

# It is Time for a Precise, Narrowly Tailored Federal Right of Publicity

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## INTRODUCTION

In 2022, twenty plaintiffs brought a putative class action claim against a mass media conglomerate for misappropriating their names and identities in disclosing the information to third parties.<sup>1</sup> They alleged different violations under their nine respective state right of publicity statutes.<sup>2</sup> Although the claims brought were all state claims with no federal equivalent, the parties ultimately stipulated to having the case consolidated and

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<sup>1</sup> *In re Hearst Commc’ns State Right of Publicity Statute Cases*, 632 F. Supp. 3d 616, 617 (S.D.N.Y. 2022).

<sup>2</sup> *Id.*

decided by one court.<sup>3</sup> In *In re Hearst Communications State Right of Publicity Statute Cases*, the court had to interpret the effect of nine different publicity statutes in the context of identical factual allegations.<sup>4</sup> The plaintiffs and defendant stipulated that the “statutes are substantially similar and will include overlapping issues of law,” reasoning that one court could dispose of the nine statutes at the same time and essentially address the various state statutes as if they were one federal law.<sup>5</sup> Without this agreement between the parties, and acceptance of that agreement by the court, widely different holdings may have resulted. Even with the agreement, substantial resources (both private and public) were necessitated by the lack of one uniform law.

The right of publicity (also now colloquially referred to as “N.I.L.” or “name, image, likeness” in the sports world) is rooted in privacy rights and is currently regulated by state law. Although the ends sought are essentially the same, the laws vary considerably from state to state.<sup>6</sup> For example, although most jurisdictions consider the interest a property right, other states hold it as a privacy right.<sup>7</sup> Without uniformity between states,

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<sup>3</sup> *Id.* at 618–19.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 619.

<sup>6</sup> See, e.g., ARIZ. REV. STAT. § 12-761 (LexisNexis 2024) (applying to soldiers exclusively rather than private citizens); N.Y. CIV. RIGHTS LAW § 50 (Consol. 2024) (protecting the “name, portrait, or picture” of all “living persons”); CAL. CIV. CODE § 3344.1(g) (Deering 2023) (providing seventy years for a post-mortem right of publicity); TENN. CODE ANN. § 47-25-1104(a) (2023) (providing ten years for a post-mortem right of publicity); VA. CODE ANN. § 8.01-40(B) (2023) (providing twenty years for a post-mortem right of publicity); FLA. STAT. ANN. § 540.08(5) (LexisNexis 2023) (providing forty years for a post-mortem right of publicity); for statutes with fifty year post-mortem right, see KY. REV. STAT. ANN. § 391.170(2) (LexisNexis 2023), NEV. REV. STAT. ANN. § 597.790(1) (LexisNexis 2024), and TEX. PROP. CODE § 26.012(d) (LexisNexis 2024); N.Y. CIV. RIGHTS LAW § 50 (Consol. 2023) (providing no post-mortem right except for unauthorized use of a deceased performer’s digital replica); WASH. REV. CODE ANN. § 63.60.040(2) (LexisNexis 2024) (providing seventy-five years for post-mortem right of publicity); see also differences in statutory damages in CAL. CIV. CODE § 3344(a) (Deering 2023) (providing for \$750 in statutory damages); IND. CODE ANN. § 32-36-1-10(1)(A) (LexisNexis 2024) (providing for \$1,000 in statutory damages); TEX. PROP. CODE § 26.013(a)(1) (West 2024) (providing for \$2,500 in statutory damages); N.Y. CIV. RIGHTS LAW § 50-f (Consol. 2024) (providing no statutory damages, other than for the limited post-mortem right related to deceased performer’s digital replica, in which case there are statutory damages of \$2,000). See also *Electra v. 59 Murray Enters., Inc.*, 987 F.3d 233, 252 (2d Cir. 2021) (quoting *Gautier v. Pro-Football, Inc.*, 106 N.Y.S.2d 553, 560 (App. Div. 1951), *aff’d*, 107 N.E.2d 485 (1952)) (explaining that New York’s right of publicity statute provides “primarily a recovery for injury to the person, not to his property or business”).

<sup>7</sup> See, e.g., N.Y. CIV. RIGHTS LAW § 50 (Consol. 2024); ARIZ. REV. STAT. § 12-761 (LexisNexis 2024); CAL. CIV. CODE § 3344 (Deering 2024); IND. CODE ANN. § 32-36-1-1 (LexisNexis 2024).

transactions are likely to incur higher costs as parties will have to grapple with laws that are similar, but still different enough to require additional due diligence to address. Similarly, with the current patchwork system, litigation costs are increased with plaintiffs encouraged to forum shop for the most beneficial jurisdiction and defendants encouraged to look for the most restrictive jurisdiction, thus creating unnecessary procedural waste.

A precise, narrowly tailored federal right of publicity will promote creativity and business rather than stifle it, and also protect First Amendment rights. In this article, Part I discusses whether the right of publicity should be considered a privacy or property right, and illustrates the importance of a publicity right. Part II provides an overview of the lack of consistency and uniformity between states' right of publicity statutes. Finally, Part III examines what a federal right of publicity should look like and how a federal right would apply in practice.

#### I. PRIVACY OR PROPERTY?

The origin of the right of publicity is the right of privacy. Interestingly, although the right has morphed and evolved for over a century, the concern that led to the creation of privacy rights in 1890 is the same concern that continues to prompt advocacy for a federal publicity right today. That concern was articulated by Samuel Warren and Louis Brandeis in the article, *The Right of Privacy*, in which they expressed the need for a right of privacy due to the instant nature of producing photographs and newspapers.<sup>8</sup> At the time, instantaneous photography threatened to invade people's private lives, where newspapers could circulate pictures of private individuals without consent.<sup>9</sup> With the potential oversteps by the press,<sup>10</sup> courts had to find a way to address this invasion of privacy for the private individual.

Today, with the advent of smartphones and relatively inexpensive media production technology, we can produce photographs, as well as graphics, images, sounds, and videos, even more rapidly and with just a few clicks. This ability continues to expand as the capacity of artificial intelligence ("AI") increases daily. Despite these advancements, and a push to address AI

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<sup>8</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 196.

specifically,<sup>11</sup> the jurisprudence on the right of publicity is still in disarray. Creating a uniform system for the century-old right of publicity should be addressed first (or at least simultaneously) with addressing any specific AI concerns. Creating one clear system will eliminate many of the foreseen problems created by AI, which have largely been hyped up in typical political fashion.

The rights of privacy and publicity are now two distinguishable doctrines. Whereas the right of privacy seeks to prevent the dissemination of private information in order to protect one's dignity and mental suffering, the right of publicity is focused on the commercial value of one's persona.<sup>12</sup> Far from a privacy right, the right of publicity is a commercial tort of unfair competition that allows people to monetize exposure of their persona.<sup>13</sup>

#### A. Value of One's Right to Publicity

The right of publicity is a distinct and necessary right, regulating an area not covered by copyright, trademark, or any other form of intellectual property. Moreover, despite the right being a lesser-known cousin of copyright, trademark, and patent rights, upon close inspection, the basis for the right of publicity is intuitive—a natural right of every person.<sup>14</sup> If someone uses a person's name, image, likeness, voice, or any aspect of their persona, to endorse or market a product, they should have to pay for that use. Further, every individual should be able to deny the use of their right of publicity for any reason, moral or otherwise.<sup>15</sup>

Similar to trademark law, one goal of a right of publicity is to protect against unfair competition.<sup>16</sup> Under the Third Restatement of Unfair Competition section 46, the appropriation of a person's identity for commercial value without that person's consent is barred from use in trade.<sup>17</sup> The prevention of this trade tactic protects people, public or private, from having their likeness,

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<sup>11</sup> H.B. 5594, 103d Gen. Assemb. (Il. 2023).

<sup>12</sup> See Warren & Brandeis, *supra* note 8; see also U.S. Dep't. of Just. v. Rep. Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989).

<sup>13</sup> See J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 6:57 (2d ed. 2023).

<sup>14</sup> See Jonathan L. Faber, *Recent Right of Publicity Revelations: Perspective from the Trenches*, 3 SAVANNAH L. REV. 37, 40 (2016).

<sup>15</sup> See Jonathan L. Faber & Welsey A. Zirkle, *Spreading Its Wings and Coming of Age: With Indiana's Law as a Model, the State-Based Right of Publicity Is Ready to Move to the Federal Level*, 45 RES GESTAE 31, 32–33 (2001).

<sup>16</sup> See, e.g., RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995).

<sup>17</sup> See *id.* §§ 46, 47.

name, or identity used without their consent by another in commercial trade.<sup>18</sup>

Although public individuals or celebrities are often the subject of cases involving the right of publicity, the right is not limited to public figures—rather, it extends to every person, public or private.<sup>19</sup> The lynchpin of a right of publicity claim is a commercial use. Nonetheless, generally, the value of one’s right of publicity is commensurate with their fame. For example, if a private person’s image or likeness is used to endorse a product, without notoriety, the actual damages may not be much. What would the market value be for a license to use a private person’s image? How much of the profits could be shown as directly attributable to the use of that non-celebrity’s persona? Even if the answer to both of those questions is “not a whole lot,” a claim may still be brought, and damages could still be awarded. As a fact-intensive inquiry, a jury and court would decide the value of the use. As such, every case is different, so although a person is not famous, that does not mean their image cannot be valuable.<sup>20</sup>

In any event, the right of publicity serves to protect people from exploitation in an area that is otherwise unregulated. Copyright law serves to protect a right “fixed in any tangible medium.”<sup>21</sup> Trademark rights protect source identifiers, i.e., anything that designates the origin of a product or service.<sup>22</sup> As an example of the value of the right of publicity, imagine a singer who is not famous and agrees to record a song, but is not told that that song will eventually be used in a global commercial campaign. That individual would likely not have enough notoriety for a claim in trademark. Their voice would not serve as a source identifier, as the public would not generally be able to identify that person based on their voice (regardless of how amazing their voice may be). Although they may have some copyright protection, a work-for-hire clause would allow the other party to not only use, but create derivative works of that initial use, and thus the singer may be left with no additional compensation if that voice is subsequently used on a massive advertising campaign.

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<sup>18</sup> *See id.*

<sup>19</sup> *See* MCCARTHY & SCHECHTER, *supra* note 13, § 1:3. *See generally* Jonathan L. Faber, *Indiana: A Celebrity-Friendly Jurisdiction*, 43 RES GESTAE 24 (2000).

<sup>20</sup> *See, e.g.*, *Christoff v. Nestlé USA, Inc.*, 213 P.3d 132, 134, 141 (Cal. 2009) (reversing a jury award of over \$15 million based on the “single publication rule”).

<sup>21</sup> 17 U.S.C. § 102.

<sup>22</sup> *See* Trademark Act of 1946, 15 U.S.C. §§ 1051–1141n.

On the other hand, a right of publicity provides a clear claim where a person's voice is used without authorization. While studios and advertising agencies will likely contract specifically for the right of publicity and continue to use their bargaining position to pay what may be seen as below market value, nonetheless, more clarity is required in contracting to provide the licensor a better grasp on what is being negotiated and result in more fair compensation when the use of a person's voice (or image) expands (often, exponentially) beyond the original contracted use.

The right of publicity sits neatly in between other forms of intellectual property, namely copyright and trademark, sharing rationale with each, and filling an unaddressed gap. Under the U.S. Constitution, works by individual authors are imbued with copyright protection to "promote the Progress of Science and useful Arts."<sup>23</sup> With a license to use a copyrighted work, a derivative work can freely build upon an existing protected expression of an idea.<sup>24</sup> Although it is debatable whether the right of publicity promotes creativity, this right should similarly incentivize a person to protect their individuality, identity, and essence as a person (regardless of how much effort they have put in to cultivate this persona). With the ability to bring a claim under a right of publicity, a pathway is created to prevent the commercialization of an individual's identity without consent.<sup>25</sup> At the same time, similar to trademark protection, a right of publicity protects the public from confusion in the commercial marketplace.<sup>26</sup>

## B. Current Right of Publicity State Statutes

Although derived from privacy rights, the right of publicity evolved and is now best characterized and generally considered a property right—specifically, an intellectual property right.<sup>27</sup> In states where the right is still considered a privacy right—and even in states where the right of publicity is generally referred to as a

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<sup>23</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>24</sup> 17 U.S.C. §§ 103, 204.

<sup>25</sup> See generally Mark Roesler & Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity*, AM. BAR ASSOC. (Sept. 16, 2020), [https://www.americanbar.org/groups/intellectual\\_property\\_law/publications/land-slide/2020-21/september-october/](https://www.americanbar.org/groups/intellectual_property_law/publications/land-slide/2020-21/september-october/) [what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/ [https://perma.cc/FWY9-VYHY].

<sup>26</sup> See Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1164 (2006).

<sup>27</sup> Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, 28 COMM'NS LAW. 14, 14 (2011). Notwithstanding, some states may still consider it a privacy right. *Id.*

property right—the historical origins as a privacy right create confusion and discrepancies in application of the right.<sup>28</sup>

i. New York

In 1903, New York passed the first privacy law in the country, concerning the use of a living person’s “name, portrait or picture”<sup>29</sup> without prior consent.<sup>30</sup> In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, the Second Circuit examined the New York law and distinguished the right of publicity from the right of privacy.<sup>31</sup> In that case, involving a contract for baseball player photographs on chewing gum products, the court saw value in a person’s photograph and in the right to exclusively contract to use that photograph for the promotion of a product, such as chewing gum.<sup>32</sup> Further, the court recognized an economic incentive for prominent persons to monetize their likenesses by issuing exclusive grants.<sup>33</sup> The New York statute primarily serves privacy interests.<sup>34</sup> The New York law provides a claim where, without written authorization, one’s “name, portrait, picture or voice is used within th[e] state for advertising purposes or for the purposes of trade.”<sup>35</sup> Although the prohibited use is in a commercial context, damages are focused on privacy concerns.<sup>36</sup> Damages from a right of publicity claim under New York Civil Rights Law sections 50 and 51 include “mental strain, humiliation, [and] distress associated with the traditional notion of privacy” and also

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<sup>28</sup> See, e.g., NEB. REV. STAT. § 20-202 (2024); 9 R.I. GEN. LAWS §§ 9-1-28, 9-1-28.1 (2024); WIS. STAT. § 995.50 (2023); *Lugosi v. Universal Pictures*, 603 P.2d 425, 439 n.14 (1979) (Bird, C.J., dissenting) (“[T]he development of [the] right has been spasmodic. This is in part a consequence of courts adjudicating claims which might be categorized as invasions of plaintiff’s right of publicity as privacy claims.”).

<sup>29</sup> N.Y. CIV. RIGHTS LAW § 50 (Consol. 2024). See Daniel J. Solove, *A Brief History of Information Privacy Law*, G.W. LAW SCHOLARLY COMMONS 1, 13 (2006), available at [https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2076&context=faculty\\_publications](https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2076&context=faculty_publications) [<https://perma.cc/V853-LND9>]; see also *New York*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY, [https://rightofpublicityroadmap.com/state\\_page/new-york/#:~:text=New%20York%20recognizes%20a%20right,the%20country's%20first%20privacy%20law.](https://rightofpublicityroadmap.com/state_page/new-york/#:~:text=New%20York%20recognizes%20a%20right,the%20country's%20first%20privacy%20law.) [<https://perma.cc/JM7M-EXME>].

<sup>30</sup> *Id.*; see also Faber, *supra* note 14, at 40.

<sup>31</sup> *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867–68 (2d Cir. 1953).

<sup>32</sup> *Id.* at 868.

<sup>33</sup> *Id.* at 868.

<sup>34</sup> See *id.* at 867; see also N.Y. CIV. RIGHTS LAW § 51 (Consol. 2024). But see *In re Hearst Commc’ns State Right of Publicity Statute Cases*, 632 F. Supp. 3d 616, 617, 620 (S.D.N.Y. 2022) (reasoning that the right of publicity in nine jurisdictions not including New York is only a property right).

<sup>35</sup> N.Y. CIV. RIGHTS LAW § 51 (Consol. 2024).

<sup>36</sup> See *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 69, 77 (S.D.N.Y. 1982) (citing *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004, 1012 (1981)).

economic injury stemming from the privacy interests of public figures (i.e., injury to a “property” interest).<sup>37</sup> While focused on privacy rights, this New York right of publicity statute nonetheless creates a property right held by the individual until contracted, licensed, or gifted.<sup>38</sup>

## ii. California

Although it is best described as a property right, courts also refer to California’s right of publicity as a privacy right.<sup>39</sup> Essentially, in California, the statutory right of publicity is a property right that provides redress for commercial injury, and the common law right of publicity provides redress for both commercial injury and non-commercial injury.<sup>40</sup> In addition, the statutory right requires a knowing use, whereas mistake and neglect are sufficient to infringe the common law right.<sup>41</sup> Practically, the non-commercial aspect of the right of publicity in California provides a remedy for emotional distress from the negligent or inadvertent use of one’s right of publicity.<sup>42</sup>

## iii. Indiana

Indiana’s right of publicity statute is often considered the most expansive (i.e., plaintiff-friendly) in the nation.<sup>43</sup> This view is derived substantially from (1) the statute providing a broad definition of what is included in the right (“name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms”<sup>44</sup>); (2) the statute allowing claims to be brought in

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; see also Assemb. 5605-C, 2019–2020 Legis. Assemb., Reg. Sess. (N.Y. 2020).

<sup>39</sup> See, e.g., *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996) (“Injury to a plaintiff’s right of publicity is not limited to present or future economic loss, but ‘may induce humiliation, embarrassment, and mental distress.’” (quoting *Waits v. Tracy-Locke, Inc.*, 978 F.2d 1093, 1103 (9th Cir. 1992))).

<sup>40</sup> In California, “the right of publicity is both a statutory and a common law right.” *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001). For California’s statutory right of publicity, see CAL. CIV. CODE § 3344 (Deering 2024). For California’s common law right of publicity, see *Comedy III Prods.*, 21 P.3d at 799, 811; *Eastwood v. Sup. Ct.*, 198 Cal. Rptr. 342, 344 (Ct. App. 1983); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992).

<sup>41</sup> See, e.g., RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995); *Orthopedic Sys., Inc. v. Schlein*, 135 Cal. Rptr. 3d 200, 210–11 (Ct. App. 2011); *Eastwood*, 198 Cal. Rptr. at 351–52.

<sup>42</sup> See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1103-04 (9th Cir. 1992), *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014).

<sup>43</sup> See, e.g., *Roesler & Hutchinson*, *supra* note 25.

<sup>44</sup> IND. CODE § 32-36-1-7(1) to (9) (2023).



Indiana regardless of the residence of the parties; and, (3) Indiana’s post-mortem right of publicity extending one hundred years after the date of a person’s death.<sup>45</sup> However, the Indiana statute does not provide the highest statutory damages in the country.<sup>46</sup>

As one can imagine, these inconsistencies in the law create inconsistent results nationwide and add to the general criticism of the right of publicity. A federal right of publicity with consistent application will, at least, lessen the harm to plaintiffs, defendants, and commercial businesses.

## II. HARM IN A LACK OF CONSISTENCY AND UNIFORMITY

Several states consider the right of publicity to be a property right.<sup>47</sup> However, some states still consider it a privacy right,<sup>48</sup> and others (such as California), view it as both.<sup>49</sup> Although it may seem like a distinction without a difference, delineating key aspects of each statute is important to ensure a clear application when framing a federal law.

In *Hearst*, the District Court for the Southern District of New York analyzed the history of the right of publicity statutes in eight states and one territory (Alabama, California, Hawaii, Indiana, Nevada, Ohio, South Dakota, Washington, and Puerto Rico),<sup>50</sup> explaining that the right of publicity is an intellectual property

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<sup>45</sup> *Id.* § 32-36-1-8(a).

<sup>46</sup> Compare IND. CODE § 32-36-1-10(1)(A) (2023) (at least \$1,000 or actual damages), with TEX. PROP. CODE ANN. § 26.013(a)(1) (West 2023) (at least \$2,500 or actual damages).

<sup>47</sup> See, e.g., *Florida Right of Publicity Law*, DIGIT. MEDIA L. PROJECT (Sept. 10, 2023), <https://www.dmlp.org/legal-guide/florida-right-publicity-law> [<https://perma.cc/Q9K9-ESWR>] (citing FLA. STAT. § 540.08 (2023)). See also *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 967–68 (10th Cir. 1996) (citing OKLA. STAT. tit. 12, § 1449(A) (1985)).

<sup>48</sup> See e.g., NEB. REV. STAT. § 20-202 (2024) (“Any person, firm, or corporation that exploits a natural person, name, picture, portrait, or personality for advertising or commercial purposes shall be liable for invasion of privacy.”)

<sup>49</sup> See Judicial Council of California Civil Jury Instructions No. 1084A (referring to the “right to privacy” but also requiring a direct connection to “commercial purpose,” which connotes a property interest).

<sup>50</sup> *In re Hearst Commc’ns State Right of Publicity Statute Cases*, 632 F. Supp. 3d 616 *passim* (S.D.N.Y. 2022) (first citing ALA. CODE §§ 6-5-770, -772 (2023); then citing CAL. CIV. CODE § 3344 (Deering 2024); then citing HAW. REV. STAT. §§ 482P-1 to 482P-8 (2023); then citing IND. CODE §§ 32-36-1-1 to 32-36-1-20 (2023); then citing NEV. REV. STAT. §§ 597.770–597.810 (2023); then citing OHIO REV. CODE ANN. §§ 2741.01–2741.99 (LexisNexis 2024); then citing S.D. CODIFIED LAWS §§ 21-64-1 to 21-64-12 (2024); then citing WASH. REV. CODE §§ 63.60.010–63.60.080 (2023); and then citing P.R. LAWS ANN. tit. 32, §§ 3151–3158 (2011)).

right that is created by one's labor and effort.<sup>51</sup> The *Hearst* court further explained that the "right of publicity is meant to protect the value of an individual's name, likeness, or other indicia of identity, by preventing it from being commercially exploited by another."<sup>52</sup> The *Hearst* court found the right of publicity is solely a property right, distinguishing publicity rights from privacy rights.<sup>53</sup> By concluding that the plaintiffs had no viable right of publicity claims, the Court denied making a judgment as to whether the activity at issue (selling subscriber information without consent) is actionable conduct as any claim other than a right of publicity but alludes to the possibility of privacy claims.<sup>54</sup> The Court also specifically rejected the plaintiffs' arguments that the right of publicity statute could be applied to misappropriation "isolated from the overarching right of publicity."<sup>55</sup> In other words, appropriation of one's name, image, or likeness absent its use to promote a product or make an endorsement, is insufficient to state a right of publicity claim. The key is that the use must be in conjunction with selling a good or service, whether that is through promotion or branding.

If considered a privacy right, damages may be limited to general damages (commonly referred to as pain and suffering). However, as a property right, damages for a violation of the right of publicity should not include damages from personal feelings, embarrassment, or distress, but should include damages to compensate for the commercial loss, including lost profits attributable to the use and diminishment in value of commercial reputation. It is confusing, and moreover, unnecessary, for the right of publicity to encompass any use outside the commercial realm—redress for non-commercial uses can be found through claims for negligent infliction of emotional distress, defamation, and right of privacy.

Currently, the Indiana statute is "the most progressive Right of Publicity Statute in the nation."<sup>56</sup> The broad protection afforded

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<sup>51</sup> *In re Hearst Comm'ns State Right of Publicity Statute Cases*, 632 F. Supp. 3d 616, 620 (S.D.N.Y. 2022) (citing *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 151 (3d Cir. 2013)).

<sup>52</sup> *Id.* at 620–21.

<sup>53</sup> *Id.* at 620.

<sup>54</sup> *Id.* at 626.

<sup>55</sup> *Id.* at 623.

<sup>56</sup> Faber & Zirkle, *supra* note 15, at 31.

by Indiana’s statute encourages forum shopping.<sup>57</sup> Although plaintiffs may enjoy the benefits of that statute, this type of a haphazard system is not beneficial for society. Without uniformity, plaintiffs are likely to file in a jurisdiction where they are most likely to reap the most benefits. For example, the California statutes explicitly includes name, voice, signature, photograph, and likeness,<sup>58</sup> while the New York statute does not include signatures.<sup>59</sup> Meanwhile, other state statutes do not include voice.<sup>60</sup>

While some states have statutory protections and others have common law (California has both<sup>61</sup>), transaction and litigation costs can be reduced significantly with a uniform federal right. Transaction costs are increased when contracting parties must consider the laws of various jurisdictions when negotiating and papering deals. Further, forum shopping by parties, complex procedural steps to consolidate state claims, and disparate results all increase litigation costs. By reducing transaction and litigation costs under a federal right of publicity, both businesses and public and private individuals will benefit from the lack of inconsistency between jurisdictions.

### III. SOLUTION: A FEDERAL RIGHT OF PUBLICITY

Although the *Hearst* court did not set out to establish a federal right of publicity, the case alludes to the idea of combining similar state statutes regarding a right of publicity. Interestingly, in *Hearst*, nine plaintiffs, alleging violations of nine different state statutes, asserted that the statutes, while “not identical . . . are substantially similar and will include overlapping issues of law.”<sup>62</sup> As seen in *Hearst*, there has been significant movement by states modeling statutes after each other.<sup>63</sup> With states emulating each other’s right of publicity statutes, a federal law would negate the

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<sup>57</sup> The statute explicitly allows claims to be brought in Indiana State Court based on activity that occurs within the state’s borders, regardless of the residence of any of the parties. IND. CODE ANN. §§ 32-13-1-1—32-13-1-20 (LexisNexis 2023).

<sup>58</sup> CAL. CIV. CODE § 3344 (Deering 2023).

<sup>59</sup> See N.Y. CIV. RIGHTS LAW § 50 (Consol. 2024).

<sup>60</sup> See, e.g., ARIZ. REV. STAT. § 12-761 (LexisNexis 2024); FLA. STAT. § 540.08 (2023); KY. REV. STAT. ANN. § 391.170 (LexisNexis 2023); MASS. GEN. LAWS ch. 214, § 3A (2024); NEB. REV. STAT. § 20-202 (2023); 9 R.I. GEN. LAWS §§ 9-1-28 to 28.1 (2024); TENN. CODE ANN. § 47-25-1104 (2024); UTAH CODE ANN. §§ 45-3-2 to -3 (LexisNexis 2023); VA. CODE ANN. § 8.01-40 (2023); WIS. STAT. § 995.50 (2023).

<sup>61</sup> See *supra* note 40.

<sup>62</sup> *In re Hearst Comm’n’s State Right of Publicity Statute Cases*, 632 F. Supp. 3d 616, 618–19 (S.D.N.Y. 2022).

<sup>63</sup> See, e.g., Faber & Zirkle, *supra* note 15, at 31.

need for each state to go through the process of enacting their own statutes. Instead, a federal law would collectively address the same issue, making the consolidation of nine different lawsuits unnecessary, avoiding a need for attorneys to know multiple state statutes, and eliminating procedural waste.

#### A. Proposal

A federal right of publicity will provide clarity through well-defined categories of what is protected, what is not protected, and how long protections are afforded. The right of publicity should protect a person's name, image, likeness, voice, and signature from being used without authorization to endorse or promote a commercial endeavor, such as the sale of goods or services. Categories beyond name, image, likeness, voice, and signature are unnecessary. For example, expanding likeness to include "distinctive appearance, gestures or mannerisms,"<sup>64</sup> such as in Indiana's statute, are unnecessary as all are already included in likeness, as long as those features actually invoke the person in the public's mind.

#### B. Private vs. Public Parties

As seen through the discussion above, there should not be a distinction between private and public parties. Although the right is generally thought of as applying to any person, regardless of the level of fame achieved, there is still debate about the differences in the right for public and private persons.<sup>65</sup>

There is no need to divide the right into categories based on the arbitrary determination of whether one is a celebrity or not. First, the inquiry would be entirely subjective and susceptible to disparate application of the law. The categorization of celebrity versus private citizen is not black and white, but rather, exists across a spectrum. Especially in the day of social media and through the rise in popularity of talent competitions such as *American Idol*, and reality shows on virtually every topic under the sun, there is a blurred line between private and public citizens, and there can be no good methodology to distinguish between celebrity and non-celebrity. Today, an unknown singer is one viral video or TikTok away from becoming an international superstar.

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<sup>64</sup> IND. CODE ANN. § 32-36-1-1 (LexisNexis 2023).

<sup>65</sup> See, e.g., *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 69, 77 (S.D.N.Y. 1982).

Most importantly, the distinction does not matter practically; the market will determine the value of a person's right of publicity.

### C. Right of Publicity After Death

With the current state-based system, the post-mortem rights provided for by state statutes could not be any more divergent—ranging from no post-mortem right at all to an unlimited right.<sup>66</sup> Criticism for a post-mortem right is focused on arbitrary comparisons to other forms of intellectual property, the concern that a “remote heir” does not deserve protection, and free speech considerations.<sup>67</sup>

Copyright protection lasts for the life of the author plus seventy years after death. Patent protection is provided for only fourteen to twenty years.<sup>68</sup> The primary reason for limiting the terms of those granted rights is to allow the public to make use of and expand upon creations and inventions, ultimately providing the biggest benefit to society. Providing some form of limited monopoly to the creator/inventor is also generally seen as being beneficial to society as it provides an incentive to create and invent.

That being said, the differences between copyright and right of publicity are vast. Copyright protects a specific work, whereas the right of publicity protects an individual. Copyright protection seeks to encourage the creation of new works by finding a balance between incentivizing creation and ensuring public access to and use of creative works (to, in turn, spawn more creation and disseminate knowledge). The same rationale does not apply to the right of publicity. The right of publicity exists to prevent unwanted association with a product or service. While there is a need to incentivize the work put into creating a marketable persona, the concern of ensuring public access that exists with copyright is not present in the right of publicity context. After all, the right is limited to commercial uses of one's persona. Allowing one to have a full monopoly over their persona, while they are living, should not be controversial. However, the same is not true of the existence of that right after death.

Decades of jurisprudence have considered the right of publicity a property right. As a property right, it should be freely descendible and alienable. As long as there are clear, codified

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<sup>66</sup> See *supra* note 6.

<sup>67</sup> *Id.*

<sup>68</sup> See *How Long Does Patent, Trademark or Copyright Protection Last?*, STOPFAKES.GOV (Feb. 25, 2021), <https://perma.cc/9UKA-6MTH> [<https://perma.cc/9UKA-6MTH>].

exceptions, there are no policy justifications for limiting the post-mortem right of publicity. With exceptions for news, public affairs, and expressive works/art, First Amendment and fair use concerns are addressed. This also accounts for any argument that the right would hinder creators or minimize the free market. Artists and producers would be free to utilize the personas of deceased celebrities in works of art, but only the heirs and rightsholders would be able to exploit the personas in connection with the promotion or endorsement of products.<sup>69</sup>

That the right of publicity should exist perpetually is not as far-fetched as it may seem at first glance. Trademarks, which may be most closely related to the right of publicity, have an unlimited duration as long as used.<sup>70</sup> Trademarks protect the reputation and goodwill of a business, similar to the right of publicity protecting the reputation and goodwill of a person.

However, at least when a person is living, the right of publicity cannot be lost due to lack of use (as with trademarks). The right of publicity stems from natural rights that are immutable, and thus the pre-mortem right of publicity does not require any use—a person should own their persona and have the free choice as to how to cultivate and exploit it (or not). However, any post-mortem right does not share the same universal human right quality. As such, the post-mortem right should have a use requirement to be maintained. After an exclusive period, the heirs and rightsholders should be required to make use of the right of publicity in order to keep it. As time goes on following a person's death, the likelihood that a rightsholder has any personal connection to the deceased diminishes, and the likelihood that a corporation controls their right of publicity increases. In addition, the passage of time would increase the societal benefit in ensuring free access to use that right of publicity, as an ingrained piece of culture. If the heirs of a deceased celebrity want to keep the right, they simply have to keep using it. Tennessee's law provides some guidance on this point.<sup>71</sup> The Tennessee statute provides that the right will continue for ten

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<sup>69</sup> See, e.g., Richard E. Fikes, *The Right of Publicity: A Descendible and Inheritable Property Right*, 14 CUMB. L. REV. 347, 367 (1984) (arguing that the public interest will be minimally impacted as the First Amendment will triumph and allow for uses that are beneficial to society).

<sup>70</sup> See *supra* note 68.

<sup>71</sup> TENN. CODE ANN. § 47-25-1104 (2023).

years after a person's death and then will continue indefinitely, unless it is not used for two years.<sup>72</sup>

The federal law should provide post-mortem rights in a similar manner. There should be an initial period in which the right is granted regardless of use and a subsequent period where use is required. Due to concerns that remote heirs may be the undeserving beneficiaries of post-mortem rights, there should be time limits on the absolute post-mortem right, roughly equivalent to one generation. Thereafter, if the rightsholders fail to make use of it for a period of two years, the right will be lost and available to anyone.

Twenty years after death, based on a conservative number of one generation, would be appropriate to balance the various concerns at play.<sup>73</sup> On one hand, there are no strong arguments against the right from continuing indefinitely, as any property right would. On the other hand, questions as to the seeming impropriety of providing a “privacy” right, after someone has died, do not seem likely to diminish, and thus, a compromise is necessary to get any legislation passed. In sum, the right will continue exclusively for 20 years after death, and indefinitely if being used by the heirs or their successors—but if not used for a period of two years (after the exclusivity period), it will be lost for good, and available to others.

#### D. First Amendment and Fair Use Exceptions

The federal statute should spell out the so-called “exceptions” to the right of publicity. There is strong precedent for these exceptions, and they serve to provide necessary and well-accepted limits on the right of publicity. Explicitly including them in legislation will help to alleviate concerns from detractors, and also provide clarity, thus reducing both transactional and litigation costs. As such, they should be codified to the greatest extent possible.

As recognized by some courts, a fair use analysis analogous to that used in copyright cases is appropriate for the right of publicity.<sup>74</sup> States have also codified exceptions to the unauthorized

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<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., *The Whys and Hows of Generations Research*, PEW RSCH. CTR. (Sept. 3, 2015), <https://www.pewresearch.org/politics/2015/09/03/the-whys-and-hows-of-generations-research/> [<https://perma.cc/G8R9-Y2K6>].

<sup>74</sup> See, e.g., *Groucho Marx Prods., Inc. v. Day & Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd*, 689 F.2d 317 (2d Cir. 1982); see also *Apple Corps Ltd. v. Leber*, 229 U.S.P.Q. 1015 (Cal. Super. Ct. 1986).

uses of the right of publicity.<sup>75</sup> In California, use of one's right of publicity in connection with any news, public affairs, or sports broadcast or account, or any political campaign, is not actionable per the statute.<sup>76</sup> However, the use of a person's name, image, or likeness in one of the enumerated categories may still give rise to a claim in California, as constitutional defamation standards have been held to apply to the right of publicity statute.<sup>77</sup>

The federal statute should codify exceptions for news, public affairs, and sports broadcasts/accounts, and political campaigns, and also make clear that uses in these categories that promote or endorse another do not qualify as an exception. The federal statute should also make clear who bears the burden of proof. As in California, the plaintiff shall bear the burden of showing that the use does not occur in relation to a news, public affairs, or sports broadcast, or any political campaign.<sup>78</sup>

General First Amendment and fair use defenses must also be available in order to account for the public interest. These defenses shall be affirmative defenses, and the defendant should have the burden of proof, similar to a copyright fair use defense.<sup>79</sup>

#### CONCLUSION

Not only is there a need for a federal right of publicity, but it should really not be a controversial proposition. As discussed in this article, under the current state-law system, claims are being heard in jurisdictions where none of the parties reside, and federal courts are tasked with consolidating and interpreting claims from multiple jurisdictions. Case outcomes can vary drastically just depending on the residency of a plaintiff.<sup>80</sup> Although not explicitly mentioned in the Constitution like the Copyright Clause,<sup>81</sup> the authority for Congress to pass a federal right of publicity can

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<sup>75</sup> See, e.g., CAL. CIV. CODE § 3344 (Deering 2024).

<sup>76</sup> See *id.*

<sup>77</sup> See *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 349–52 (1983).

<sup>78</sup> See *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 319 (2001) (“Throughout this litigation plaintiffs have borne the burden of establishing that their names and likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d).”).

<sup>79</sup> See 17 U.S.C. § 107 (2024); Jury Council of California Civil Jury Instructions 1804A (2024); see also *Yang v. Mic Network, Inc.*, 405 F. Supp. 3d 537, 542 (S.D.N.Y. 2019) (quoting *Authors Guild v. Google, Inc.*, 804 F.3d 202, 213 (2d Cir. 2015)).

<sup>80</sup> See *Milton H. Greene Archives v. CMG Worldwide, Inc.*, 568 F. Supp. 2d 1152, 1182 (C.D. Cal. 2008), *aff'd*, 692 F.3d 983 (9th Cir. 2012).

<sup>81</sup> See U.S. CONST. art. I, § 8, cl. 8.



hardly be doubted. As demonstrated by the mere fact that cases are brought in states where no party resides, the Commerce Clause<sup>82</sup> is sufficient support for a federal right, as products are being marketed, promoted, or sold interstate.

When the right of publicity is clearly defined to exist only in relation to commercial promotion or endorsement, rather than an open-ended right of privacy, and the exceptions and defenses outlined above are statutorily set forth, the right should not be feared but rather embraced. By eliminating ambiguity, and, in turn, reducing wasted time and money, a federal right of publicity will protect publicity rights for individuals and their families and also spur creativity and desired public discourse on matters of public interest.

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<sup>82</sup> *Id.* art. I, § 8, cl. 3.

