-Lewis, or John Proctor.

⁶⁹ ARTHUR MILLER, *THE CRUCIBLE* 143 (1976).

⁷⁰ *See* 1 MCCARTHY, *supra* note 14, § 2:1 ("Those who are critical of [the natural rights of property justification for the right of publicity] should have the burden to articulate some important countervailing social policy which negates this natural impulse of justice."); *id.* § 2:3 ("The advocate of a right of publicity, when called upon to explain why such a right should exist at all, is not being illogical in simply challenging: 'Why not?'").

“In brief, [an individual] in his lifetime ha[s] a right to create in his name and/or likeness ‘ . . . a right of value,’ which could have been transmuted into things of value or [the individual] could, if he elected not to exercise such right, protect it from invasion by others by a suit for injunction and/or damages.”⁷¹ Then, the right of publicity recognizes the fact that some individuals live a life of solitude and others a life of publicity. This difference is particularly valuable in the situation of unauthorized use of an accurate picture or depiction of a nonfamous (or previously nonfamous) individual in advertisement, as occurred in *Pavesich* and *Roberson*. It should be noted that, in this situation, the right of publicity grants individuals a right that is perhaps subtly different from privacy; it allows individuals to stay out of the public eye by prohibiting truthful, nondeceptive speech about an individual just outside of the right of privacy. The right of publicity protects also against *unwanted* fame.⁷² The normative confusion about the right of publicity is precisely that it performs what may be considered two different functions. In the case of unwanted “fame,” it provides a remedy for an individual who did not want the fame to begin with. Here, the right is an extension of its historical anchor, the right of privacy, that is, the right to be let alone. When fame is wanted, then the right of publicity becomes an entirely new right: a right to manage fame.

There are other compelling motivations advanced to support the right of publicity. Economists may argue that the right of publicity grants the most efficient user of an individual’s name and likeness the right to its use.⁷³ Significantly, the right of publicity facilitates the licensing of an individual’s name and likeness⁷⁴—a

⁷¹ *Lugosi v. Universal Pictures*, 603 P.2d 425, 428 (Cal. 1979).

⁷² It bears emphasis, however, that unwanted is not the same as unplanned but accepted after the fact, such as for those who perform heroic actions or otherwise gain substantial media attention.

⁷³ See Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 414 (1983) (“In a market economy, granting individuals exclusive rights to property is an effective way of allocating scarce resources.”).

⁷⁴ See Joseph R. Grodin, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123, 1126–27 (1953) (“This new right of publicity allows a licensee of a famous person adequate protection against third parties. Traditionally, direct action by the licensee against such parties was permitted where they had *induced* breach of the contract. And, in

process that may otherwise involve a more complex transaction and a less complete transfer of rights.⁷⁵ It also prevents the overuse of an individual's name and likeness.⁷⁶

The right of publicity may also protect individuals and the public from certain deceptive or false commercial uses of an individual's name and likeness in addition to false endorsement laws, the Lanham Act, and other related laws.⁷⁷ Similarly, the right of publicity provides an independent cause of action for commercial uses of a person's name and likeness that may also violate privacy law by way of damage to the individual's dignitary interests. However, prohibiting uses that are protected by the right of privacy and deception-based restrictions should not be used independently to justify the right of publicity. Although overlapping laws are a necessary evil, planned redundancy is not desirable.

B. Arguments Against a (Broad) Right of Publicity

Professor Michael Madow, who taught for many years at Brooklyn Law School, presented a compelling case against the right of publicity.⁷⁸ He advanced four main arguments. First, Madow

addition, use of a name or picture could be enjoined where continued use constituted trademark infringement. Otherwise the licensee's remedy had to be against his licensor. And in all cases damages—presumably based on lost profits—would be difficult to prove.”).

⁷⁵ For example, in Germany the commercial use of one's name or likeness involves a covenant not to sue and an incomplete transfer of rights to the licensee. See Daniel Biene, *Celebrity, Culture, Individuality and Right of Publicity as a European Legal Issue*, 36 IIC 505, 518 (2005) (“[A]ny right related to personality is under German law strictly inalienable and not transferable . . . [licensing] is generally done by means of an agreement not to sue, since the right itself cannot be transferred to third parties.”).

⁷⁶ Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 110-126 (1994) (The right of publicity helps to prevent rent dissipation).

⁷⁷ Because a false use of an individual's name and likeness necessarily means the plaintiff is identifiable, the right of publicity may be asserted if the plaintiff's name or likeness is used in a false or deceptive way for commercial gain. See 1 MCCARTHY, *supra* note 14, § 2:8 (“The problem with the rationale of preventing false advertising is that falsity of endorsement does not mark the outer boundary of the right of publicity. A clearly false endorsement is separately actionable under state law or Lanham Act § 43(a) as a form of false or misleading advertising. If legally provable falsity is necessary to state a claim for invasion of the right of publicity, it would be a redundant legal theory.”).

⁷⁸ See generally Michael P. Madow, *Private Ownership Of Public Image: Popular Culture And Right of Publicity*, 81 CALIF. L. REV. 127 (1993).

argued that the right of publicity “redistributes wealth upwards.”⁷⁹ “Why not,” he asked, “instead treat a famous person’s name and face ‘as a common asset to be shared, an economic opportunity available in the free market system?’”⁸⁰ Second, Madow argued that there are significant distributional consequences.⁸¹ The right of publicity raises the price of celebrity merchandise and of advertising in general, thereby shifting wealth away from the great mass of consumers to a very small group of persons who are already very handsomely compensated.⁸² This works to the advantage of larger advertisers.⁸³ Hoffman had made a similar point, labeling the phenomenon “net social disutility.”⁸⁴ Third, as the title of his article suggests, Madow argued that there is a risk of private appropriation and censorship of popular culture.⁸⁵ He made this point rather forcefully:

It is impossible, I think, for the law to remain neutral in this contest. The law can strengthen the already potent grip of the culture industries over the production and circulation of meaning, or it can facilitate popular participation, including participation by subordinate and marginalized groups, in the processes by which meaning is made and communicated.⁸⁶

Fourth and finally, Madow argued that the right of publicity creates incentives to overinvest in celebrity.⁸⁷ Professor Radin made a similar, though broader argument when she noted:

In the context of property for personhood, then, a “thing” that someone claims to be bound up with

⁷⁹ *Id.* at 136–37.

⁸⁰ *Id.* at 137 (quoting *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 960 (6th Cir. 1980)).

⁸¹ *Id.* at 218–19.

⁸² *Id.* at 218.

⁸³ *Id.* at 224.

⁸⁴ Stephen J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC’Y 111, 120 (1980).

⁸⁵ See Madow, *supra* note 78, at 138.

⁸⁶ *Id.* at 141–42.

⁸⁷ *Id.* at 216.

nevertheless should not be treated as personal vis-à-vis other people's claimed rights and interests when there is an objective moral consensus that to be bound up with that category of "thing" is inconsistent with personhood or healthy self-constitution.⁸⁸

In the context of the right of publicity, Professor Madow asked:

Is it not at least *possible* that society would be better off if some of the kids who are now devoting themselves to perfecting their jumpshots (or guitar riffs) in the usually vain hope of making it to the NBA (or the top of the charts) said 'to hell with it,' and started thinking of other ways of making a living? The high visibility of sports and entertainment careers means that it is easier (and cheaper) for people to find out about these careers [S]ports and entertainment are fields in which narcissism, vanity, fantasy, and self-deception probably take more than their usual toll on rational decision making. Aspirants in these fields are especially likely both to overestimate their talents (and their chances of 'making it') and to underestimate the quality of their competition. . . . [P]eople considering careers in these fields do not have anything approaching perfect information about just how long the odds on success actually are.⁸⁹

In answering each of those points, Julius Pinckaers first noted that allowing commercial exploitation of a persona without authorization enriches the company using it (e.g. for promotional purposes), which does not necessarily ameliorate the redistribution or concentration of wealth.⁹⁰ Second, Pinckaers noted that there are distributional consequences, but that they are outweighed by advantages. Providing an exclusive right on commercial use of a persona generates allocative efficiencies because the market will allow

⁸⁸ See Radin, *supra* note 22, at 959–60.

⁸⁹ Madow, *supra* note 78, at 216–18.

⁹⁰ JULIUS C.S. PINCKAERS, FROM PRIVACY TOWARD A NEW INTELLECTUAL PROPERTY RIGHT IN PERSONA 241 (1996).

the famous person to maximize the value of the advertising at the cost that advertisers are willing to pay. There are many celebrities and their personae can be used in several different contexts. Demand is often elastic, and “the owner is less likely to maintain a price that excludes potential users.”⁹¹ If this is correct, consumers pay more because they value the image of their favorite celebrity on a product, that is, product + desirable association = more value than product alone.⁹² Third, Pinckaers noted that, while there are potential conflicts between the right of publicity and free speech, a balancing test can be created to deal with such conflicts.⁹³ Finally, Pinckaers noted that even without a right of publicity people would enter the sports or arts fields for “other (psychological) reasons.”⁹⁴

C. The Improper Use of Trademark Rationales to Justify the Right of Publicity

Rationales that are used to justify trademark law should not be offered to justify the right of publicity simply because the two rights seem similar. The two rights are motivated by different primary concerns: trademark law reduces search costs for consumers and incentivizes quality through accountability;⁹⁵ the right of publicity, meanwhile, allows an individual to profit from and exercise control over the commercial use of his name and likeness because

⁹¹ *Id.* at 254.

⁹² *See id.* at 256.

⁹³ *See id.* ch. 9.3.

⁹⁴ *Id.* at 256.

⁹⁵ Most commentators also justify trademark law as protecting a trademark holder’s property rights. *See Indus. Rayon Corp. v. Dutchess Underwear Corp.*, 92 F.2d 33, 35 (2d Cir. 1937) (“A trade-mark is not property in the ordinary sense but only a word or symbol indicating the origin of a commercial product.” Hand, J.); *see also* Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1841 (2007) (“[T]rademark law, like all unfair competition law, sought to protect producers from illegitimate diversions of their trade by competitors [A]merican courts protected producers from illegitimately diverted trade by recognizing property rights.”); 1 MCCARTHY, *supra* note 2, § 2:2 (“Trademark law serves to protect both consumers from deception and confusion over trade symbols and to protect the plaintiff’s infringed trademark as property.”); *but cf. id.* § 2:1 (“The interest of the public in not being deceived has been called the basic policy [concern of unfair competition law] . . . [b]ut there is also the policy of encouraging competition from which the public benefits.”).

of natural rights.⁹⁶ “[S]ome courts have failed to see the important distinctions and have unthinkingly imported certain inapplicable pieces of trademark doctrine into right of publicity cases Such courts miss the important reality that the right of publicity is only analogous, not identical, to the law of trademarks.”⁹⁷

The aspect of trademark law that is most analogous to the right of publicity is dilution. To succeed on a dilution claim, the mark owner must show that the mark is famous and distinctive.⁹⁸ A trademark holder could succeed under either a dilution by blurring (if the use impairs the distinctiveness of the mark) claim or under a dilution by tarnishment (if the use harms the reputation of the mark) claim.⁹⁹ Dilution is a cause of action for uses of a mark that create an association between a famous mark and the defendant’s symbol—a standard lower than likelihood of confusion.¹⁰⁰ Thus, dilution claims can be asserted in the absence of confusion, finding echo in property rights, not consumer protection.

A number of scholars believe that federal protection against dilution of famous marks was a poor policy choice, because trademark law’s primary normative concern is supposedly to protect consumers, and the vast majority of consumer harm occurs where there is confusion.¹⁰¹ Dilution without confusion does not harm consumers; it may harm a brand, however.

⁹⁶ See 1 MCCARTHY, *supra* note 14, § 5:6 (“[A]fter adding up all the differences and similarities [between trademark and the right of publicity], the differences outweigh the similarities. The differences stem largely from the historical fact that the right of publicity had its origins in the law of ‘privacy,’ whereas the law of trademarks had its origins in the tort of fraud.”).

⁹⁷ *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 155 (3d Cir. 2013) (“Various commentators have noted that right of publicity claims—at least those that address the use of a person’s name or image in an advertisement—are akin to trademark claims because in both instances courts must balance the interests in protecting the relevant property right against the interest in free expression.” (citing *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003))); 1 MCCARTHY, *supra* note 14, § 5:6.

⁹⁸ *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, L.L.C.*, 507 F.3d 252, 264 n. 2 (4th Cir. 2007).

⁹⁹ *Rosetta Stone Ltd. v. Google, Inc.*, 730 F. Supp. 2d 531, 551 (E.D. Va. 2010).

¹⁰⁰ 15 U.S.C. § 1125(c)(1) (2012).

¹⁰¹ See, e.g., Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789 (1997).

For the purposes of this Article, parallels with trademark dilution do not answer the normative question about the right of publicity because that right lies outside of federal trademark law. Like dilution, however, the right of publicity may be asserted where there is no confusion; in fact, consumer confusion is often not a consideration at all with the right of publicity.¹⁰² It does then resemble a property right.

Where a famous person is selling a product or service using a likeness, name or signature as a trademark, then trademark law applies if a likelihood of source or sponsorship confusion exists. That said, overlapping trademark and publicity analyses lead to normative confusion between the right of publicity and trademark law. Let us explore the difference in greater detail.

Trademarks perform four basic functions:

- (1) To identify one seller's goods and distinguish them from goods sold by others;
- (2) To signify that all goods bearing the trademark come from or are controlled by a single, albeit anonymous, source;
- (3) To signify that all goods bearing the trademark are of an equal level of quality; and
- (4) As a prime instrument in advertising and selling the goods.¹⁰³

A trademark represents the goodwill an entity has accumulated.¹⁰⁴ It allows consumers to become repeat customers and inform other consumers of their good experience;¹⁰⁵ conversely, it allows consumers to *not* repeat their business and to inform others

¹⁰² See *Hart*, 717 F.3d at 158 (“[T]he right of publicity does not implicate the potential for consumer confusion.”).

¹⁰³ 1 MCCARTHY, *supra* note 2, § 3:2.

¹⁰⁴ See *id.* (“Without the identification function performed by trademarks, buyers would have no way of returning to buy products that they have used and liked. If this consumer satisfaction and preference is labeled ‘good will,’ then a trademark is the symbol by which the world can identify that good will.”).

¹⁰⁵ See *id.*

of a bad experience. Trademarks therefore reduce transaction costs¹⁰⁶ and incentivize quality goods.¹⁰⁷

Public benefits flowing from the right of publicity are not so clear, especially when compared to trademark rationales.¹⁰⁸ In the words of the Restatement:

The rationales underlying recognition of a right of publicity are generally less compelling than those that justify rights in trademarks or trade secrets. The commercial value of a person's identity often results from success in endeavors such as entertainment or sports that offer their own substantial rewards. Any additional incentive attributable to the right of publicity may have only marginal significance. In other cases the commercial value acquired by a person's identity is largely fortuitous or otherwise unrelated to any investment made by the individual, thus diminishing the weight of the property and unjust enrichment rationales for protection. In addition, the public interest in avoiding false suggestions of endorsement or sponsorship can be pursued through the cause of action for deceptive marketing.¹⁰⁹

It is also difficult to see how any consumer benefits from having his perception of goods and services deliberately altered by the endorsement of a celebrity.¹¹⁰ Could one not argue that, if a celebrity believes in a product—as endorsements are intended to show—presumably she will not need to be compensated to use it?

¹⁰⁶ See *Ty Inc. v. Perryman*, 306 F.3d 509, 510 (7th Cir. 2002) (“The fundamental purpose of a trademark is to reduce consumer search costs by providing a concise and unequivocal identifier of the particular source of particular goods.”).

¹⁰⁷ 1 MCCARTHY, *supra* note 2, § 3:2.

¹⁰⁸ See *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 499, 504 (1996) (“[A] blanket prohibition against truthful, nonmisleading speech . . . serves an end unrelated to consumer protection.”).

¹⁰⁹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

¹¹⁰ The perception of goods and services changes when celebrities that a consumer identifies with endorse a product. See Michael D. Basil, *Identification as a Mediator of Celebrity Effects*, 40 J. BROADCASTING & ELEC. MEDIA 478, 478 (1996).

While trademark law confers clear benefits on the public, the connection between the right of publicity and public welfare is comparatively attenuated—too much so to support the very existence of the right. Hence, if the right of publicity should exist at all, it should exist as a natural right in an individual’s celebrity and identity.

D. Unjust Enrichment and the Right of Publicity

Unjust enrichment is frequently advanced as the underpinning for the right of publicity; those who use an individual’s likeness free ride on the goodwill that individual has amassed, and are therefore unjustly enriched. This intuition can be traced to *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,¹¹¹ the case most courts and scholars credit with creating the right of publicity.¹¹² According to Professor Dogan:

[T]he *Haelan* court deliberately abandoned a harms-based approach to celebrity right of publicity in favor of an approach centered on unjust enrichment. In doing so, the court paved the way for a presumption of celebrities’ entitlement to every cent of commercial value conferred by the use of their identities, without regard to whether the use caused them any reputational or personal harm.¹¹³

We agree that overemphasis on unjust enrichment as the rationale for the right of publicity has led to its overbreadth.

While the doctrine has intuitive appeal and may inform an equitable analysis, and may indeed be appropriate in some circumstances, an analysis of unjust enrichment illustrates that it should not be used to justify the existence of the right of publicity. As the Restatement asserts, “a person who is unjustly enriched at the expense of another is subject to liability in restitution.”¹¹⁴ Thus, unjust enrichment is actionable only where: (1) there is an injustice; (2) and an enrichment has occurred; (3) “at the expense of another.”

¹¹¹ 202 F.2d 866 (2d Cir. 1953).

¹¹² See Dogan, *supra* note 9, at 18.

¹¹³ *Id.*

¹¹⁴ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (2011).

er.” In the context of intellectual property law, the Restatement rule is: “A person who obtains a benefit by misappropriation or infringement of another’s legally protected rights in any idea, expression, information, image, or designation is liable in restitution to the holder of such rights.”¹¹⁵

Importantly, the Restatement recognizes unjust enrichment where there has been an infringement of another’s “legally protected” rights. In the right of publicity, there is anything but a consensus that many infringing uses are unjust, or “at the expense of another.” Thus, unjust enrichment in the right of publicity context runs in to a circular reasoning problem: there is only an injustice, at the expense of another, *if* the law first protects the use of a person’s name or likeness.¹¹⁶ Thus, we return to the real question: what should be the boundaries of the right of publicity?

III. THE DANGERS OF OVERPROTECTION

Over twenty years ago, Judge Alex Kozinski recognized the dangers posed by an overly expansive right of publicity.¹¹⁷ In a stinging dissent, Judge Kozinski argued that the Ninth Circuit had extended the right of publicity too far when the court found a humorous TV ad featuring a robot dressed as a woman on a Wheel of Fortune look-alike set to infringe Vanna White’s right of publicity.¹¹⁸ Judge Kozinski observed:

¹¹⁵ *Id.* § 42.

¹¹⁶ See Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935) (asserting that it is circular reasoning to base legal protection upon economic value when economic value depends upon legal protection).

¹¹⁷ *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting).

¹¹⁸ *Id.* See also *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 976 (10th Cir. 1996) (“One of the primary goals of intellectual property law is to maximize creative expression. The law attempts to achieve this goal by striking a proper balance between the right of a creator to the fruits of his labor and the right of future creators to free expression. Underprotection of intellectual property reduces the incentive to create; overprotection creates a monopoly over the raw material of creative expression. The application of the Oklahoma right of publicity statute to Cardtoons’ trading cards presents a classic case of overprotection. Little is to be gained, and much lost, by protecting MLBPA’s right to control the use of its members’ identities in parody trading cards.”).

Something very dangerous is going on here. Private property, including intellectual property, is essential to our way of life. It provides an incentive for investment and innovation; it stimulates the flourishing of our culture; it protects the moral entitlements of people to the fruits of their labors. But reducing too much to private property can be bad medicine. Private land, for instance, is far more useful if separated from other private land by public streets, roads and highways. Public parks, utility rights-of-way and sewers reduce the amount of land in private hands, but vastly enhance the value of the property that remains.

So too it is with intellectual property. Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.¹¹⁹

The First Amendment provides several tools for limiting the right of publicity arising out of the ways it has been used and applied in other, related contexts. For example, ideas and facts are not copyrightable.¹²⁰ A fair use—that is a use that is generally transformative¹²¹—“is not an infringement of copyright.”¹²² Fur-

¹¹⁹ *White*, 989 F.2d at 1513 (Kozinski, J., dissenting).

¹²⁰ See *Baker v. Selden*, 101 U.S. 99, 107 (1879) (demonstrating that standard accounting forms are not copyrightable).

¹²¹ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

¹²² 17 U.S.C. § 107 (2012). (“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
the nature of the copyrighted work;
the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

ther, copyright law grants compulsory licenses.¹²³ The nominative fair use¹²⁴ and descriptive fair use¹²⁵ doctrines make room for the First Amendment in trademark law.¹²⁶ Similarly, the right of publicity must yield to the First Amendment, even if the subject of its protection—a human being’s identity—is perhaps the most “personal” in all intellectual property law.

The First Amendment often erects a lower hurdle for asserting a publicity right, because the use may amount to commercial speech.¹²⁷ This does not make the First Amendment meaningless though, as Judge Kozinski explained: “The majority dismisses the First Amendment issue out of hand because Samsung’s ad was commercial speech. So what? Commercial speech may be less protected by the First Amendment than noncommercial speech, but less protected means protected nonetheless.”¹²⁸ Similarly, in the context of advertising,¹²⁹ the Supreme Court has said “we may as-

the effect of the use upon the potential market for or value of the copyrighted work.”).

¹²³ 17 U.S.C. §§ 115, 119(b) (2012).

¹²⁴ See *New Kids on the Block v. News Am. Pub., Inc.*, 971 F.2d 302, 308 (9th Cir. 1992) (“[H]ere the defendant uses a trademark to describe the plaintiff’s product, rather than its own, we hold that a commercial user is entitled to a nominative fair use defense provided he meets the following three requirements: First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.”).

¹²⁵ See *WCVB-TV v. Boston Athletic Ass’n*, 926 F.2d 42, 46 (1st Cir. 1991) (“[T]he use of words for descriptive purposes is called a ‘fair use,’ and the law usually permits it even if the words themselves also constitute a trademark.”); see also 15 U.S.C. § 1115(b)(4) (2012).

¹²⁶ See *New Kids*, 971 F.2d at 306–08.

¹²⁷ Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J.L. & ARTS 165, 195 (2010) (“[T]he right of publicity is often applied to commercial speech. In these cases, the exercise of publicity rights is generally consistent with the First Amendment.”).

¹²⁸ *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1519 (9th Cir. 1993).

¹²⁹ Commercial uses of an individual’s name or likeness occur in more contexts than just advertising and endorsements. See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, (3d Cir. 2013) (“Appellant’s claims stemmed from Appellee’s alleged use of his likeness and biographical information in its *NCAA Football* series of videogames.”); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 800–01 (Cal. 2001) (“Saderup sold lithographs and T-shirts bearing a likeness of The Three Stooges reproduced from a

sume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment."¹³⁰

Commercial speech is speech that does "no more than propose a commercial transaction."¹³¹ Even in the context of commercial speech, though, the First Amendment often erects a formidable barrier. At a minimum, the government must show: that the commercial speech restriction is supported by a substantial state interest; that the restriction advances the substantial state interest; and that the restriction is narrowly tailored to the substantial state interest.¹³² As the Supreme Court has noted, "[t]he regulatory technique [restricting commercial speech] may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well."¹³³

The Supreme Court has indicated that commercial speech restrictions that are not false or misleading are subject to scrutiny stricter than the intermediate level of scrutiny just described.¹³⁴ "[W]hen a State entirely prohibits the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment general-

charcoal drawing he had made. These lithographs and T-shirts did not constitute an advertisement, endorsement, or sponsorship of any product.").

¹³⁰ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

¹³¹ *Id.*

¹³² *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980) ("The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.").

¹³³ *Id.* at 565 (internal citations omitted).

¹³⁴ *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) ("The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them.").

ly demands.”¹³⁵ Then, the exclusive realm of the right of publicity—nonprivate, nondeceptive uses of a person’s name or likeness—might be treated by a court as subject to the same “rigorous review that the First Amendment generally demands,”¹³⁶ even if the use is commercial.

Because of an unusual procedural posture, the Court of Appeals for the Seventh Circuit was recently forced to devote an entire opinion to whether the use of Michael Jordan’s name was a commercial use in a case claiming violations of the Lanham Act and the Illinois right of publicity.¹³⁷ In *Jordan v. Jewel Food Stores*, the grocery store chain defendant published a full page image in a special commemorative edition of *Sports Illustrated*, congratulating Michael Jordan on being inducted in to the hall of fame.¹³⁸ The defendant agreed to offer the magazine for sale in its stores in the Chicago area, in exchange for a full page of advertising space in the magazine.¹³⁹ The ad showed a pair of Jordan’s sneakers, congratulated a “fellow Chicagoan,” and indicated that Jordan was “a shoe in” for the hall of fame.¹⁴⁰ Of course, the Defendant’s logo was prominently featured below the congratulatory message. The Seventh Circuit found Jewel’s speech to be commercial, and remanded the case for further proceedings, noting that the Supreme Court of the United States “has not strayed from its commercial-speech jurisprudence despite calls for it to do so.”¹⁴¹

¹³⁵ *Id.*; see also *id.* at 502–03 (“It is the State’s interest in protecting consumers from ‘commercial harms’ that provides ‘the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.’ Yet bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms. Instead, such bans often serve only to obscure an ‘underlying governmental policy’ that could be implemented without regulating speech.”) (citations omitted).

¹³⁶ *Id.* at 485.

¹³⁷ See *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 513 (7th Cir. 2014) (“[T]he district court agreed with Jewel that the ad was noncommercial speech and sought further briefing on the implications of that classification. Jewel maintained that the commercial-speech ruling conclusively defeated all of Jordan’s claims. Jordan agreed, accepting Jewel’s position that the First Amendment provided a complete defense.”).

¹³⁸ *Id.* at 511.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 512.

¹⁴¹ *Id.* at 515–16.

Although the Supreme Court of the United States has not abandoned the commercial/noncommercial speech distinction in First Amendment jurisprudence,¹⁴² that doctrine has been seriously eroded by legal scholars.¹⁴³ The commercial nature of a use lost at least some of its pull in a Supreme Court opinion in the context of copyright and fair use in a famous case invoking 2Live Crew's reuse of part of Roy Orbison's classic song "Pretty Woman."¹⁴⁴

¹⁴² See *Harris v. Quinn*, 134 S. Ct. 2618, 2639, 189 L. Ed. 2d 620 (2014) (making a finding of noncommercial speech but determining that the noncommercial speech determination is not dispositive because the state action could not even survive intermediate scrutiny); see also *Jordan*, 743 F.3d at 522.

¹⁴³ DAVID L. HUDSON, JR., *THE FIRST AMENDMENT: FREEDOM OF SPEECH* § 6.9 (2012); See Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317, 1317 (1988) (explaining that "virtually every commentator writing about the first amendment believes that the [Supreme] Court's treatment of commercial speech is wrong"); Sean P. Costello, Comment, *Strange Brew: the State of Commercial Speech Jurisprudence Before and After 44 Liquormart, Inc. v. Rhode Island*, 47 CASE W. RES. L. REV. 681, 682 (1997) (explaining that commercial speech is "in a state of constitutional limbo"); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990) (writing that the "commercial/noncommercial distinction makes no sense"); David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CALIF. L. REV. 359, 360-61 (1990) (criticizing the Supreme Court's treatment of commercial speech as inconsistent and incoherent); Thomas W. Merrill, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 206 (1976) (explaining that the Supreme Court's rulings in commercial speech cases "may be difficult for lower courts to apply consistently"); Robert M. O'Neil, *Nike v. Kasky—What Might Have Been . . .*, 54 CASE W. RES. L. REV. 1259, 1259-60 (2004) (contending that *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 gave the Court an opportunity to clarify the "increasingly confusing" commercial speech doctrine); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 2 (2000) (describing the commercial speech doctrine as "a notoriously unstable and contentious domain of First Amendment jurisprudence"); Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 YALE J. ON REG. 85, 92 (1999) (writing that "a lack of clarity continues to mark" commercial speech jurisprudence); Brian J. Waters, Comment, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech*, 27 SETON HALL L. REV. 1626, 1634 (1997) (criticizing the "lack of clarity" surrounding commercial speech law); Nancy J. Whitmore, *Facing the Fear: A Free Market Approach for Economic Expression*, 17 COMM. L. & POL'Y 21, 31 (2012) (citing Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser"*, 55 VAND. L. REV. 693, 701 (2002) (concluding that the Court's commercial speech doctrine is "confused and unstable").

¹⁴⁴ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994). Lower courts seem to continue to engage in a commercial nature of the use inquiry. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 598 (2008) ("[O]f the 306 [lower court] opinions, 84.0% explicitly considered

One of the specific statutory factors which courts examine is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”¹⁴⁵ All but rejecting the value of the statutory commercial use inquiry, Justice Souter, writing for the majority in *Campbell*, quoted Samuel Johnson that “[n]o man but a blockhead ever wrote, except for money.”¹⁴⁶ Justice Souter’s opinion in *Campbell* emphasized that the commercial nature of a use was but one factor to be balanced in the fair use inquiry,¹⁴⁷ correcting the court’s previous ruling in *Sony Corp.* that “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege.”¹⁴⁸ Several commentators take the position that the statutory fair use factors in copyright law, including the commercial nature prong, have been entirely displaced by a “transformative use” or “productive use” inquiry.¹⁴⁹

One cannot ignore the fact that the commercial speech doctrine is still the law of the land. In the context of the right of publicity, the doctrine makes it very unlikely that a teenager tweeting “Paris Hilton is so cool” would be liable for a right of publicity claim. This is a good outcome. While the line between a commercial use and a noncommercial use in the context of artistic, literary, and critical

whether the use was commercial or noncommercial in nature under factor one, while only 38.2% explicitly considered the transformativeness of the defendant’s use under the factor.”). The years following Beebe’s study, however, have shown a significant increase in the transformative use inquiry. See Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 Lewis & Clark L. Rev. 715, 755 (2011) (Of unreversed district court preliminary injunctions, bench trials, and crossed motions for summary judgment during 1995-2000, 70.45% of courts considered the transformative nature of the use, compared to 95.83% during 2005-2010).

¹⁴⁵ 17 U.S.C. § 107(1) (2012).

¹⁴⁶ *Campbell*, 510 U.S. at 584.

¹⁴⁷ See *id.* at 590.

¹⁴⁸ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

¹⁴⁹ See Netanel, *supra*, note 144, at 755. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”); *Hofheinz v. Discovery Commc’ns, Inc.*, 2001 WL 1111970 (S.D.N.Y. Sept. 20, 2001) (“Although ‘transformativeness’ is primarily analyzed in connection with the first fair use factor, it forms the basis of the entire fair use analysis.”); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106-07 (1990).

works might be blurry, it is plain that the tweet just described is noncommercial. Heightened speech protection for that type of plainly noncommercial speech encourages the free exchange of ideas. The next section will discuss the convergence of courts and scholars in working other First Amendment limitations in to the right of publicity through the transformative use test and the newsworthiness exemption.

IV. THE PROPER SCOPE OF THE RIGHT OF PUBLICITY

A properly delineated right of publicity is one that comports with First Amendment principles, and extends only as far as the natural rights that support its existence. The following sections operationalize those principles.

A. The Emerging First Amendment Balancing Tests: The Transformative Use Test and the Newsworthiness Exemption

There is no settled, structured legal framework for evaluating right of publicity claims—including for balancing the right of publicity with the First Amendment.¹⁵⁰ Much of the case law is irreconcilable with itself and the First Amendment.¹⁵¹ Moreover, there is significant variation among the states in defining the scope of the right of publicity.¹⁵² Indeed, the uncertainty associated with liability

¹⁵⁰ To date, the U.S. Supreme Court has taken only one case focused on the right of publicity. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578–79 (1977) (broadcasting company infringed the “human cannonball’s” right of publicity when it broadcast his entire act on a news program). One seemingly-settled First Amendment exception to the right of publicity is the “newsworthiness exception,” discussed *infra*.

¹⁵¹ See Adam Liptak, *When it May Not Pay to Be Famous*, N.Y. TIMES, June 1, 2013, <http://www.nytimes.com/2013/06/02/sunday-review/between-the-first-amendment-and-right-of-publicity.html?smid=tw-share> (“The courts have, on the one hand, rejected right-of-publicity suits arising from a painting of Tiger Woods, a comic book evoking the musicians Johnny and Edgar Winter, parody baseball trading cards and a fantasy baseball game that used the names, statistics and biographies of Major League players. But courts have allowed suits over the broadcast of a human cannonball’s entire act, a comic book using a hockey player’s nickname, an ad evoking Vanna White’s skill at turning letters on ‘The Wheel of Fortune’ and a reference to Rosa Parks in a song If there is a legal principle that unites these rulings, it is hard to discern.”).

¹⁵² See *infra* Section IV.B.

stemming from the right of publicity is potentially chilling speech.¹⁵³ There is, however, an emerging consensus among courts that the use of an individual's name or likeness should be allowed when that use is *transformative* or *newsworthy*. We agree with this emerging consensus.

In keeping with this rule, courts should ensure that the use is not protected by the First Amendment's freedom of the press clause.¹⁵⁴ This is a routine and established practice. Courts generally apply the "newsworthiness" test where an individual's name or likeness is used in relation to a matter of public interest.¹⁵⁵

If the use is not newsworthy, courts should apply the transformative use test to balance the right of publicity with the First Amendment. The transformative use test asks "whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness."¹⁵⁶ Put another way, a court will ask "whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question."¹⁵⁷

The transformative use test is widely used by courts attempting to balance the right of publicity with the First Amendment.¹⁵⁸

¹⁵³ Electronic Arts ceased production of its popular video game NCAA Football in the face of legal challenges to the game's use of the likeness of college football players. Steve Berkowitz, *EA Drops Football in '14, Settles Cases as NCAA Fights*, USA TODAY, Sept. 26, 2013, <http://www.usatoday.com/story/sports/college/2013/09/26/ea-sports-ncaa-13-video-game-keller-obannon/2878307/>.

¹⁵⁴ "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. Matters of public interest are deemed newsworthy and subject to First Amendment protection. *See Eastwood v. Superior Court*, 149 Cal. App. 3d 409 (Ct. App. 1983); *Messenger v. Gruner + Jahr Printing & Publ'g*, 94 N.Y.2d 436, 446-47, 727 N.E.2d 549, 555 (2000); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996); *Finger v. Omni Publ'g Intern.* 566 N.E.2d 141 (N.Y. 1990); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

¹⁵⁵ *See supra* note 154.

¹⁵⁶ *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001).

¹⁵⁷ *Id.*

¹⁵⁸ *See Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (adopting the transformative use test and citing to a long line of cases adopting the test).

Transformative use applies even in the presence of a commercial motivation.¹⁵⁹ The transformative use test is elegant and relatively simple to understand, especially when compared to the *Rogers* test—another test endorsed by many courts and scholars. The *Rogers* test would permit a right of publicity action only if the use of an individual's identity was *wholly unrelated* to the underlying work or was simply a disguised commercial advertisement for the sale of goods or services.¹⁶⁰ The *Rogers* test seems to protect First Amendment principles at the expense of the natural rights an individual possesses in her identity. In the words of the Third Circuit, the *Rogers* test “is a blunt instrument, unfit for widespread application in cases that require a carefully calibrated balancing of two fundamental protections: the right of free expression and the right to control, manage, and profit from one's own identity.”¹⁶¹

By contrast, the transformative use test takes into account important First Amendment principles. It protects speech when the speaker contributes to the marketplace of ideas. Conversely, it allows individuals to assert natural rights in their identity when speech does not contribute to the marketplace of ideas, but merely free rides on an individual's identity. That applying the transformative use test to a difficult set of facts in *Hart* led to a 2–1 decision may be viewed as evidence that the transformative use test effectively balances the competing concerns of natural rights in one's name and likeness and the First Amendment.

Uses of an individual's name or likeness that are wholly unrelated to a matter of public interest or creative expression cannot be said to be transformative or newsworthy. Importantly, the high degree of deference given to defendants under the *Rogers* test would allow an array of *ex post* justifications for an infringing use. Uses of an individual's name or likeness that are *largely* unrelated to a matter of public interest or creative expression are most likely not

¹⁵⁹ *Campbell v. Acuff Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (explaining that in the context of copyright law, “the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness”).

¹⁶⁰ *See Rogers v. Grimaldi*, 875 F.2d 994, 1005 (2d Cir. 1989).

¹⁶¹ *See Hart*, 717 F.3d at 157.

transformative or newsworthy; they do not contribute to the marketplace of ideas. Because the *wholly unrelated* standard would allow such uses, the *Rogers* test provides insufficient protection to right of publicity plaintiffs.

There are still lessons to take from the *Rogers* test. A less extreme standard applying the same principles driving the *Rogers* test would appropriately balance the right of publicity and the First Amendment. Courts allow newsworthy and transformative uses of intellectual property because those uses contribute to the market place of ideas; because those uses benefit society in some way. The important part is the nexus between: (1) the use; and (2) the creative expression (transformation), or the matter of public interest (newsworthiness). The problem with the *Rogers* test is that it allows defendants to avoid liability under the right of publicity with *de minimis* transformation or newsworthiness.

Courts, then, should allow right of publicity claims to survive where a plaintiff can show that the defendant's use of an individual's name or likeness had *no real relationship* to a creative expression or a matter of public interest—put another way, where there is no transformation or newsworthiness of the person's name or likeness. Of course, both the transformative use test and the newsworthiness exceptions are subject to judicial discretion. Balancing competing concerns—within the proper framework—is precisely the job of the judiciary. By giving judges properly guided discretion, allowing uses of an individual's name or likeness that are transformative or newsworthy achieves an ideal balance between natural rights in individual identity and the “important countervailing social policy” of free speech.¹⁶²

B. The Right of Publicity Should Be Limited After Death

The right of publicity should end with a person's death, or soon thereafter. That is not quite the case under current law. “The overwhelming majority rule under either statute or common law is that the right of publicity is descendible property and has a post-mortem duration which is not conditioned on lifetime exploita-

¹⁶² 1 MCCARTHY, *supra* note 14 § 2:1.

tion.”¹⁶³ A total of twenty states have expressly adopted “a postmortem right of publicity: 14 by statute and six by common law.”¹⁶⁴ Very few courts have simply rejected a postmortem right of publicity at common law, and when courts have, some states have reacted by passing statutes to make the right of publicity descendible.¹⁶⁵ In fact, only New York and Wisconsin have flatly rejected the postmortem right of publicity, limiting the right to “living persons.”¹⁶⁶

Yet, while at least thirty-one states¹⁶⁷ have adopted the right of publicity in some form, only twenty states have recognized the right of publicity as a descendible right.¹⁶⁸ Other states simply have yet to consider whether the right of publicity is descendible.¹⁶⁹ While the trend of those that have considered the issue leans heavily towards a postmortem right of publicity, there is no trend as to

¹⁶³ 2 *id.* § 9:17.

¹⁶⁴ *Id.* § 9:18.

¹⁶⁵ *Id.* (“Only one appellate court has clearly and unequivocally considered, weighed, and rejected any postmortem right of publicity. This is the federal Sixth Circuit Court of Appeals in its 1980 decision in [*Memphis Development*], opining as to Tennessee common law. The law in Tennessee was subsequently changed by statute and by court decision. In California, while one possible interpretation of the 1979 Lugosi decision was that there was never any postmortem right of publicity under any circumstances, that implication was later changed by the 1985 California statute. In Ohio, while a 1983 federal court decision had held that Ohio did not recognize a postmortem duration, that was changed by Ohio’s 1999 enactment of a postmortem right of publicity statute.”) (citations omitted).

¹⁶⁶ N.Y. CIV. RIGHTS LAW § 50 (“A person, firm or corporation that uses 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, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.”); WIS. STAT. ANN. § 995.50 (West) (providing civil penalties for “[t]he use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person.”); *Messenger v. Gruner + Jahr Print. & Pub.*, 94 N.Y.2d 436, 441, 727 N.E.2d 549, 552 (2000) (Even though section 51, providing for civil penalties, does not explicitly apply only to living persons, New York courts have consistently “recogniz[ed] the Legislature’s pointed objective in enacting sections 50 and 51, [and] underscored that the statute is to be narrowly construed and ‘strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person.’”) (internal citations omitted).

¹⁶⁷ See 1 MCCARTHY, *supra* note 14, § 6:3.

¹⁶⁸ See 2 *id.* § § 9:17–9:18.

¹⁶⁹ See *Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.*, 270 F.3d 298, 326 (6th Cir. 2001) (“Given the number of states that are agnostic as to the issue of a post-mortem right of publicity it may be something of an overstatement to state that sixteen states constitute an ‘overwhelming majority rule.’”).

the duration of that right. These statutes “define varying durations for the postmortem right, ranging from 100 years, 75 years, 70 years, 60 years, 50 years, 40 years, 30 years, 20 years, as long as continuously used, or no stated duration.”¹⁷⁰

There are reasonable arguments that the right of publicity seen as a natural right should die with the individual,¹⁷¹ and reasonable arguments that the right of publicity should survive the individual.¹⁷² Westfall and Landau have questioned whether referring to the right of publicity as property (the “property syllogism”) helps shed light on the debate and proper policy response.¹⁷³ Certainly, this Article agrees with Professor Armstrong’s assertion that “[c]haracterization of a value as property does not solve the question of content of this right.”¹⁷⁴

As Jennifer Rothman noted, the discomfort

with alienating publicity rights reveals an undeveloped, but very much present, concern that—even if rooted in property—the right of publicity should have limits placed on its alienability. In some sense then, it is scholars who have seen things in black and white, while the courts in the trenches have taken a more nuanced approach, albeit an underdeveloped and unacknowledged one.¹⁷⁵

The differing willingness to recognize the right of publicity as descendible, or to grant varying durations of the right, might be explained by certain jurists conceiving of the right of publicity as an intellectual property right and certain jurists conceiving of the right of publicity as a natural right.

The principal historical antecedent to the right of publicity,¹⁷⁶ the right of privacy, is not descendible.¹⁷⁷ This comports with an

¹⁷⁰ 2 MCCARTHY, *supra* note 14, § 9:18 (citations omitted).

¹⁷¹ See Hoffman, *supra* note 84, at 133.

¹⁷² See, e.g., Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125 (1980).

¹⁷³ See Westfall & Landau, *supra* note 21, at 72.

¹⁷⁴ Armstrong, *supra* note 6, at 465.

¹⁷⁵ Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 205 (2012).

¹⁷⁶ See generally Warren & Brandeis, *supra* note 13.

understanding of the right of privacy as a natural right: a right so inextricably intertwined with the human to whom the right belongs, that it must cease to exist when that human ceases to exist. The mental and physical suffering allegedly caused by an invasion of privacy simply cannot exist after that human has died.¹⁷⁸

Intellectual property rights, on the other hand, may continue beyond the death of the linked individual or organization.¹⁷⁹ This includes trademark rights, which continue indefinitely, so long as the mark is used in commerce.¹⁸⁰ Trademarks continue to be protected so long as they are used in commerce because consumers benefit from decreased transaction costs and increased quality so long as the mark is being used in commerce. Having already rejected the use of trademark rationales in defining the scope of the right of publicity, we submit that such rationales likewise cannot support an argument that the right of publicity should be descendible.

As with privacy, the underlying motivation for the right of publicity—natural rights—ceases to exist when the human that owns the right ceases to exist. It would seem absurd to argue that heirs or assignees should be given an autonomous right to *define* the persona of someone else, who happens to be deceased. The choice to lead a life of solitude or a life of publicity is also not compelling when applied to a dead person. Heirs and assignees cannot assert “the notion that my identity is *mine*—it is my property to control

¹⁷⁷ See 2 MCCARTHY, *supra* note 14, § 9:1 (“There is no dispute as to the postmortem rule for traditional ‘privacy’ rights which protect human dignitary values, damage to which is measured by mental and physical suffering and damage to reputation. Such classic ‘privacy’ rights die with the person whose privacy was allegedly invaded. Both the commentators and the cases unanimously support this rule.”).

¹⁷⁸ *See id.*

¹⁷⁹ See 17 U.S.C. § 302(a) (2012) (“Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author’s death.”); *De la Vergne Refrigerating Mach. Co. v. Featherstone*, 147 U.S. 209, 230 (1893) (holding that patent rights pass to patent holder’s estate).

¹⁸⁰ 15 U.S.C. § 1127 (2012) (“A mark shall be deemed to be ‘abandoned’ if . . . its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment. ‘Use’ of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark.”).

as I see fit.”¹⁸¹ Moreover, in situations involving the disclosure of private facts postmortem, the right of publicity could be used to circumvent and frustrate well-established law that privacy rights die with the individual.

There are, however, two compelling motivations for restricting the use of an individual’s name or likeness that may still be compelling after the death of that individual: the allocative efficiency rationale and the deception-based rationales. These two rationales only make sense as applied to famous or notable individuals. For deception—consumer confusion—to exist, consumers must recognize the individual; this occurs only in the context of famous or notable individuals. Similarly, the allocative efficiency rationale applies most forcefully where resources are scarce; nonfamous individuals are not a scarce resource.¹⁸²

Although not settled law, § 1125(a) of the Lanham Act¹⁸³ may be available to estates and heirs of famous and notable individuals. Such a claim would allege that a defendant’s use caused confusion such that members of the public believed the estate or heirs authorized a use of the deceased’s name or likeness. This would allow for allocative efficiencies and punish deceptive uses of a deceased and famous individual’s name or likeness.

15. U.S.C. § 1125(a) provides:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her

¹⁸¹ See 1 MCCARTHY *supra* note 14, § 2:1.

¹⁸² See Baird *supra*, note 73, at 414.

¹⁸³ 15 U.S.C. § 1125(a) (2012).

goods, services, or commercial activities by another person, or
 (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.¹⁸⁴

“Section 1125(a) thus creates two distinct bases of liability: false association, § 1125(a)(1)(A), and false advertising, § 1125(a)(1)(B).”¹⁸⁵ The United States Supreme Court recently directly addressed in *Lexmark* the issue of standing under the false advertising prong of § 1125, holding “[t]o invoke the Lanham Act’s cause of action for false advertising, a plaintiff must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant’s misrepresentations.”¹⁸⁶ In reaching that conclusion, the court engaged in a two-step inquiry: (1) whether the plaintiff fell within the zone of interest of § 1125; and (2) whether plaintiff’s injury was proximately caused by a violation of § 1125?¹⁸⁷

While this Article cannot identify a case on point since *Lexmark*, there are several examples of instances where lower courts have allowed a Lanham Act false association claim to be asserted by an estate.¹⁸⁸ One district court in California concluded that “[b]y

¹⁸⁴ *Id.*

¹⁸⁵ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1384 (2014).

¹⁸⁶ *Id.* at 1395.

¹⁸⁷ *See id.* at 1388.

¹⁸⁸ *See Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1018 (3d Cir. 2008) (“[B]ecause Facenda’s voice is a distinctive mark, the Estate owns the mark, and [defendant’s use of that mark] allegedly creates a likelihood of confusion that Facenda’s Estate [endorsed the product.]); *Cheever v. Acad. Chi., Ltd.*, 690 F. Supp. 281, 288, 88 n.15 (S.D.N.Y. 1988) (noting no apparent impediment to author John Cheever’s survivors’ § 43(a) claims and commenting that potential financial motive would not undermine claim based on literary reputation of deceased); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1375–76 (D.N.J. 1981) (concluding facts supporting finding of likelihood of confusion also supported § 43(a) claims brought by Elvis Presley’s estate); *Hicks v. Casablanca Records*, 464 F. Supp. 426, 433 (S.D.N.Y.1978) (assuming without comment that estate and assignees of

using the term ‘another person’ [in § 1125(a)], Congress selected language broad enough to encompass a claim by a deceased celebrity’s Estate or by any celebrity’s assignee.”¹⁸⁹ Whether or not the estates and heirs of celebrities have standing under § 1125 is an issue the higher courts may address in the future. For now, it seems quite feasible for such an estate to assert a § 1125 false association claim. This *might* obviate the need for a descendible right of publicity, as § 1125 could ensure the efficient allocation of resources and prevent consumer deception.

This Article does not endorse the notion that an estate *should* be able, as a matter of policy, to assert a § 1125 false association claim in perpetuity. That may be a result of the application of § 1125 standing for estates of deceased, famous individuals.¹⁹⁰ If courts do not ultimately find such standing under § 1125, the Authors do not take the view that a postmortem right of publicity is necessarily suboptimal policy, but in such a case the right should be limited in duration to no more than ten years. This would provide a reasonable “cool down” period for estates to prevent the onslaught of uses that would otherwise inevitably ensue with the recent death of a famous individual.¹⁹¹

Agatha Christie could bring a § 43(a) false endorsement claim, but dismissing it because there was no likelihood of confusion).

¹⁸⁹ Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1032 (C.D. Cal. 1998).

¹⁹⁰ Nor does this Article endorse the notion that § 1125 should displace the right of publicity. See Barbara A. Solomon, *Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Right of Publicity*, 94 TRADEMARK REP. 1202, 1228 (2004) (“To those who resist a federal right of publicity law because they believe that the Lanham Act provides sufficient coverage, the case law does not bear this out. The Lanham Act does not protect against misappropriation of one’s likeness, nor should it, given the different interests protected by the Lanham Act and by state right of publicity laws. To those who believe that a federal right of publicity statute would improperly intrude on First Amendment interests, this too is not borne out by the existing law, which recognizes a strong and rigorous First Amendment defense to right of publicity claims. If there is a consensus that one’s persona should be protected from unauthorized commercial use (and the fact that a majority of states have enacted a statute suggests there is), a federal statute to protect the right of publicity may be the only way to accomplish that goal. Clearly, the Lanham Act in its current incarnation is not a proper substitute.”).

¹⁹¹ Rothman, *supra* note 175, at 240 (“[T]he durational limit for a postmortem right of publicity that might be the most appropriate is one that grants heirs only a limited

The exact scope of the postmortem right of publicity is not as important as the principle that the postmortem right should be limited in duration and reach.¹⁹² Whether § 1125, a reasonable cool down period, or a non-descendible right provides that limitation is a matter we will leave for courts and legislatures.

C. The Right of Publicity Should be Limited to Enumerated Natural Characteristics

The scope of the right of publicity recognized by some courts today confuses protecting an individual's natural rights with protecting consumers from deception. The generally accepted test used to establish an infringement of the right of publicity is whether or not the plaintiff is "identifiable."¹⁹³ We support this test, but the ill-defined scope of identity allows plaintiffs to assert the right of publicity when a use does not make use of the plaintiff's identity in a way that affects her natural rights.¹⁹⁴ The right of publicity should only be actionable where a Plaintiff's name or visual likeness—the extent of the individual's natural rights—are identifiable.¹⁹⁵

postdeath period of rights in which the dignity interests of the survivors are most at issue and the impact on pre-death incentives is likely to be greatest.”).

¹⁹² See *id.* at 241 (“In the context of postmortem rights, the countervailing public interest in using a deceased person’s image will weigh more strongly against the interests of the heirs or devisees. Accordingly, countervailing speech and liberty interests will more often limit enforcement of publicity rights than in the context of *inter vivos* rights.”).

¹⁹³ 1 MCCARTHY, *supra* note 14, § 3:18 (“Right of publicity case law routinely states that plaintiff must plead and prove that defendant’s use ‘identifies’ plaintiff.”).

¹⁹⁴ See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1105 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460, 462–63 (9th Cir. 1988) (Advertiser hired singer to mimic Midler’s voice once Midler refused to participate in advertisement.); *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 833 (6th Cir. 1983).

¹⁹⁵ Several lawsuits, some successful and some failures, demonstrate the absurdity that ensues when plaintiffs are allowed to assert the right of publicity based on the identifiability of something other than the plaintiff’s name or visual likeness. See *Oliveira v. Frito-Lay, Inc.*, 251 F.3d 56, 64 (2d Cir. 2001) (singer claims violation of right of publicity when defendant uses musical composition that singer made famous); *White v. Samsung Elecs. Am.*, 971 F.2d 1395, 1396 (9th Cir. 1992); *Carson*, 698 F.2d at 839; *Robinson v. HSBC Bank USA*, 732 F. Supp. 2d 976, 983 (N.D. Cal. 2010) (plaintiff claimed violation of right of publicity when Defendant publishes picture of plaintiff’s house, because Plaintiff and his house are so closely associated); *Leopold v. Levin*, 259

As noted above, the scope of the right of publicity that we are advocating for recognizes that the right of publicity does have what may seem a dual purpose. Normatively, it is rooted in the right to protect (up to a point) one's identity; the right of publicity exists because there are instances where the right of privacy and deception-based restrictions do not adequately protect rights in a person's identity. For example, in the case of the unauthorized use of an accurate picture of a previously non-famous individual in advertisement, the right of publicity functions as an extension of privacy.¹⁹⁶ In other similar cases, the right allows a celebrity to manage commercial exploitation of her fame such as: the unauthorized T-shirts depicting celebrities in a life-like manner;¹⁹⁷ the unlicensed television broadcast of a performer's entire act;¹⁹⁸ and a use such as "Famous baseball pitcher Sam Spade may be the best in the league, but he has never tasted HIGH FIVE sports drink. Why don't you?"¹⁹⁹

*Jordan v. Jewel Food Stores*²⁰⁰ provides an excellent example of a situation where deception and privacy based restrictions would not provide a viable cause of action: it is very unlikely for consumers to be confused in to thinking that Michael Jordan sponsored or endorsed Jewel Food Stores based upon Jewel Food Stores' advertisement congratulating Michael Jordan for being inducted into the hall of fame.²⁰¹ Nor is Jordan's induction in to the hall of fame private information.

In such instances, the right of publicity serves to protect an individual's rights in their identity. Put differently, it allows individuals to exercise their autonomous right of self-definition. It allows

N.E.2d 250 (1970) (convicted murderer's right of publicity claim failed against book and movie authors based on the convicted murder's story).

¹⁹⁶ See *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (N.Y. 1902).

¹⁹⁷ See *Comedy III*, 21 P.3d at 800-01.

¹⁹⁸ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977).

¹⁹⁹ 5 MCCARTHY, *supra* note 2, § 28:14.

²⁰⁰ 743 F.3d 509 (7th Cir. 2014).

²⁰¹ See *id.* at 522 ("We note that the lone federal claim in the suit—a false-endorsement claim under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)—requires proof that Jewel's congratulatory ad caused a likelihood of confusion that Jordan was a Jewel-Osco sponsor or endorsed its products and services.").

for a life of solitude or a life of publicity. As noted earlier, it is difficult to imagine how asserting the right of publicity in any of the contexts just given benefits the public because the public is not protected—from being confused as to sponsorship or otherwise. The normative underpinning that this Article suggests is narrow but different: the right of publicity is based in a property-like right in one's name and likeness. That is the state's substantial interest. One should be allowed to assert that natural right so long as it yields to "important countervailing social polic[ies] which negate[] this natural impulse of justice"²⁰²—here, the First Amendment.

We have chosen an individual's name (including using signature as a name) and likeness as the extent of the natural rights in her identity partly because those are the two most important, immutable characteristics of identity. One could reasonably argue that voice is another one of those important, immutable characteristics that should be included in an individual's natural rights.²⁰³ We do not think including voice in the concept of identity for the right of publicity would necessarily be bad policy. Individuals often work

²⁰² 1 MCCARTHY, *supra* note 14, § 2:1.

²⁰³ See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983) (Kennedy, J. dissenting) ("I do not believe that the common law right of publicity may be extended beyond an individual's name, likeness, achievements, identifying characteristics or actual performances, to include phrases or other things which are merely associated with the individual, as is the phrase "Here's Johnny." The majority's extension of the right of publicity to include phrases or other things which are merely associated with the individual permits a popular entertainer or public figure, by associating himself or herself with a common phrase, to remove those words from the public domain."); *White v. Samsung Elecs., Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992) ("The term 'likeness' refers to a visual image not a vocal imitation." (citing *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988))); *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) ("Once the right of publicity is extended beyond specific physical characteristics, this will become a recurring problem: Outside name, likeness and voice, the things that most reliably remind the public of celebrities are the actions or roles they're famous for. A commercial with an astronaut setting foot on the moon would evoke the image of Neil Armstrong. Any masked man on horseback would remind people (over a certain age) of Clayton Moore. And any number of songs—"My Way," "Yellow Submarine," "Like a Virgin," "Beat It," "Michael, Row the Boat Ashore," to name only a few—instantly evoke an image of the person or group who made them famous, regardless of who is singing."); *Wendt v. Host Int'l, Inc.*, 197 F.3d 1284, 1286 (9th Cir. 1999) ("The right of publicity, as defined by the state courts, is limited to using a celebrity's name, voice, face or signature.") (citations omitted).

hard at crafting their voice to sound a certain way, and like the trademark holder who works hard to establish a brand, a Lanham act claim will protect most, if not all, “voice appropriation” claims.²⁰⁴ This then changes the test: The distinct sound of an individual’s voice, the unique fashion sense of an individual, or the bubbly personality of an individual are all choices that individual’s make, and other individuals should be free to make similar choices, unless there is consumer confusion.

In the United States, these choices are generally outside the scope of natural rights. Intellectual property protections in the United States are motivated by utilitarian concerns, not natural or moral rights, and the boundaries of the rights dictate the incentives the United States offers. In the context of copyright and patent law, this utilitarian motivation is present in the Constitution: [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁰⁵ Similarly, trademark law is primarily motivated by decreasing transaction costs and ensuring accountability, hence its normative roots in consumer protection.²⁰⁶

As a general matter, the United States rejects the notion that inventors, authors, and brand owners should be granted protection of their respective discoveries, writings, and business reputations or symbols because their work product is part of their personhood. The right of publicity, on the other hand, exists precisely to reify and commoditize the concept of personhood. The right of publicity is not a simple alternative to fill doctrinal gaps left by the Lanham Act and similar laws, where neither the utilitarian concern of preventing consumer confusion, nor natural rights in an individual’s identity are present.²⁰⁷ Instead, the right of publicity should be de-

²⁰⁴ *Carson*, 698 F.2d at 839 (Kennedy, J. dissenting) (“The existence of a cause of action under section 43(a) of the Lanham Act, 15 U.S.C.A. § 1125(a) (1976) and Michigan common law does much to undercut the need for policing against unfair competition through an additional legal remedy such as the right of publicity.”).

²⁰⁵ U.S. Const. art. I, § 8, cl. 8.

²⁰⁶ *Supra*, Section II.C.

²⁰⁷ Policy decisions have already been made by the Lanham Act and other related laws and those decisions should govern the limits of the use of name or likeness where natural

lineated to effect its true purpose: to protect rights in an individual's identity, whether unwanted fame or management of the commercial exploitation of a person's fame in cases where no consumer deception is present. We believe those rights, which one could call "natural," should extend to name and visual likeness, though perhaps a case can be made that they should extend to a limited number of other enumerated natural characteristics, such as voice.

Finally, we suggest that a federal legislative solution²⁰⁸ could be most appropriate to: (a) create a level playing field for the right of publicity which varies in scope and duration among the various states; (b) distinguish its purpose from trademark law; and (c) set proper limits in particular as to which characteristics can be protected, all against the backdrop of First Amendment considerations.

CONCLUSION

Conceiving the right of publicity as a derivative of or related to trademark law has led to serious errors by courts and commentators. It may even be a misnomer to label the right of publicity as a species of intellectual property. Any argument that the right of publicity somehow incentivizes individuals to pursue laudable careers is as disingenuous as the argument that the public benefits from a celebrity's ability to sue for monetary damages when a person or entity makes a non-private, non-deceptive use of an individual's likeness. The right of publicity should be delineated to effectuate its limited but legitimate purpose: to protect an individual's natural rights in her identity.

rights are not affected. We recognize, however that the Lanham Act only sets a floor of liability, and states may offer heightened protection. *See* 3 MCCARTHY, *supra* note 2, § 22:2 ("The federal Lanham Act does *not* occupy the field of trademark and unfair competition law in such a way that it would preempt parallel state law.").

²⁰⁸ Many have called for a federal right of publicity in the past. *See* Eric J. Goodman, *A National Identity Crisis: The Need for A Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. 227 (1999); Sean D. Whaley, "I'm A Highway Star": *An Outline for A Federal Right of Publicity*, 31 HASTINGS COMM. & ENT L.J. 257, 258 (2009); Kevin L. Vick & Jean-Paul Jassy, *Why A Federal Right of Publicity Statute Is Necessary*, 28 COMM. LAW. 14 (2011).