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Henley v. Dillard Department Stores: Don Loves His Henley, and Has a Right to It Too

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HENLEY v. DILLARD DEPARTMENT STORES:
DON LOVES HIS HENLEY, AND HAS A RIGHT TO IT TOO

"[I]t is common knowledge that many prominent persons . . . would feel sorely deprived if they no longer received money for authorizing advertisements."1

I. INTRODUCTION

As we approach the new millennium, we are aware of a vast subculture that modern society has developed based upon "celebrities" and their lives. Capitalizing upon the popularity of our "stars," companies enter into multi-million dollar contracts with celebrities to endorse various products.2 With such a large sum of money changing hands, it is not surprising that the legal world has become an important part of such transactions. One aspect of these transactions that is of particular interest is the "right of publicity" doctrine, which first appeared approximately fifty years ago.3

The term "right of publicity" was introduced into the judicial system with the Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.4 decision. Es-

2. One can simply turn on the television or open almost any magazine to see examples of celebrity commercial power. There are Nike ads that feature many sports celebrities, including Michael Jordan and numerous other NBA basketball players, soccer stars such as Mia Hamm, athletes like Gabriel Reese and many more. The American Express Card is another example, with commercials featuring Jerry Seinfeld, Tiger Woods and other celebrities. Playstation, a video game system, has advertisements featuring numerous sports stars. MCI has advertisements featuring Michael Jordan, and AT&T features numerous stars in its advertisements, including Paul Reiser. These are simply examples to show that celebrity endorsement in advertisements is far from a rarity, but rather very common in American society.
3. For a discussion of the evolution of the right of publicity, see infra notes 22-37 and accompanying text.
4. 202 F.2d 866, 868 (2d Cir. 1953). In his opinion, Judge Frank reasoned: [I]n addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross." . . . This right might be called a "right of publicity." For it is common knowledge that many prominent persons . . . far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses [sic], trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.

Id. at 868. It is interesting to note that the very circuit to develop the term would later deny any protection under a common law idea of a right of publicity. See

(169)
sentially, the right of publicity gives a person a property right in his or her own publicity, and it also gives an individual the right to protect and control the use of his or her identity in the commercial sphere. The right of publicity has gained independence and a general acceptance in the courts. In modern times, the right of publicity is generally a

Stephano v. News Group Publications, Inc., 474 N.E.2d 580, 584 (N.Y. 1984) (allowing only statutory right to privacy claim). The New York Court of Appeals found that New York privacy statutes precluded recognition of a common law right of publicity. See id. at 583 ("Since the 'right of publicity' is encompassed under the Civil Rights Law as an aspect of the right of privacy, which . . . is exclusively statutory . . . , the plaintiff cannot claim an independent common-law right of publicity.").

Most commentators and courts will agree that the decision in Haelen marked the emergence of the right of publicity. See, e.g., Sheldon W. Halpern, The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality, 46 Hastings L.J. 855, 854 (1995) ("The right of publicity as currently understood was the product of the determination of the Second Circuit in Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc."); H. Lee Hetherington, Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity, 17 Colum.-Vla. L. & Arts L. 2 (1992) ("The court suggested the label, 'right of publicity,' and by so doing, provided the legal theory that would help empower celebrities in the emerging economic sphere being created by the entertainment, media and advertising industries."); Steven C. Clay, Note, Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts, 79 Minn. L. Rev. 485, 489 (1994) (noting Haelen court coined term "right of publicity" and was "the first case to explicitly recognize that a celebrity's name or likeness has value beyond a right of privacy.").

5. See White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1399 (9th Cir. 1992) (discussing right of celebrity to control commercial value of identity); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983) ("The right of publicity has developed to protect the commercial interest of celebrities in their identities."); Motschenbacher v. R. J. Reynolds Tobacco Co., 498 F.2d 821, 824-25 (9th Cir. 1974) (noting right of individual to control commercial use of identity); Henley v. Dillard Dep't Stores, 46 F. Supp. 2d 587, 590 (N.D. Tex. 1999) (discussing purpose of right of publicity); Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979) ("The so-called right of publicity means in essence that the reaction of the public to name and likeness, which may be fortuitous or which may be managed or planned, endows the name and likeness of the person involved with commercially exploitable opportunities."); see also Barbara A. Burnett, The Property Right of Publicity and the First Amendment: Popular Culture and the Commercial Persona, 3 Hofstra Prop. L.J. 171, 173 (1990) (discussing right of publicity); Richard S. Robinson, Preemption, the Right of Publicity, and a New Federal Statute, 16 Cardozo Arts & Ent. L.J. 183, 184 (1998) (same). See generally J. Thomas McCarthy, The Rights of Publicity and Privacy (4th ed. 1999) (discussing right of publicity).


The Haelen opinion's recognition of a proprietary interest in personality and the analytic work done over four decades adumbrate a right that is predicated on significant societal interests and concerns. It is not happenstance that the right of publicity has come to be articulated in the Restatement of the Law of Unfair Competition. There is, at bottom, recognition of the fact that there is something wrong, a manifest "unfairness," when one person seeks to trade on the personality of another.

Id. at 878; see Burnett, supra note 5, at 180-81 ("[B]y the mid-1950's the distinct forms of injury arising from the privacy tort and the publicity tort were recognized,
celebrity-based cause of action. The right of publicity has been described as “the inherent right of every human being to control the commercial use of his or her identity.” Currently, over twenty states recognize

and the potential commercial loss as a basis of publicity rights was distinguished from psychological distress as a basis for a privacy tort action.”); Patricia B. Frank, White v. Samsung Electronics America, Inc.: The Right of Publicity Spins its Wheels, 55 Ohio St. L.J. 1115, 1115 (1994) (“Since the 1950s, American law has recognized a property right in a person’s publicity as ‘the right of each person to control and profit from the publicity values which he has created.’”) (quoting Melville B. Nimmer, The Right of Publicity, 19 Law & Contemp. Probs. 203, 216 (1954)).

7. See Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1098 (9th Cir. 1992) (noting right of publicity most often involves celebrity); Carson, 698 F.2d at 835 (discussing right in terms of celebrities); Motschenbacher, 498 F.2d at 824-25 (same); Frank, supra note 6, at 1116-17 (same); Robinson, supra note 5, at 184 (discussing right as developed in response to needs of celebrities); Gary M. Ropski & Diane L. Marschang, The Stars’ Wars: Names, Pictures and Lookalikes, 17 AIPLA Q.J. 81, 82 (1989) (“Generally, the right of publicity exists to protect a ‘celebrity’ from another person’s commercial exploitation of that celebrity’s ‘fame.’”). Although Ropski and Marschang state that the right of publicity generally protects celebrities, they note:

Obvious questions arise concerning the right of publicity, specifically, who is a celebrity and what degree of fame is required for someone to achieve celebrity status. Any person famous or well-known in his or her field of endeavor may be a celebrity, including entertainers, athletes, politicians, and even lawyers. The degree of fame a celebrity must have is a much more difficult issue . . . .

Id. at 82. Interestingly, they note that it is unresolved “whether the right of publicity should be available to someone who has attained his or her notoriety through immoral or criminal activities.” Id. at 83. In today’s society, it seems that equal, or even greater, media exposure is given to individuals who could be described as participants in “immoral” or “criminal” activities. Just a few of the many examples are the “Unabomber” Ted Kaczynski, or Heidi Flice, the Hollywood call-girl ring-leader, and perhaps even Monica Lewinski, with whom President Bill Clinton engaged in an extra-marital affair. The line between fame and notoriety is not as sharp as it once was. As a result, the outcome of right of publicity claims brought by those individuals who fall into the gray area, is even less certain than claims brought by admitted “celebrities.” See id. Yet as Ropski and Marschang noted, “There is no case law in the United States that directly addresses the right of publicity as applied to infamous public figures.” Id.

Halpern notes that although some commentators debate as to whether the status of “celebrity” is necessary, “in practice that debate is largely academic.” Halpern, supra note 4, at 854. The right of publicity is generally reserved for celebrities. See id; see also Hetherington, supra note 4, at 45-47 (discussing status of “celebrity”). As many have noted, Hetherington agrees that the right of publicity raises “the obvious question: Who is a celebrity in the eyes of the law?” Id. at 45. Hetherington argues that this question is not hard to answer and that “anyone whose identity commands value in the commercial marketplace should qualify for protection under the ‘direct commercial exploitation of identity’ test.” Id. at 46. Like Halpern’s reasoning, Hetherington feels that “[t]o start drawing lines and creating judicial tests for celebrity status is an unnecessary exercise.” Id.

a right of publicity in some form. Although the Supreme Court has confirmed the existence of a right of publicity, the boundaries of this right continue to be a source of contention among courts and commentators. Some are willing to expand the right to include many forms of publicity promotions, while others are reluctant

9. See CAl. CIV. CODE § 3344 (West 1997) (recognizing right of publicity); FLA. STAT. ANN. § 50.08 (West 1997) (same); TEX. PROF. CODE ANN. § 26.002 (West 1994) (same); Wis. STAT. ANN. § 895.50 (West 1997) (same); see also McCarthy, supra note 5, § 6.2, at 6-10 (providing information regarding number of state statutes creating right of publicity). States that have recognized the right of publicity under common law include: California, Connecticut, Florida, Georgia, Hawaii, Illinois, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, Utah and Wisconsin. See id. § 6.1, at 6-7 to 6-8 (listing states with common law recognition of right); see also Clay, supra note 4, at 493 (noting number of states recognizing right); Lisa M. Ferri & Robert G. Gibbons, Outside Counsel, Skirting the Right of Publicity in the Wake of 'Hoffman v. Capital Cities,' 221 N.Y.L.J. 37 (Feb. 1999) (stating that over half of states recognize right by statute or common law). See generally James Barr Haines, First Amendment II: Developments in the Right of Publicity, 1189 ANN. SURV. AM. L. 211 (1989) (discussing current right of publicity statutes). In his article, Haines discusses right of publicity statutes as they stood in 1989. See id. at 212. He separates the state statutes into those that are narrowly drawn and broadly drawn, and he identifies a few of the identity characteristics protected by each. See id. at 215-21 (discussing in detail statutes concerning right).

10. See generally Zacchini, 435 U.S. 562 (discussing and recognizing right of publicity).

11. See, e.g., Halpern, supra note 4, at 873 ("The complex questions, such as those raised by White v. Samsung, and the unsettled boundary at the interface of evocation and appropriation, require continuing efforts to articulate principled bases for both the limitations and the expansion of the right."); Lobbin, supra note 8, at 158 (arguing that right of publicity in California is disjointed and unclear); Hetherington, supra note 4, at 15 ("[T]he debate over publicity rights has shifted from non-recognition to definition of the scope and duration of protection."); Ropinski & Marschang, supra note 7, at 99 ("Despite the rather large number of court decisions in the United States involving publicity right issues, it is clear that the right of publicity remains an 'amorphous' right. Both the courts and legislatures have failed to produce uniform standards of guidelines to establish a well-defined right of publicity."); David E. Shipley, Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption, 66 CORNELL L. REV. 673, 675 (1981) ("[T]he definition of the right of publicity remains unclear; its theory is still evolving and its limits are uncertain."); Clay, supra note 4, at 487 (arguing that right of publicity has gone too far). But see Peter L. Felcher & Edward L. Rubin, Privacy, Publicity and the Portrayal of Real People by the Media, 88 YALE L.J. 1577, 1589 (1979) (noting apparent consistency in defining right in courts and by commentators). For a further discussion of examples where the boundaries of the right of publicity are unclear or different, see infra notes 143-66 and accompanying text.

12. See, e.g., Wende v. Host Int'l, Inc., 125 F.3d 806, 810-12 (9th Cir. 1997) (allowing right of publicity claim involving animatronic robots allegedly based on actors’ likenesses); White v. Samsung Elecs. Am., Inc., 971 F.2d 1595, 1399 (9th Cir. 1992) (recognizing viable right of publicity claim where robot used in advertisement), reh'g denied, 989 F.2d 1512 (9th Cir. 1993), cert. denied, 508 U.S. 951 (1993); Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (allowing claim involving voice misappropriation); Carson, 698 F.2d at 835 (allowing common law right of publicity claim where Johnny Carson’s signature “The Tonight Show” introduction, “Here’s Johnny,” used without his permission); Moschenbacher, 498 F.2d at 827 (allowing claim where photograph of plaintiff’s race
to recognize the right of publicity as an independent area of the law.\textsuperscript{13}

This Note argues that the law within the judicial system concerning the right of publicity is contradictory and confused, and there is a need for a federal right of publicity statute to provide circuit courts with guidelines and boundaries for this elusive area of the law.\textsuperscript{14} \textit{Henley v. Dillard Department Stores}\textsuperscript{15} illustrates the current status of the right in the United States Court of Appeals for the Fifth Circuit and demonstrates the expansive boundaries that some courts are willing to apply to the right of publicity.\textsuperscript{16} Other circuits either do not recognize the right at all or apply different standards and/or boundaries.\textsuperscript{17} Part II of this Note discusses the development of the right of publicity and its acceptance as a legal concept.\textsuperscript{18} Part III presents the Fifth Circuit’s approach in \textit{Henley} as representative of the expansive approach to the right of publicity.\textsuperscript{19} Part IV discusses the impact of the \textit{Henley} opinion and also explores how the various applications of the right of publicity by different circuit courts is creating confusion and divergence in the law surrounding this right.\textsuperscript{20} Part V of this Note proposes that a federal right of publicity statute is necessary to bring uniformity to this amorphous area of the law.\textsuperscript{21}

\section*{II. The Evolution of the Right of Publicity}

\subsection*{A. The Right to Privacy Gave Rise to the Right of Publicity}

The right of publicity has strong roots in the right to privacy, a right that developed in the late nineteenth century and was first discussed in an

\begin{itemize}
\item car used in television commercial, but neither plaintiff’s name nor likeness used);
\item 14. For a further discussion of the need for a federal statute, see \textit{infra} notes 198-216 and accompanying text.
\item 15. 46 F. Supp. 2d 587 (N.D. Tex. 1999).
\item 16. See generally id.
\item 17. See, e.g., Oliveira, 43 U.S.P.Q.2d at 1462 (recognizing only limited privacy right under New York law); Cheatham v. Paisano Publications, Inc., 891 F. Supp. 381 (W.D. Ky. 1995) (recognizing right of publicity only as offshoot of privacy doctrine).
\item 18. For a further discussion of the development and acceptance of the right of publicity, see \textit{infra} notes 22-133 and accompanying text.
\item 19. For a further discussion of the Fifth Circuit's expansive approach to the right of publicity, see \textit{infra} notes 134-79 and accompanying text.
\item 20. For a further discussion of the impact of \textit{Henley} and the divergence in the law surrounding the right of publicity, see \textit{infra} notes 134-79 and accompanying text.
\item 21. For a further discussion of the author’s view that federal statutory guidance is needed, see \textit{infra} notes 198-216 and accompanying text.
\end{itemize}
article by Samuel Warren and Louis Brandeis. The article defined the right to privacy as "the right to be let alone." The right focused on the injured feelings of an individual whose private life was exposed against his or her will, and was therefore more of a mental anguish than a property-based tort. Because privacy law focused upon the "right to be let alone," celebrity plaintiffs, as the focus of much media attention already, did not find much relief under privacy law. Although there were different varia-


23. Id. at 193.

24. See, e.g., Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 967 (10th Cir. 1996) (noting source of right of publicity is law of privacy, but it is business right to control identity in commerce rather than personal right to maintain privacy); Ali v. Playgirl, Inc., 447 F. Supp. 723, 728 (S.D.N.Y. 1978) ("The right of privacy has been characterized as establishing and limiting the right of a person 'to be left alone' and protecting 'the sentiments, thoughts and feelings of an individual ... from [unwanted] commercial exploitation.'") (quoting Flores v. Mosler Safe Co., 7 N.Y.2d 276, 280 (N.Y. 1959)); Lugosi v. Universal Pictures, 603 P.2d 425, 437 (Cal. 1979) ("The appropriation of [persona] ... intrudes on interests distinctly different than those protected by the right of privacy."); Cabaniss v. Hipsley, 151 S.E.2d 496, 504 (Ga. Ct. App. 1966) (distinguishing between privacy rights and "an appropriation of rights in the nature of property rights for commercial exploitation"); see also 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 28:6, at 28-8 (4th ed. 1999) (discussing difference between privacy and publicity rights). McCarthy states:

The appropriation type of invasion of privacy, like all privacy rights, centers on damage to human dignity. Damages are usually measured by 'mental distress'—some bruising of the human psyche. On the other hand, the right of publicity relates to commercial damage to the business value of human identity. Put simplistically, while infringement of the right to publicity looks to an injury to the pocketbook, an invasion of appropriation privacy looks to an injury to the psyche.

Id.; see Burnett, supra note 5, at 174-75 (discussing role of injury to emotions in privacy law). Burnett reasons that privacy doctrine did not take into account commercial concerns relating to an individual's persona because society did not have the curiosity and obsession that it has today with stars and their lives. See id. at 175 (noting when privacy doctrine was developed, commercial value of media exploitation of celebrities and their lives was not contemplated).

25. Cardtoons, 95 F.3d at 967; see, e.g., O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941) (finding no damages where defendant brewery published picture of plaintiff, who was professional football player). In O'Brien, the plaintiff was a famous college football player who claimed an invasion of privacy because of his participation in programs that discouraged alcohol abuse in minors. See id. at 169. O'Brien had actively sought national publicity through his college's publicity department, and the court found that this self-promotion amounted to a waiver of his right to privacy. See id. (determining O'Brien did not have right to privacy); see also Paramount Pictures, Inc. v. Leader Press, Inc., 24 F. Supp. 1004, 1009 (W.D. Okla. 1938) (holding that Ohio right of privacy did not extend to prominent, notorious or well known persons); Frank, supra note 6, at 1116-17 (discussing inadequacies of privacy doctrine as relating to celebrities); Robinson, supra note 5, at 184 ("Embarassment or humiliation was often difficult to demonstrate where the celebrities had suffered no mental anguish when subjected to publicity."); Clay, supra note 4, at 488 ("Some courts were reluctant to apply privacy rights to celebrities, stating that celebrities waived any right 'to be let alone' through their active pursuit of and profit from fame.").
tions of the right to sue for invasion of privacy, all forms focused upon the personal dignity of the individual.26

As celebrity status began to gain more commercial and economic value, it became apparent to commentators and courts alike that privacy law was inadequate.27 Melville Nimmer, a well-known legal commentator, was one of the first to suggest a theory based on a right of publicity, and he described it as the "right of each person to control and profit from the publicity values which he has created or purchased."28 Nimmer's article helped to lay the foundation for a right of publicity by observing that celebrities do not truly seek privacy.29 He stated:

Well known personalities connected with these industries [including the advertising, motion picture, television and radio] do not seek the "solitude and privacy" which Brandeis and Warren sought to protect. Indeed, privacy is the one thing they do "not want, or need." Their concern is rather with publicity, which may be regarded as the reverse side of the coin of privacy. However, although the well known personality does not wish to hide his light under a bushel of privacy, neither does he wish to have his name, photograph, and likeness reproduced and publicized without his consent or without remuneration to him.30

William Prosser, another legal commentator, was also integral to the development of the right of publicity.31 In his influential article on privacy law, Prosser divided the right of privacy into four separate torts: "Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
Public disclosure of embarrassing private facts about the plaintiff; Publicity which places the plaintiff in a false light in the public eye; Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness. 32 Under the last test, the tort of appropriation, Prosser discussed a right of publicity. 33 Many courts and commentators look to this discussion as “one of the earliest and most enduring articulations of the common law right of publicity cause of action.” 34 In his discussion, Prosser separated the mis-appropriation tort from the others by stating that it was more of a proprietary tort than mental anguish. 35 Therefore, the right of publicity can be seen to have strong roots in privacy doctrine. 36 Today, the law concerning the right is still developing, and many of its property characteristics are unsettled within the courts. 37

B. The Underlying Policies Justifying the Right of Publicity

It is an undisputed fact that a celebrity’s identity is regularly associated with economic value. 38 There are several theories as to why an indi-

33. See id. at 406-07 (discussing right of publicity). In his discussion, Prosser focused on name and likeness appropriations. See id. at 400. He noted, however, that it might be extended beyond this realm: “[i]t is not impossible that there might be appropriation of the plaintiff’s identity, as by impersonation, without the use of either his name or his likeness, and that this would be an invasion of his right of privacy.” Id. at 397-98. Prosser discussed the idea of a right of publicity in terms of privacy law doctrine. See id. at 393 (using language of privacy rights).
34. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992), reh’g denied, 989 F.2d 1512 (9th Cir. 1993), cert. denied, 508 U.S. 951 (1993); see Burnett, supra note 5, at 175-76 (discussing Prosser’s theories on privacy doctrine as spurring creation of right of publicity).
35. See Prosser, supra note 32, at 389 (discussing property aspects of misappropriation). From early on, courts recognized the property aspects of an individual’s identity. See, e.g., Ali v. Playgirl, Inc., 447 F. Supp. 723, 728 (S.D.N.Y. 1978) (“The distinctive aspect of the common law right of publicity is that it recognizes the commercial value of the picture or representation of a prominent person or performer, and protects his proprietary interest in the profitability of his public reputation or ‘persona.’”); Uhlaender v. Henricksen, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (classifying identity of celebrity as type of property); see also Ropski & Marschang, supra note 7, at 82 (“Unlike the right of privacy which is strictly a personal right, the right of publicity has acquired many attributes of a property right.”).
36. See Hetherington, supra note 4, at 4 (“The seeds of celebrity rights lay in the novel doctrine of privacy.”). For a further discussion of the evolution of the right of publicity from privacy doctrine, see supra notes 22-37 and accompanying text.
37. This Note will focus mainly on the scope of protection offered by the right of publicity in the different circuits, and not on such facets as inheritability of the right.
38. See White, 971 F.2d at 1399 (“Advertisers use celebrities to promote their products. The more popular the celebrity, the greater the number of people who recognize her, and the greater the visibility for the product.”); Carson v. Here’s Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983) (stating celebrity’s identity is valuable in promotion of products); see also Burnett, supra note 5, at 172 (noting economic value associated with famous people); Halpern, supra note 4, at
vidual should be able to protect his or her own public identity. A number of courts have taken the position that the individual has spent a lot of time, effort and perhaps money to achieve the status of being famous. Therefore, "[c]elebrities have a moral claim under this justifica-

857-58 (discussing marketable value associated with celebrity identity); Lobbin, supra note 8, at 157 (noting celebrity endorsement of products as lucrative industry for celebrities). As H. Lee Hetherington eloquently stated:

By the 1970s, the stage was set for an unprecedented product and marketing explosion. Initially, it meant a proliferation of entertainment software: television programming, sports, movies, videos, magazines and music. This new national capability for mass marketing combined with improved means of product distribution and increased consumer demand in turn ushered in a flurry of new consumer products, all calculated to make modern life complete, especially for the newly affluent, younger consumer. Manufacturers became increasingly eager to link their products to a recognizable celebrity face, voice or body that would be appropriately drinking, singing, sweating or jumping, but always selling. Hetherington, supra note 4, at 2-3.

39. See, e.g., Haines, supra note 9, at 214-15 (discussing three underlying pol-
icies of right); Lobbin, supra note 8, at 174 ("There have been several policy arguments consistently set forth by both courts and commentators in favor of the right of publicity—namely, moral, economic, distributional, and consumer protection justifications for recognizing the right."); Clay, supra note 4, at 491-93 (discussing various justifications for right of publicity). Haines notes the policies as follows: "The right of publicity (1) recognizes the economic value of one's identity; (2) acts as an incentive to creativity by encouraging the production of entertaining and intellectual works; and (3) prevents the unjust enrichment of those who usurp the identity of another." Haines, supra note 9, at 214-15. But see Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 959 (6th Cir. 1980) (arguing that fame is not always due to celebrity's hard work). The court stated: "Fame often is fortuitous and fleeting. It always depends on the participation of the public in the creation of an image. It usually depends on the communication of information about the famous person by the media." Id.; see Clay, supra note 4, at 501-06 (arguing that traditional justifications for right of publicity are unjustified). In arguing against the property rationale, Clay states:

The property rationale . . . ignores two factors: first, many unknown entertainers expend similar resources developing abilities that are equal to or better than those of celebrities, and never receive the compensation this exclusive right bestows only on those already famous. More importantly, the property rationale fails to account for the serendipitous and unpredictable influence of the public and media on who becomes a celebrity.

Id. at 502. Clay also argues against the market saturation rationale, the economic incentive justification and the theory that a celebrity's identity would be rendered valueless. See id. at 504-06 (arguing justifications do not withstand analysis). He states: "Those who posit the incentive argument would have us believe that the million dollar salary of an NBA draft pick (or other entertainer) is not enough to ensure an adequate flow of talent into this field. This argument assumes that only the addition of the shoe endorsement contract will attract the correct mix of ability." Id. at 505-06; see Michael Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 CAL. L. REV. 127, 134 (1993) (criticizing traditional justification arguments, even stating "I hope . . . to reopen the question of whether the right of publicity should exist at all . . . ").

40. See, e.g., White, 971 F.2d at 1399 ("Considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit. The
tion to any money flowing from their fame, and those evoking this identity are free riders on the celebrity’s gravy train.”

Courts, in using this justification, generally reason that they are trying to prevent “unjust enrichment.”

Others, including the Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*, have viewed protection of one’s public identity as providing a type of “economic incentive.” The Court reasoned that an individual has a right to “reap the reward of his endeavors.” This argument is closely related to the purposes underlying copyright and patent law.

law protects the celebrity’s sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof.”; *Uhlaender*, 316 F. Supp. at 1282 (“A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is a type of property.”); *Eastwood v. Superior Ct.*, 198 Cal. Rptr. 342, 350 (Ct. App. 1983) (“Often considerable money, time and energy are needed to develop the ability in a person’s name or likeness to attract attention and evoke a desired response in a particular consumer market.”).


42. Lobbin, *supra* note 8, at 174. As Lobbin notes:

[M]ost courts explicitly stated that they were trying to prevent ‘unjust enrichment’ of those who would make an unauthorized appropriation of the value of an individual’s persona for their own commercial advantage. When this is done, the courts reasoned, the user is ‘usurp[ing] both profit and control of that individual’s public image.’

*Id.* at 176 (quoting *Lugosi*, 603 P.2d at 441).


44. *Id.* at 576. The Court stated:

Ohio’s decision to protect petitioner’s right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public.

*Id.*

45. *Id.* at 573.

46. See, e.g., *id.* at 576 (discussing protection under copyright and patent law); see also *Baltimore Orioles, Inc. v. Major League Baseball Player Ass’n*, 805 F.2d 663, 679 (7th Cir. 1986) (noting common interest served by copyright law and right of publicity), cert. denied, 480 U.S. 941 (1987). The Seventh Circuit noted that in *Zacchini*:

[T]he Supreme Court recognized that the interest behind federal copyright protection is the advancement of the public welfare through the encouragement of individual effort by personal gain, and that a state’s interest in affording a cause of action for violation of the right to publicity “is closely analogous to the goals of patent and copyright law.”


The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and
Included in both copyright and patent law, and the economic incentive theory of a right of publicity, is the belief that if the economic value of an individual’s identity was protected, people would be encouraged to undertake more activities that would benefit society.\(^{47}\)

A third theory is based on the reasoning that if others were able to benefit from a celebrity’s identity without having to compensate the individual, it would in a sense render that person’s identity valueless.\(^{48}\) Therefore, a celebrity would lose a substantial part of his or her income.\(^{49}\)

Finally, one should be aware that a number of other theories exist that justify a right of publicity.\(^{50}\)

inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Id.; see Lugosi, 603 P.2d at 428. The California Supreme Court noted:

The tie-up of one’s name, face and/or likeness with a business, product or service creates a tangible and salable product in much the same way as property may be created by one who organizes under his name a business to build and/or sell houses according to a fixed plan or who writes a book, paints a picture or creates an invention.

Id.

47. See Zacchini, 433 U.S. at 577 (stating “[t]he Constitution does not prevent Ohio from making a similar choice here in deciding to protect the entertainer’s incentive [by allowing right of publicity claim] in order to encourage the production of this type of work”); Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994) (“Protecting one’s name or likeness from misappropriation is socially beneficial because it encourages people to develop special skills, which then can be used for commercial advantage.”); McCarthy, supra note 5, § 2.2, at 2-10 to 2-13 (discussing economic incentive aspect of right of publicity).

48. See Matthews, 15 F.3d at 437-38 (discussing commercial over-exploitation of identity as diminishing value of identity); Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 138 (Wis. 1979) (“The economic damage caused by unauthorized commercial use of a name [may include] the dilution of the value of the name in authorized advertising.”); see also Richard A. Posner, Economic Analysis of Law § 3.3, at 43 (4th ed. 1992). One commentator stated:

It might seem that creating a property right in such use would not lead to any socially worthwhile investment but would simply enrich already wealthy celebrities. However, whatever information value a celebrity’s endorsement has to consumers will be lost if every advertiser can use the celebrity's name and picture . . . . [T]he value of associating the celebrity’s name with a particular product will be diminished if others are permitted to use the name in association with their products.

Id.; see Clay, supra note 4, at 492-93 (“Another argument holds that unauthorized use of a celebrity’s identity saturates the market, thus injuring the celebrity by reducing demand for his or her image. This reasoning deems celebrities as commodities whose value will wither from overexposure.”).

49. See Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (finding that celebrity has monetary interest in his or her celebrity status).

50. See generally Lobbin, supra note 8, at 174-84 (discussing in depth numerous theories of justifications for right of publicity); Clay, supra note 4, at 491-93 (discussing justifications for right). In addition to noting the moral and economic justifications for the right of publicity, Lobbin goes on to suggest justifications that are not as widely argued and lists various justifications. See Lobbin, supra note 8, at 174-84. For instance, he states “[p]rocessing the right of publicity in the individual is
C. Supreme Court Recognition of a Right of Publicity

It was not until the Supreme Court's decision in Zacchini that it became clear that the right of publicity had gained solid judicial acceptance.\textsuperscript{51} In Zacchini, the Supreme Court determined that a performer's right of publicity had been violated when his entire "human cannonball" act was broadcast on a local news program.\textsuperscript{52} While performing at a county fair in Ohio, Zacchini's act was filmed without his permission and later aired in its entirety on a newscast.\textsuperscript{53} Zacchini alleged an "unlawful appropriation of [his] professional property."\textsuperscript{54} The Supreme Court recognized that Zacchini had a right of publicity, and that it had been violated.\textsuperscript{55} In its determination, the Court held that broadcasting the "entire performance . . . [went] to the heart of [Zacchini's] ability to earn a living as an entertainer."\textsuperscript{56} Therefore, the broadcast was found to be a substantial threat to Zacchini's economic interest in the performance.\textsuperscript{57} In its holding, the Court recognized the need for a right of publicity cause of action.\textsuperscript{58} After Zacchini, the right of publicity was accepted on a much partly justified by asserting that it will result in the most economically efficient allocation of resources." \textit{Id.} at 178. Contained within this justification is the theory that as between a commercial user that wishes to profit from an association with a celebrity, and the celebrity himself, the commercial user would be in the better position to monetarily obtain the right to use the individual's identity. \textit{See id.} at 178-79 (discussing theories of right of publicity). Lobbin argues:

The commercial user of persona . . . is usually well-positioned to conduct an efficient transaction to "buy out" the right of publicity from the individual. The user most likely knows whose persona is being appropriated, and the user also has a good idea of the commercial value generated by that use, and therefore how much the user would be willing to pay to buy out the right of publicity from the individual. Consequently, a transaction for the transfer of the right only involves locating the individual and reaching an agreement, such as a license to use a celebrity's persona. \textit{Id.} at 179.

Lobbin also makes the argument that as between a commercial user of persona and a celebrity, the distributional considerations of wealth favor the celebrity. \textit{See id.} at 180 (noting cost of being deprived of right would be greater for individual celebrity). He argues that the commercial user would be "harmed less by not having the right" and could spread the costs of obtaining the right more easily than the cost falling on an individual. \textit{Id.} The last justification for the right that Lobbin sets forth is that by having the right in the individual, irrational consumer choices would be discouraged. \textit{See id.} at 181-82.

\textsuperscript{51} \textit{See Zacchini}, 433 U.S. at 562.

\textsuperscript{52} \textit{See id.} at 565-66 (finding violation of petitioner's right of publicity).

\textsuperscript{53} \textit{See id.} at 564 (describing facts of case).

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textit{See id.} at 574-76 (finding no defense justified violation of right of publicity).

\textsuperscript{56} \textit{Id.} at 576.

\textsuperscript{57} \textit{See id.} (discussing damage to petitioner's interest).

\textsuperscript{58} \textit{See id.} at 573 (discussing right of publicity versus "false light" privacy actions); \textit{see also} Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1099-100 (9th Cir. 1992) ("[T]he Court itself recognized the authority of states to protect entertainers'
wider scale within the courts. Unfortunately, the Court’s analysis of the right of publicity in Zacchini was far from comprehensive and left open the question of how courts should define the right and determine its limits. Because the Court did not definitively state when the right of publicity should apply, recognition of the right has been far from uniform in the lower courts.

D. Application of the Right in Courts Today

At least twenty-four states recognize the right of publicity. Some states have even enacted statutes recognizing this right. Others rely on common law to protect an individual’s right of publicity. Still other states do not explicitly recognize a right of publicity, but have privacy law provisions that sometimes protect a celebrity’s identity.

See Frank, supra note 6, at 1119 (noting widespread judicial acceptance of right did not come about until Supreme Court recognition).

See Robinson, supra note 5, at 188 (noting Supreme Court holding involving right was limited); Ropski & Marschang, supra note 7, at 84 (“The United States Supreme Court has not spoken comprehensively on the right of publicity.”).

For a further discussion of different approaches taken by the courts, see supra notes 58-60, infra notes 62-63 and accompanying text. Courts are divided on many issues, including inheritability and descendibility of the right, and use of fair use defenses. For an in-depth discussion of these subjects of controversy, see Ropski & Marschang, supra note 7 (discussing cases with different approaches to these subjects). Some courts, including those in the Ninth Circuit, are beginning to expand protection to areas including voice imitation, and a broadening of protection under “look-alikes.” For a further discussion of these trends, see infra notes 143-67 and accompanying text.

For examples of such statutes, see supra note 9 and accompanying text.

See, e.g., Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1447 (11th Cir. 1998) (“We read Alabama’s commercial appropriation privacy right . . . to represent the same interests and address the same harms as does the right of publicity as customarily defined.”). States that have recognized the right of publicity under common law are: California, Connecticut, Florida, Georgia, Hawaii, Illinois, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, Utah and Wisconsin. See McCarthy, supra note 5, § 6.1, at 6-7 to 6-8 (listing states with common law right).

As illustrated by a number of cases, however, these privacy statutes do not always protect right of publicity claims that would be afforded protection in other jurisdictions. See, e.g., Allison, 136 F.3d at 1447 (discussing right to privacy versus right of publicity and only allowing Alabama privacy tort protection to limited
Currently, there is no federal statute that focuses on the right of publicity, nor is there a definitive Supreme Court decision dealing with the right of publicity that could help guide courts. Therefore different circuits, following varying language in state statutes or common law, differ in what they believe is actually protected under the right of publicity.

The issue that most courts struggle with is exactly how much protection an individual's identity should have. In some instances, the scope of protection has slowly broadened to include not only "name or likeness," but also to protect almost any appropriation of identity. In the new Restatement of the Law of Unfair Competition, the right of publicity has been dealt with as an appropriation of "the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity." The comments clearly reject limiting the right to merely "name or likeness":

66. See generally Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (addressing right of publicity). Although the Court in Zacchini recognized the existence of a right of publicity, it did not engage in a comprehensive analysis of the right. See id. (discussing right of publicity as allowed by Ohio law).

67. See, e.g., Burnett, supra note 5, at 181 (noting differences in application); Ropski & Marschang, supra note 7, at 83 (discussing various statutes and common law approaches).

68. See, e.g., Clay, supra note 4, at 486-87 (arguing that right of publicity as applied in White is too expansive). Clay argues that "the rush to protect all aspects of celebrity identity has proceeded with little or no critical judicial analysis." Id. at 486. He focuses upon the decision reached in White as an example of the extremes that courts have gone to, and should never have reached. See Ropski & Marschang, supra note 7, at 82 (discussing ambiguity of right). Commentators Ropski and Marschang note that the law surrounding the "right of publicity" is far from a static field, with numerous issues involving the nature and scope of the right. See id. (noting uncertainties inherent in current recognition of right). They note: "Courts and legislatures have attempted to resolve the issues, but their attempts have only resulted in conflicting court decisions and ambiguous statutory language concerning the basic principles underlying the right." Id. Further, "[o]bvious questions arise concerning the right of publicity, specifically, who is a celebrity and what degree of fame is required for someone to achieve celebrity status." Id.


71. Id.
In most cases an appropriation of identity is accomplished through the use of a person's name or likeness. In the absence of a narrower statutory definition, a number of cases have held that the unauthorized use of other indicia of a person's identity can infringe the right of publicity if they are so closely and uniquely associated with the identity of a particular individual that their use enables the defendant to appropriate the commercial value of the person's identity.

Some courts have followed this theory, and have interpreted the scope of protection broadly. California, as one of the most concentrated centers for the entertainment industry, has encountered substantial litigation concerning the right of publicity. Not surprisingly, the United States Court of Appeals for the Ninth Circuit is on the "leading edge" of expanding and broadening the scope of protection the right provides. For example, it was once virtually impossible to gain protection from the use of a "sound-alike" of a celebrity's voice. In Midler v. Ford Motor Co., however, the Ninth Circuit recognized that the common law right of publicity could be violated by the use of a voice imitator.

72. Id. cmt. d.
73. See, e.g., Wendt v. Host Int'l, Inc., 125 F.3d 806, 809 (9th Cir. 1997) (allowing statutory and common law cause of action involving mechanical robot impersonations); White, 971 F.2d at 1399 (allowing common law right of publicity claim).
74. See Clay, supra note 4, at 486 n.12 (noting impact large volumes of celebrities in California have on California publicity law). For various Ninth Circuit cases, see infra notes 74-101 and accompanying text.
75. See Lobbin, supra note 8, at 158 ("California has been one of a few jurisdictions on the forefront of protecting the individual's commercial interest in persona . . .").
76. See Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 714 (9th Cir. 1970) (denying claim involving unfair competition action based on voice imitation); Lahr v. Adell Chem. Co., 300 F.2d 256, 257 (1st Cir. 1962) (denying claim alleging voice appropriation). Lahr was one of the earliest cases involving a sound-alike. See id. (discussing voice appropriation). Bert Lahr was the actor who played the Cowardly Lion in MGM's 1939 Wizard of Oz, and he also did a number of distinctive character voices. See id. at 257. He alleged that producers of a commercial appropriated one of these voices without his permission. See id. at 257. The court held that New York's privacy statute did not extend protection to appropriation of voice. See id. at 258; see also Ropski & Marschang, supra note 7, at 91 ("In the past, right of publicity protection for a celebrity's voice or vocal style was difficult or impossible to obtain.").
77. 849 F.2d 460 (9th Cir. 1988).
78. See id. at 463 (allowing common law claim involving voice impersonator). The court in Midler did not allow a statutory claim of voice misappropriation. See id. It reasoned that the statutory language only referred to the appropriation of a "person's name, voice, signature, photograph, or likeness." Id. Therefore, because the defendants used a sound-alike, and not Midler's actual voice, her claim under the statute was defeated. See id. (holding there was no statutory right involving voice appropriation). Midler, however, was allowed to maintain a common law claim. See id. at 463.
In *Midler*, Ford's advertising agency had attempted to contract with Midler to sing in its commercial. 79 Midler refused, and Ford hired one of her former back-up singers to sing and to "sound as much as possible like the Bette Midler record." 80 The court held that "when a well-known singer's voice is distinctive and is deliberately imitated for a commercial purpose, unauthorized users of the singer's voice have 'appropriated what is not theirs' and, thus, may be stopped under California law." 81 Therefore, Midler was successful in maintaining a right of publicity cause of action against a voice imitator. 82

*Waits v. Frito-Lay, Inc.* 83 followed the Ninth Circuit's decision in *Midler* and allowed a voice misappropriation right of publicity claim. 84 The plaintiff, Tom Waits, was a professional singer, songwriter and actor. 85 He had a "unique" singing voice, characterized as "raspy" and "gravelly." 86 The court found that a commercial made by the defendants, featuring "a deliberate imitation of Waits' voice," violated Waits' right of publicity. 87

In determining whether Waits' voice misappropriation claim was valid, the court first held that, contrary to the defendants' arguments, *Midler* was good law and supported by the Supreme Court's decision in *Zacchini*. 88

*White v. Samsung Electronics America, Inc.*, 89 is perhaps the beginning of the broadest interpretation of the "likeness" element to date. 90 In *White*, the Ninth Circuit found that an advertisement featuring a mechanical robot could have violated Vanna White's California common law right of publicity. 91 The advertisement at issue depicted a robot dressed in a wig,

79. See id. at 461.
80. Id.
81. Ropski & Marschang, *supra* note 7, at 92.
82. See *Midler*, 849 F.2d at 463 (allowing common law claim).
83. 978 F.2d 1093 (9th Cir. 1992).
84. See id. at 1112 (finding voice misappropriation claim legally sufficient).
85. See id. at 1097 (describing Waits' career).
86. Id.
87. Id. at 1098.
88. See id. at 1099-100 (discussing viability of *Midler* decision). The court rejected the defendants' argument that *Midler* was wrongly decided. See id. The court examined the cases the defendant raised in support of this argument and concluded, "The cases [the defendant] asserts were ‘rightly decided’ all predate *Zacchini* and other Supreme Court precedent narrowing Sears' and Compco's sweeping preemption principles. In sum, our holding in *Midler*, upon which Waits’ voice misappropriation claim rests, has not been eroded by subsequent authority." Id. at 1100.
89. 971 F.2d 1395 (9th Cir. 1992).
90. See Frank, *supra* note 6, at 1115 (noting decision in *White* was expansive in interpretation); Clay, *supra* note 4, at 486 (same).
91. See *White*, 971 F.2d at 1397 (allowing right of publicity cause of action without strict "name or likeness" appropriation). The series of advertisements in *White* that were at issue depicted a robot whose clothing and jewelry resembled Vanna White's style. See id. at 1396. The robot itself did not resemble White in facial features, and Vanna White's name was not used anywhere in the advertisements. See id.
gown and jewelry reminiscent of Vanna White’s style. The robot was depicted in a setting recognizable as the Wheel of Fortune game set, and the robot was “in a stance for which White is famous.” Although the robot clearly did not look like a human, let alone Vanna White, the court upheld a common law right of publicity claim. This decision expanded the definition of “name or likeness” because there was not a risk of anyone thinking that the robot was actually Vanna White, yet the court allowed the cause of action.

The Ninth Circuit continued this broad interpretation of the right in *Wendt v. Host International, Inc.*, where the court expanded upon the protection against mechanical reproduction. The court in *White* denied Vanna White a statutory right of publicity under California Civil Code because they found a lack of similarity between her and the robot. In *Wendt*, the plaintiffs, actors George Wendt and John Ratzenberger from the television show “Cheers,” sued the defendant, Host International Inc., for using animatronics robotic figures modeled after their likenesses. The court allowed the plaintiffs to maintain a common law right of public-

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92. See id. at 1396.
93. Id.
94. See id. at 1399 (holding that district court erred by rejecting White’s claim).
95. See id. at 1397 (stating that robot with mechanical features could not be mistaken as Vanna White, therefore not White’s “likeness”).
96. 125 F.3d 806 (9th Cir. 1997).
97. See id. at 811 (allowing the plaintiffs’ common law and statutory right of publicity claims surrounding animatronic reproductions of their characters on TV show to be tried).
98. See White, 971 F.2d at 1397 (requiring actual “likeness” of plaintiff, and mechanical robot did not adequately satisfy this element). California Civil Code § 3344 provides:

Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, . . . for purposes of advertising or selling, . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.

CAL. CIV. CODE § 3344 (West 2000). The court in *White* found that the defendants had used a robot with mechanical features, and therefore could not be deemed White’s “likeness.” See *White*, 971 F.2d at 1397 (finding robot was not sufficiently similar to White). The court, however, left open the situation when a robot might violate California statutory law. See id. As the court stated, “[w]ithout deciding for all purposes when a caricature or impressionistic resemblance might become a ‘likeness,’ we agree . . . the robot at issue here was not White’s ‘likeness.’” Id.
99. See *Wendt*, 125 F.3d at 809 (discussing plaintiffs’ claims of publicity rights). The defendants in *Wendt* created animatronic robotic figures based upon the actors’ likenesses and placed the “robots” in airport bars around the country, in a setting modeled after the television show “Cheers.” See id.
In addition, the court allowed a statutory right of publicity claim under the California Civil Code. The court in *Wendt* stated that the decision in *White* had "specifically held open the possibility that a manikin molded to Vanna White's precise features . . . might become a likeness for statutory purposes." Therefore, the court concluded that the degree of similarity between the robots and the plaintiffs was "clearly material to a claim of violation of CAL. CIV. CODE § 3344." In *Wendt*, the Ninth Circuit went beyond its previous rulings in determining when a statutory claim would be allowed.

Few circuit courts other than the Ninth Circuit have recognized such an expansive right of publicity. It is unlikely that animatronics reproduction claims would have much success in any other circuit. Other circuits, such as the Fifth Circuit, however, have recognized a right that extends beyond a literal "name or likeness" appropriation of identity.

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100. See id. at 811-12 (discussing common law right of publicity claim). In its analysis of a common law right of publicity claim, the court considered the defendants' argument that the plaintiffs should not be allowed to claim appropriation of identity, because the robots were meant to portray the identities of the "Cheers" characters Norm and Cliff, and not the identities of the actors themselves. See id. at 811. Wendt and Ratzenberger argued that the commercial value that came from the advertisements was because of the "likenesses" to the actors. See id. The court reasoned: "While it is true that appellants' fame arose in large part through their participation in Cheers, an actor or actress does not lose the right to control the commercial exploitation of his or her likeness by portraying a fictional character." Id. (citing Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979)).

101. See *Wendt*, 125 F.3d at 810 (allowing statutory claim because material facts existed as to "likeness" of robots to plaintiffs).

102. Id.

103. Id.

104. See, e.g., White v. Samsung Electronics Am., Inc., 971 F.2d 1395, 1395 (9th Cir. 1992) (disallowing statutory claim). A statutory claim under section 3344 of the California Civil Code was much harder for celebrities to prove because only certain means of appropriation were allowed and listed in the statute. See, e.g., Lobbin, supra note 8, at 164-67 (discussing application section 3344 to protection of persona). On the other hand, the common law right did not contain such necessary elements, and so protected more than the statute. See, e.g., Abdul-Jabbar v. General Motors Corp., 85 F.3d 407, 415 (9th Cir. 1996) (discussing flexibility of common law compared to statutory law); Midler v. Ford Motor Co., 849 F.2d 460, 463-64 (9th Cir. 1988) (allowing common law right of publicity action, but not statutory claim under section 3344 with voice impersonation); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir. 1974) (allowing common law claim when defendant used photograph of plaintiff's race car, even though driver was not visible, and name was not appropriated).

105. For a further discussion of the Ninth Circuit's expansive approach, see supra notes 72-73 and accompanying text.

106. See, e.g., Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994) (recognizing right as protecting value associated with name, not name per se); Elvis Presley Enters., Inc. v. Capice, 950 F. Supp. 783, 801 (S.D. Tex. 1996) ("To violate a plaintiff's right of publicity, however, the defendant must employ an aspect of persona in a manner that symbolizes or identifies the plaintiff, such as the use of a name, nickname, voice, picture, achievements, performing style, distinctive characteristics or other indicia closely associated with a person."), rev'd on other grounds,
The United States Court of Appeals for the Second Circuit recognizes only a limited statutory right to privacy and neither a common law nor a statutory right of publicity. Celebrities in the Second Circuit are thus only offered a very limited form of protection. For example, in Oliveira v. Frito-Lay Inc., the plaintiff was denied a voice "sound-alike" claim because voice misappropriation was not included in the New York privacy law statutes. Generally, a plaintiff would only succeed on a claim that involved his or her name or picture. The only extension the court sometimes allows is the use of a "look-a-like." Another controversial area involving the right of publicity is whether or not the right should be descendible. Many commentators have dealt with this issue extensively. The issue, however, remains unsettled because different courts and legislatures have reached different conclusions.

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107. For a further discussion of the Second Circuit's treatment of the protection of identity, see infra notes 107-12 and accompanying text (discussing lack of recognition of right in New York).

108. See Oliveira v. Frito-Lay Inc., 43 U.S.P.Q.2d 1455, 1462 (S.D.N.Y. 1997) ("To state a claim under the New York Civil Rights Law, plaintiff must allege (1) the use of her name, portrait or picture (2) for commercial or trade purposes (3) without written permission.").


110. See id. at 1462 (holding voice misappropriation claim not allowed).

111. See id. (discussing what is allowed under privacy statute).


113. See Ropski & Marschang, supra note 7, at 84-86 (discussing conflicting views regarding inheritability of right of publicity). Ropski and Marschang note that "[w]hether the right of publicity is descendible to a celebrity's heirs is an issue which courts have grappled with in far from unanimous ways." Id. at 84; see Sheldon H. Halpern, The Right of Publicity: Commercial Exploitation of the Associative Value of Personality, 39 VAND. L. REV. 1199, 1237 (1986) ("Concentration on descendibility has diverted the development of the right [of publicity] into tortuous paths and literal dead ends that may lead to more ill-conceived legislation and further judicial conflict."). But see Burnett, supra note 5, at 184 (discussing trend towards accepting descendibility). Burnett contends:

The desirability of making the right descendible is questionable, but the momentum in favor of descendibility seems to have prevailed. In the words of one commentator, "[a] freely descendible right of publicity for all individuals is the only approach which truly vindicates the primary interests protected by the right of publicity." Only practical concerns of duration and definition remain for future analysis.


Examining these conflicting decisions from various circuits demonstrates the different ways individual circuits treat the right of publicity. In *Lugosi v. Universal Pictures*, the Supreme Court of California held the right to publicity was not descendible. In *Lugosi*, Bela Lugosi’s heirs sought to enjoin the defendant from licensing merchandise that portrayed Bela Lugosi as Count Dracula. The court denied descendibility of the right and held that once Lugosi was dead, “his name was in the public domain . . . [and] anyone . . . could use it for a legitimate commercial purpose.” Since then, California has passed section 990 of the Civil Code, which created “freely transferable property rights in the name, voice, signature, photograph or likeness of any deceased person provided any of these attributes had commercial value at the time of the personality’s death.”

In Tennessee, an appeals court took a different approach. The court in *State ex rel. Elvis Presley v. Cromwell* stated that the right of publicity was descendible. There, two not-for-profit corporations were using Elvis Presley’s name in the title of their respective corporations. The Presley estate had incorporated one business. The court held that the right of publicity descended to Presley’s estate and its respective licensees. In *Estate of Presley v. Russen*, yet another case involving Elvis Presley and his estate, the United States District Court for the District of Commercial Exploitation Requirement as a Limit on the Right of Publicity, 96 Harv. L. Rev. 1703 (1983) (same).

115. For a further discussion of the different approaches to the right, see supra notes 96-112 and accompanying text.

116. For a further discussion of courts’ decisions, see infra notes 135-72.


118. See id. (determining whether publicity rights become property of heirs after death).

119. See id. at 427 (discussing plaintiffs’ claims).

120. Id. at 430.

121. Hetherington, supra note 4, at 13 (discussing California’s treatment of descendibility issue); see Cal. Civ. Code § 990(a), (h) (West Supp. 1993).


123. 733 S.W.2d 89 (Tenn. Ct. App. 1987).

124. See id. at 92 (finding right to be descendible).

125. See id.

126. See id. at 93.

127. See id. at 92 (concluding that descendible right promoted several of policies underlying right of publicity). This case overturned an earlier Sixth Circuit case, which had determined that the right was not descendible. See Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 960 (6th Cir. 1980) (holding that right of publicity is not descendible), cert. denied, 449 U.S. 953 (1980); see also Haines, supra note 9, at 222-24 (discussing *Cromwell* case in depth). Haines notes, “[t]he *Cromwell* court concluded that a descendible right of publicity promoted several important policies, including the recognition of the economic value of identity and the principle of unjust enrichment.” Id. at 224.

New Jersey again held that the right of publicity was inheritable because the right was viewed as a property right.129

In Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.,130 the Supreme Court of Georgia held that the right of publicity was descendible.131 There, the defendant had been marketing plastic busts of the late Dr. King.132 The court reasoned that "without this characteristic [descendibility], full commercial exploitation of one’s name and likeness is practically impossible ... without assignability, the right of publicity could hardly be called a 'right.'"133

III. Henley v. Dillard Department Stores: Its Place in the Right of Publicity Spectrum

Don Henley, the plaintiff in Henley, sought to enforce his right of publicity against the defendant for misappropriation of his name and likeness in a newspaper advertisement.134 Don Henley is a music celebrity, best known as the founder and member of the band “The Eagles” and for his successful solo career. The defendant, Dillard Department Stores, ran a newspaper advertisement on two separate days in 1997 featuring a shirt known as a "henley." As part of the advertisement, there was a man shown wearing the "henley" shirt, with the words "This is Don," and "This is Don’s henley," both in the same large print beside the picture with an arrow pointing towards the man.135

The court began its analysis of Henley’s right of publicity claim by defining the right of publicity and setting forth the three elements that the Fifth Circuit had previously established as necessary to recover for the tort of misappropriation.136 Under Texas law the plaintiff must prove that: “1) the defendant appropriated the plaintiff’s name or likeness or the value associated with it, and not in an incidental manner or for a newsworthy purpose; 2) the plaintiff can be identified from the publication; and 3) there was some advantage or benefit to the defendant.”137 The court found that the plaintiff had satisfied all three elements and thus held that there had been an invasion of Henley’s right of publicity.138

129. See id. at 1355 (treating right to publicity like property right).
131. See id. at 703 (finding descendibility of right).
132. See id. (discussing facts of case).
133. Id. at 703.
135. Id. at 589 (discussing content of advertisement). The advertisement also contained the statement: “Sometimes Don tucks it in; other times he wears it loose—it looks great either way. Don loves his henley; you will too.” Id. The ad further identified the defendant, the price of the shirt, and information such as available sizes. See id. (discussing other details of advertisement).
136. See id. at 590 (discussing tort of misappropriation of name or likeness).
137. Id. at 591.
138. See id. at 597 (discussing holding of court).
IV. DIFFERENT ANSWERS TO THE RIGHT OF PUBLICITY QUESTION IN DIFFERENT COURTS: CONFUSION IN THE SYSTEM

A. Henley and the Fifth Circuit's Approach to the Right of Publicity

The court began its analysis by examining whether or not the defendant had actually appropriated the plaintiff's name or likeness. The court followed other courts' expansive interpretations of "name or likeness," and it found that the plaintiff's precise name did not need to be appropriated, but rather that a phrase or image that clearly identified the plaintiff was sufficient. The court followed the view that "[a] person’s right of publicity may be violated when a defendant employs an aspect of that person’s persona in a manner that symbolizes or identifies the person, ‘such as the use of a name, nickname, voice, picture, performing style, distinctive characteristics or other indicia closely associated with a person.” Based on this, the court found that “Don’s henley” did indeed clearly identify plaintiff Don Henley.

Further, the court found that the defendant’s appropriation of Henley’s name and likeness was not incidental. The court based its decision on the defendant’s testimony at deposition. The designer of the advertisement admitted that she used the play on Don Henley’s name to make the ad more interesting. The court rejected the defendant’s argument that the phrase was merely used for “fun,” and held that the words “Don’s henley” could not have been meant for any other purpose than to attract attention to Dillard’s advertisement. In discussing whether or not Henley could be identified from the advertisement, the court looked only at

139. See id. at 591.
140. See id. (discussing fact that cause of action not limited to name or likeness).
141. Id. (quoting Elvis Presley Enters., Inc. v. Capece, 950 F. Supp. 783, 801 (S.D. Tex. 1996)).
142. See Henley, 46 F. Supp. 2d at 591 (holding same). The court went on to say that “because the use of the expression ‘Don’s henley’ is so clearly recognizable as a likeness of Plaintiff, the Court finds that no reasonable juror could conclude that the phrase ‘Don’s henley’ does not clearly identify the Plaintiff, Don Henley.” Id.
143. See id. at 592-93.
144. See id. at 593 (discussing depositional testimony, and finding that use was not incidental).
145. See id. (comparing “play on words” in this case to expression used in Carson). The defendant in Carson rented and sold “Here’s Johnny” portable toilets. See Carson v. Here’s Johnny Portable Toilets, Inc., 698 F.2d 831, 833 (6th Cir. 1983). He combined this phrase with “The World’s Foremost Commodian” to “make a good play on a phrase.” Id. “Here’s Johnny” was a phrase associated with the plaintiff’s opening as host of the Tonight Show. See id. The court found that the phrase “Here’s Johnny” was sufficiently identifiable to the plaintiff, Johnny Carson, and, consequently, found that his right of publicity had been violated. See id. at 836.
146. See Henley, 46 F. Supp. 2d at 593 (finding use of Henley’s identity was not incidental).
the evidence presented by the plaintiff, which showed, through use of a survey, that the plaintiff was recognized by more than a "de minimus number of persons." 147

The Henley court followed prior court decisions to decide whether the defendant benefited from the use of Don Henley's identity. 148 To prove that there was an advantage or benefit, a plaintiff must prove that the "[d]efendant derived some commercial benefit from the use of [the] plaintiff's name or likeness as opposed to deriving no commercial benefit due to the fact that the use was incidental." 149 The court rejected the defendant's argument that the plaintiff must prove the defendant made money from the advertisement. 150 In determining whether there was a

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147. *Henley*, 46 F. Supp. 2d at 595. The court used the standard as set forth by J. Thomas McCarthy, which states: "[t]o establish liability, plaintiff need prove no more than that he or she is reasonably identifiable in defendant's use to more than a de minimus number of persons." J. THOMAS MCCARTHY, 1 THE RIGHTS OF PUBLICITY AND PRIVACY § 3.4 [A] (1998). McCarthy, one of the leading commentators on the right of publicity, suggests elements that would be necessary to prove an infringement claim for a right of publicity. *See id.* (discussing what threshold levels should be met for "right of publicity claim"). The court in *Henley* looked to McCarthy as a source for guidance on a number of elements in the case. *See Henley*, 46 F. Supp. 2d at 595, 597.

In discussing the "identifiable" element in an action for right of publicity infringement, McCarthy states that the "plaintiff as a human being must be 'identifiable' from the total context of the defendant's use." MCCARTHY, supra, § 3.2. McCarthy further states that "the intent, state of mind and degree of knowledge of a defendant may shed light on the identifiably issue." Id. In considering the evidence, the *Henley* court found that it was "undisputed that defendant intended to appropriate Don Henley's identity and intended that consumers associate the ad with Don Henley." *Henley*, 46 F. Supp. 2d at 595.

148. *See Henley*, 46 F. Supp. 2d at 596 (following RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (1977)). The comment states that "[i]t is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or likeness that the right of privacy is invaded." RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (1977). The court in *Henley* followed Matthews and determined that the benefit element required some type of commercial benefit, as opposed to no commercial benefit due to incidental usage. *See Henley*, 46 F. Supp. 2d at 596 (analyzing benefit element); see also Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994) (analyzing benefit in terms of comment d of RESTATEMENT (SECOND) OF TORTS § 652C); Polsby v. Spruill, No. CIV.96-1641, 1997 WL 680550, at *1, *4 (D.D.C. Aug. 1, 1997) (discussing what is required for benefit to exist).

149. *Henley*, 46 F. Supp. 2d at 596.

150. *See id.* at 597 (rejecting defendant's argument that plaintiff must show defendant made money from commercial use). The court relied on previous decisions, the Restatements, and on a legal commentator:

Requiring Plaintiff to prove Defendant's ad was profitable was not contemplated by the drafters of the Restatement, nor has it been suggested by the Fifth Circuit or the Ninth Circuit, the appellate court most frequently confronted with this issue. Further, one of the foremost legal commentators on the Right of Publicity, J. Thomas McCarthy... never suggests... requiring a plaintiff to prove that a defendant made a profit or secured a tangible benefit.

Id. (citing MCCARTHY, supra note 147, §§ 2.3, 6.12, 8.8, 8.9).
benefit, the court focused on the defendant's intent.\footnote{See id. at 596 (citing Wendt v. Host Int'l, Inc., 125 F.3d 806, 811 (9th Cir. 1997)).} This was not difficult to discern because the defendant's own employees admitted that they meant to use Henley's name (or wordplay on his name) to attract attention.\footnote{See id. at 593 (admitting invocation of Henley's persona to make advertisement interesting).} Considering this admission, the court found that the defendant intended to benefit from the use of Henley's identity.\footnote{See id. at 597 (finding defendant derived benefit from Henley's identity).}

As a result, the court held that the defendant had indeed appropriated Henley's name or likeness for its value, that Henley could be identified from the ad and that Dillard derived a benefit from the use of Henley's name.\footnote{See id. at 597 (holding that actual profit did not need to exist).} Based on these conclusions, the court held that Dillard Department Stores violated Henley's right of publicity.\footnote{See id.}

B. Conflicting Decisions Among the Courts

The decision in Henley is consistent with Fifth Circuit cases that have dealt with the right of publicity.\footnote{See generally Matthews v. Wozencraft, 15 F.3d 432 (5th Cir. 1994) (defining elements of cause of action for publicity rights violations in Texas); Elvis Presley Enters., Inc. v. Capecce, 950 F. Supp. 783, 801 (S.D. Tex. 1996) (following Texas right of publicity law), rev'd, 141 F.3d 188 (5th Cir. 1998).} Further, the Fifth Circuit's approach to the scope of protection under the right is consistent with the expansive approach employed by the Ninth Circuit.\footnote{See generally White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992) (allowing cause of action involving robotic representation), reh'g denied, 989 F.2d 1512 (9th Cir. 1993), cert. denied, 508 U.S. 951 (1993); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983) (allowing right of publicity claim not directly involving name or likeness).} In fact, the court in Henley looked to Ninth Circuit decisions to analyze the plaintiff's claim.\footnote{See Henley, 46 F. Supp. 2d at 597 (noting Ninth Circuit is involved in right of publicity cases most frequently). The court rejected the defendant's argument to adopt an interpretation of benefit that required profit or tangible benefit. See id. (holding that actual profit did not need to exist). In doing so, the court argued: "requiring Plaintiff to prove Defendant's ad was profitable was not contemplated by the drafters of the Restatement, nor has it been suggested by the Fifth Circuit or the Ninth Circuit, the appellate court most frequently confronted with this issue." Id.} The decisions being made within the Fifth Circuit concerning the right of publicity, however, have not gone beyond the bounds of reason.\footnote{See, e.g., Matthews, 15 F.3d at 437 (setting forth elements needed for right of publicity claim, and denying plaintiff's claim).}

The Fifth Circuit has not gone as far as the Ninth Circuit in broadening the scope of protection under the right of publicity.\footnote{Compare Wendt v. Host Int'l, Inc., 125 F.3d 806 (9th Cir. 1997) (expanding interpretation of right to include mechanical likenesses), with Matthews,
"likeness" although it is seemingly clear that a robot could never be mistaken for an actual celebrity.\textsuperscript{161} The Ninth Circuit continued to follow this liberal interpretation involving mechanical reproductions of celebrities in \textit{Wendt}. In \textit{Wendt}, plaintiffs George Wendt and John Ratzenberger, actors that played Norm and Cliff respectively on the TV show "Cheers," had a right of publicity claim when robotic caricatures of their TV characters were used in airport bars around the country.\textsuperscript{162}

The Ninth Circuit, however, stands alone in interpreting the right so broadly.\textsuperscript{163} In fact, other circuits have failed to recognize a right where other circuits would clearly find one.\textsuperscript{164} For example, New York does not recognize a specific right of publicity.\textsuperscript{165} Therefore, if a celebrity wishes to bring a cause of action, he or she must couch it in terms of the privacy statutes that do exist.\textsuperscript{166}

In \textit{Oliveira} the plaintiff, Astrud Oliveira, otherwise known as Astrud Gilberto, brought a cause of action because her voice was used without her permission in an advertisement.\textsuperscript{167} Gilberto recorded the song, "The Girl from Ipanema," in 1964.\textsuperscript{168} In 1996, the defendant, Frito-Lay, produced a television commercial featuring "Miss Piggy" from the Muppets eating "Baked Lays" while "singing" along to "The Girl from Ipanema."\textsuperscript{169} Among her other claims, Gilberto argued that the advertisement was "a violation of [her] right to publicity as protected by New York Civil Rights Law Sections 50, 51."\textsuperscript{170} These statutory provisions do not recognize a right of publicity per se, but rather a limited right of privacy.\textsuperscript{171} The court concluded that Gilberto’s claim failed because "no look-a-like or recognizable representation of the plaintiff [was] present in the commercial."\textsuperscript{172}

\textsuperscript{15} F.3d at 437 (stating elements needed for right of publicity claim and strictly applying them).

\textsuperscript{161} See \textit{White}, 971 F.2d at 1397 (noting same).

\textsuperscript{162} See \textit{Wendt}, 125 F.3d at 806 (applying broad interpretation of publicity right to mechanical likeness of celebrities).

\textsuperscript{163} For a further discussion of the breadth of Ninth Circuit decisions, see \textit{supra} note 73, 83-101 and accompanying text.

\textsuperscript{164} For a further discussion of the decisions of other circuits, see \textit{supra} notes 156-63, \textit{infra} notes 165-66 and accompanying text.


\textsuperscript{166} \textit{Id.} at 1462 (discussing right to privacy); \textit{Robinson}, \textit{supra} note 5, at 200 (noting that New York does not recognize common law right of publicity).

\textsuperscript{167} \textit{See Oliveira}, 43 U.S.P.Q.2d at 1457 (discussing facts of case).

\textsuperscript{168} \textit{See id.}

\textsuperscript{169} \textit{See id.}

\textsuperscript{170} \textit{Id.}

\textsuperscript{171} \textit{See id.} at 1462 (discussing limited right to privacy under New York statutory law). To "state a claim under the New York Civil Rights Law, plaintiff must allege (1) the use of her name, portrait or picture (2) for commercial or trade purposes (3) without written permission." \textit{Id.}

\textsuperscript{172} \textit{Id.}
The court further held that the New York statutes excluded voice misappropriation and, therefore, dismissed Gilberto's claim.173

If this case were brought in the Ninth Circuit, the plaintiff clearly would have a viable claim.174 Both Midler and Waits illustrate that voice imitation is protected under a right of publicity, thereby producing a different result.175

It is thus clear that the circuit courts are producing conflicting decisions.176 When issues involving the right of publicity arise, various methods of interpretation may control involving either the common law, state right of publicity statutes, state right of privacy statutes or no particular law at all.177 A plaintiff might win a case involving voice imitation in California, but lose the same case in New York.178 This disparity might encourage practices such as forum shopping.179

C. The Right of Publicity and First Amendment Concerns

Any analysis of the right of publicity doctrine directly implicates the First Amendment.180 The Framers of the Constitution designed the First

173. See id. (discussing inapplicability of voice imitation).
174. See, e.g., Waits v. Frito-Lay Inc., 978 F.2d 1093, 1098 (9th Cir. 1992) (citing Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988)) ("We recognized in Midler that when voice is a sufficient indicia of a celebrity's identity, the right of publicity protects against its imitation for commercial purposes without the celebrity's consent."); Midler, 849 F.2d at 463 (allowing voice misappropriation as violation of right of publicity).
175. For a further discussion of Ninth Circuit voice misappropriation decisions, see supra notes 74-88 and accompanying text.
176. For a further discussion of these conflicting decisions, see supra notes 143-64 and accompanying text.
177. For a further discussion of various approaches to the right to protect one's identity, see supra notes 51-65 and accompanying text.
179. See Robinson, supra note 5, at 201 (discussing whether jurisdiction recognizing right of publicity "encourages forum shopping, and discourages publicity rights owners and creators from residing in certain jurisdictions").
180. See Halpern, supra note 4, at 867 ("By its nature, the right of publicity implicates speech: whatever else it may be, the right of publicity involves a communicative tort. Of course, such a characterization merely starts--and does not resolve--a First Amendment inquiry."); Hetherington, supra note 4, at 21 ("The most forceful argument against a wholesale extension of the right of publicity can be found in the First Amendment's policy of promoting the free flow of ideas essential to vigorous public discourse."). Hetherington argues that the First Amendment does not act as an absolute limitation on the right of publicity. See id. at 21-22; see also Haines, supra note 9, at 225-226 (explaining when conflict occurs between right of publicity and First Amendment). Haines states:

By protecting the freedoms of speech and the press, the First Amendment promotes democratic self-government, facilitates the search for truth, and protects the free flow of information through such media as magazines, newspapers, television, and film. At the same time, the right of publicity creates an exclusive right in an individual to the commercial
Amendment to protect the freedoms of speech and the press. 181 An individual's right of publicity could potentially be violated in areas that are protected by the First Amendment. 182 The First Amendment, however, has not been given a great deal of attention in courts' right of publicity analyses. 183 Where courts have faced a conflict between the First Amendment and the "right of publicity," most have examined whether the use of identity was purely commercial or a use of free speech that was protected. 184 This conflict has the potential to create challenging situations. 185

use of his or her identity. The First Amendment and the right of publicity conflict when a person commercially benefits from a constitutionally protected use of another's identity.

Id. 181. See U.S. CONST. amend. I. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Id.

182. See Robinson, supra note 5, at 198 ("The right of publicity might be potentially infringed by news, fiction, commercial speech, or some combination of the three. Each category represents a different level of First Amendment protection."). Commercial speech is afforded the lowest level of First Amendment protection. See id.

183. See Frank, supra note 6, at 1136 (discussing lack of court attention to right of publicity analysis); Halpern, supra note 4, at 868 (discussing same). Frank discusses the fact that the reason most courts do not consider First Amendment concerns is because courts do not generally view the plaintiff as seeking to withhold appropriation of identity altogether. See Frank, supra note 6, at 1136. She argues that courts tend to fall back on the logic expressed in Zacchini. See id. Frank states that courts view an individual as merely seeking compensation for use of his or her identity. See id. In Zacchini, the court expressed this view: "Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it." Zacchini v. Scripps-Howard Broad., Co., 433 U.S. 562, 578 (1977). The majority in Zacchini felt that First Amendment concerns of freedom of expression need not be addressed, because plaintiffs were not trying to prevent their identity from being in the public sphere. See id. They simply wished to be paid for the use of their identity. See id. Further, as Frank notes, "[t]he major block towards recognizing a First Amendment defense in these [right of publicity] cases has been the slight protection granted commercial speech." Frank, supra note 6, at 1136. In other words, when a commercial interest is involved, the level of First Amendment protection is lowered, and the defendant will have a harder time proving his right to freedom of expression has been violated. See generally Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (stating that commercial speech is entitled to minimal First Amendment protection).

184. See, e.g., Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988) (quoting Peter L. Felcher & Edward L. Rubin, Privacy, Publicity and the Portrayal of Real People by the Media, 88 YALE L.J. 1577, 1596 (1979)) ("The purpose of the media's use of a person's identity is central. If the purpose is 'informative or cultural' the use is immune; 'if it serves no such function but merely exploits the individual portrayed, immunity will not be granted.'"); see also Groucho Marx Prods., Inc. v. Day & Night Co., 523 F. Supp. 485, 492 (S.D.N.Y. 1981), rev'd, 689 F.2d 317 (2d Cir. 1982). The court in Groucho Marx noted:

As a general rule, if the defendants' works are designed primarily to promote the dissemination of thoughts, ideas or information through news
in balancing First Amendment policies and the policies underlying the right of publicity.\textsuperscript{185}  

The Supreme Court directly balanced the First Amendment and a right of publicity in \textit{Zacchini}. In \textit{Zacchini}, the Court held that the First Amendment did not protect a news station's right to broadcast Hugo Zacchini's entire "human cannonball" performance.\textsuperscript{186} The facts in \textit{Zacchini} were unusual and the Court was careful to specifically limit the

or fictionalization, the right of publicity gives way to protected expression . . . . If, however, the defendants' use of the celebrity's name or likeness is largely for commercial purposes, such as the sale of merchandise, the right of publicity prevails.\textit{Id. But see Haines, supra note 9, at 227 (discussing whether use commercial or protected free speech). Haines argues that this particular approach is flawed because "[t]he concepts of 'commercial' use and 'protected (or newsworthy) free speech use . . . present significant analytical problems because no uniform definition of 'commercial use' has emerged from the case law." Id.; see Frank, supra note 6, at 1136 (discussing First Amendment concerns). Frank states that: As shown in \textit{White}, the finding of any amount of commercial motivation is virtually the kiss of death to a First Amendment defense, even one based on an intent to parody the original. Even in the exalted field of news reporting, it is difficult to conceive of a pure appropriation of publicity, untainted by commercial avarice.}

Frank, \textit{supra} note 6, at 1136. In the February 26, 1999 edition of the New York Law Journal, the cover of a New Yorker magazine is discussed as something that falls within the gray area between "commercial" and "newsworthy." \textit{See generally Ferri & Gibbons, supra note 9 (discussing cover). The cover discussed was the February 8, 1999 issue of the New Yorker, which featured a picture of Leonardo Da Vinci's famous portrait of the "Mona Lisa" with Monica Lewinsky's face superimposed. See id. at 38 (describing cover of magazine). The authors argue: Although this ironic, controversial cover undoubtedly heightened consumer interest in New Yorker magazine, the publisher would likely escape liability for any right of publicity action brought by Ms. Lewinsky. This is so because Ms. Lewinsky currently figures prominently in the news, in light of the current impeachment proceedings against President Clinton, and the New Yorker issue does contain news and commentary concerning the proceedings.\textit{Id.}}

\textit{Id.}  
\textsuperscript{185.} \textit{See Halpern, supra note 4, at 868 (discussing First Amendment concerns and right of publicity). Halpern explains: [A]t the outer edges of the right of publicity, there may be challenging questions of policy. For example, imitation and impersonation create difficult issues; interests must be balanced in order to protect the personality interest from appropriation while preserving the equally deserving areas of parody, satire, and self-conscious impersonation.\textit{Id.; see Robinson, supra note 5, at 198 ("Weighing First Amendment principles against the right of publicity is a difficult task.").}}  

\textsuperscript{186.} \textit{See Zacchini, 433 U.S. at 575 (determining First Amendment does not "immunize the media when they broadcast a performer's entire act without his consent"). The Court went on to say: There is not doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news. But it is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized.\textit{Id. at 578.}}
scope of its decision. The Court did not "deliberately or otherwise . . . establish a general test balancing the right of publicity against First Amendment freedoms." In the absence of a clear balancing test, First Amendment concerns have generally proven unfounded due to limitations placed on the right of publicity by courts and legislatures. The Restatement of the Law of Unfair Competition limits the right of publicity, generally excluding the right when "the use of a person’s identity [is] in news reporting, commentary, entertainment, or in works of fiction or nonfiction or in advertising that is incidental to such uses."

In situations where courts have found a violation of an individual’s right of publicity, recognition of the right only when there was an exploitative use of the identity. The court in Henley never reached a First Amendment issue because the advertisement involved was strictly commercial and because Texas law limits the publicity right to protect freedom of speech values. In Matthews v. Wozencraft, another leading Fifth Circuit right of publicity case, First Amendment values acted as a limitation. In Matthews, the court held that a novel containing a fictionalized

187. See id. at 574-75 ("Wherever 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 his consent.").

188. Robinson, supra note 5, at 197-98; see Burnett, supra note 5, at 192 (discussing vagueness of Zacchini decision in terms of First Amendment limitations).

189. See Henley v. Dillard Dep’t Stores, 46 F. Supp. 2d 587, 590 (N.D. Tex. 1999) (outlining elements for tort of misappropriation of name or likeness in Texas). The first element limits the right of publicity so that First Amendment values are still protected by excluding "incidental uses" and uses for "newsworthy purposes." Id. at 590; see Cher v. Forum Int’l, Ltd., 692 F.2d 634, 638 (9th Cir. 1983) ("The California Supreme Court has subjected the 'right of publicity' under California law to a narrowing interpretation which accords with First Amendment values."); Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 461-62 (Cal. 1979) (Bird, C.J., concurring) ("[T]he right of publicity has not been held to outweigh the value of free expression. Any other conclusion would allow . . . prominent persons to be subject to censorship under the guise of preventing the dissipation of the publicity value of a person’s identity."); Burnett, supra note 5, at 193 (discussing "newsworthiness" and "incidental use" exceptions placed on misappropriation tort by courts); Haines, supra note 9, at 226 n.102 (listing state publicity statutes limiting right of publicity where conflicts with First Amendment and statutes failing to incorporate limitations).


191. See Halpern, supra note 4, at 868 ("The right of publicity does not reach beyond the interest it is designed to protect, i.e., the associative value, the hard economic commercial value of an individual’s identity, and thus is limited to commercially exploitative uses.").

192. See Henley, 46 F. Supp. 2d at 589 (citing that advertisement was run specifically to feature “henley” shirt that could be bought at defendant’s department store).

193. 15 F.3d 432 (5th Cir. 1994).

194. See id. at 440 (denying claim on basis of free speech principles of First Amendment).
account of true events occurring in the plaintiff's life as an undercover narcotics officer fell under First Amendment protection, even if he met all of the elements of a right of publicity claim.\(^{195}\)

In decisions following Zacchini, First Amendment concerns have preempted right of publicity interests.\(^{196}\) When faced with a conflict between the two interests, "courts almost invariably subordinate the interests protected by the right of publicity to competing free speech interests."\(^{197}\)

V. A FEDERAL RIGHT OF PUBLICITY STATUTE: A POSSIBLE ANSWER TO RIGHT OF PUBLICITY QUESTIONS

The right of publicity has its place in the judicial system.\(^{198}\) In modern society, certain individuals have gained a public persona from which they derive much of their livelihood.\(^{199}\) Courts recognize this and have, on the whole, accepted the idea of a right of publicity.\(^{200}\) Yet many circuit courts approach the right differently.\(^{201}\) This divergence creates a conflict among judicial decisions.\(^{202}\) As a result, "a celebrity who claims a right of publicity infringement may have a vast array of laws upon which to seek protection."\(^{203}\) This abundant availability could encourage practices such as forum shopping by plaintiffs and might even encourage or discourage

\(^{195}\) See id. (holding novel that contained fictionalized account of true events involving undercover police officer fell within protection of First Amendment). The court stated that "[e]ven if Matthews has created a genuine issue of material fact on his misappropriation claim, Wozencraft is entitled to summary judgment as a matter of law because of free speech and public domain defenses."\(^{196}\) See, e.g., Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 968 (10th Cir. 1996) (holding that First Amendment preempted Oklahoma's right of publicity statute where parody baseball cards were commercially sold); Rogers v. Grimaldi, 875 F.2d 994, 1004 (2d Cir. 1989) (holding that right of publicity is preempted when balanced with First Amendment interests); New York Magazine v. Metro. Transit Auth., 987 F. Supp. 254, 257 (S.D.N.Y. 1997) (invoking First Amendment in denying attempt to stop commercial exploitation of New York City Mayor Rudolph W. Giuliani's name); Hicks v. Casablanca Records, 464 F. Supp. 426, 433 (S.D.N.Y. 1978) (finding that First Amendment took precedence over plaintiff's publicity rights).

\(^{197}\) Haines, supra note 9, at 226.


\(^{199}\) See, e.g., id. at 576 (recognizing entertainer's livelihood comes from activity that gives entertainer his reputation). For a further discussion of the economic value of a celebrity's identity, see supra note 38 and accompanying text.

\(^{200}\) For a further discussion of judicial recognition of the right of publicity, see supra notes 51-61 and accompanying text.

\(^{201}\) For examples of different approaches taken by the courts, see supra notes 62-133 and accompanying text.

\(^{202}\) For a further discussion of the judicial conflict, see supra notes 62-133 and accompanying text.

\(^{203}\) Ropski & Marschang, supra note 7, at 99 (noting that, because of undefined nature of right of publicity, there are many variations of laws under which celebrities will seek protection).
individuals' particular choices of residence, depending on the jurisdiction in question.\textsuperscript{204} To create uniformity among court decisions, Congress should enact a federal statute dealing specifically with the right of publicity. One commentator argues that "[a] right of public identity statute would benefit the public, the judiciary, and those who invest time, effort, and money in their personal identities."\textsuperscript{205} If this holds true, such a statute would solve judicial conflicts and prevent aberrations like forum shopping.\textsuperscript{206} A federal right to publicity statute should set forth boundaries for the right of publicity, and not specifically list what should and should not be included in the right.\textsuperscript{207} Without such clear boundaries, advertisers can easily find ways to exploit a person's identity without violating an individual's right of publicity because technology is advancing so quickly that it would not be possible to include in a statute all varieties of commercial use.\textsuperscript{208} Further, any statute that is developed must be defined to prevent conflict between First Amendment rights and the right of publicity.\textsuperscript{209} One commentator suggests that "the courts would do well to limit the scope of the right of publicity and temper it in a direction more amenable to the First Amendment."\textsuperscript{210} This general concern that the right of publicity may soon impermissibly infringe upon areas constitutionally protected by

\textsuperscript{204} See Robinson, supra note 5, at 201 (discussing gap and consequences of legal conflict). Robinson discusses cases like Wendt and Oliveira, and concludes that "these decisions graphically underscore the inevitable, ever widening conflict between the circuits regarding the right of publicity." Id.

\textsuperscript{205} Id. at 201-02. Robinson gives a detailed analysis of the elements that should be considered in developing a statute. See id. at 201-07 (proposing analysis); see Hetherington, supra note 4, at 4 ("A sharply defined right of publicity would provide needed certainty in legitimate commercial transactions involving celebrities, advertisers and entertainment concerns while helping guard against overreaching that would unduly restrict public access to and enjoyment of our popular culture."). This call for a standardized right of publicity has been made by a number of commentators. See, e.g., Lobbin, supra note 8, at 193 ("[T]he right of publicity should be brought under one definition—it should be one right. And, although the legislature has caused much of the present discontinuity, a legislative solution seems more appropriate than a judicial one.").

\textsuperscript{206} See Robinson, supra note 5, at 201 (discussing whether undefined nature of right of publicity will encourage practices like forum-shopping).

\textsuperscript{207} See White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992) ("A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth."); reh'g denied, 989 F.2d 1512 (9th Cir. 1993), cert. denied, 508 U.S. 951 (1993).

\textsuperscript{208} See, e.g., Wendt v. Host Int'l, Inc., 125 F.3d 806, 811 (9th Cir. 1997) (involving mechanical reproductions of plaintiffs); White, 971 F.2d at 1398 (involving robot version of plaintiff).

\textsuperscript{209} See Burnett, supra note 5, at 191 ("The right of publicity must be crafted... providing the breathing space necessary for free speech rights to flourish.").

\textsuperscript{210} Frank, supra note 6, at 1141.
the First Amendment makes it clear that a federal statute is necessary to limit the expansion of the right.211

Certain broad considerations should be accounted for by the recommended statute as well.212 The elements of identity enumerated in previous case law and the Restatements should be considered when developing the statute.213 In addition, creators of the statute should keep in mind the rapid technological advances taking place. As a result of these advances, the statutory language should be fluid enough to account for unpredictable scenarios. In essence, the statute should not shock legal rules already in place, but rather embody the concept of an identity having a "value" that should be protected.214

Without a workable federal statute, the result is ongoing ambiguity.215 As it stands now, an individual involved in a case concerning his or her right of publicity cannot be certain of the outcome.216 With a federal statute, this uncertainty would be abolished. It would both eliminate the split among the courts and enable this area of the law to mature. After all, protection under a right of publicity is essential in today's media-driven, commercial world.

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211. See, e.g., id. at 1115 (arguing that "serious efforts must be made to limit the encroachment of this personal property right upon First Amendment rights of free expression").

212. For an in-depth discussion of what the federal statute should take into consideration, see Robinson, supra note 5, at 202-04 (suggesting elements of statute) and Lobbins, supra note 8, at 193 (calling for legislative solution to make definition of right of publicity uniform).

213. See, e.g., Henley v. Dillard Dep't Stores, 46 F. Supp. 2d 587, 591 (N.D. Tex. 1999) ("A person's right of publicity may be violated when a defendant employs an aspect of that person's persona in a manner that symbolizes or identifies the person, 'such as the use of a name, nickname, voice, picture, performing style, distinctive characteristics or other indicia closely associated with a person.") (quoting Elvis Presley Enters., Inc., v. Capece, 950 F. Supp. 783, 801 (S.D. Tex. 1996)).

214. See Robinson, supra note 5, at 203-04 ("Far from presenting a novelty in the law, the statute would simply constitute an acceptance of the inherent value of identity, a concept reinforced by forty years of case law.").

215. For a further discussion of the ambiguity that surrounds the right of publicity, see supra notes 62-133, 139-79 and accompanying text.

216. For a further discussion of the uncertainty of the outcome, see supra notes 163-66 and accompanying text.