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Saving Face: Adopting a Right of Publicity to Protect North Carolinians in an Increasingly Digital World

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Saving Face: Adopting a Right of Publicity to Protect North Carolinians in an Increasingly Digital World*

Who steals my purse steals trash; 'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.

—WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3

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INTRODUCTION

The right of publicity is the right to control the use of one's identity.[1] It has traditionally been viewed as a "celebrity law suit"—a legal mechanism used to protect the commercial interest of a celebrity's image, name, or "likeness."[2] However, the modern ability to record and to photograph anything and everyone, combined with the rise of social media and the increasing tendency to "upload," "post," "like," "share," or "+1" everything around us has created a world in which anyone can become a "celebrity."[3] In fact, as of

1. *See* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 928 (6th Cir. 2003) ("The right of publicity . . . has been defined as the inherent right of every human being to control the commercial use of his or her identity."); J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3, at 3 (2013 ed. 2013).

2. *See* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983) ("The theory of the right is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity.").

3. The Internet is replete with instances of instant fame. For example, in 2013, Blake Wilson, better known as "BatDad," garnered over nine million viewers in three months for parodying Batman while giving out his fatherly wisdom. He now has a dedicated YouTube channel and a merchandising website. *See BatDad Blake*, YOUTUBE, http://www.youtube.com/channel/UCSjl0j6EUWMKFU8IU5yf7tA (last visited May 4, 2014). In 2010 Antoine Dodson found himself famous overnight following a news clip containing his impassioned warning to an assailant who had previously broken into Dodson's home and assaulted his sister. Dodson's interview was turned into a YouTube video and a song. *See* Elizabeth Gentle, *Overnight Internet Sensation Reacts to New-Found Fame*, WAFF 48 NEWS (July 30, 2010), http://www.waff.com/story/12901080/overnight-Internet-sensation-reacts-to-new-found-fame. However, not all Internet fame is positive or sought after. The recent phenomenon of so-called "revenge porn"—the practice of posting nude and intimate photos and videos of an ex-lover to humiliate them—brings unwanted fame to more and more victims every day. *See* Susan Moses, *Will Ohio Lawmakers Consider Revenge Porn Ban?* WKYC NEWS (Dec. 18, 2013), http://www.wkyc.com/story/news/crime/2013/12/17/revenge-porn-laws/4057881/ (detailing a recent case of revenge porn in Ohio).

November 11, 2013, if you have a Google Account, Google has reserved the right to use your name, photo, and any action you take on Google by displaying them in ads and in "other commercial contexts."[4] Facebook has a similar clause in its terms as well.[5] Thus, it is likely you have already unknowingly endorsed a whole host of products in a "celebrityesque" manner. Although Google and Facebook are blatant about the appropriation of your likeness for commercial purposes, others likely will not be.[6] In today's digital and open world where almost everything on the Internet can be downloaded, copied, manipulated, and distributed by anyone at any time, it is becoming increasingly difficult for individuals to control how their likenesses are used.

In response to this growing difficulty, many states have enacted right of publicity statutes or broadened the applicability of their privacy laws.[7] North Carolina has done neither. However, in recent years there has been growing momentum for North Carolina to adopt a statutory right of publicity. In fact, in 2009 the North Carolina

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4. In November of 2013, Google updated its Terms of Service. Most of these updates were minor and routine. However, in the middle of its updated Terms, Google inserted the following: "If you have a Google Account, we may display your Profile name, Profile photo, and actions you take on Google or on third-party applications connected to your Google Account (such as +1's, reviews you write and comments you post) in our Services, including displaying in ads and other commercial contexts." *Google Terms of Service*, GOOGLE, http://www.google.com/intl/en/policies/terms/ (last modified April 14, 2014). Google is expressly telling you that it plans on using your name, image, and actions—essentially your persona—for marketing purposes. If you own a Google Account, you are now a celebrity whose persona has viable commercial value.

5. *See Statement of Rights and Responsibilities*, FACEBOOK ¶ 10, https://www.facebook.com/legal/terms (last modified Nov. 15, 2013) ("You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you. If you have selected a specific audience for your content or information, we will respect your choice when we use it.").

6. *See, e.g.*, In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1271–72 (9th Cir. 2013) (detailing how video game maker EA Sports used various collegiate athletes images and likeness without their consent); *see also* Sonya Hamasaki, *California Man Charged in 'Revenge Porn' Case*, CNN (Dec. 10 2013), http://www.cnn.com/2013/12/10/justice/california-revenge-porn-arrest/ (describing how a California man exploited private images of various women to his advantage).

7. *See infra* Table 2 (showing that eleven states have adopted or revised a statutory right of publicity within the past twenty years). In addition, Arizona, Colorado, New Hampshire, South Carolina, and West Virginia have all expanded their common law to cover right of publicity actions within the last fifteen years. *See infra* Table 1 and corresponding notes.

General Assembly considered such a bill.[8] As recently as June 2013, the Sports and Entertainment Law Section of the North Carolina Bar Association published an article by well-known right of publicity activist Jonathan Faber.[9] In the article, Faber criticizes the proposed 2009 bill as being too weak and calls on North Carolina to enact an "undiluted" right of publicity statute.[10] However, the proposed 2009 statute and the "undiluted" statute promoted by Faber both fail to appreciate the changing landscape of technology and the potential for anyone to be a celebrity. This Comment focuses on the need for North Carolina to update its statutory law in order to protect the significant interest of all its citizens in controlling the use of their likenesses. In doing so, this Comment argues that North Carolina should consider the varied interests and rights at stake in crafting its right to publicity jurisprudence and adopt a statutory legal scheme that will adequately balance the growing interest North Carolinians have in protecting their likenesses with the traditional interests of the First Amendment.

Analysis proceeds in four parts. Part I introduces the right of publicity and describes its evolution out of the right of privacy. Part II explains the moral and the economic justifications for a right of publicity, highlighting how the right conflicts with the interests of expression and speech found in the First Amendment and how different jurisdictions have attempted to balance those interests. Part III then looks to how these competing interests have played out on the national level and examines the problems and benefits with the current national trend. Part IV presents the normative thesis of this Comment and examines how North Carolina's current privacy laws fail to adequately protect the privacy and pecuniary interests of its citizens. It then recommends a path forward, which includes adopting a statutory right of publicity in North Carolina that attempts to adopt the best parts of the national trend without strangling the First Amendment.

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8. H.B. 327, 2009–2010 Gen. Assemb., Reg. Sess. (N.C. 2009).

9. Jonathan Faber is an adjunct professor of law at Indiana University, founder and CEO of the Luminary Group, and a nationally recognized advocate of right of publicity claims. *See Jonathan L. Faber*, ROBERT H. MCKINNEY SCHOOL OF LAW (2014), http://mckinneylaw.iu.edu/faculty-staff/profile.cfm?Id=268; *Jonathan Faber*, LUMINARYGROUP, http://www.luminarygroup.com/executive-bios/ (last visited May 4, 2014).

10. Jonathan Faber, *Lessons Learned: Legislative Right of Publicity Efforts Throughout U.S. Could Be Instructive for North Carolina's Legislature*, FRONT ROW, June 2013, at 4, 6.

I. THE RIGHT OF PUBLICITY

A. *The Genesis*

As one commentator remarked, the right of publicity was "carved out of the general right of privacy," "[l]ike Eve from Adam's rib."[11] The right to privacy, in turn, was born out of an 1890 law review article by Samuel Warren and Louis Brandeis.[12] Troubled by new inventions capable of recording and photographing private acts and circulating them through the community,[13] Warren and Brandeis borrowed the term "privacy" from an English case, *Albert v. Strange*,[14] to coin what they described as the individual's "right to be let alone."[15] They reasoned that the right of privacy was a natural evolution of common law principles as applied to new developments.[16] As such, they argued that the violation of privacy should be recognized at common law as an actionable injury, like the common law injuries of assault, nuisance, libel, and slander.[17] Following the publication of the Warren and Brandeis article, courts split on the idea of a common law right to privacy. In fact, while some courts quickly accepted the idea,[18] it was the New York courts' rapid refusal to recognize a common law right of privacy[19] that drove New York to pass the nation's first privacy statute.[20]

However, it was not until fifty years after the first privacy statute was enacted that the right of publicity emerged. In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,[21] the Second Circuit

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11. MCCARTHY, *supra* note 1, § 5.61, at 539.

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

13. *Id.* at 195.

14. Albert v. Strange, (1849) 41 Eng. Rep. 1171 (Ch.) 1171–72, 1179. *Strange* involved a suit brought by Prince Albert to prevent the defendant from publishing etchings that he and Queen Victoria had drawn for their own entertainment. *Id.* Lord Cottenham ruled for Prince Albert and used the term "privacy" to define the right that had been violated. *Id.*

15. Warren & Brandeis, *supra* note 12, at 193.

16. *Id.*

17. *Id.* at 193–94.

18. *See, e.g.*, Pavesich v. New England Life Ins. Co., 50 S.E. 68, 73 (Ga. 1905) (holding that privacy was an individual right that could be violated).

19. *See, e.g.*, Roberson v. Rochester Folding Box Co., 64 N.E. 442, 447 (N.Y. 1902) ("An examination of the authorities leads us to conclude that the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence . . . .").

20. *See* N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2009); *see also* Denis O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437, 437–38 (1902) (detailing the public outcry against the Robertson ruling).

21. 202 F.2d 866 (2d Cir. 1953).

explicitly recognized the right of publicity as a distinct right separate from the right to privacy.[22] In *Haelan*, the trial court rejected the plaintiff's argument that it had acquired the exclusive use of a baseball player's photograph and held that the right of privacy was a nontransferable personal right.[23] The Second Circuit disagreed,[24] and in one stroke, the court carved the right of publicity out of the right of privacy. Writing for the court, Judge Jerome Frank stated, "We think that, in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph . . . ."[25] Judge Frank then noted that "[t]his right might be called a 'right of publicity.' "[26]

Immediately following its birth in *Haelan*, the right of publicity's popularity ebbed and flowed.[27] However, in 1977 the United States Supreme Court recognized the right of publicity as a valid state law claim,[28] and by the 1980s, the existence of the right was widely accepted.[29] Today, at least forty-one states have recognized the right of publicity by statute or through common law,[30] and the right has been incorporated into the Restatement (Third) of Unfair Competition.[31]

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22. *Id.* at 868.
23. *See id.* at 867–68.
24. *Id.* at 868.
25. *Id.*
26. *Id.* Following Judge Frank's christening of the right of publicity in *Haelan*, commentators jumped into the fray, and in 1954, Melville Nimmer published a law review article expanding Judge Frank's short sketch of the right of publicity into a full academic defense. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954). Oddly, an article written by William Prosser in 1960 has often been incorrectly attributed as the birth of the right of publicity. *See, e.g.*, Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 307, 313 (Cal. Ct. App. 2001) ("The common law right of publicity derives from the fourth category of invasion of privacy identified by Dean Prosser . . . ."); Andrew Beckerman-Rodau, *Toward a Limited Right of Publicity: An Argument for the Convergence of the Right of Publicity, Unfair Competition and Trademark Law*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 132, 139 (2012) ("The appropriation action identified by Prosser appears to have been the basis for the right of publicity. . . ."). However, Prosser's article, which defined the right of privacy into four separate torts, was published six years after Nimmer's article and seven years after *Haelan*. *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).
27. *See* MCCARTHY, *supra* note 1, §§ 1:29–31, at 59–65.
28. Zachinni v. Scripps Howard Broad. Co., 433 U.S. 562, 566–67 (1977).
29. *See* MCCARTHY, *supra* note 1, § 1:31, at 65 ("By the mid 1980s, the initial phase of questioning what the right of publicity was and why it should exist passed largely into history.").
30. *See infra* Table 2.
31. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46–49 (1993).

B. *Distinguishing the Right of Publicity from the Right to Privacy*

Even though the right of publicity has been widely accepted as distinct from the right of privacy, the two are often still conflated.[32] While it is true that the right of publicity and the right to privacy derive from a common ancestor,[33] they are separate causes of action aimed at protecting separate interests.[34]

The right to privacy focuses on an individual's right to be free from unwanted attention and protects an individual from outside parties publicizing his personal information.[35] It is a personal right primarily concerned with a specific person's feelings.[36] Privacy violations are tortious in nature and, as such, remedies focus on compensating the victim for resulting mental, emotional, and reputational injuries.[37] In contrast, the right of publicity is concerned with the unauthorized use of an individual's identity.[38] The remedies for right of publicity violations focus on recovering the economic value of a persona, as opposed to compensating for emotional or mental anguish.[39]

For instance, the right of publicity and the right of privacy would treat an individual who willingly publishes a photo on a public social media site such as Facebook or Google+ differently. The user will have a hard time recovering damages under a privacy action because proving that emotional or mental anguish resulted from the use of a picture that she intentionally published on a public site would be

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32. Much of the confusion around the two terms stems from two events. The first is New York's steadfast insistence that their privacy statute encompasses a right to publicity. *See* Stephano v. News Grp. Publ'ns, Inc., 474 N.E.2d 580, 584 (N.Y. 1984). The second is an article written by William Prosser in which he equates the right of publicity with the privacy tort of misappropriation. Prosser, *supra* note 26, at 406–07 (citation omitted) ("It seems sufficiently evident that appropriation is quite a different matter from intrusion, disclosure of private facts, or a false light in the public eye .... Its proprietary nature is clearly indicated by a decision of the Second Circuit that an exclusive license has what has been called a 'right of publicity ....' ").

33. *See supra* Part I.A.

34. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 834 (6th Cir. 1983) ("[T]he right of privacy and the right of publicity protect fundamentally different interests and must be analyzed separately.").

35. *See id.*

36. *See* MCCARTHY, *supra* note 1, § 1:11, at 17.

37. *See id.* § 11:26, at 747.

38. *See id.* § 1:3, at 3.

39. *See generally id.* §§ 11:30–31, at 762–64 (noting that damages for a violation of the right of publicity are typically based on commercial or economic injury, rather than mental or emotional injury).

difficult, to say the least.[40] In contrast, to recover under a right of publicity action, the burden of proving mental or emotional injury is removed, and all the plaintiff must prove is unauthorized use.[41]

This distinction between the "private" and "public" person is one of the main reasons the right of publicity developed in the first place.[42] As Melville Nimmer highlighted in his article, the traditional law of privacy was intended to protect the private person from unwanted intrusion and was not designed to protect the public person who intentionally puts herself before the public.[43] Conversely, the right of publicity evolved specifically to protect the public person by providing a means by which she could recover, not for emotional or mental anguish caused by an invasion of privacy, but for pecuniary damage caused by unauthorized use of her image.[44]

II. BALANCING COMPETING INTERESTS

As one commentator remarked, "[l]egal rights typically do not exist in a vacuum .... [T]he unintended consequences or externalities that result from any legal right create collisions with competing rights."[45] This is certainly true of the right of publicity. Since its inception, many commentators have argued that the right of publicity intrudes upon the freedoms of speech and expression protected by the First Amendment and that the right should be limited in its

40. In fact, if it was posted on Google+ or Facebook one explicitly grants the companies the right to use one's image. *See supra* notes 4 and 5. Thus, it would be hard to argue that having a third party use that same photograph to promote a product is somehow more mentally or emotionally damaging. This is especially true if it is to promote a product that one has publicly "liked" or otherwise recommended.

41. *See* Shamsky v. Garan, Inc., 632 N.Y.S.2d 930, 933 (N.Y. Sup. Ct. 1995) ("[The right of publicity] 'consists of only two elements: the commercial use of a person's name or photograph and the failure to procure the person's written consent for such use.' " (citation omitted)); *see also* Zacchini v. Scripps-Howard Broad. Co., 351 N.E.2d 454, 458 (Ohio 1976), *rev'd on other grounds*, 433 U.S. 562 (1977) ("The interest which the law protects is that of each individual to the exclusive use of his own identity, and that interest is entitled to protection from misuse whether the misuse is for commercial purposes or otherwise.").

42. Nimmer, *supra* note 26, at 204–06.

43. *Id.*

44. *See id.* at 203–04; *see also* Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 976 (10th Cir. 1996) ("Publicity rights ... are meant to protect against the loss of financial gain, not mental anguish."); MCCARTHY, *supra* note 1, §§ 11:30–31, at 766–67 (noting that damages for right of publicity violations are based on commercial value).

45. Beckerman-Rodau, *supra* note 26, at 148.

application, if not altogether abolished.[46] However, others argue that the right of publicity protects a fundamental right "to the fruit of [one's] labors."[47] This argument presumes that there is an innate right to own one's identity and persona[48] and that the right should be broadly applied. This Part discusses the most popular justifications for adopting a right of publicity and the competing concerns of the First Amendment. It then provides an overview of how different jurisdictions have balanced these interests.

A. *Justifications for a Right of Publicity*

Recognizing the need for a legal mechanism by which public personas could control the use of their identity, Nimmer provided the first justification for the right of publicity in his 1954 article.[49] Relying on the axiom of Anglo-American jurisprudence "that every person is entitled to the fruit of his labors,"[50] Nimmer argued that "unless there are important countervailing public policy considerations," individuals should be entitled to the fruit of their public personas, which are often created only through "expend[ing] considerable time, effort, skill, and even money."[51] In the ensuing decades, justifications for the right of publicity have become more wide-ranging and include both economic and moral justifications.

Commentators have articulated various economic justifications for a right of publicity.[52] Most rationales revolve around the

46. *See, e.g.*, Martin Luther King Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prod. Inc., 296 S.E.2d 697, 708 (Ga. 1982) (Welter, J., concurring) (stating that the right of publicity "created an open-ended and ill-defined force which jeopardizes a right of unquestioned authenticity—free speech"); Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 35, 53–54 (1998) ("Publicity rights, in other words, are a kind of content-based regulation of speech.").

47. Nimmer, *supra* note 26, at 216.

48. *See generally* Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383 (1999) (describing how Kantian philosophy and current cultural mores support a moral argument that individuals have an innate right to control how their identity is used).

49. *See* Nimmer, *supra* note 26, at 216.

50. *Id.*

51. *Id.*

52. For various economic theories, see, for example, Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 975 (10th Cir. 1996) ("People deserve the right to control and profit from the commercial value of their identities because, quite simply, they've earned it."); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 837 (6th Cir. 1983) (noting the theory of unjust enrichment as supportive of the right of publicity); Lugosi v. Universal Pictures, 603 P.2d 425, 438 (Cal. 1979) (Bird, J., dissenting) ("Often

"utilitarian" or "tragedy of the commons" theories. The utilitarian theory argues that when individuals are granted an exclusive right to the product of their labor, they become more productive and more inventive than they otherwise would be.[53] The theory posits that, because an individual cannot possibly capture the entire economic benefit created from his increased productivity and innovation, this uncaptured surplus spills over into society and ultimately benefits the public.[54] As such, supporters of a broad right of publicity argue that, just as other property rights incentivize more productive labor,[55] the right of publicity incentivizes development of a valuable persona.[56] This incentive in turn drives individuals to generate performances, works, skills, or other products they otherwise would not have created, which not only enhance their own persona, but also benefit society at large either aesthetically, economically, or both.[57]

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considerable money, time and energy are needed to develop one's prominence in a particular field. Years of labor may be required before [one sees] . . . an economic return through some medium of commercial promotion."); Christopher Pesce, *The Likeness Monster: Should the Right of Publicity Protect Against Imitation?*, 65 N.Y.U. L. REV. 782, 792–93 (1990) ("The right serves to prevent the unjust enrichment of commercial appropriators . . . .").

53. *See* JEREMY BENTHAM, THE THEORY OF LEGISLATION 68–69 (Richard Hildreth trans., Oceana Publ'ns, Inc. 1975) (1789) (describing the basic general tenets of the incentive-based theory).

54. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 132 (1979) ("The individual may be completely selfish, but . . . in a well-regulated market economy . . . the social product of the productive individual . . . will exceed his earnings, [and] such an individual cannot help creating more wealth than he takes out of society.").

55. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (8th ed. 2011) (discussing how property rights encourage individuals to use resources more productively).

56. *See Lugosi*, 603 P.2d at 441 (Bird, J., dissenting) ("[P]roviding legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition . . . ."); Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1128 (1980) ("The social policy underlying the right of publicity is encouragement of individual enterprise and creativity by allowing people to profit from their own efforts.").

57. *See, e.g.*, *Here's Johnny*, 698 F.2d at 837 ("Vindication of the right [of publicity] will tend to encourage achievement in Carson's chosen field."); Steven J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y 111, 118 (1980) ("Like the copyright and patent regimes, the right of publicity may foster the production of intellectual and creative works by providing the financial incentive for individuals to expend the time and resources necessary to produce them."). *But see* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 208–10 (1993) (arguing that incentives generated by the right of publicity are

The second economic justification offered by proponents of the right of publicity focuses on avoiding the devaluation of a person's identity through overuse.[58] This theory suggests that in the same way that overgrazing of cattle on the proverbial tragic commons would render the land valueless to the herdsmen,[59] not recognizing a right of publicity would render an individual persona economically valueless through overuse.[60] Essentially, the production of too many low value or low quality products will crowd out the production of the valuable ones.[61] In contrast, just as restricting the use of the commons optimized its value for herdsmen,[62] limiting the use of a person's likeness optimizes the economic value of her identity.[63]

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unnecessary because: (1) the reward of having a valuable identity is sufficient incentive itself; (2) restricting the right of publicity would actually increase the incentive for individuals to create primary goods; and (3) society would be better served by reducing the incentive to seek fame rather than increasing it).

58. *See* Matthews v. Wozencraft, 15 F.3d 432, 437–38 & n.2 (5th Cir. 1994) ("Without the artificial scarcity created by the protection of one's likeness, that likeness would be exploited commercially until the marginal value of its use is zero .... [I]t soon would be overused, as each user will not consider the externality effect his use will have on others."). Put another way, the right of publicity is "needed to ensure that publicity assets are not wasted by a scramble to use them up as quickly as possible." Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 98 (1994).

59. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (detailing the classic application of the tragedy of commons theory).

60. *See* Grady, *supra* note 58, at 103–04, 126 (1994) (arguing that without a right of publicity a celebrity's publicity assets would rapidly dissipate by means of overuse).

61. *See id.* at 101–02. For example, the popular singer Tom Waits employs a very unique vocal style. If third parties could copy his voice and style for their own use, the market would quickly become saturated and the public would grow tired of hearing it, which would negatively impact the economic value of Waits's actual performances. Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1110 (9th Cir. 1992) (noting that allowing Frito-Lay to run a commercial featuring a sound-alike performer without Waits's consent would saturate Waits's audience and likely "injure [Waits] commercially"); *see also* Lahr v. Adell Chem. Co., 300 F.2d 256, 257, 259 (1st Cir. 1962) (noting that a commercial featuring a cartoon voiced by someone who specialized in mimicking the plaintiff's voice, "saturated [the] plaintiff's audience to the point of curtailing his market").

62. *See* Hardin, *supra* note 59, at 1245, 1248 (arguing that restricting use of the commons preserves its value for society as a whole).

63. *See* Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 411 (1978) ("There is a perfectly good economic reason for assigning the property right in a photograph used for advertising purposes to the photographed individual: this assignment assures that the advertiser to whom the photograph is most valuable will purchase it. Making the photograph the communal property of advertisers would not achieve this goal."). *But see* Madow, *supra* note 57, at 224 ("Advertisers will use A's photograph until it has been squeezed dry of advertising value .... [But] [w]e are not dealing here with a nonrenewable natural resource like land .... After all, there would be no 'tragedy' in the classic parable if the herdsmen, after depleting their common pasture, could simply move on to another one.").

Advocates of the right of publicity have also advanced two main moral justifications for the right of publicity. The first of these follows the Lockean moral theory that "every person is entitled to the fruit of his labors."[64] The argument is largely self-explanatory: if an individual puts in the effort and the work to cultivate a commercially valuable identity, then he should be entitled to the economic benefit derived from that identity.[65]

The second theory is grounded in the idea that a person should own his identity, not because he has earned it, but because "[i]dentity [is] something intrinsic to the individual."[66] As articulated by Alice Haemmerli, proponents of this view offer a moral justification based on the philosophy of Immanuel Kant rather than John Locke.[67] Advocating "a property right based on human freedom,"[68] Haemmerli argues that identity should remain "subject to individual control as an autonomy-based property right, no matter what or who has affected its level of fame."[69] Essentially, the argument is an academic extension of the innate feeling that, regardless of circumstance, every person should have the right to control his own identity and persona.[70] Under this view, it is "damage to the human

64. Nimmer, *supra* note 26, at 216. For the origination of Lockean moral theory, see generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT 44 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

65. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977) (articulating the state's interest in enforcing a right of publicity as "focusing on the right of the individual to reap the reward of his endeavors"). Critics of this justification often point out, however, that fame is often unearned. Madow, *supra* note 57, at 179 ("Plenty of people become famous nowadays through sheer luck, through involvement in public scandal, or through criminal or grossly immoral conduct."). Furthermore, critics argue, even the most successful identities owe their success to factors over which they have no control or to others who helped them along the way. *See id.* at 184–95 (detailing how celebrity images are not the product of labor). However, this argument is neither novel nor persuasive, as almost all work is constructed on the shoulders of those who came before. *See* Emerson v. Davies, 8 F.Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436) ("[I]n literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout . . . ."); *see also* ROBERT BURTON, THE ANATOMY OF MELANCHOLY 25 (Holbrook Jackson ed., N.Y. Review of Books 2001) (1628) ("A dwarf standing on the shoulders of a Giant may see farther than a Giant himself; I may likely add, alter, and see farther than my predecessors . . . .").

66. Haemmerli, *supra* note 48, at 431.

67. *See id.* at 390.

68. *Id.* at 429.

69. *Id.* at 431.

70. *See id.* at 418, 420–28 (discussing the philosophical underpinnings of having a property right in one's persona).

spirit,"[71] not to economics, that is at issue. This is perhaps best summarized in a statement made over a hundred years ago by Justice Andrew J. Cobb:

> The knowledge that one's features and form are being used ... and displayed in ... advertisements ... brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him; and, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master; and ... no one can be more conscious of his enthrallment than he is.[72]

The idea that one's identity belongs to oneself is a strong one, and the thought of someone else having free reign to use one's likeness without permission makes even the "individual of ordinary sensibility" uncomfortable.[73] Yet, on the other hand, equally uncomfortable is the thought of curtailing or censoring the fundamental right of free speech.

B. *First Amendment Concerns*

Commentators have articulated many reasons why the right of publicity should be limited in its application or even abolished.[74] The two most prominent arguments are preemption by federal copyright law and infringement of the First Amendment. While preemption arguments have enjoyed some limited success, they have largely been ineffective in the courts.[75] Rather, it is the First Amendment arguments that have carried the most weight.[76]

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71. Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 166.

72. Pavesich v. New England Life Ins., Co., 50 S.E. 68, 80 (Ga. 1905).

73. *Id.*

74. *See generally, e.g.*, Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365 (1992); Madow, *supra* note 57; David Tan, *Political Recoding of the Contemporary Celebrity and the First Amendment*, 2 HARV. J. SPORTS & ENT. L. 1 (2011); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003).

75. *See, e.g.*, Dryer v. Nat'l Football League, 689 F. Supp. 2d 1113, 1121–22 (D. Minn. 2010) (rejecting preemption of right of publicity claims by federal copyright and trademark laws); *see also* MCCARTHY, *supra* note 1, § 11:50, at 845 (stating that the majority rule is that a state-based right of publicity is not preempted by federal copyright law); Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C.

The First Amendment protects freedom of expression and speech[77] and, as many legal minds have noted, is essential to a democratic society.[78] Critics argue that, by banning the use of another's image or likeness, the right of publicity infringes upon the freedom of speech protected by the First Amendment and is imposed at the expense of expression and creativity.[79] Judge Alex Kozinski of the Ninth Circuit explains this viewpoint in *White v. Samsung Electronics America*.[80] In *White*, Vanna White, the Wheel of Fortune hostess, sued Samsung over a VCR advertisement.[81] Judge Kozinski dissented from the court's opinion that White's right of publicity had been violated by arguing that the right of publicity stifles creativity and is "imposed at the expense of future creators and of the public at

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DAVIS L. REV. 199, 225–26 (2002) (noting that few courts have found the right of publicity to be preempted by copyright law). *But cf.* Ahn v. Midway Mfg. Co., 965 F. Supp. 1134, 1138 (N.D. Ill. 1997) (holding that federal copyright law does preempt a state right of publicity).

76. *See, e.g.*, C.B.C. Distrib. & Mktg. Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 823–24 (8th Cir. 2007) (holding that while a prima facie right of publicity claim existed, it was superseded by the First Amendment); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 976 (10th Cir. 1996) (holding that First Amendment concerns trumped the players' right of publicity interests).

77. U.S. CONST. amend. I.

78. Justice Louis Brandeis noted:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties.... They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people, that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Whitney v. California, 274 U.S. 357, 375 (1927). Furthering Justice Brandeis's analysis on the topic, Justice Thurgood Marshall noted that the "First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress such expression would be an 'affront to the individual's worth and dignity.' " Procunier v. Martinez, 416 U.S. 396, 427 (1974).

79. *See* Volokh, *supra* note 74, at 929 ("But, when applied to expression 'my property' is another way of saying 'legally forbidden to be another's speech.' "); Zimmerman, *supra* note 46, at 53–54 ("Publicity rights, in other words, are a kind of content-based regulation of speech.").

80. 971 F.2d 1395 (9th Cir. 1992), *reh'g denied*, 989 F.2d 1512 (9th Cir. 1993).

81. *Id.* at 1396.

large ...."[82] He then went on to explain, "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 force it's supposed to nurture."[83]

Three years after Kozinski's dissent in *White*, the Tenth Circuit applied Kozinski's reasoning in *Cardtoons, L.C. v. Major League Baseball Player's Association*.[84] In *Cardtoons*, the court was asked to determine whether cartoon-like trading cards, in parody of then-popular baseball cards, violated the baseball players' right to publicity.[85] The court reasoned that because the use of the baseball players' likenesses was for "social commentary" purposes and not a "purely commercial" purpose as in *White*,[86] the cards were worthy of First Amendment protection as "an important form of entertainment and social commentary."[87] The court explained further:

> 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.[88]

Since then, courts have gone on to hold that the right of publicity does not apply if the use of a person's identity is sufficiently newsworthy, transformative, or expressive.[89] However, these rulings have done little to ease the tension between the First Amendment

82. White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1516 (9th Cir. 1993) (Kozinski, J., dissenting); *see also id.* at 1513 ("Overprotecting [the right of publicity] is as harmful as underprotecting it. Creativity is impossible without a public domain.").

83. *Id.* at 1513.

84. 95 F.3d 959 (10th Cir. 1996).

85. *Id.* at 963–64.

86. *Id.* at 969–70.

87. *Id.* at 976.

88. *Id.*

89. *See, e.g.*, ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 937–38 (6th Cir. 2003) (holding that the expressive elements of painting of Tiger Woods outweighed any right of publicity concerns); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1185–86 (9th Cir. 2001) (holding that the First Amendment allows magazines to use celebrities' names and likeness in feature articles); Comedy III Prod., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 811 (Cal. 2001) (holding that an artist's rendition of the Three Stooges was not sufficiently "transformative" to outweigh any right of publicity concerns).

and the right of publicity,[90] and courts and states have continued to struggle with how to balance these competing interests.[91]

C. *The Balancing Act*

In response to changing technology and a desire to extend protection to public as well as private personas, various states began adopting right of publicity statutes or recognizing the right through their common law.[92] The breadth and depth of protection granted by each state and how it balances the competing interests varies substantially.[93] By way of comparison, this subpart provides an overview of how New York, California, Tennessee, and Georgia—the four states with the longest history of right of publicity claims[94]—have dealt with right of publicity issues and how courts have attempted to balance the competing interests of the right of publicity and the protections of the First Amendment.

1. New York

New York courts do not recognize a common law right to publicity.[95] However, New York's statutory right of publicity developed out of a common law ruling in the 1902 case, *Roberson v. Rochester Folding Box Co.*[96] In that case, the defendant used a private

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90. *See ETW Corp.*, 332 F.3d at 931 ("There is an inherent tension between the right of publicity and the right of freedom of expression under the First Amendment."); Jeremey T. Maar, Comment, *Constitutional Restraints on State Right of Publicity Laws*, 44 B.C. L. REV. 863, 871 (2003) ("The right of publicity's restriction on the unauthorized commercial use of one's identity prohibits certain forms of expression; it therefore potentially conflicts with the freedom of speech the First Amendment seeks to protect.").

91. Although originally speaking of the right of privacy, Judge Cobb's statement extends to publicity as well:

> The stumbling block which many have encountered in the way of a recognition of the existence of a right of privacy [publicity] has been that the recognition of such a right would inevitably tend to curtail the liberty of speech and of the press. The right to speak and the right of privacy [publicity] have been coexistent. Each is a natural right, each exists, and each must be recognized and enforced with due respect for the other.

Pavesich v. New England Life Ins., Co., 50 S.E. 68, 73 (Ga. 1905).

92. *See infra* Table 1 (providing a complete list of states and their current laws regarding the right of publicity).

93. *See infra* Table 1.

94. *See infra* Table 1.

95. *See* Stephano v. News Grp. Publ'n, Inc., 474 N.E.2d 580, 584 (N.Y. 1984) (holding that any "right of publicity" in New York was encompassed under its Civil Rights Privacy Law).

96. 64 N.E. 442 (N.Y. 1902).

picture of the plaintiff to produce over 25,000 posters advertising the defendant's baking flour.[97] The court held that in the absence of legislation, the plaintiff did not have a valid cause of action.[98] This decision caused immense public outcry, and within a year, the New York Legislature passed sections 50 and 51 of the Civil Rights Law entitled "Right of Privacy."[99] While the New York courts have steadfastly insisted that there is no right of publicity statute in New York,[100] the protections enumerated in the state's "Right of Privacy" statute are indistinguishable from those protected under a common law right of publicity.[101]

In order to establish a right of privacy claim in New York, a plaintiff must demonstrate that the defendant (1) used the plaintiff's name, portrait, picture, or voice; (2) for the purposes of advertising or trade; and (3) did so without the plaintiff's written consent.[102] The plaintiff can recover damages for any injuries, and if the defendant knowingly used the plaintiff's name, portrait, picture, or voice in an unauthorized manner, the jury can also award "exemplary damages."[103]

In an effort to accommodate the First Amendment interest, the New York courts have recognized some limitations on their right of publicity law, including a newsworthiness and public interest exception,[104] an incidental use exception,[105] the application of the

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97. *Id.* at 442.

98. *Id.* at 447–48. The court also noted that "others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes . . . ." *Id.* at 443.

99. Lerman v. Flynt Distrib. Co., 745 F.2d 123, 129 (2d Cir. 1984); Denis O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437, 437–38 (1902) (describing the public outrage following the *Roberson* decision).

100. *See Stephano*, 474 N.E.2d at 584 (holding that any "right of publicity" in New York was encompassed under its Civil Rights Privacy Law).

101. In fact, *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), the first case to coin the term "right of publicity," was a federal case interpreting New York law, and the federal courts continued to find a separate right of publicity in New York until *Stephano* explicitly rejected the right of publicity in 1984. *See* Madow, *supra* note 57, at 144 n.76, 172.

102. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2014).

103. *Id.*

104. *See* Davis v. High Soc'y Magazine, Inc., 457 N.Y.S.2d 308, 313 (N.Y. App. Div. 1982) ("It has long been recognized that use of a name or picture by the media in connection with a newsworthy item is protected by the First Amendment . . . .").

105. *See* Preston v. Martin Bergman Prod., Inc., 765 F. Supp. 116, 119 (S.D.N.Y. 1991) (finding that the image of a woman shown in the opening scenes of a motion picture was not actionable because her appearance was incidental).

statute to commercial uses only,[106] and a requirement that the reference to the plaintiff be clear and recognizable.[107]

2. California

California has both a common law and a statutory right to publicity. The common law right of publicity was first addressed in California in *Lugosi v. Universal Pictures*.[108] In that case, the widow and son of movie actor Bela Lugosi sued Universal Pictures to prevent Universal from selling and marketing Count Dracula products, which had been made popular by Lugosi's portrayals of the character.[109] The court found that a right of publicity existed, but that the right was only descendible and exercisable after Lugosi's death if the right had been exercised at some point during his life.[110] In this case, it had not, and therefore the claim was denied.[111]

In response, California's legislature created a statutory right to publicity that does not require exercising the right during life and extends seventy years after the death of the person whose likeness is in question.[112] The statutory right provides protection against "knowing" uses of a person's name, voice, signature, photograph, or

106. *See* N.Y. CIV. RIGHTS LAW § 50 (limiting the application of the statute to "advertising purposes"); *see also* Arrington v. New York Times Co., 434 N.E.2d 1319, 1321–22 (N.Y. 1982) (holding that the statute only applies to commercial use of an individual's name or likeness).

107. Negri v. Schering Corp., 333 F. Supp. 101, 103 (S.D.N.Y. 1971).

108. 603 P.2d 425 (Cal. 1979).

109. *Id.* at 426–27.

110. *Id.* at 430–31.

111. *Id.*

112. In his dissent to the *Lugosi* case, Justice Bird remarked, "The weight of authority holds that an individual need *not* exercise one's right of publicity 'to protect it from use by others or to preserve any potential right of one's heirs.' " *Id.* at 477 (Bird, J., dissenting) (quoting Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 846 (S.D.N.Y. 1975)). Bird also suggested that the right of publicity should be descendible for fifty years after the death of the individual in question. *See id.* Just five years later, the California legislature passed its right of publicity statute and followed Justice Bird's advice, making the right descendible for fifty years following the death of the person in question. Act of May 25, 1988, ch. 113, sec. 2, § 990(h), 1988 Cal. Stat. 463, 466. This was later amended to seventy years. *See* Act of Oct. 10, 1999, ch. 998, sec. 101, § 990(h), 1999 Cal. Stat. 7616, 7618 (codified at CAL. CIV. CODE § 3344.1 (West 2014)). However, to qualify for application of the posthumous right, the holder of a deceased person's right of publicity must register the claim with California's Secretary of State. CAL. CIV. CODE § 3344.1(f) (West 2014). Additionally, the rights-holder cannot recover damages for any use that occurs before registration, *id.* § 3344.1(f)(1), and to qualify under the statute, the deceased person's right of publicity must have had "commercial value at the time of his or her death, or because of his or her death." *Id.* § 3344.1(h).

likeness for various commercial purposes.[113] However, the simple use of a person's likeness in connection with a commercial product does not violate the statute.[114] Rather, the use has to be specifically for "advertising" purposes as defined by the statute.[115] Thus, the statute imposes a three-step test that requires the following: (1) a "knowing" use of the plaintiff's identity; (2) use for "advertising" purposes; and (3) a direct connection between the use and the commercial purpose.[116]

Conversely, under California's common law right of publicity a plaintiff must prove the following: (1) the defendant's appropriation of plaintiff's "identity" for defendant's advantage; (2) lack of plaintiff's consent; and (3) resulting injury.[117] Courts have interpreted "identity" broadly and the term encompasses more than it does under the statutory right of publicity.[118] For example, a picture of a distinctly decorated racecar where the driver is not visible would not violate the statute, but it does violate the common law right.[119] Additionally, the Ninth Circuit has suggested that under certain circumstances the common law right is not limited exclusively to commercial uses of the plaintiff's identity.[120]

Plaintiffs can bring actions under both the statutory right and the common law right,[121] and most do.[122] However, both the statutory and the common law rights are subject to various First Amendment exceptions: under the common law there is an exception for

113. *Id.* § 3344(a).

114. *See id.* § 3344(e).

115. *Id.*

116. *See, e.g.*, Newcombe v. Adolf Coors Co., 157 F.3d 686, 692 (9th Cir. 1998).

117. *See* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992).

118. *See* Waits v. Frito-Lay, 978 F.2d 1093, 1098–1100 (9th Cir. 1992) (holding that imitating someone's voice may violate the common law right); *White*, 971 F.2d at 1397–99 (holding that a robot designed to look like someone may violate the common law right, even if it is not sufficiently similar to violate the statute).

119. *See* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir. 1947) (holding that a race car driver could have a property interest in his own identity).

120. *See* Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1186 (9th Cir. 2001) (holding that under certain circumstances a plaintiff can recover damages for noncommercial speech if he or she can show that the speaker acted with "actual malice").

121. CAL. CIV. CODE § 3344(g) (West 2014).

122. The strategy behind this is that under the statute, the plaintiff, if successful, receives at minimum $750.00, but can also receive punitive damages, profits attributable to the unauthorized use, and attorney's fees. *See id.* § 3344(a). Meanwhile, under the common law, the plaintiff can simultaneously recover for "injury to peace, happiness, and feelings." *See, e.g.*, Newcomb v. Adolf Coors Co., 157 F.3d 686, 689 (9th Cir. 1998); Wendt v. Host Int'l, Inc., 125 F.3d 806, 810–11 (9th Cir. 1997); *Waits*, 978 F.2d at 1103.

"expressive works, whether factual or fictional";[123] and under the statutory law there are express exceptions for any use in a "play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value," or an advertisement for any of these works.[124]

3. Tennessee

Like California, Tennessee recognizes both a common law right to publicity and a similar statutory right.[125] Like California, Tennessee also made the right both freely transferable and descendible.[126] However, Tennessee differs from California in that it limits coverage to a "name, photograph or likeness."[127] Also, it does not require registration by the heirs of the right upon the death of the individual.[128] Rather, it provides that the heirs have the sole right to use the publicity rights during the first ten years following the death of the individual.[129] Then, following the ten-year period, there is a grace period of two years in which the estate can still claim the right by using it. If the heirs claim the right in this period, then the right permanently belongs to the estate; if not claimed, then it enters the public domain.[130] Tennessee provides First Amendment exceptions to its right of publicity for the use of a person's "name, photograph or likeness ... in connection with any news, public affairs, or sports broadcast or account."[131]

4. Georgia

Georgia has no statutory right of publicity; however, it has a well-developed common law right.[132] In *Martin Luther King, Jr.*

123. *See* Daly v. Viacom, 238 F. Supp. 2d 1118, 1123 (N.D. Cal. 2002).

124. *See* CAL. CIV. CODE § 3344.1(a)(2) (listing several mediums of entertainment and stating that they are not to be considered under the statute if they are a "dramatic, literary, or musical work").

125. TENN. CODE ANN. §§ 47-25-1101 to -1108 (2012) (establishing a statutory right); State *ex rel.* Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89, 97 (Tenn. Ct. App. 1987) (recognizing a common law right); *see also infra* Table 1.

126. TENN. CODE ANN. § 47-25-1103 (2012).

127. *Id.* § 47-25-1103(a).

128. *Id.*; *see also id.* § 47-25-1104 (explaining the conditions of descendibility).

129. *Id.* § 47-25-1104.

130. *Id.* § 47-25-1104(b)(2).

131. *Id.* § 47-25-1107(a).

132. *See* Martin Luther King, Jr. Cntr. for Soc. Change, Inc. v. Am. Heritage Prod., Inc. 296 S.E.2d 697, 703 (Ga. 1982) ("Therefore, we hold that the appropriation of another's

Center for Social Change, Inc. v. American Heritage Products, Inc.,[133] the Supreme Court of Georgia answered three certified questions from the Eleventh Circuit regarding the right of publicity in Georgia: (1) does the right of publicity exist as a right independent of the right of privacy; (2) does the right survive the death of the owner; and (3) does the right have to be exploited during life to be descendible?[134] In response, the Georgia court held (1) that the right of publicity was discrete from the right of privacy; (2) that it was property and was thus inheritable and devisable; and (3) that the owner of the right did not have to use it during life for it to survive his death.[135] Georgia's right of publicity extends only to a person's name and likeness and only protects against unauthorized uses of a person's identity for financial gain.[136] It currently only provides a First Amendment exception for "newsworthiness."[137]

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While each state arrived at separate conclusions about the basic questions of whether or not the right of publicity should be a property right, extend beyond death, or be a statutory or common law right,[138] these states uniformly recognized the need to balance the right with the interests of the First Amendment by identifying specific exemptions.[139] However, the range of exclusions, numbering from one in Georgia to over ten in California,[140] indicate the disparity of

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name and likeness ... is a tort in Georgia ... whether the person ... is a private citizen, entertainer, or as here a public figure who is not a public official.").

133. 296 S.E.2d 697 (Ga. 1982).

134. *Id.* at 698–99.

135. *Id.* at 703, 705–06.

136. *See id.* at 703 ("[T]he appropriation of another's name and likeness, whether such likeness be a photograph or sculpture, without consent and for financial gain of the appropriator is a tort in Georgia . . . .").

137. The Georgia Supreme Court has stated: "Where an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one's legal right of privacy." Waters v. Fleetwood, 91 S.E.2d 344, 348 (Ga. 1956). Though *Waters* focuses on the "right of privacy," courts have expanded the newsworthiness test to right of publicity cases. *See, e.g.*, Toffolini v. LFP Publ'g Grp., 572 F.3d 1201, 1208 (11th Cir. 2009) ("[W]here a publisher may be precluded by the right of publicity from publishing one's image for purely financial gain, as in an advertisement, where the publication is newsworthy, the right of publicity gives way to freedom of the press.").

138. *See supra* Part II.C.1–4.

139. *See supra* Part II.C.1–4.

140. *See supra* Part II.C.2, Part II.C.4.

thought in deciding how much weight should be given to each right. This balancing of interests is something that courts have struggled with as well when interpreting right of publicity laws against the backdrop of First Amendment rights.

D. *How Courts Have Interpreted Right of Publicity Laws While Balancing First Amendment Concerns*

The first time the Supreme Court of the United States examined the right of publicity was in *Zacchini v. Scripps-Howard Broadcasting Co.*[141] In *Zacchini*, the plaintiff's complete "human cannonball" performance was recorded and subsequently broadcast by a television station in Ohio.[142] Zacchini brought suit against the television company alleging a violation of his right of publicity under Ohio law.[143] The Ohio courts ruled in favor of the broadcasting company and ruled that Zacchini's claim was barred by the First Amendment.[144] Zacchini appealed and the case went before the Supreme Court.[145] The Supreme Court noted conflicting interests. On the one hand, the Court recognized the interest of "protecting the proprietary interest of the individual" and the individual's ability to "reap the reward of his endeavors,"[146] and on the other hand, the Court identified the First Amendment guarantees of freedom of speech and the press.[147] Ultimately, the Court ruled in favor of Zacchini, finding that "[w]herever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without consent."[148] Following *Zacchini*, in an attempt to define the "line in particular situations,"[149] lower courts began applying different balancing tests to resolve conflicts between the right of publicity and First Amendment protections. The three most common tests are the Predominant Use Test,[150] the *Rogers* Test,[151] and the Transformative Use Test.[152]

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141. 433 U.S. 562 (1977).
142. *Id.* at 564.
143. *Id.*
144. *See id.* at 565–66.
145. *See id.* at 565.
146. *Id.* at 573.
147. *See id.* at 574–76.
148. *Id.* at 574–75.
149. *Id.*
150. *See infra* Part II.D.1.

1. The Predominant Use Test

The Predominant Use Test focuses on the ultimate use of the identity and was first applied in *Doe v. TCI Cablevision.*[153] *TCI* considered the right of publicity claim of Anthony "Tony" Twist, a hockey player, against the producers of the *Spawn* comic book series due to the introduction of a villain into the series by the name of Anthony "Tony Twist" Twistelli.[154] In balancing Twist's property interests in his name and identity against the First Amendment interests of the comic book creators, the court rejected the *Rogers* and Transformative Use tests and instead employed what it labeled a "sort of predominant use test":

> If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some "expressive" content in that it might qualify as "speech" in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight.[155]

The court then ruled for Twist, holding that "the metaphorical reference to Twist, though a literary device, has very little literary value compared to its commercial value."[156] Essentially, if the use is primarily for commercial purposes, then the First Amendment will not protect the use. However, if the use is primarily to express an idea, thought, or speech rather than to create economic profit, then the First Amendment will protect the use.

2. The *Rogers* Test

Many commentators have suggested that right of publicity claims are similar to trademark claims because both types of claims require balancing property interests against the interests of free expression.[157]

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151. *See infra* Part II.D.2.
152. *See infra* Part II.D.3.
153. 110 S.W.3d 363 (Mo. 2003) (en banc).
154. *Id.* at 366–68.
155. *Id.* (quoting Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 500 (2003)).
156. *Id.*
157. *See* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 924 (6th Cir. 2003) ("[A] Lanham Act false endorsement claim is the federal equivalent of the right of publicity."

As such, courts have at times applied what is called the *Rogers* Test. The *Rogers* Test evolved out of *Rogers v. Grimaldi*,[158] a case that involved both a right of publicity claim and a claim under the trademark-specific Lanham Act.[159]

In *Rogers*, actress Ginger Rogers brought suit against the maker of a film titled "Ginger and Fred."[160] Rogers asserted a right of publicity claim, citing the unauthorized use of her name in the title.[161] She also asserted a claim under the Lanham Act alleging that the movie title would confuse consumers.[162] The court held that, because "the title 'Ginger and Fred' is clearly related to the content of the movie and is not a disguised advertisement for the sale of goods and services or a collateral commercial product,"[163] the right of publicity does "not bar the use of a celebrity's name in a movie title unless the title was 'wholly unrelated' to the movie or was 'simply a disguised commercial advertisement for the sale of goods or services.' "[164] The test has since expanded beyond movie titles,[165] but the focus of the test remains on whether the use of the identity in question is "wholly unrelated" to the underlying work.

3. The Transformative Use Test

In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,[166] the California Supreme Court considered whether an artist's charcoal rendering of the Three Stooges, sold on t-shirts and as prints, violated

(citing Bruce P. Keller, *The Right of Publicity: Past, Present, and Future*, 1207 PLI CORP. LAW & PRAC. HANDBOOK 159, 170 (2000))). *See generally* Beckerman-Rodau, *supra* note 26 (arguing for a limited right of publicity based on trademark law principles); Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161 (2006) (analogizing the right of publicity and trademark law).

158. 875 F.2d 994 (2d Cir. 1989).

159. *See id.* at 997.

160. Although titled "Ginger and Fred," the movie was not actually about Ginger Rogers or Fred Astaire, but was about two Italian entertainers who imitated Ginger and Fred. *See id.* at 996–97.

161. *See id.* at 997.

162. *See id.*

163. *Id.* at 1004–05.

164. *Id.* at 1005 (citations omitted).

165. *See, e.g.*, Parks v. LaFace Records, 329 F.3d 437, 441, 461 (6th Cir. 2003) (applying the *Rogers* Test to a case involving the use of Rosa Park's name in the title of a song recorded by the rap group OutKast); Matthews v. Wozencraft, 15 F.3d 432, 432, 440 (5th Cir. 1994) (applying the *Rogers* Test to a case involving a novel using events from the life of an undercover narcotics officer).

166. 21 P.3d 797 (Cal. 2001).

the Three Stooges' right of publicity.[167] The court ruled in favor of the Three Stooges.[168] Importing the first factor of the Fair Use Test employed in copyright law,[169] the court defined the Transformative Use Test as follows:

> [T]he central purpose of the inquiry ... "is to see ... whether the new work merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.' "[170]

Essentially, the focus of the Transformative Use Test is on the expressive nature of the use. It asks whether the use is creating something new, thereby "transforming" the original image into a new expression, as opposed to just copying or reproducing the original.[171]

III. THE NATIONAL TREND

As evidenced above, different states and courts have adopted various means for dealing with the competing interests of the right of publicity and the First Amendment.[172] However, the national trend is moving towards adopting a statutory right of publicity that defines the right as a property right,[173] is limited to commercial activity,[174] relies

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167. *See id.* at 799–800.

168. *See id.* at 811.

169. *See id.* at 808 (noting that importing the first step of the Fair Use Test made sense because copyright law and the right of publicity have "a common goal of encouragement of free expression and creativity ... by protecting the creative fruits of intellectual and artistic labor").

170. *Id.* (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

171. *See infra* notes 186–88 and accompanying text. The Transformative Use Test was recently adopted by the Ninth Circuit and applied in *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013). In *NCAA Student-Athlete*, an NCAA football player brought suit against the makers of the video game *NCAA Football 2013* alleging that the creation of an avatar of the plaintiff was a violation of his right of publicity. *See id.* at 1271–72. In evaluating the claim, the Ninth Circuit noted that, while the game as a whole included some changes to the plaintiff's image, such as the ability to alter some of the avatar's features, the entire purpose of the game was to realistically portray the plaintiff in the context of college football games. *See id.* at 1278–79. The court then concluded that under the Transformative Use Test, because the aim was to reproduce the plaintiff in realistic fashion and not create something new, "EA's use of the likenesses of college athletes like Samuel Keller in its video games is not, as a matter of law, protected by the First Amendment." *Id.* at 1284.

172. *See supra* Parts II.C, II.D.

173. Of the thirty-three states that explicitly base the right in privacy or property, twenty-two base the right in property. *See infra* notes 409–10 and accompanying text.

on statutory exemptions,[175] and uses the Transformative Use Test[176] to preserve First Amendment protections.[177] This Part highlights some of the benefits of this trend, such as the transferability and descendibility that comes with defining the right as property, and also some of the problems, such as limiting protection only to commercial activity.

A. The Benefits

Two benefits of defining the right as a property right, rather than a privacy right, are that the right is both transferable and descendible.[178] The principal argument in favor of transferability is grounded in the incentive-based theory.[179] The argument runs that "transferability promotes economic creation incentives by allowing those who hold the right to exploit it to their advantage."[180] Furthermore, transferability in other intellectual property interests such as copyright, trademark, and patents has helped promote

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174. *See, e.g.*, CAL. CIV. CODE § 3344(a) (West 2014) ("for purposes of advertising or selling"); FLA. STAT. § 540.08(1) (2014) ("for purposes of trade or for any commercial or advertising purpose"); 765 ILL. COMP. STAT. 1075 / 10 (2012) ("for commercial purposes"); NEV. REV. STAT. § 597.790 (2010) ("[a]ny commercial use").

175. *See, e.g.*, IND. CODE § 32-36-1-1(c) (2012) (granting multiple exemptions); MASS. ANN. LAWS ch. 214, § 3A (LexisNexis 2011) (noting an exception for professional photography); NEB. REV. STAT. § 20-202(1)–(3) (2007) (listing various statutory exemptions); OHIO REV. CODE ANN. § 2741.02(D) (LexisNexis 2012) (listing exemptions).

176. The Transformative Use Test has now been applied in various jurisdictions. *See, e.g.*, *NCAA Student-Athlete*, 724 F.3d at 1284 (applying the Transformative Use Test in the Ninth Circuit); Hart v. Elec. Arts, Inc., 717 F.3d 141, 165–66 (3d Cir. 2013) (accepting and applying the test in the Third Circuit); Winter v. DC Comics, 69 P.3d 473, 476 (Cal. 2003) (applying the test in a California case).

177. For a survey of how the fifty states have approached the right of publicity, see *infra* Tables 1, 2.

178. *See* Estate of Presley v. Russen, 513 F. Supp. 1339, 1354 (D.N.J. 1981) (noting that designating the right of publicity as property made it "capable of being disassociated from the individual and transferred by him for commercial purposes"); *see also* MCCARTHY, *supra* note 1, §§ 1:5–7, at 611. The distinction between privacy and property is important. Privacy law is concerned primarily with the rights of the individual and is considered a personal right. *See* Nimmer, *supra* note 26, at 209–10. Personal rights are non-transferable and terminate upon death of the individual. *See id.* Conversely, property rights are concerned with pecuniary value; they are not unique to an individual and are freely assignable and descendible. *See id.*

179. *See supra* Part II.A

180. J. Eugene Salomon, Jr., Note, *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179, 1205 (1987) (highlighting the need for a transferable right of publicity).

efficient economic allocation and use.[181] Thus, allowing individuals to freely license or assign their images or "identities" enables the individual to maximize the economic benefits—benefits that will ultimately spill over into society at large.[182]

Similarly, descendibility would also encourage individuals to invest in themselves in ways that would serve the public interest.[183] A descendible publicity right would allow an individual to assure that the right vests in a "suitable beneficiary."[184] Such a beneficiary would be more likely to ensure the image of the decedent was used in a manner the decedent would have wanted and would prevent it from being exploited purely for commercial or political gain.[185] Finally, it does not seem rational or equitable that upon an individual's death, advertisers, political pundits, or others should be able to use the image of the decedent to further their own ends simply because that individual is no longer alive to assert a privacy right. A mother, father, or child should be able to prevent the objectionable or offensive use of the image or likeness of a deceased family member.[186]

Another benefit to the national trend is the use of the "transformative test" in determining the applicability of First Amendment protections. While criticized by some for being vague and uncertain,[187] the Transformative Use Test strikes the best balance between providing a flexible yet uniformly applicable framework for balancing the interests of the First Amendment against those of the right of publicity. Unlike the Predominant Use Test, the Transformative Use Test is primarily concerned with the expressive nature of the product or creation rather than whether the use was commercial.[188] Thus, by focusing on the expressive element rather

181. *See id.* (noting that the value of the right of publicity would likely be greatly diminished if it was not transferable); *see also supra* Part II.A (discussing the justifications for a right of publicity under the tragedy of commons theory).

182. *See supra* notes 53–57 and accompanying text (discussing the utilitarian theory and spill-over effect).

183. *See supra* notes 53–57 and accompanying text.

184. Estate of Presley v. Russen, 513 F. Supp. 1339, 1355 (D.N.J. 1981) (quoting Lugosi v. Universal Pictures, 603 P.2d 425, 446 (Cal. 1979) (Bird, J., dissenting)).

185. For example, Jonathan Faber notes that a descendible right of publicity "ensures that movie clips of Humphrey Bogart, a heavy smoker who died of cancer, cannot be featured in tobacco advertisements without his heirs having a say," something which Faber says Bogart's heirs routinely rejected. *See* Faber, *supra* note 10, at 5.

186. *See supra* notes 66–73 and accompanying text.

187. *See, e.g.*, Volokh, *supra* note 74, at 916–25 (critiquing the Transformative Use Test).

188. *See supra* Part II.D.

than the predominant use, the Transformative Use Test avoids the conclusion implicit in the Predominant Use Test that at least some expressive speech has no First Amendment value.[189]

Likewise, the Transformative Use Test is superior to the *Rogers* Test because, unlike the *Rogers* Test, the Transformative Use Test maintains its focus on the principal issue—whether the use is an expression protected by the First Amendment. By focusing on whether the use is "wholly unrelated" to the underlying work,[190] the *Rogers* Test shifts the analysis away from the expressive nature of the use and instead focuses on whether the use is related to the protected material.[191] This shift blurs the primary First Amendment concern of whether the work is expressive speech. In contrast, the core inquiry of the Transformative Use Test is precisely whether the "new work merely 'suspercede[s] the objects' of the original creation, or instead adds ... new expression, meaning, or message."[192] Thus, the analysis under the Transformative Use Test remains on whether the speech is expressive and therefore deserving of constitutional protection, or whether it is simply copying someone else's work.

B. *The Problems*

Although the national trend of defining the right of publicity as a property interest has its benefits,[193] this designation also carries significant problems. Property ownership creates certain rights in the owner, one of which is the right to exclude others from using the property and to invoke the government's authority to uphold such exclusions.[194] Thus, a property owner may exclude others from using his property as a means to engage in speech.[195] This is true even when

189. *See* Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003) (en banc) (noting that First Amendment protection could be denied in some circumstances "even if there is some 'expressive' content ... [that] might qualify as 'speech' in other circumstances").

190. Rogers v. Grimaldi, 875 F.2d 994, 1005 (2d Cir. 1989) (citation omitted) (internal quotation marks omitted).

191. *See supra* Part II.D (describing the "wholly unrelated" analysis under the *Rogers* Test).

192. Comedy III Prods. Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808 (Cal. 2001) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

193. *See supra* Part III.A (discussing the positive social repercussions of having a transferable and descendible right of publicity).

194. *See* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) ("[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as property [is] the right to exclude others.").

195. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 485 (1988) (holding that "[t]here is simply no right to force speech into the home of an unwilling listener," that "we have repeatedly

excluding use may prevent the most effective means of expressing one's message. For example, while "[a]n espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall,"[196] the Supreme Court has held that speakers only have a right to adequate means of communication, not the most effective means.[197] Similarly, while a postcard of John Wayne wearing lipstick may be a powerful message, a property-based right of publicity would extinguish that message if the owner of the right chose to prohibit that use.[198] Such a line of reasoning would be equally applicable to the famous Andy Warhol paintings,[199] political cartoons, and any other medium that used a person's likeness for purposes of speech or expression. Ultimately, a property-based right of publicity would completely swallow any expression, parody, or social commentary that used another's image or likeness.

Another problem with the national trend is limiting the right to only commercial uses. Such a limitation may have been practical in the past, as the cost of obtaining and reproducing an individual's likeness for noncommercial use would have been prohibitive. However, with modern technological advances, capturing and widely disseminating someone's likeness can be accomplished from a smartphone or similar device with no additional cost beyond acquiring the device and a data connection. This ease of obtaining

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held that individuals are not required to welcome unwanted speech into their own homes," and that "the government may protect this freedom"); Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 568–69 (1972) ("[T]his Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech [using] property privately owned and used nondiscriminatorily for private purposes only .... [P]roperty [does not] lose its private character merely because the public is generally invited to use it for designated purposes.").

196. City of Ladue v. Gilleo, 512 U.S. 43, 56–57 (1994).

197. *See* Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) (holding that there is no right to a specific means of communication if "there are ample alternative modes of communication"); *Lloyd*, 407 U.S. at 567 (1972) (noting that only "adequate alternative avenues of communication" must be available); *see also Frisby*, 487 U.S. at 486, 488 (upholding a ban on picketing an individual house "even if some such picketers have a broader communicative purpose").

198. Madow, *supra* note 57, at 144–45.

199. Andy Warhol was a famous American artist widely known for his "pop art" paintings. *See Andy Warhol: A Documentary Film*, PBS (Sept. 20, 2006), http://www.pbs.org/wnet/americanmasters/episodes/andy-warhol/a-documentary-film/44/. His paintings included many of famous celebrities. *See id.* The most famous of these is likely the "Marilyn Diptych" in which Warhol painted Marilyn Monroe. *See id.* Under a strictly property right jurisprudence, Warhol's use of Marilyn's image would not be protected as Marilyn's heirs would have the right to exclude him from using her likeness.

and disseminating an individual's likeness has led to unauthorized uses for an increasing array of purposes outside the scope of commercial uses, such as extracting revenge[200] or cyberbullying.[201] Such uses are as equally unauthorized as commercial ones, often have no describable expressive element, and often are not adequately covered under applicable state privacy law.[202]

Ultimately, the national trend is steadily moving towards a descendible and transferable property-based right that requires commercial use of one's image before triggering protection. However, by basing the right of publicity in property law, this movement threatens to swallow any First Amendment claims, and by limiting protection only to commercial uses, it leaves citizens vulnerable to uses of their likeness that strike at a person's dignity rather than their pocketbook.

IV. NORTH CAROLINA LAW, PRIVACY, AND PUBLICITY

A. *North Carolina Privacy Law*

In contrast to the national trend, North Carolina currently does not explicitly recognize a right to publicity; however, it does recognize a limited misappropriation action under its privacy common law.[203] Nevertheless, the breadth and depth of the protection is currently uncertain, as the Supreme Court of North Carolina has only addressed the issue of misappropriation once, in 1938.

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200. *See* Amaka Ubaka, *UCF Student Accused in 'Revenge Porn' Case*, CLICKORLANDO (Feb. 7, 2014), http://www.clickorlando.com/news/ucf-student-accused-in-revenge-porn-case/-/1637132/24361886/-/14q0yd2/-/index.html?utm_medium=twitter&utm_source=twitterfeed (detailing how a University of Central Florida student posted nude pictures of his ex-girlfriend as revenge for talking to the police about his involvement with another case).

201. *See* David Boroff, *Texas Parents to Sue Six Cyberbullies for Allegedly Harassing their Teen Daughter on Instagram*, N.Y. DAILY NEWS, (Jan. 27, 2014), http://www.nydailynews.com/news/national/texas-parents-sue-cyberbullies-instagram-post-article-1.1592841 (reporting a case of cyberbullying involving the use of a young teen's photo); *see also* Chris Taylor, *'Star Wars Kid' Blasts Bullies, Jedi Knights Defend Him*, MASHABLE (May 10, 2013), http://mashable.com/2013/05/10/star-wars-kid-interview-cyberbullying/ (describing the bullying of a fifteen year old boy whose lightsaber video was posted online by his classmates, subjecting him to harassment and humiliation, including comments suggesting he commit suicide).

202. See *infra* Part IV.B for a discussion about why privacy law is often ill-suited to protect against these uses.

203. *See infra* Table 1.

The 1938 case, *Flake v. Greensboro News Co.*,[204] involved the unauthorized publication of a photo of Nancy Flake, a widely known orchestra singer, in an advertisement for the "Folies de Paree," a group that Flake described as "a theatrical troupe organized in the city of Chicago and composed of the cheapest class of chorus girls."[205] The advertisement was jointly sponsored by the North Carolina Theaters and Melts Bakery, and featured a photo of Flake in a bathing suit accompanied by the words "Keep that Sylph-Like Figure[206] by eating more of Melts Rye and Whole Wheat Bread, says Mlle. Sally Payne, exotic red haired Venus."[207] The newspaper had mistakenly used the photo of Flake instead of a photo of Sally Payne, who was a member of the Folies.[208] Flake brought suit alleging that the publication of the photo in the advertisement was libelous and violated her right of privacy.[209] The Supreme Court of North Carolina dismissed her libel claim,[210] but held that she had a valid cause of action for the unauthorized publication of her image.[211]

Later, in *Barr v. Southern Bell Telephone and Telegraph Co.*,[212] the North Carolina Court of Appeals extended application of the privacy action of misappropriation to cases where consent was granted to use a person's name and image, but the use exceeded the scope of consent.[213] In *Barr*, an employee gave consent for his name and photograph to be used in a Yellow Pages advertisement for his employer's rug cleaning business.[214] However, the telephone company then published the ad using the employee's name but substituting the employee's picture with that of a "much older" man.[215] The court of appeals found that such evidence "would justify" a finding that the

204. 212 N.C. 780, 195 S.E. 55 (1938).

205. *Id.* at 783, 195 S.E. at 58.

206. A sylph is an imaginary spirit of the air. THE OXFORD AMERICAN COLLEGE DICTIONARY 1400 (2002). The term "sylphlike" is an adjective for a woman or girl meaning "slender and graceful." *Id.*

207. *Flake*, 212 N.C. at 782, 195 S.E. at 58.

208. *See id.* at 783, 195 S.E. at 58.

209. *See id.* at 785, 195 S.E. at 59.

210. *See id.* at 790, 195 S.E. at 62.

211. *Id.* at 793, 195 S.E. at 64 ("If ... the name of a person is a valuable asset in connection with an advertising enterprise, then it must likewise be conceded that his face or features are likewise of value. Neither can be used without the consent of the owner without giving rise to a cause of action.").

212. 13 N.C. App. 388, 185 S.E.2d 714 (1972).

213. *See id.* at 393, 185 S.E.2d at 717.

214. *See id.* at 388, 185 S.E.2d at 715.

215. *Id.* at 388, 391, 185 S.E. 2d at 715–16.

company had violated Barr's rights and remanded the case to the trial court.[216]

These two cases, *Flake* and *Barr*, encompass the entirety of North Carolina's current right of publicity and misappropriation jurisprudence. Under current North Carolina law, to establish a case for the unauthorized use or misappropriation of an individual's image, the plaintiff must establish that the defendant used the plaintiff's likeness without consent and that the use was for an advertisement.[217] In today's hyper-connected world where anyone can become a celebrity overnight,[218] such limited and basic protection is simply not enough. Not only does it fail to protect plaintiffs in cases involving purely noncommercial activity such as cyberbullying or revenge, but it also fails to provide protection for any commercial use outside of advertising. Thus, someone could lift an image of a local fallen military hero off the Internet, place it on a t-shirt or coffee mug, and then, as long as they did not advertise with it, they could go about selling the merchandise, and the hero's family would be without recourse to stop it.

B. Problems with North Carolina's Current Privacy Law and Why a Publicity Right Would Better Serve its Citizens

In today's connected world of social media, there are many drawbacks to relying on privacy common law to address the issues surrounding the unauthorized use of one's identity. For instance, people are less private than in the past, routinely publishing photos, thoughts, and images of themselves on the Internet.[219] Such actions make it difficult to claim that their privacy has been violated by the use of such an image. On the other hand, posting a photo of oneself on a blog or social media site should not give license to whatever third party comes along to appropriate it for personal use.[220]

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216. *Id.* at 393, 185 S.E.2d at 717.

217. *See* Flake v. Greensboro News Co., 212 N.C. 780, 792–93, 195 S.E. 55, 64 (1938).

218. *See supra* notes 3–6 and accompanying text.

219. As of October of 2013, Facebook had over one billion active users and Google+ had 540 million users. *See* Alistair Barr, *Google's Social Network Sees 58% Jump in Users*, USA TODAY (Oct. 29, 2013), http://www.usatoday.com/story/tech/2013/10/29/google-plus/3296017/. Google was also uploading roughly 1.5 billion photos per week. *Id.* Even if users of these sites have privacy settings set at the strictest level, at a minimum the site still displays a main "profile picture" that is viewable, can be copied, and is thus usable by the public at large.

220. This is true of copyright law. *See* MARGARET C. JASPER, THE LAW OF COPYRIGHT 22–23 (2d ed., 2002). Just because an author or photographer publishes his

Another shortcoming of pursuing an action under a privacy tort theory is that the plaintiff must generally demonstrate that the defendant's unauthorized use of the plaintiff's likeness caused "some damage to plaintiff's peace of mind and dignity, with resulting injury measured by mental or physical distress and related damage."[221] As mentioned above, this would be difficult for the person who made her image publicly available in the first place. However, even for the more private person, the prospect of having to publicly prove damage to her dignity and "mental distress" would likely deter her from seeking redress in court.[222]

The advent of modern technology creates yet another problem. In today's world it is rather simple and inexpensive to create a "perpetual" identity—one that exists beyond death.[223] Additionally, recent advances in digital and holographic technology have made it possible to recreate deceased personalities and use them for marketing, entertainment, or other purposes.[224] Under existing privacy law, the descendants of such personalities would not have standing to pursue a claim in court against the use of the decedent's image because privacy rights are personal and expire upon death.[225]

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work on the Internet does not mean that it suddenly becomes public domain or that he gives up his copyright. *See id.* at 22–23, 30.

221. MCCARTHY, *supra* note 1, § 5:62, at 539.

222. Thomas McCarthy notes that forcing individuals to "conjure up evidence of nasty jokes by acquaintances and shock to the nervous system to prove indignity and psychic harm" deters many individuals from pursing privacy actions in "the legal system because of the forced disclosure in court of embarrassing personal affairs which often have little to do with the real nature of the grievance." *Id.* § 4:18, at 226.

223. Examples of such perpetual identities can be found in social media site profiles, blogs, and other online content that was created by persons who are now deceased. Some reports estimate that there are over 30 million Facebook accounts of deceased individuals. *See* Jaweed Kaleem, *Death on Facebook Now Common as 'Dead Profiles' Create a Vast Virtual Cemetery*, HUFFINGTON POST, http://www.huffingtonpost.com/2012/12/07/death-facebook-dead-profiles_n_2245397.html (last updated Jan. 16, 2013).

224. The rapper Tupac Shakur has been dead for more than fifteen years, but, thanks to recent advances in technology, programmers re-created a live performance of the artist at the Coachella Valley Music and Arts Festival in 2012 using a hologram. *See* Jacob Ganz, *How That Tupac Hologram at Coachella Worked*, NPR THE RECORD (Apr. 17, 2012) http://www.npr.org/blogs/therecord/2012/04/17/150820261/how-that-tupac-hologram-at-coachella-worked. A digital Marilyn Monroe is also being considered and is the subject of a recent legal debate. *See* Eriq Gardner, *Marilyn Monroe Estate Threatens Legal Action Over Hologram*, THE HOLLYWOOD REPORTER (June 11, 2012), http://www.hollywood reporter.com/thr-esq/marilyn-monroe-estate-hologram-legal-334817. In 2006, Audrey Hepburn, who died in 1993, did a commercial for GAP. *See Audrey Hepburn "Back in Black,"* YOUTUBE http://www.youtube.com/watch?v=rNesal2IL-o (last updated Nov. 17, 2009).

225. *See* MCCARTHY, *supra* note 1, § 9:1, at 418–19.

Thus, an individual surfing the web who receives a targeted toilet paper ad featuring a deceased relative would have no standing to prevent that company's use of the ad.

Finally, North Carolina only recognizes the privacy torts of appropriation and intrusion, explicitly rejecting publication of private facts and false light.[226] Thus, if someone makes a private photo or video with the individual's consent but then publishes it on the Internet for a noncommercial use, the victim would have no recourse to have it removed.[227] There would be no defamation claim as the image would be truthful.[228] The privacy tort of appropriation would fail because it requires commercial use,[229] and an intrusion claim would fail because the image was taken with consent.[230] This shortcoming leaves North Carolinians exposed to exploitation,

226. Most states recognize four types of privacy torts: (1) Intrusion, which concerns the unauthorized intrusion upon the plaintiff's seclusion, solitude, or private affairs that would be highly offensive to a reasonable person; (2) Publication of private facts, which allows a cause of action for the publication of private facts without consent that would be highly offensive to a reasonable person; (3) False Light, which allows for a cause of action when a publication places the plaintiff in a false light that is highly offensive to a reasonable person; and (4) Appropriation, which protects against the unauthorized use of a plaintiff's image for commercial purposes which causes injury to dignity and self-esteem. *See id.* §§ 1:19–23, at 31–42. The Supreme Court of North Carolina has rejected the private facts tort, Hall v. Salisbury Post, 323 N.C. 259, 269–70, 372 S.E.2d 711, 717 (1988), and the false light tort, Renwick v. News & Observer Publ'g Co., 310 N.C. 312, 326, 312 S.E.2d 405, 413–14 (1984).

227. This is increasingly problematic due to the recent rise in revenge porn and cyber bullying. *See* Lizette Alvarez, *Girl's Suicide Points to Rise in Apps Used by Cyberbullies*, N.Y. TIMES (Sept. 13, 2013), http://www.nytimes.com/2013/09/14/us/suicide-of-girl-after-bullying-raises-worries-on-web-sites.html?pagewanted=all (discussing the rise of apps that allow cyberbullies to harass victims through photos and text); Alex Cochrane, *The Perils of "Revenge Porn,"* THE INT'L FORUM FOR RESPONSIBLE MEDIA BLOG (June 10, 2013), http://inforrm.wordpress.com/2013/10/06/the-perils-of-revenge-porn-alex-cochrane/ (discussing the recent rise in revenge porn).

228. Defamation requires that the "statement" be false. *See* White v. Town of Chapel Hill, 899 F. Supp. 1428, 1438 (M.D.N.C. 1995) (citing West v. King's Dep't Store, Inc., 321 N.C. 698, 703, 365 S.E.2d 621, 624 (1988)) (listing falsity as an element of defamation); *see also* Parker v. Edwards, 222 N.C. 75, 78, 21 S.E.2d 876, 878 (1942) (citing Snow v. Witcher, 31 N.C. (9 Ired.) 346 (1849)) (noting that truth is a complete defense).

229. *See* Flake v. Greensboro News Co., 212 N.C. 780, 792–93, 195 S.E. 55, 64 (1938) (requiring use to be for an advertisement).

230. *See* Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 27, 588 S.E.2d 20, 27 (2003) (requiring the intrusion to be "unauthorized"); Hall v. Post, 85 N.C. App. 610, 615, 355 S.E.2d 819, 823–24 (1987) (noting that intrusion requires information to be "wrongfully obtained"), *rev'd on other grounds*, Hall v. Post 323 N.C. 259, 372 S.E.2d 711 (1988); *see also* Reeves v. Fox Television Network, 983 F. Supp. 703, 712 (N.D. Ohio 1997) (noting that consent is an absolute defense to intrusion).

humiliation, and mental anguish when their unauthorized private images appear on the Internet.

Adopting a statutory right of publicity in North Carolina would largely solve the problems listed above. For example, unlike a privacy action, a right of publicity claim does not require the showing of mental or emotional damage. Thus, a victim of a revenge posting would be free to pursue legal action under the right of publicity without having to endure the humiliating and often demeaning process of proving mental or emotional damage in open court. Additionally, by granting a right of publicity that is transferable and descendible, children would have standing to prevent the exploitation of their deceased parents' identities and images. This would help eliminate the undesirable prospect of being barraged with targeted ads featuring deceased relatives hawking various products. Finally, granting a statutory right that protects against any unauthorized use of someone's identity, and not just commercial ones, would fill the gap North Carolina's current privacy law creates regarding online bullying, harassment, and the unauthorized dissemination of privately created photos and images.

C. *North Carolina's Failed 2009 Right to Publicity Bill*

Adopting a statutory right of publicity in North Carolina is not a new idea. In 2009, in response to concerns of the NASCAR community and family of military personnel,[231] the North Carolina General Assembly considered a statutory right of publicity.[232] Under the proposed statute, any person would have a statutory property interest in his "personality," defined to include any attribute that serves to identify a person to "an ordinary reasonable viewer or listener, including the [person's] name, voice, signature, photograph, image, portrait, likeness, or distinctive appearance."[233] This right would have been violated when anyone "knowingly used another individual's personality for commercial purposes without obtaining prior consent."[234] The right would have been freely transferable and descendible (descendibility was limited to seventy years) and would have provided for use in the following exceptions:

231. Rick Conner & Corby Anderson, *Right of Publicity Statute Considered in North Carolina*, SPORTS AND ENTERTAINMENT (McGuireWoods, Richmond, Va.), June 2009, at 7, 10.

232. H.B. 327, 2009–2010 Gen. Assemb., Reg. Sess. (N.C. 2009).

233. *Id.*

234. *Id.*

> A play, book, magazine, newspaper, musical composition, radio or television program, single and original work of art, work of political or newsworthy value, audiovisual work other than a video game, or an advertisement or commercial announcement for any of these works, if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work. Any news, public affairs, or sports broadcast or account.[235]

It also included a provision stating that any person who violated the statute would be liable for the greater of either one thousand dollars or any provable profit resulting from the unauthorized use,[236] and included provisions for attorney's fees and punitive damages.[237]

The bill did not pass,[238] and while it contained many redeeming qualities, there were various problems as well.[239] Borrowing heavily from California's statutory law and following the national trend, the bill codified the right of publicity as a property interest.[240] A property designation provides the positive traits of transferability and descendibility, but is also problematic because it largely dismisses First Amendment concerns.[241] Similarly, following the national trend, the bill only applied to commercial uses,[242] which is problematic because such a provision leaves citizens vulnerable to harmful noncommercial uses like revenge and bullying. The bill also included a long list of exclusions that would have diluted the effectiveness of establishing the right in the first place[243] and required registration by anyone claiming ownership of a right of a deceased individual.[244] This is problematic not only because it would cost North Carolina a

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235. *Id.* §§ 41B-5(b)(1)–(2), 41B-6.

236. *Id.*

237. *Id.*

238. The bill passed its first reading in the House but died in committee. *See House Bill 327*, N.C. GEN. ASSEMBLY, http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=H327 (last visited May 4, 2014).

239. At least one commentator thought it was a good thing the bill did not pass, stating that the bill actually weakened the right of publicity rather than providing meaningful protection. *See* Faber, *supra* note 10, at 4, 6.

240. *Compare* H.B. 327, 2009–2010 Gen. Assemb., Reg. Sess. (N.C. 2009) (defining the publicity right as a property right), *with* CAL. CIV. CODE § 3344.1(b) (West 2014) (defining the publicity right as a property right).

241. *See infra* Part III.B (discussing the problems of a property-based right of publicity).

242. H.B. 327, 2009–2010 Gen. Assemb., Reg. Sess. (N.C. 2009); *see also* CAL. CIV. CODE § 3344.1(a)(1) (explaining the scope of the law in commercial contexts only).

243. H.B. 327, 2009–2010 Gen. Assemb., Reg. Sess. (N.C. 2009).

244. *Id.*

substantial amount of money,[245] but also because it requires affirmative action before extending coverage. Moreover, it is unlikely that a person would think to register until an unauthorized use occurred, but by then, it would be too late, as such use would be exempted.[246]

D. Recommendations for North Carolina

Instead of adopting a statute like the one proposed in 2009 or an "undiluted" statute as recently championed by Faber, North Carolina would be better served by adopting a statute that adequately balances the significant interest that North Carolinians have in protecting their image with the traditional interests of the First Amendment. In order to achieve this goal, North Carolina should follow New York's lead and adopt a statute that is limited in scope and based in privacy, not property.[247] Unlike New York, however, North Carolina should incorporate a provision for transferability and descendibility and extend protection to both commercial and noncommercial uses.

1. Privacy over Property

Although the national trend favors treating the right of publicity as a property right rather than a privacy right,[248] North Carolina would be better served by basing its right to publicity in privacy because any recognition of a property right would immediately attach a "bundle of rights."[249] This attachment of property rights would largely squash any First Amendment rights because, as discussed earlier, property rights include the right to exclude others from use.[250] Thus, there would be no balancing against First Amendment interests

245. *See* N.C. Gen. Assemb., Legis. Fiscal Note, H.B. 327, Sess. 2009 (estimating that it would cost the state $45,050 to set up a registration system that would only bring in about $15 a year in registration fees).

246. *See* H.B. 327, 2009–2010 Gen. Assemb., Reg. Sess. (N.C. 2009) (providing an exception for use where the right was not registered "until such time as a claim of right has been registered"). This means that unless a person has the foresight to register their claim to the right, it is likely that the first use of the individual's likeness will be exempted because the individual will not have registered yet.

247. *See* N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2014).

248. *See infra* Table 2 (providing national totals for categories in Table 1); *see also infra* Table 1 (detailing individual states).

249. *See supra* notes 192–97 and accompanying text (describing the proverbial bundle of property rights and its effects on the right of publicity); *see, e.g.*, United States v. Craft, 535 U.S. 274, 278 (2002) (describing property as a "bundle of sticks"—a "collection of individual rights which, in certain combinations, constitute property").

250. *See supra* notes 192–97 and accompanying text.

and no weighing of whether a particular use contributed to the public sphere or was meaningful "social commentary."[251] Rather, the property right of publicity would trump free speech and expression every time.[252] Such a model would not only severely handicap free speech and expression, but it would also be cumbersome. The legislature would be tasked with attempting to conceive of every exception worthy of protection in its original drafting, and when technology advances or when other circumstances arise, courts would be faced with either only allowing those specific exceptions or creating new ones.[253]

In contrast, basing a right of publicity in privacy would avoid the problem of the attachment of the proverbial "bundle of rights" and allow for the flexibility needed in addressing emerging technologies and changing circumstances. Additionally, where property rights have traditionally trumped First Amendment concerns, privacy rights, since their inception, have been balanced against First Amendment interests.[254] Furthermore, the right of publicity was conceived out of

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251. *See* Cardtoons, L.C. v. Major League Baseball Player's Ass'n, 95 F.3d 959, 970–76 (10th Cir. 1996) (recognizing "social commentary" as worthy of First Amendment protection over a right of publicity claim).

252. *See supra* notes 192–97 and accompanying text. The only exceptions are those explicitly recognized by statute or case law.

253. Such is the case in California, which has a long list of statutory exemptions but has routinely created additional exceptions in its case law to the point of creating the Transformative Use Test specifically for the purpose of dealing with exceptions outside the statutory list. *See* CAL. CIV. CODE § 3344.1(a)(2) (West 2014) (listing the statutory exceptions); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808 (Cal. 2001) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)) (creating the Transformative Use Test for works that are outside the statutory exemptions).

254. In the first case to recognize a right to privacy, the Georgia Supreme Court recognized the inherent tension between the First Amendment and privacy rights. *See* Pavesich v. New England Life Ins., Co., 50 S.E. 68, 73 (Ga. 1905) ("The stumbling block which many have encountered in the way of a recognition of the existence of a right of privacy has been that the recognition of such a right would inevitably tend to curtail the liberty of speech and of the press."). Courts have recognized this inherent tension and balancing ever since. *See, e.g.*, Florida Star v. B.J.F, 491 U.S. 524, 529 (1989) (noting the tension between the right of privacy and the First Amendment); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 489 (1975) (noting that privacy claims often "directly confront" the First Amendment and that the "face-off" between the two is apparent); ETW Corp. v. Jireh Pub'g Inc., 332 F.3d 915, 931 (6th Cir. 2003) ("There is an inherent tension between the right of publicity and the right of freedom of expression under the First Amendment."). For scholarship addressing this conflict, see, for example, Edward J. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis's Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611 (1968); Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139 (2001); Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295 (2010).

privacy,[255] and thus, it makes sense that a right of publicity statute should be based in privacy—not property—rights.

2. Descendibility and Transferability

While some states, like New York, still refuse to recognize a post-mortem right of publicity,[256] more and more states are extending protection after death.[257] The need for a descendible and transferable right of publicity only increases as technology continues to provide ways to re-create the past in stunningly lifelike renditions.[258] Here, North Carolina would do well to keep with the national trend,[259] and include a provision in its right of publicity statute to allow for descendibility and transferability. Such a provision would allow the right to be freely assignable during life and descendible upon death. Providing transferability during life allows those interested in the commercialization of their images to do so freely. Descendibility upon death would serve two purposes. First, if the decedent's likeness did have commercial value, then it would ensure that the decedent's descendants or assignees received its benefit. Second, descendibility would ensure that those closest to the decedent had the legal means to protect the decedent's images.[260]

However, here again, the pecuniary and privacy interests protected by a descendible and transferable right of publicity should be balanced with the interests of free speech and expression to preserve a rich public domain upon which future artists and creators can draw.[261] Thus, like most other states that provide post-mortem rights, North Carolina should limit the protection to a specific length of time, after which the right would expire and become part of the public domain. Here, states vary dramatically, with Tennessee providing a minimum of ten years of protection[262] and Indiana

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255. *See supra* Part I.A.

256. *See infra* Table 1, "New York."

257. *See infra* Table 1.

258. *See supra* notes 221–24 and accompanying text. No one wants to face the prospect of their mother hawking toilet paper to them ten years after she passed away.

259. *See supra* notes 177–84 and accompanying text.

260. For example, if a military member dies while in service, the deceased's family should have the right to prevent the use of that soldier's image for commercial and noncommercial purposes.

261. *See, e.g.*, White v. Samsung Elecs. Am, Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting) ("Overprotecting [the right of publicity] is as harmful as underprotecting it. Creativity is impossible without a rich public domain.").

262. *See supra* notes 129–30 and accompanying text.

providing an entire century of exclusive use.[263] Providing protection for only ten years is too short of a time. The Internet retains images for almost an indefinite period of time and limiting protection to only a decade leaves many of those closest to the deceased without recourse before even a generation has passed. Furthermore, the pecuniary interest in a right of publicity generally increases over time and a limit of ten years would cut short the economic value of those interests.[264] However, Indiana's approach of a hundred years of protection is too long. Such a long term of protection would stifle creativity and weaken the public domain.[265] Rather, providing protection for fifty years following the death of a person seems more in line with the aims of the right of publicity. Such an approach would safeguard both the commercial and privacy interests of the decedent's immediate family for a reasonable amount of time,[266] but not unduly starve the public domain.[267]

3. Commercial vs. Noncommercial Use

No state has currently enacted a statute that extends right of publicity protection to noncommercial uses.[268] This is likely due to the fact that, historically, the right of publicity has been viewed as a celebrity right, useful only to those who are famous enough to have their image published in multiple places.[269] Furthermore, until recently, many commentators thought that the right of privacy was sufficient to protect non-famous citizens.[270] Yet, privacy actions fail to

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263. IND. CODE ANN. § 32-36-1-8(a) (LexisNexis 2012).

264. For example, Elvis Presley was worth $250 million in 2003 as opposed to the $10 million he was worth at this death. *See* Alanna Nash, *Elvis at 69: Richer than Ever*, BANKRATE (Jan. 8, 2003), http://www.bankrate.com/brm/news/advice/20040108a1.asp.

265. *See supra* notes 81–83 and accompanying text (explaining the dangers of overprotecting the right of publicity).

266. Fifty years would encompass an entire generation, thus those closest to the person in question would still have recourse.

267. *See supra* notes 81–83 and accompanying text.

268. To the author's knowledge, no state has explicitly recognized protection for noncommercial uses. *But cf.* Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1186–87 (9th Cir. 2001) (indicating that, under certain circumstances, a plaintiff could potentially recover under the common law for noncommercial uses).

269. *See supra* note 2 and accompanying text. *But cf. supra* notes 3–6 and accompanying text (describing how technology has changed the definition of who is a celebrity).

270. *See, e.g.*, Nimmer, *supra* note 26, at 203–04 (noting how privacy law protects the ordinary person whereas the famous personality, who is interested in pecuniary gain, seeks only monetary compensation for the use of his likeness rather than simply privacy).

adequately protect the non-famous citizen for a variety of reasons.[271] Chief among those reasons is that people are becoming less and less private in the traditional sense.[272] It is not difficult to imagine a scenario in which a Facebook user (or other social media site user) uploads a photo of themselves or their friends only to have that image downloaded or copied by a third party and used to harass, embarrass, or humiliate the individual pictured.[273] Under North Carolina's current privacy law, the victim would have little or no recourse.[274] Just because the way people share and communicate with each other is evolving does not mean people are any less deserving of control over how their image is used.[275]

Additionally, as technology advances, new types of harms emerge. Recent years have seen a surge in cyberbullying and revenge-oriented online publication.[276] Extending protection to noncommercial uses would provide victims of these emerging harms with a straightforward way to seek recovery. Moreover, extending protection to cover such ill-willed uses would deter would-be perpetrators in the first instance, thereby reducing the overall rate of occurrence and preventing the harm before it occurs. No one should have to suffer the indignity of having her likeness misused by malignant perpetrators—regardless of whether the likeness has commercial value or not.

4. Putting it all Together

Creating a statute as described above need not be complicated.[277] It should simply state that an action may be brought for knowingly using an individual's name, portrait, photograph, or voice without authorization;[278] include a definition of photograph that requires the plaintiff to be readily identifiable and includes videography;[279] add a

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271. *See supra* Part IV.B.

272. *See supra* notes 3–6, 217–18 and accompanying text.

273. For example, pictures of high school girls were recently taken from their Facebook pages and uploaded to a site where the user was asked to vote whether or not they would have sex with the pictured girl. *See Offensive Website Targets High School Girls*, OURWINDSOR.CA, http://www.ourwindsor.ca/news-story/4448517-offensive-website-targets-high-school-girls/ (last visited May 4, 2014).

274. *See supra* notes 225–29 and accompanying text.

275. *See supra* note 219 and accompanying text.

276. *See supra* notes 198–200.

277. *See infra* Appendix A for author's suggested sample statute.

278. *See* N.Y. CIV. RIGHTS LAW § 51 (McKinney 2014) (including protection for "name, portrait, picture or voice").

279. *See* H.B. 327, § 41B-2(4), 2009–2010 Gen. Assemb., Reg. Sess. (N.C. 2009).

provision that allows the action to be brought for a period of fifty years following the death of an individual by the individual's designated beneficiary or takers at law having at least a 50% interest in the deceased's estate;[280] omit any registration requirement;[281] and provide damages in the greater of one thousand dollars or actual damages with special provision for punitive damages and reasonable attorneys' fees.[282] Finally, the statute should include a list of exemptions that includes use for any original "transformative" creation,[283] incidental use,[284] or any news, public interest, or sports broadcast or account.[285]

Such a statute would grant North Carolinians legal protection for their identity in a meaningful way without overtly intruding on the rights guaranteed by the First Amendment. Allowing an action to be brought for fifty years following the death of an individual, but without creating a property interest in the right, will still protect the pecuniary and privacy interests of the individual and his descendants but will avoid sidelining the First Amendment. By allowing exemptions for "transformative," incidental, or newsworthy uses, but not requiring the use to be for commercial purposes, the statute would provide protection for instances of noncommercially motivated uses such as revenge, malice, or similar motives, but still protect legitimate uses such as parody, social commentary, news and other such uses traditionally protected under the First Amendment. Finally, a provision for damages and fees would help deter would-be perpetrators by guaranteeing a minimum punishment.

Making the statute as concise and as simple as possible will help ensure the First Amendment is left room to breathe. Meanwhile,

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280. *See* 42 PA. CONS. STAT. ANN. § 8316(b)(3) (West 2012).

281. *See supra* notes 243–44 and accompanying text (describing why a registration requirement is undesirable).

282. *See* H.B. 327, 2009–2010 Gen. Assemb., Reg. Sess. (N.C. 2009).

283. Specifically listing an exception for " 'transformative' creations" would direct the courts to use the Transformative Use Test in determining whether uses outside those listed in the statutory language qualify for protection under the First Amendment. For a discussion about the benefits of the Transformative Use Test, see *supra* notes 186–90 and accompanying text.

284. The exception for incidental use is an effort to prevent frivolous claims. *See, e.g.*, Preston v. Martin Bergman Prods., Inc., 765 F. Supp. 116, 119 (S.D.N.Y. 1991) (finding that the image of a woman shown in the opening scenes of a motion picture was not actionable because her appearance was incidental).

285.The list of exemptions includes the traditional press exemptions found in a variety of other state statutes. *See, e.g.*, CAL. CIV. CODE § 3344.1(l) (West 2014); IND. CODE ANN. § 32-36-1-13 (LexisNexis 2012); 42 PA. CONS. STAT. ANN. § 8316 (d) (West 2012).

making the right explicit and uniformly applicable will provide North Carolina's citizens with the protection they deserve in our ever-changing and increasingly digital world.

CONCLUSION

Just as technological advances in the early twentieth century led to legal protection for privacy,[286] technological advances in the twenty-first century have led to the need for a meaningful right of publicity.[287] In the past, photos and videos were only available in hard copy and wide distribution was both complicated and costly. Now, with the rise of social media, smartphones, and other technologies, vast amounts of people have "public" personas, with hundreds of photos and several videos containing their images available on sites like Facebook, Google+, and other user-generated content sites. This change in technology and in the way we interact has created rampant opportunity for unauthorized use and dissemination of individuals' identities. This widespread misuse has prompted many states to adopt right of publicity protections, and it is time for North Carolina to follow suit by adopting a statutory right of publicity that effectively protects the identity rights of all its citizens without choking the First Amendment. As one commentator remarked, quoting Charles Dickens, "[t]here is probably nothing so strongly intuited as the notion that my identity is mine. If I cannot control my own identity and prevent [its] use by others, then the 'law is a ass.' "[288]

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286. *See* Warren & Brandeis, *supra* note 12, at 195.

287. *See supra* Part III.B (discussing how modern technological advances make capturing and disseminating someone's likeness relatively simple and inexpensive).

288. MCCARTHY, *supra* note 1, § 2:5 at 101.

TABLE I. FIFTY STATES: CURRENT RIGHT OF PUBLICITY LAWS

State	Common Law Protection	Statutory Protection / Year Enacted or Most Recently Revised	Post Mortem Rights/ Length of Protection	Nature of Right
Alabama	Yes[289]			Privacy[290]
Alaska[291]				
Arizona	Yes[292]	Yes / 2007[293]	Yes / not stated[294]	Property[295]
Arkansas	Yes[296]			
California	Yes[297]	Yes / 2010[298]	Yes / 70 years[299]	Property[300]

289. *See* Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1447 (11th Cir. 1998) (noting that Alabama does not distinguish between misappropriation and right of publicity claims).

290. *See id.* (noting that right of publicity claims fall under the privacy action of misappropriation).

291. To the author's knowledge, Alaska has not addressed the right of publicity in statute or common law.

292. *See* Pooley v. Nat'l Hole-In-One Ass'n, 89 F. Supp. 2d 1108, 1111–12 (D. Ariz. 2000) (recognizing a common law right of publicity under Arizona law).

293. *See* ARIZ. REV. STAT. ANN. §§ 12-761 (civil), 13-3726 (criminal) (2012). However, Arizona's civil statutory protection is limited only to the "name, portrait or picture of any *soldier*." *Id.* § 12-761 (emphasis added).

294. *See id.* (noting that consent may be obtained from the soldier's spouse, immediate family member, or trustee). There is no defined time limit on how long after death consent for use must be sought. *See id.*

295. *See Pooley*, 89 F. Supp. 2d at 1115 (noting that the right of publicity is considered a "property right").

296. *See* Olan Mills, Inc. v. Dodd, 353 S.W.2d 22, 22 (Ark. 1962) (allowing plaintiff to recover for the unauthorized use of her photo in an advertising campaign by a photo studio).

297. *See* White v. Samsung Elecs. Am. Inc., 971 F.2d 1395, 1397 (9th Cir. 1992) (listing the elements of a common law right of publicity claim).

298. *See* CAL. CIV. CODE § 3344 (West 2014).

299. *Id.* § 3344.1(f)(3).

300. *Id.* § 3344.1(b).

State	Common Law Protection	Statutory Protection / Year Enacted or Most Recently Revised	Post Mortem Rights/ Length of Protection	Nature of Right
Colorado	Yes[301]			Privacy[302]
Connecticut	Yes[303]			Privacy[304]
Delaware[305]				
District of Columbia	Yes[306]			Privacy[307]
Florida	Yes[308]	Yes/ 1967[309]	Yes / 40 years[310]	Both[311]
Georgia	Yes[312]		Yes/ not stated[313]	Property[314]
Hawaii	Yes[315]	Yes/ 2010[316]	Yes / 70 years[317]	Property[318]

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301. *See* Joe Dickerson & Assocs., LLC v. Dittmar, 34 P.3d 995, 999 (Colo. 2001) ("Over the years, almost every state has recognized, either statutorily or by case law, that one way an individual's privacy may be invaded is when a defendant appropriates a plaintiff's name or likeness for that defendant's own benefit.").

302. *Id.* (noting that an individual's *privacy* may be invaded).

303. *See* Korn v. Rennison, 156 A.2d 476, 477–78 (Conn. 1959) (recognizing a common law tort for an invasion of the right of privacy).

304. *See id.*

305. To the author's knowledge, Delaware has not addressed the right of publicity in statute or common law.

306. *See* Polsby v. Spruill, No. CIV. 96-1641(TFH), 1997 WL 680550, at *4 (D.D.C. 1997) (noting that the District of Columbia does not recognize separate causes of action for misappropriation and the right of publicity), *aff'd*, 97-7148, 1998 WL 202285 (D.C. Cir. Mar. 11, 1998).

307. *See id.*; *see also* Lane v. Random House, Inc., 985 F. Supp. 141, 148 (D.D.C. 1995) (recognizing the right of publicity is based in a claim of invasion of privacy).

308. *See* Gridiron.com v. Nat'l Football League Player's Ass'n, 106 F. Supp. 2d 1309, 1315 (S.D. Fla. 2000).

309. *See* FLA. STAT. ANN. § 540.08 (West 2014).

310. *Id.* § 540.08(4).

311. From the case law it appears that the common law right is based in privacy but the statutory right grants a property right. *Compare* Nat'l Football League v. Alley, Inc., 624 F. Supp. 6, 10 (S.D. Fla. 1983) (indicating that the common law right of publicity is a personal one [like privacy] and may not be assigned to another) *with* Loft v. Fuller, 408 So. 2d 619, 622 (Fla. Dist. Ct. App. 1981) (quoting RESTATEMENT (SECOND) OF TORTS § 652I (1977)) (noting that the appropriation of name and likeness is similar to the impairment of a property right).

312. *See* Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 703 (Ga. 1982).

313. *See id.* at 703–04.

314. *See id.* at 703.

State	Common Law Protection	Statutory Protection / Year Enacted or Most Recently Revised	Post Mortem Rights/ Length of Protection	Nature of Right
Idaho[319]				
Illinois		Yes/ 1999[320]	Yes / 50 years[321]	Property[322]
Indiana	Yes[323]	Yes/ 2012[324]	Yes / 100 years[325]	Property[326]
Iowa[327]				
Kansas	Yes[328]			Privacy[329]
Kentucky	Yes[330]	Yes/ 1984[331]	Yes / 50 years[332]	Property[333]

315. *See* Fergerstrom v. Hawaiian Ocean View Estates, 441 P.2d 141, 144 (Haw. 1968) ("[P]rotection is available for appropriation of name or picture for commercial purposes.").

316. HAW. REV. STAT. ANN. § 482P (LexisNexis 2011).

317. *Id.* § 482P-4.

318. *Id.* § 482P-2.

319. To the author's knowledge, Idaho has not addressed the right of publicity in statute or common law.

320. *See* 765 ILL. COMP. STAT. ANN. 1075 / 1–60 (West 2012). The statutory right of publicity has been held to replace the common law privacy action of misappropriation. *See* Blair v. Ne. Landing P'ship, 859 N.E.2d 1188, 1192 (Ill. App. Ct. 2006).

321. 765 ILL. COMP. STAT. ANN. 1075 / 20(a), 1075/30(b) (West 2012).

322. *Id.* at 1075 / 15 (West 2012).

323. *See* Cont'l Optical Co. v. Reed, 86 N.E.2d 306, 310 (Ind. App. 1949) (holding that the unauthorized use of photographs of a person for commercial use is an invasion of privacy and is actionable).

324. IND. CODE ANN. §§ 32-36-1-1 to -20 (LexisNexis 2002 & Supp. 2012).

325. *Id.* § 32-36-1-8(a).

326. *Id.* § 32-36-1-7.

327. To the author's knowledge, Iowa has not addressed the right of publicity in statute or common law.

328. Kunz v. Allen, 172 P. 532, 532 (Kan. 1918) (allowing an action for plaintiff where she was photographed in a dry goods store and defendant then used the photographs for advertising purposes without plaintiff's permission).

329. *Id.* ("The publication of a picture of a person, without his consent, as a part of an advertisement, for the purpose of exploiting the publisher's business, is a violation of the right of privacy . . . ." (citation omitted)).

330. Foster-Milburn Co. v. Chinn, 120 S.W. 364, 366–67 (Ky. 1909) (holding that plaintiff's picture was protected when it was used in a advertisement without plaintiff's permission).

331. KY. REV. STAT. ANN. § 391.170 (LexisNexis 2010). However, the right is only granted to "public figures." *Id.*

State	Common Law Protection	Statutory Protection / Year Enacted or Most Recently Revised	Post Mortem Rights/ Length of Protection	Nature of Right
Louisiana	Unclear[334]			
Maine	Yes[335]			Privacy[336]
Maryland	Yes[337]	Yes / 2008[338]	Yes / 50 years[339]	Privacy[340]
Massachusetts		Yes / 1974[341]	Uncertain[342]	
Michigan	Yes[343]		Yes / not stated[344]	Property[345]

332. *Id.* § 391.170(2).
333. *Id.* § 391.170(1); *see also* Montgomery v. Montgomery, 60 S.W.3d 524, 528 (Ky. 2001).
334. *See* Prudhomme v. Procter & Gamble Co., 800 F. Supp. 390, 395–96 (E.D. La. 1992) ("While Louisiana courts have not explicitly adopted this right, they have not specifically precluded it, either.").
335. *See* Nelson v. Times, 373 A.2d 1221, 1224 (Me. 1977) (recognizing the appropriation of another's likeness for defendant's benefit as a cause of action).
336. *Id.* at 1225 (noting that the right is purely personal and can only be maintained by a living person whose privacy is invaded).
337. Maryland does not distinguish between a right of publicity and a misappropriation action. *See* Lawrence v. A.S. Abell Co., 475 A.2d 448, 451 (Md. 1984) ("[T]he effect of the appropriation is to recognize or create an exclusive right in the individual plaintiff to a species of trade name, his own, and a kind of trademark in his likeness." (citation omitted)).
338. The Fallen Soldier Privacy Act of 2008 prohibits the advertising or commercial use of the name or image of a soldier killed in the line of duty within the previous 50 years. MD. CODE ANN. BUS. REG. §§ 19-501 to -504 (LexisNexis 2010).
339. *Id.* § 19-503.
340. *See generally Lawrence*, 475 A.2d 448 (recognizing a privacy action against a newspaper for using a photograph of a mother and her two infants for an advertising campaign without the mother's permission).
341. MASS. ANN. LAWS ch. 214, § 3A (LexisNexis 2011).
342. No appellate level court has ruled on this issue. *But cf.* Hanna v. Ken's Foods, Inc., No. 06-P-1071, 2007 WL 1695311, at *1 n.4 (Mass. App. Ct. June 12, 2007) (unpublished opinion) (noting that the trial court dismissed plaintiff's § 3A claim on grounds that plaintiff was not a living person and that the issue was not appealed).
343. *See* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 834 (6th Cir. 1983).
344. *See* Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc., 270 F.3d 298, 325–26 (6th Cir. 2001) (recognizing a post-mortem right of publicity).
345. *Id.* at 326 ("We believe that the . . . right of publicity is more properly analyzed as a property right and, therefore, is descendible.").

State	Common Law Protection	Statutory Protection / Year Enacted or Most Recently Revised	Post Mortem Rights/ Length of Protection	Nature of Right
Minnesota	Yes[346]			
Mississippi	Yes[347]		Uncertain[348]	Privacy[349]
Missouri	Yes[350]			Property[351]
Montana[352]				
Nebraska		Yes / 1979[353]	Yes/ not stated[354]	Privacy[355]
Nevada		Yes/ 1995[356]	Yes / 50 years[357]	Property[358]

346. *See* Hillerich & Bradsby Co. v. Christian Bros. Inc., 943 F. Supp. 1136, 1141 (D. Minn. 1996) ("Although the Minnesota state courts have not explicitly recognized (or rejected) this cause of action [a right of publicity], the federal courts in this circuit and district have concluded that it exists in Minnesota.").

347. *See* Candebat v. Flanagan, 487 So. 2d 207, 209 (Miss. 1986) (holding that misappropriation of identity for commercial purposes was a valid cause of action).

348. There are no cases or statutes in Mississippi that directly address the question of descendibility. However, MISS. CODE ANN. § 91-7-237 (West 1999 & Supp. 2012) states that only "personal" actions can survive the death of a party, and in *Flagg-Allen v. Carson*, No. 5:07CV179-DCB-JMR, 2008 WL 907656, at *1 (S.D. Miss. Mar. 28, 2008), the court held that a cause of action for misappropriation was a "personal action," *id.*

349. *See Candebat*, 487 So. 2d at 209.

350. *See* Munden v. Harris, 134 S.W. 1076, 1079 (Mo. Ct. App. 1911) ("We therefore conclude that one has an exclusive right to his picture, on the score of its being a property right of material profit. We also consider it to be a property right of value . . . .").

351. *See id.*

352. To the author's knowledge, Montana has not addressed the right of publicity in statute or common law.

353. *See* NEB. REV. STAT. § 20-202 (2007).

354. *Id.* § 20-208.

355. *Id.* § 20-202 (referring to the right as an "invasion of privacy").

356. *See* NEV. REV. STAT. §§ 597.770 to .810 (2010 & Supp. 2011).

357. *See id.* § 597.790(1). *But cf.* Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc., 688 F. Supp. 2d 1148, 1162 (D. Nev. 2010) ("[U]pon discovering an unauthorized use by anyone, a successor must register within six months or forever waive his claim to publicity rights in the deceased person.").

358. *See* People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269, 1283 (Nev. 1995) (noting that in Nevada misappropriation was a personal right while the right of publicity was a property right relating to economic loss).

State	Common Law Protection	Statutory Protection / Year Enacted or Most Recently Revised	Post Mortem Rights/ Length of Protection	Nature of Right
New Hampshire	Yes[359]			
New Jersey	Yes[360]		Yes / not stated[361]	Property[362]
New Mexico	Yes[363]		Yes / not stated[364]	Property[365]
New York		Yes/ 1995[366]	No	Privacy[367]
North Carolina	Yes[368]			Privacy[369]
North Dakota[370]				
Ohio	Yes[371]	Yes / 2002[372]	Yes / 60 years[373]	Property[374]

359. Doe v. Friendfinder Network Inc., 540 F. Supp. 2d 288, 303 (D.N.H. 2008) ("New Hampshire recognizes a cause of action for infringement of the right of publicity as set forth in the *Restatement (Second) of Torts*." (citing Remsburg v. Docusearch, Inc., 149 N.H. 148, 157 (2003))).

360. *See* Palmer v. Schonhorn Enter. Inc., 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967) (holding that professional golfers' rights to privacy were violated when their names were used in connection with defendant corporation's product).

361. *See* McFarland v. Miller, 14 F.3d 912, 923 (3d Cir. 1994) (finding the right of publicity to be descendible).

362. *See id.*

363. *See* Benally v. Hundred Arrows Press, Inc., 614 F. Supp. 969, 978 (D.C.N.M. 1985), *rev'd on other grounds, sub nom.* Benally *ex rel.* Benally v. Amon Carter Museum of W. Art, 858 F.2d 618 (10th Cir. 1988).

364. In dicta, the New Mexico Court of Appeals observed that a claim for the invasion of privacy is not descendible but then explicitly made an exception to that rule for the appropriation of one's name or likeness. *See* Smith v. City of Artesia, 772 P.2d 373, 375 (N.M. Ct. App. 1989).

365. *Benally*, 614 F. Supp. at 978 ("The right created . . . is in the nature of a property right.").

366. *See* N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2014).

367. *See id.* § 50.

368. *See* Flake v. Greensboro News Co., 212 N.C. 780, 792, 195 S.E. 55, 64 (1938).

369. *See id.*

370. To the author's knowledge, North Dakota has not addressed the right of publicity in statute or common law.

371. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578–79 (1977).

372. OHIO REV. CODE ANN. §§ 2741.01 to .09 (LexisNexis 2008 & Supp. 2012).

373. *Id.* § 2741.02.

374. *Id.* § 2741.01(D).

State	Common Law Protection	Statutory Protection / Year Enacted or Most Recently Revised	Post Mortem Rights/ Length of Protection	Nature of Right
Oklahoma		Yes/ 1986[375]	Yes / 100 years[376]	Property[377]
Oregon[378]				
Pennsylvania	Yes[379]	Yes / 2003[380]	Yes / 30 years[381]	
Rhode Island		Yes / 1980[382]		
South Carolina	Yes[383]		Yes / not stated[384]	Property[385]
South Dakota[386]				
Tennessee		Yes/ 1984[387]	Yes / 10 years[388]	Property[389]
Texas	Yes[390]	Yes/ 1987[391]	Yes / 50 years[392]	Property[393]

375. OKLA. STAT. ANN. tit. 21 §§ 839.1–839.3 (West Supp. 2013).
376. OKLA. STAT. ANN. tit. 21 § 1448(G) (West 2010).
377. *See id.* § 839.1 (describing the right of living persons as a privacy right); *id.* § 1448(B) (labeling the right for deceased persons as a property right).
378. To the author's knowledge, Oregon has not addressed the right of publicity in statute or common law.
379. *See* Eagle's Eye, Inc. v. Ambler Fashion Shop, Inc., 627 F. Supp. 856, 862 (E.D. Pa. 1985) ("[T]he right of publicity inures to an *individual* who seeks to protect and control the commercial value of his name or likeness.").
380. *See* 42 PA. STAT. ANN. § 8316 (West 2007).
381. *Id.* § 8316(b)(3), (c).
382. R.I. GEN. LAWS § 9-1-28 (1997 & Supp. 2011).
383. Gignilliat v. Gignilliat, Savitz, & Bettis, L.L.P., 684 S.E.2d 756, 762 (S.C. 2009) ("We hold that South Carolina does recognize the right of publicity, that the right survives death and that nominal damages are presumed.").
384. *Id.*
385. *Id.* at 763.
386. To the author's knowledge, South Dakota has not addressed the right of publicity in statute or common law.
387. TENN. CODE. ANN. §§ 47-25-1101 to -1108 (2012).
388. *See id.* § 47-25-1104; *see also supra* notes 129–30 and accompanying text.
389. TENN. CODE. ANN. § 47-25-1103(a) (2012).
390. *See* Henley v. Dillard Dep't Stores, 46 F.Supp.2d 587, 590 (N.D. Tex. 1999) (noting that Texas does not distinguish between misappropriation and right of publicity actions and that the right of publicity safeguards "the commercial interests of celebrities in their identities").
391. *See* TEX. PROP. CODE ANN. §§ 26.001 to .015 (West 2000).
392. *Id.* § 26.012(d).

State	Common Law Protection	Statutory Protection / Year Enacted or Most Recently Revised	Post Mortem Rights/ Length of Protection	Nature of Right
Utah	Yes[394]	Yes/ 1999[395]	Yes/ not stated[396]	
Vermont	Yes[397]			
Virginia		Yes/ 1977[398]	Yes / 20 years[399]	Property[400]
Washington		Yes / 2008[401]	Yes / 10 or 75 years[402]	Property[403]
West Virginia	Yes[404]			
Wisconsin	Yes[405]	Yes/ 2006[406]	No[407]	Privacy[408]

393. *Id.* § 26.002.

394. *See* Nature's Way Prods., Inc., v. Nature-Pharma, Inc., 736 F. Supp. 245, 251 (D. Utah 1990).

395. *See* UTAH CODE ANN. §§ 45-3-1 to -6 (LexisNexis 2010).

396. *See Nature's Way*, 736 F. Supp. at 251–53 (holding that plaintiff could bring a claim involving a deceased individual's persona).

397. *See* Staruski v. Cont'l Tel. Co., 581 A.2d 266, 269 & n.5 (Vt. 1990) (noting the existence of a right of publicity cause of action and distinguishing it from misappropriation).

398. VA. CODE ANN. §§ 8.01–40, 18.2–216.1 (2009).

399. *Id.* § 8.01-40(B).

400. *See* PTS Corp. v. Buckman, 561 S.E.2d 718, 722 (Va. 2002) ("The statutory cause of action is premised upon the concept that a person holds a property interest in his or her name and likeness.").

401. WASH. REV. CODE ANN. § 63.60.010 to .080 (LexisNexis 2005 & Supp. 2013).

402. *See id* at § 63.60.040(1)–(2) (noting that an "individual" has post-mortem rights for 10 years while a "personality" has rights for 75 years). "Individual" and "personality" are defined in the statute and could be easily read as "non-celebrity" and "celebrity," respectively. *See id.* § 63.60.020(1)–(2).

403. *Id.* § 63.60.030.

404. *See* Curran v. Amazon.com, Inc., No. 2:07-0354, 2008 WL 472433, at *4 (S.D. W.Va. Feb. 18, 2008) ("[T]he court concludes that a common law right of publicity is cognizable in West Virginia.").

405. *See* Conrad v. Isthmus Pub., Inc., No. 09-CV-566-BBC, 2009 WL 3254024, at *4 (W.D. Wis. Oct. 5, 2009) ("Wisconsin recognizes a right of publicity under both statutory and common law.").

406. *See* WIS. STAT. ANN. § 995.50 (West 2007).

407. *See id.* § 995.50(b) (protection is specifically for "a living person"); *see also* Heinz v. Frank Lloyd Wright Found., 85-C-482-C, 1986 WL 5996, at *7 (W.D. Wis. 1986).

408. WIS. STAT. ANN. § 995.50(1) (West 2007).

State	Common Law Protection	Statutory Protection / Year Enacted or Most Recently Revised	Post Mortem Rights/ Length of Protection	Nature of Right
Wyoming[409]				
Totals	**31**	**22**		

TABLE II. SUMMARY OF STATE PUBLICITY RIGHTS

Protection for Publicity Rights	Number of States
Statutory or Common Law Protection	41[410]
Statutory Protection enacted or revised within last twenty years	11
Protection based in privacy	11[411]
Protection based in property	22[412]

409. To the author's knowledge, Wyoming has not addressed the right of publicity in statute or common law.

410. Alabama, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin.

411. Alabama, Colorado, Connecticut, District of Columbia, Florida, Kansas, Maine, Maryland, Mississippi, Nebraska, New York, North Carolina, Wisconsin.

412. Arizona, California, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Michigan, Missouri, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Virginia, Washington.

APPENDIX A. SAMPLE STATUTE

1. Likeness: A natural person's name, portrait, photograph, or voice. Photograph is any photograph or photographic reproduction, digital or otherwise, still or moving, or any video recording or live transmission, of any person, such that the person is readily identifiable by the naked eye.

2. Prohibition: Any person, firm, or corporation who knowingly uses another individual's likeness without obtaining prior written consent of any of the parties authorized in subsection (a) shall be liable for any damages or loss sustained by the person or persons to whom the personality belongs.
    (a) Parties authorized to bring action for a violation of section 2:
        i. The natural person;
        ii. A parent or guardian of a natural person, if the natural person is a minor;
        iii. Any person, firm, or corporation authorized in writing by such natural person to license the person's likeness; or
        iv. If such natural person is deceased, any person, firm, or corporation authorized in writing to license the use of the natural person's likeness during the natural person's lifetime or by will or other testamentary device; or where there is no such authorization, then by the deceased person's surviving spouse at the time of death until the surviving spouse's death or, in a case where there is no surviving spouse, then any other heir or group of heirs having at least a 50% interest in the deceased person's estate as provided under this State's Probate Code.
3. Duration of Right: No action shall be commenced under this section more than fifty years after the death of such natural person.
4. Exemptions: It shall not be a violation of this section to use the likeness of a person in connection with:
    (a) Any news, public affairs/interest, historical, or sports broadcast or account;

(b) Any original expressive work that is transformative of the original likeness;
(c) Any use that is incidental; or
(d) Any advertisement or announcement for a use permitted under this section.

5. Limited Immunity: Owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads, by whom any use of an individual's likeness for commercial purposes in violation of this section is published or disseminated, shall not be liable unless it is established that the owners or employees had knowledge of the unauthorized use as prohibited by this section.
6. Remedies:
   (a) Actual Damages: Any party injured by a violation of this right shall be entitled to the greater of:
      i. One thousand dollars ($1,000); or
      ii. The actual damages resulting from the unauthorized use.
   (b) Other Remedies: A court may also grant injunctive relief. Punitive damages may be awarded if the unauthorized use was willful or wanton.

WILLIAM K. SMITH**

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