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Judgment for Federalism: A Case for why the Right of Publicity should be a Federal Right

Brittany Lee-Richardson

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Judgment for Federalism: A Case for why the Right of Publicity should be a Federal Right

By: Brittany Lee-Richardson

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Judgment for Federalism:

A Case for why the Right of Publicity should be a Federal Right

Introduction

The purpose of the right of publicity is to provide all individuals the right to control the commercial use of their attributes such as likeness, image or name. This state-based right is primarily concerned with protecting celebrities, hereinafter referred to as “personalities.”¹ As the right gained more recognition from courts and legislatures in the last 25 years, its value to personalities increased substantially. Sport, entertainment and public figures, like Tiger Woods, Bill Clinton and Woody Allen, make millions of dollars² from endorsements, speaking engagements, and right of publicity claims. Personalities are also taking advantage of the wide variation in right of publicity laws to bring claims based on a perception of infringement.

Significant variation in state laws and judicial interpretations has proven problematic. Thus, one must ask, does this state-based right of publicity scheme demand a federal right of publicity statute? The answer to that question is “yes” for the following reasons. First, lack of uniformity among state laws causes uncertainty regarding the right’s scope and limitation, and proper forum. Second, the right of publicity conflicts with other intellectual property

¹ IND. CODE § 32-36-1-6 (2002): “Personality” defined. “As used in this chapter, “personality” means a living or deceased natural person whose [protected attribute] has commercial value, whether or not the person uses or authorizes the use of the person’s rights of publicity for a commercial purpose during the person’s lifetime.”

² Lauren Streib, *How Celebrities Make Their Millions*, FORBES.COM, (June 3, 2009, 6:00 PM), <http://www.forbes.com/2009/06/03/forbes-100-celebrity-09-earnings-paycheck-millions.html> (last visited Apr. 24, 2012). Kevin Spak, *Clinton Speech Income Passes \$75M Mark: Last Year Was His Most Lucrative Ever*, NEWSER.COM (Jul. 12, 2011, 3:19 PM), <http://www.newser.com/story/123246/bill-clinton-has-earned-75-million-from-speeches-over-last-decade.html> (last visited Apr. 25, 2012). *Woody Allen settles American Apparel infringement for \$5 million*, RightofPublicity.com (May 19, 2009), <http://rightofpublicity.com/woody-allen-settles-american-apparel-infringement-for-5million-51809> (last visited Apr. 25, 2012).

laws like copyright and trademark. Thirdly, some states have overprotected the right by protecting a personality's gesture, distinctive appearance or object like a sports car, and by granting postmortem rights of publicity, retroactively.

This paper examines these issues and proposes that a federal statute be implemented to limit the right of publicity. Part I of this paper provides a brief background of the right of publicity's origin, underlying policy and current state. Part II examines the problems with the right of publicity by focusing on differences among state laws, copyright implications in chosen cases, and the expansion of personality rights. Section III examines arguments for and against a federal right of publicity statute. Section IV concludes that a federal statute is necessary and discusses what elements should be incorporated into such a statute.

I. Background

A. Origin of the Right of Publicity

The right of publicity evolved from the right of privacy, and is a newer area of intellectual property than other areas such as copyright and trademark. The right of privacy is a concept generally credited to former Supreme Court Justices Louis Brandeis and Samuel Warren, as they discussed this idea as the right to be let alone.³ They proposed the privacy right in an 1890 law review article,⁴ and it did not take long before states began adopting the privacy right by common law or statute.⁵ In 1903, New York created a limited right for

³ Risa J. Weaver, Article, *Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute*, 2010 DUKE L. & TECH. REV. 2, ¶ 5 (2010) (citing Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 202, 203 (1954)).

⁴ Warren and Brandeis, Article, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁵ Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 202, 203 (1954).

persons to control the commercial value in their image under its civil rights statute.⁶ Soon thereafter in 1907, New Jersey adopted the right without calling it the right of publicity.⁷

It was not until 1953 that the term “right of publicity” was coined in New York state in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*⁸ This case was the first time any court clearly distinguished publicity rights from privacy rights, stating that the purpose of the right of publicity was to protect one’s right in the commercial value of one’s photograph, likeness or image.⁹ This case involved two companies claiming the right to use a baseball player’s name. The court said that men have the exclusive right to the value of their photographs, and the right should be called the ‘right of publicity.’ It reasoned that prominent individuals would feel extremely deprived if corporations and businesses could use the individual’s photographs without compensation.¹⁰

B. Purpose and Policies for the Right of Publicity

As discussed above, the right of publicity concerns who gets to exploit a personality’s attributes. Courts, legislatures and commentators have identified the foremost policy underlying this right as providing an economic incentive to create works of public interest. The United States Supreme Court in its only right of publicity case, *Zacchini v. Scripps-*

⁶ Memorandum in Opposition of Senate Bill 8373-A from the Comm. on Media (June 28, 2010), available at http://www.nysba.org/AM/Template.cfm?Section=Legislative_Memoranda_2009_20101&ContentID=43117&template=/CM/ContentDisplay.cfm (last visited Mar. 23, 20112).

⁷ 73 N.J. Eq. 136 (N.J. Ch. 1907).

⁸ 202 F.2d 866 (2d Cir. 1953).

⁹ 202 F.2d 866 (2d Cir. 1953).

¹⁰ *Id.*

Howard Broadcasting Co.,¹¹ stated that the goals of the right of publicity were comparable to those of copyright and patent law.

Personalities are more motivated to invest in advancing and improving their talents and abilities when they know they are able to exclusively capitalize on the commercial value developed in their identity (attributes).¹² These investments are likely to advance the common good because personalities will produce works that interest the public.¹³ Avoiding unjust enrichment is important, as it prevents people from free riding and commercially benefiting from the value personalities have worked hard to build for their image.¹⁴

This policy justification is strongly related to the “moral right” policy justification for the right of publicity. The moral right justification is based on the concept of natural rights, including the right of one to have the right in that which one labors.¹⁵ Therefore, reaping the benefits of one’s labor and preventing others from unjustly gaining from that labor are important to personalities.

C. Current Law since *Haelan*

After the *Haelan* decision, other states began to establish the right of publicity in common law, by statute or both. By the 1970s, the courts and legislatures in several states were embracing the right of publicity. For example, California enacted a right of publicity

¹¹ 433 U.S. 562 (1977).

¹² Jeremy T. Marr, *Constitutional Restraints on State Right of Publicity Laws*, 44 B.C. L. REV. 863, 875 (2003) (citing J. Thomas McCarthy, *The Rights of Publicity and Privacy* 1:3, :4 (2d ed. Rev. Mar. 2002)). *See also*, Randall T.E. Coyne, *Toward a Modified Fair Use Defense in Right of Publicity Cases*, 29 WM. & MARY L. REV. 781, 786 (1988) (discussing the benefit of having the right of publicity).

¹³ Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 Calif. L. Rev. 125 (1993) (citing Simon Green, *Taking Talents Serious*, 2 CRITICAL REV. 202, 213 (1988)).

¹⁴ Jeremy T. Marr, *Constitutional Restraints on State Right of Publicity Laws*, 44 B.C. L. REV. 863, 875 (2003) (citing J. Thomas McCarthy, *The Rights of Publicity and Privacy* 1:3, :4 (2d ed. Rev. Mar. 2002)).

¹⁵ Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 181 (1993).

statute in 1971.¹⁶ Six years later, the right of publicity gained widespread acknowledgement as a result of the United States Supreme Court's recognition of the right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*¹⁷ The court held that because Ohio had an important state interest in protecting Zacchini's incentives, its recognition of the right of publicity did not offend Scripps-Howard's First Amendment right.

In 1983, Michigan followed by adopting the right in common law with the *Carson v. Here's Johnny Portable Toilets, Inc.*¹⁸ case. The court found that there was infringement because the public could make an association between the phrase, "Here's Johnny", and the personality, Carson. As of early 2012, thirty-one states recognize the right of publicity in either common law, by statute or both.¹⁹ Although the interstate laws vary widely, California and New York are where most right of publicity causes of action arise and are heard, as the majority of American personalities are domiciled in either state.²⁰

II. Problems with State Right of Publicity Laws

A. Lack of Uniformity Among the States

Each state determines whether it will recognize a right of publicity and what the scope and limits of the right will be. As a result, state laws vary greatly. Also, only thirty-one of the fifty states recognize the right; nineteen states do not.

¹⁶ CAL. RIGHT OF PUBLICITY CIV. CODE §3344 (West 1971).

¹⁷ 433 U.S. 562 (1977).

¹⁸ 698 F.2d 831 (6th Cir. 1983).

¹⁹ Jonathan D. Reichman, *Getting the Deal Through: Right of Publicity—United States*, (Kenyon & Kenyon LLP/New York, N.Y.), 2012, at 78, available at <http://www.kenyon.com/newspublications/publications/2011/~media/Files/Publication%20PDFs/2011/ROP2012%20Kenyon%20%20Kenyon.ashx> (last visited Feb. 8, 2012).

²⁰ *Id.*

1. Right of Publicity Statutory Differences

Several of the thirty-one states have conflicting right of publicity laws. With significant differences among states, confusion and unpredictability result. Eric Goodman, a California intellectual property attorney and professor, agrees that it is difficult for lawyers to properly advise clients on right of publicity matters because parties engage in forum shopping²¹ for a jurisdiction most favorable to their case. New York, California and Indiana laws are of particular interest to personalities because New York's right is almost in direct conflict with the rights of California and Indiana. Although New York led in the development of the right of publicity (discussed above)²² and is considered a major cultural and entertainment center, its right is narrow while California's and Indiana's rights are broad (as discussed below). Also, New York does not recognize a common law right of publicity, but California and Indiana do.

a. Protected Attributes

Section 51 of the New York statute states that individuals who use one's portrait, voice, picture, or name for trade or advertising purposes without written authorization violates that person's rights.²³

California, unlike New York, also protects one's signature.²⁴ Moreover, the types of uses actionable under California's statute are much more expansive than New York's, as the

²¹ Krishan Thakker, *The Federalism Case Against a Federal Right to Publicity*, 2011 U. DENV. SPORTS & ENT. LAW J. 97, 120 (2011) (citing Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. 227, 244 (1999)).

²² A New York court, in deciding *Haelan Laboratories*, 202 F.2d 866, coined the term "right of publicity." This is discussed in Part I.

²³ N.Y. CIV. RIGHTS LAW § 51 (McKinney 1999 & Supp. 2000).

²⁴ West's Ann. Cal. Civ. Code § 3344 (original date: 1971, amended date: 1984).

statute prohibits use of one's attributes, in any manner, on or in merchandise, products, or goods, or for purposes of soliciting, advertising or selling without prior authorization.²⁵

Indiana protects even more attributes than New York and California, including distinctive appearance, mannerisms and gestures.²⁶ Further, Indiana is the only state that applies its right of publicity statute to residents and non-residents as long as the infringement occurred in Indiana.²⁷

*b. Postmortem Rights*²⁸

The recognition of a postmortem right of publicity turns on whether the state treats it as a property right because personal rights are not descendible. Some states, such as California and Indiana, regard the right of publicity as a property right, and therefore, allow it to descend.^{29,30} Utah requires the personality to commercially exploit his persona during his lifetime in order for the right of publicity to descend,³¹ and appears to be the only state with this requirement.³² Other states, such as New York and Wisconsin, regard the right of publicity as a personal right.^{33,34}

²⁵ *Id.*

²⁶ IND. CODE ANN. § 32-36-1-6 (2002).

²⁷ IND. CODE ANN. § 32-36-1-1 (2002). *See also* Experience Hendrix, L.L.C., et al. v. Hendrixlicensing.com, Ltd, et al., No. C09-285Z (W.D. Wash. Feb. 8, 2011).

²⁸ “Descendible” and “postmortem” right of publicity are used interchangeably to refer to the right surviving after the personality has died.

²⁹ CAL. RIGHT OF PUBLICITY CIV. CODE § 3344.1 (West 1971) (amended 2008).

³⁰ IND. CODE ANN. § 32-36-1-16 (2002).

³¹ Jonathan D. Reichman, *Getting the Deal Through: Right of Publicity—United States*, (Kenyon & Kenyon LLP/New York, N.Y.), 2012, at 80, available at <http://www.kenyon.com/newspublications/publications/2011/~~/media/Files/Publication%20PDFs/2011/ROP2012%20Kenyon%20%20Kenyon.ashx> (last visited Feb. 8, 2012).

³² Laura Lee Stapleton and Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 MARQ. SPORTS L. REV. 23, 65 (1999) (citing J. Thomas McCarthy, McCarthy on Trademarks & Unfair Competition 28:45, at 28-57 (1996)).

³³ N.Y. CIV. RIGHTS LAW § 50 (McKinney 1999 & Supp. 2000).

³⁴ WIS STAT. § 895.50 (West 2000).

For those states that allow publicity rights to descend, the duration of the postmortem right varies significantly. Virginia's descendible right of publicity only lasts twenty years after the personality's death while California's lasts seventy years and Indiana's and Oklahoma's both last 100 years.³⁵ Other states have different terms of duration depending on various factors. For example, Washington's descendible right lasts ten years if the person's attribute does not have commercial value and seventy-five years if it does have commercial value,³⁶ whereas Tennessee allows the right to continue indefinitely as long as the deceased personality's attributes are continually exploited.³⁷

i. States Amend Postmortem Rights

In two 2007 cases involving Marilyn Monroe's postmortem right of publicity, both federal district courts reached the same decision. In the New York decision in *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*,³⁸ and the California decision in *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*³⁹ the courts ruled that Monroe's rights terminated at death whether she was domiciled in New York or California. The courts based their rulings on the fact that New York does not recognize a postmortem right of publicity and that Monroe died before California passed its Celebrity Rights Act in 1985.

In response to both federal courts' rulings, California amended its 1985 right of publicity law (section 3344.1)⁴⁰ to grant a retroactive right of publicity to deceased personalities with a date of death on or after January 1, 1915. As a result of this amendment, the Central District

³⁵ VA. CODE ANN. § 8.01-40 (1950). CAL. RIGHT OF PUBLICITY CIV. CODE §3344 (West 1971) (amended 2008).

IND. CODE ANN. § 32-36-1-8 (West 2002). OKLA. STAT. ANN. tit. 12, §1449 (West 1998).

³⁶ WASH. REV. CODE ANN. § 63.60.040 (West 1998).

³⁷ TENN. CODE ANN. §45-25-1104 (West 1988).

³⁸ 486 F.Supp.2d 309 (S.D.N.Y., 2007).

³⁹ 568 F. Supp.2d 1152 (C.D. Cal. 2008).

⁴⁰ CAL. RIGHT OF PUBLICITY CIV. CODE § 3344.1 (2008).

Court of California granted CMG World's motion for reconsideration and held that the amended statute would apply in *Milton H. Greene Archives, Inc. v. CMG World, Inc.*,⁴¹ if Monroe was domiciled in California at the time of her death.

The 2008 Washington State Legislature followed suit, revising its Washington Personality Rights Act⁴² to protect the postmortem rights of publicity of individuals or personalities no matter where they are domiciled at the time of death.⁴³ The district court, however, held in *Experience Hendrix, L.L.C., et al., v. Hendrixlicensing.com, Ltd, et al.*,⁴⁴ that Washington's statute violated the Due Process and Full Faith and Credit Clauses of the United States Constitution as well as the so-called "dormant commerce clause."⁴⁵ Therefore, the law of the state where a personality was domiciled at the time of death applies.⁴⁶

ii. *Indiana Expanded Postmortem Rights*

Many states apply the statute of the state of domicile at the time of a personality's death.⁴⁷ Indiana, however, applies its postmortem right of publicity law to those personalities not domiciled in Indiana at the time of death.⁴⁸ Indiana's statute provides that regardless of domicile, residence, or citizenship, no one may use a personality's right of publicity

⁴¹ *Milton H. Greene Archives, Inc. v. CMG World, Inc.*, 568 F. Supp.2d 1152 (C.D. Cal. 2008).

⁴² Lewis R. Clayton, Expert Analysis, *Right of Publicity, Trademark Dilution, Considering Copyright in Gardens*, 245 N.Y. L.J 1, Mar. 9, 2011, available at <http://www.paulweiss.com/files/Publication/850ca480-c0e8-4797-87cd-1cb6855d60f8/Presentation/PublicationAttachment/3ba135f8-16a9-4510-b4f4-21d875d3fee9/Mar11IPL.pdf> (last visited Feb. 2012).

⁴³ WASH. REV. CODE ANN. § 63.60.010: Property right—Use of name, voice, signature, photography, or likeness (2008).

⁴⁴ *Experience Hendrix, L.L.C., et al. v. Hendrixlicensing.com, Ltd, et al.*, No. 09-285Z at 30 (W.D. Wash. Feb. 8, 2011).

⁴⁵ Clayton, *supra* note 42 (quoting *Healy v. Beer Inst. Inc.*, 491 U.S. 324, 336 (1989)).

⁴⁶ *Experience Hendrix, L.L.C., et al. v. Hendrixlicensing.com, Ltd, et al.*, Order No. 09-285Z (W.D. Wash. Feb. 8, 2011).

⁴⁷ *Id.*

⁴⁸ Clayton, *supra* note 42.

commercially without consent for a period of 100 years after the death of such person, unless the personality⁴⁹ dies intestate with no surviving heirs.⁵⁰

2. *Different Jurisdictions Interpret Similar Cases Differently*

Facenda v. NFL, Films, Inc.,⁵¹ and *The Romantics v. Activision Publishing, Inc.*,⁵² both decided in 2008, are two similar cases with different outcomes based on jurisdiction.

In *Facenda*, a Philadelphia broadcaster well-known for his distinctive voice, John Facenda, worked with and provided his voice for many of NFL Films' productions. Several years after Facenda's death, NFL Films used samplings of Facenda's voice from its copyrighted sound recordings in a television production called "*The Making of Madden NFL 06*" to promote the "Madden NFL 06" football video game. The Facenda estate brought several claims, including infringement of Facenda's right of publicity, against NFL Films.

The district court granted summary judgment to Facenda's estate on the right of publicity claim. The Third Circuit affirmed the district court's ruling. The court applied the two-prong copyright preemption test⁵³ to determine if federal copyright law preempted Facenda's estate right of publicity claim under Pennsylvania law. The court found that the state law cause of action was not equivalent to an exclusive right under the Copyright Act because

⁴⁹ IND. CODE ANN. § 32-36-1-6 (2002): "Personality" defined. "As used in this chapter, "personality" means a living or deceased natural person whose: (1) name; (2) voice; (3) signature; (4) photograph; (5) image; (6) likeness; (7) distinctive appearance; (8) gesture; or (9) mannerisms; has commercial value, whether or not the person uses or authorizes the use of the person's rights of publicity for a commercial purpose during the person's lifetime.

⁵⁰ IND. CODE ANN. § 32-36-1-8: Use of personality's right of publicity (2002).

⁵¹ 542 F.3d 1007 (3rd Cir. 2008).

⁵² 532 F. Supp. 2d 884 (E.D. Mich. 2008).

⁵³ The Copyright Act preempts state laws that conflict with the exclusive rights provided to works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103.

Pennsylvania's right-of-publicity statute required a showing of commercial value, which was an additional element that copyright law did not require.⁵⁴

The Second Circuit defined an additional element in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,⁵⁵ stating that if a state law violation is predicated upon an act incorporating elements beyond reproduction, the rights involved are not equivalent.⁵⁶ As for the second prong of the copyright preemption test, the court found that Facenda's voice did not fall within the subject matter of copyright. Thus using the Second Circuit's definition of an additional element, the Third Circuit held that Pennsylvania's right of publicity statute, as applied to Facenda's voice, did not conflict with and cannot be preempted by copyright law.⁵⁷

In *The Romantics v. Activision Publishing*, which was decided by the Eastern District Court of Michigan, the outcome was different from the *Facenda v. NFL, Films, Inc.* case. In this case, The Romantics, a rock band, wrote and recorded a song titled "What I Like About You" in 1979. Several years later, Activision Publishing, a company that makes and sells video games,⁵⁸ and its subsidiary, RedOctane, created the video game "Guitar Hero Encore: Rock's the 80s" ("Guitar Hero"). RedOctane had a license from the copyright owner, EMI Entertainment World, Inc. for the song "What I Like About You." The license allowed RedOctane to use the composition of the song to make a revised recording and use it with visual images in the Guitar Hero video game.

⁵⁴ The issue of copyright and right of publicity conflict and preemption is discussed in Section B of this Part.

⁵⁵ 723 F.2d 195, 204 (2d Cir. 1983).

⁵⁶ *Id.*

⁵⁷ 542 F.3d 1007 (3rd Cir. 2008).

⁵⁸ 532 F. Supp.2d 884 (E.D. Mich., 2008).

The Romantics sought a preliminary injunction to restrain Activision Publishing from offering or selling the Guitar Hero video game. The Romantics claimed Activision Publishing and RedOctane violated their right of publicity by recording a newer version of their song, “What I Like About You,” and using it in the Guitar Hero video game,⁵⁹ which carried the subtitle “as made famous by the Romantics.” The court held that The Romantics did not establish that their right of publicity claim would succeed on the merits because “Michigan has never recognized right of publicity in the sound of a voice, even if distinctive, nor has it recognized a right of publicity for a combination of voices...”⁶⁰ The court also stated that the Copyright Act preempted the right of publicity claim. The court applied the copyright preemption two-prong test and found that The Romantics’ right of publicity claims to the sound of the song, “What I Like About You,” fell within the subject matter of the Copyright Act because The Romantics’ claims were based on the licensing of a copyrighted work. The court also found that the rights claimed by The Romantics were equivalent to the rights protected by the Copyright Act.

These two cases highlight that the application of the copyright preemption test in similar cases vary by jurisdiction. Pennsylvania’s right of publicity recognizes one’s voice as a protectable attribute while Michigan’s does not. Although in both instances the voice was fixed in a copyrighted work, the court in *Facenda* focused on the attribute and not the copyrighted work, whereas the court in *The Romantics* focused on the copyrighted work.

⁵⁹ *Id.*

⁶⁰ *Id.* at 888.

3. *Same Jurisdiction Interprets Similar Cases Differently*

*Downing v. Abercrombie & Fitch*⁶¹ and *Laws v. Sony Music Entertainment, Inc.*⁶² are two similar cases heard in the same jurisdiction with different holdings. These two cases were both heard in the Ninth Circuit within five years of each other.

In *Downing*, George Downing, a former surfer, and other individuals filed suit against Abercrombie & Fitch, a specialty retailer, for infringement of their right of publicity. In 1965, Downing competed in an international surfing championship, which was filmed by Photographer Leroy Grannis. Years later in 1999, Abercrombie obtained a copyright license for some of Grannis' photographs of the surfing championship to support the surfing theme for its upcoming "Abercrombie and Fitch Quarterly," ("Quarterly"). The Quarterly featured the photograph of the surfers, on which Grannis had written the names of the surfers. On the adjacent page, Abercrombie advertised tee-shirts similar to those worn by the surfers in the photograph.

The court rejected Abercrombie's copyright preemption argument and found that Abercrombie used the photograph to promote its Quarterly's surf theme although there was no information in the catalog stating that the individuals in the photo endorsed or promoted Abercrombie or its products. The court stated that the publication of the photograph itself was not the issue, but rather, the use of Downing and the other surfers' likenesses and names pictured in the published photograph was the issue.

⁶¹ 265 F.3d 994 (9th 2001).

⁶² 448 F.3d 1134 (9th Cir. 2006).

Using Nimmer's treatise on copyright law,⁶³ the court held that although the surfers' likenesses and names are fixed in a copyrighted photograph, the publicity rights asserted are not the subject matter of or equivalent to those protected under copyright law. Therefore, the right of publicity claim was not preempted by the Copyright Act.

The *Laws v. Sony Music Entertainment, Inc.*⁶⁴ case is similar to *Downing*, but reaches a different result. In *Laws*, a professional singer, plaintiff Debra Laws, along with Spirit Productions, a recording company, made an agreement with Elektra and Asylum Records to create master recordings of plaintiff's vocal performances for Elektra. The agreement granted Elektra an exclusive license to the master recordings. Further, Elektra obtained the right to use and allow others to make use of the personality's likeness, name and other identifying attributes in association with the master recordings. Elektra agreed to obtain written consent from plaintiff Laws before using or authorizing others to sell records embodying the master recordings.

Years later, Elektra's agent entered an agreement with Sony Music Entertainment Inc. to permit Sony a "non-exclusive license" to use a sample of plaintiff Laws' recording of "Very Special" in a song to be performed by other recording artists. The copyright owner, Elektra, did not receive permission from Spirit or plaintiff Laws prior to releasing the video and disc, and neither Spirit nor plaintiff Laws received compensation for the release. Sony then

⁶³ Nimmer on Copyright §1.01[B][1][c] at 1-23 (1999), [T]he "work" that is the subject matter of the right of publicity is the persona. A persona can hardly be said to constitute a "writing" of an "author" within the meaning the copyright clause of the Constitution. A fortiori it is not a "work of authorship" under the Act. Such name or likeness does not become a work of authorship simply because it is embodied in a copyrightable work such as a photograph.

⁶⁴ *Id.*

published a disc and music video, which integrated short samples of “Very Special” into the recording of “All I Have.”

Plaintiff Laws brought a right of publicity claim against Sony for infringement. The court found that Laws’ action did not concern her name or image, but concerned the copyrightable work itself. The court stated that Sony licensed the use of plaintiff Laws’ actual sound recording and incorporated the sound recording of Laws singing her song into the “All I Have” song produced by Sony. While Laws argued that Sony misappropriated her voice, the court said Sony had a license and right to use her sound recording, and that fact made the Laws case an issue of copyright and not an issue of right of publicity. According to the court, using a recording of Laws’ voice is different than licensing a song and having someone imitate the singer’s voice who sang the song like in *Midler v. Ford Motor Co.*⁶⁵ The court also found that the right plaintiff Laws claimed was comparable to the right granted in Section 106 of the Copyright Act;⁶⁶ thus, the court held that plaintiff Laws’ right of publicity claims were preempted by copyright.

These two cases highlight how the applications of the copyright preemption test vary within a jurisdiction. California’s right of publicity law protects voice, name, signatures and images, but the Ninth Circuit ruled differently on these cases. In *Downing*, the court focused on the attributes, whereas in *Laws*, it focused on the copyrighted work, which is the sound recording embodying the plaintiff’s voice.

⁶⁵ 849 F.2d 460 (9th Cir. 1988). The case is discussed in Section D of this Part.

⁶⁶ 17 U.S.C.A § 106 (1976): Exclusive rights in copyrighted works. “...the owner of copyright under this title has the exclusive rights to do and to authorize...to prepare derivative works based upon the copyrighted work.”

B. Conflict between Right of Publicity and Copyright

The purpose of the right of publicity is similar to that of copyright. They both protect artists and encourage creativity.⁶⁷ However, the right of publicity, which only started receiving recognition in 1953, conflicts directly and indirectly with copyright law. These conflicts are problematic because not all courts conduct the appropriate analysis or apply the copyright preemption test consistently to determine if the state law right of publicity claim is preempted by the Copyright Act when a conflict exists. Those courts that do conduct the appropriate analysis do not apply it uniformly, thereby reaching different conclusions. Therefore, copyrights are devalued when courts do not consistently and uniformly apply copyright preemption to protect the rights of copyright owners and licensees.⁶⁸

Courts must consider federal preemption when deciding state cases. Section 301 of the Copyright Act specifically states that: “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . and come within the subject matter of copyright . . . are governed exclusively by this title.”⁶⁹

The *Laws v. Sony Music Entertainment, Inc.* case (discussed above) is an example of the court properly applying section 301 because the right of publicity cannot be used to interfere with the copyright holder or licensee’s right to use the copyrighted work in a manner consistent with the Copyright Act. Section 301 is applied when state law claims, such as the right of publicity, attempt to protect equitable or legal rights that are equivalent to the exclusive rights already protected under Section 106 of the Copyright Act and where the state

⁶⁷ Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199 (2002).

⁶⁸ *Laws v. Sony Music Entertainment, Inc.*, 448 F.3d 1134, 1144 (9th Cir. 2006) (citing *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711, 718 (9th Cir. 1970)).

⁶⁹ 17 U.S.C.A. § 301 (1998).

law claim is being applied to work that qualifies as a work protected under Sections 102 and 103 of the copyright law.⁷⁰

The work in question in *Laws* was a vocal performance, which was entirely incorporated into a copyrighted medium, a sound recording;⁷¹ therefore, it satisfied the “subject matter” part of the test. The claim also satisfied the “equivalency” part of the test because plaintiff Laws argued that she had the right to reproduce her sound recordings. The right to reproduce a copyrighted work is a right provided by the Copyright Act.⁷² Plaintiff Laws further argued that her claim was not equivalent to rights provided under copyright law because her claim had an extra element, commercial exploitation. The court disposed of her argument by holding that the mere existence of an extra element does not suffice to significantly distinguish plaintiff Laws’ right of publicity claim from a copyright claim.⁷³ By finding that the state law claim fell within the same subject matter and had an equivalent right as protected by copyright law, the *Laws* court properly applied section 301 preemption.

Though the copyright law seems clear, there are several examples that demonstrate that courts inconsistently or improperly apply section 301. Two examples where the courts improperly applied section 301 are discussed below.

1. *Wendt v. Host International*⁷⁴

The *Wendt v. Host International* case decided by the Ninth Circuit in 1997 is a good example of the conflict between copyright law and the right of publicity. Host, a company

⁷⁰ GREGORY J. BATTERSBY AND CHARLES W. GRIMES, *Trademark & Copyright Disputes: Litigation Forms and Analysis* § 3.03B (2003).

⁷¹ 17 U.S.C. § 102(a)(7).

⁷² 17 U.S.C. § 106(1).

⁷³ 448 F.3d 1134, 1144 (2006).

⁷⁴ 125 F.3d 806 (9th Cir. 1997).

that provides shops and restaurants in airports, wanted to start a chain of bars in airports based on the television show “Cheers.” The company licensed the Cheers’ characters from Paramount Pictures, the copyright owner. The company created animatronic robots for the restaurants based on the two star characters from the show, Norm and Cliff, played by George Wendt and John Ratzenberger. Wendt and Ratzenberger then sued Host International for infringement of their rights of publicity.

After comparing photos of Wendt and Ratzenberger to those of the animatronic robots, the district court ruled that there was no likeness and granted Host’s motion for summary judgment on the right of publicity claim. The Ninth Circuit reversed the district court’s ruling, holding that there was an issue of material fact concerning the degree of likeness between the robots and Wendt and Ratzenberger.

The Ninth Circuit went on to state that they wanted to make it clear from the onset that the case at hand was not a preemption case.⁷⁵ The court quoted Congress, stating that plaintiffs’ claims are not preempted by the federal copyright statute so long as they “contain elements, such as the invasion of personal rights...that are different in kind from copyright infringement.”⁷⁶ Although the California statute does not provide such protection, the court used the conflict between California’s statutory and common law right of publicity to support the decision. The court stated that under the common law Wendt may be able to use the right of publicity to claim the characters that are owned by the copyright owner. Thus, the court held that the robots were not so different from the characters in the show that a jury could not find that Host infringed the actors’ rights of publicity.

⁷⁵ *Id.*

⁷⁶ *Wendt v. Host International I*, 1995 WL 115571 at 1 (quoting *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 110 (9th Cir. 1992)).

This holding is a good example of the conflict between copyright and the right of publicity. Copyright permits one, who has licensed the right or owns the copyright, to make a derivative work from the original work,⁷⁷ and the *Wendt* decision did not hold that copyright preempted the actors' rights of publicity. Instead, the *Wendt* decision has effectively allowed the right of publicity to take away the right to produce derivative works, a right indirectly granted by copyright law.⁷⁸ While under certain circumstances laws can be made to limit derivative works of some works, the right of publicity does not rise to this level of importance and necessity to interfere with any part of the federal copyright law.

Judge Alex Kozinski dissented and criticized the way the majority favored the right of publicity over federal copyright law. Judge Kozinski, who also dissented in *White v. Samsung Electronics*⁷⁹ (discussed below),⁸⁰ was bothered more by the result of the *Wendt* case than he was in the *White* case because Host International did obtain a license, which permitted it to use the "Cheers" copyrights. He stated that the *Wendt* decision is the result of the "sweeping standard" the court adopted in the *White* case.⁸¹

In *Wendt*, the court allowed the right of publicity to outweigh copyright law. The public and copyright holders are harmed and perplexed when courts choose to expand the right of publicity rather than find in favor of the copyright owner or licensee, especially since copyright is a federal law. As a result, the right of publicity is reducing the significance of federal law, specifically copyright law.

⁷⁷ 17 U.S.C.A § 106 (1976): Exclusive rights in copyrighted works. "...the owner of copyright under this title has the exclusive rights to do and to authorize...to prepare derivative works based upon the copyrighted work."

⁷⁸ *Id.*

⁷⁹ 971 F.2d 1395 (9th Cir. 1997).

⁸⁰ *White v. Samsung Electronics*, 971 F.2d 1395 (9th Cir. 1997) is discussed in Section D of this Part.

⁸¹ *Wendt v. Host International, Inc.*, 197 F.3d at 1284, 1286 (1999).

2. *James Brown v. ACMI Pop Division*⁸²

In 2007, the Illinois Court of Appeals held that Brown's right of publicity claims were not preempted by the Copyright Act. Corbis, a stock photography agency and copyright owner and licensee, offered more than 2.1 million photographs and images for licensing on its website. The Corbis collection included photographs of James Brown, a famous singer and musician. Brown brought a right of publicity infringement claim in Illinois⁸³ against Corbis for using his image on the Internet without permission.⁸⁴

While Corbis did not use or sell Brown's images or use his images to advertise or sell a product, the agency did offer to license particular rights granted by copyright law. The trial court held that Corbis was marketing a "product" to earn revenue and because Brown did not receive compensation from the unauthorized commercial use, his publicity rights were violated.

The Illinois trial court relied on the Seventh Circuit decision in *Toney v. L'Oreal USA, Inc.*,⁸⁵ to determine if the Copyright Act preempted Brown's right of publicity claims. In *Toney*,⁸⁶ the court focused on Toney's likeness and not the copyrighted photograph, stating that the likeness of Toney was not "fixed in a tangible medium of expression" and that the state publicity rights are not "equivalent" to any of the Copyright Act exclusive rights.

⁸² *Brown v. ACMI Pop Division*, 873 N.E.2d 954 (2007).

⁸³ 765 ILCS 1075/10: Recognition of right of publicity (1999). "The right to control and to choose whether and how to use an individual's identity for commercial purposes is recognized as each individual's right of publicity."

⁸⁴ *Brown*, 873 N.E.2d at 955.

⁸⁵ 406 F.3d 905 (7th Cir. 2005).

⁸⁶ *Id.*: This case concerns a model who consented to use of her picture for the defendant's hair packaging products for a contracted period of time; however, the defendant continued use her picture on the company's products beyond the agreed period.

Although Corbis argued that the Ninth Circuit ruling in *Laws*⁸⁷ (discussed above) was applicable and not *Toney*, the appeals court affirmed the trial court's ruling. The appeals court found that although it is likely that the photos as displayed on Corbis' Internet Web page would be interpreted as tangible, the Publicity Act as applied in this case is not preempted by copyright law because the display of the photos of Brown on the web page constituted an improper commercial use under the Illinois common law or the Publicity Act.⁸⁸

C. Inconsistent Application of Copyright Preemption

Several negative effects result when the two-part copyright preemption test is not applied or is applied incorrectly. The Copyright Act is a federal statute; therefore, it preempts conflicting state statutes. In the last fifteen years, various courts, especially the Ninth Circuit, have held that the right of publicity supersedes the Act's preemption provision. These courts have, thus, effectively created an exception to copyright preemption, and this exception restricts copyright holders' from fully exploiting their copyrights.⁸⁹ Several courts that do not hold that copyright preempts the right of publicity when they should further diminish the value and incentive provided by copyright law.

For example, the Third Circuit appears to have relied heavily on copyright expert, Melville Nimmer, to determine if a right of publicity claim was preempted by copyright in the *Facenda* case (discussed above).⁹⁰ Nimmer proposed that if the primary use of the

⁸⁷ *Laws*, 448 F.3d at 1142 where Ninth Circuit distinguished its decision from *Toney*, 406 F.3d 905, stating that plaintiff claimed misappropriation of her identity *was separate and apart* from the any copyrighted work.

⁸⁸ *Brown*, 873 N.E.2d 955.

⁸⁹ P. Stephen Fardy, *Feet of Clay: How the Right of Publicity Exception Undermines Copyright Act Preemption*, TEX. INTELL. PROP. L.J. 443, 444 (2004).

⁹⁰ *Facenda v. NFL, Films, Inc.*, 542 F.3d 1007 (2008). The case is discussed in section A of this Part.

copyright is for commercial advertising then it should not preempt the right of publicity claim.⁹¹ The court held that NFL Films' twenty-two minute television production, which included Facenda's voice, was promotional; thus, NFL Films' copyright did not preempt the Estate right of publicity claim. Both the literal reading of the statute and the Nimmer test, however, fail to address the fundamental question of when state protection does conflict with federal policy.⁹² Also, Nimmer's proposal does not promote the goals and objectives for creative expression.⁹³

Nimmer's proposal is problematic because it conflicts with the Constitutional goals of copyright law. First, it does not foster a uniform copyright system, and a uniform copyright system among the states is something the authors of the Copyright Act of 1976 specifically sought to have.⁹⁴ Nimmer's proposal does not foster a uniform copyright system because it suggests that courts base preemption on the personality's contract with an advertiser, which leaves a lot open to interpretation.⁹⁵ Leaving so much open to interpretation can lead to inconsistencies among the courts.⁹⁶

When courts fail to hold that copyright law preempts a right of publicity claim when it actually does, as shown above, copyright holders, licensees and the public are harmed. Copyright holders could lose out on licensing fees because the incentive the Copyright Act provides, ownership of exclusive rights for a specified length of time, is dwindling. Licensees will be harmed if they license a work to produce a derivative of the work, but then

⁹¹ *Id.*

⁹² Christopher Pesce, Note, *The Likeness Monster: Should the Right of Publicity Protect Against Imitation?*, 65 N.Y.U.L. REV. 782 (1990).

⁹³ Kristen E. Riccard, *Product Place or Pure Entertainment? Critiquing a Copyright Preemption Proposal*, 59 AM. U. L. REV. 427, 451 (2009).

⁹⁴ *Id.* (citing Joseph P. Bauer, *Addressing the Incoherency of the Preemption Provision of the Copyright Act 1976*, 10 VAND. J. ENT. & TECH. L. 1, 2 (2007)).

⁹⁵ *Id.*

⁹⁶ *Id.*

lose a case regarding the right of publicity in the work. The money they have invested, as well as expected future earnings from the derivative work, would be lost. Suffering this type of loss will discourage licensees from licensing copyrighted works, thereby depriving the public of new creative works and entertainment.

Copyright protects derivative works.⁹⁷ Therefore, copyright law permits the owner of a copy, lawfully obtained, to publicly display the work without having to ask permission of the copyright owner.⁹⁸ This right is devalued if courts do not hold that copyright law preempts the right of publicity.

D. Overprotection

As discussed above,⁹⁹ the right of publicity originally protected a personality's right to her likeness, image or name. The right has expanded far beyond those attributes, leading to overprotection. Overprotection occurs when the right of publicity 1) protects more attributes than necessary to accomplish the purpose and policies underlying the right or 2) conflicts with other intellectual property rights like copyright. As noted in part I, the primary policy reason underlying the right of publicity is an economic incentive for personalities to perform or create works of interest to the public.¹⁰⁰ Expanding the right to protect common phrases and intangibles such as 'evoking an image' provides no notice to the public as to what is or is

⁹⁷ Library of Congress, *Copyright Registration for Derivative Works*, CIRCULAR 14, available at <http://www.copyright.gov/circs/circ14.pdf>.

⁹⁸ *Id.* at 216. See 17 U.S.C. § 109(c) states that "the owner of a particular copy lawfully made under this title... is entitled, without the authority of the copyright owner, to display that copy publicly" <http://www.law.cornell.edu/uscode/text/17/109> (last visited Feb. 14, 2012).

⁹⁹ What right of publicity originally protected is discussed in Part I.

¹⁰⁰ William M. Heberer III, Comment, *The Overprotection of Celebrity: A Comment on White v. Samsung Electronics America, Inc.*, 22 Hofstra L. Rev. 729, 746 (1994).

not protected. These kinds of expansions put the public at the whim of personalities, resulting in a “chilling effect on commercial innovation and opportunity.”¹⁰¹

The purpose of protecting a personality’s right for the ultimate benefit of the public is no longer fulfilled when the right is expanded to the point that it diminishes the public domain and expressive work. Because not all states adhere to the underlying policy rationale, the purpose and policies are no longer the focus of state legislatures and courts. Even when there is a state statute, the courts look to common law to find or create an attribute. Expanding the right of publicity as they have in the following federal circuit cases overprotects a personality’s right.

1. *Courts’ Expansion of Protection*

a. *Relates to Fame*

The Ninth Circuit decided *Motschenbacher v. R.J. Reynolds Tobacco Co.*,¹⁰² in 1974. Lothar Motschenbacher, an internationally known professional race car driver, sued R.J. Reynolds Tobacco Company for misappropriating his likeness, name and personality. In 1970, Reynolds created a televised commercial that included a “stock” color photograph portraying various race cars on a racetrack. For its commercial, Reynolds used a car similar to that of Motschenbacher but made several changes to Motschenbacher’s car. Reynolds changed the number from “71” to “11”, added a spoiler to the rear of the car, and added “Winston,” the Reynolds’ product name. Motschenbacher’s facial features were not discernible; his distinctive red with white pinstripe car, however, appeared to be in the

¹⁰¹ Christopher Pesce, Note, *The Likeness Monster: Should the Right of Publicity Protect Against Imitation?*, 65 N.Y.U.L. REV. 782 (1990).

¹⁰² 498 F.2d 821 (9th Cir. 1974).

foreground of the commercial with other race cars. Some of Motschenbacher's associates who saw the commercial assumed it was Motschenbacher's car and that his car was sponsored by Winston.

The court found in favor of Motschenbacher, as it held that Reynolds appropriated Motschenbacher's "proprietary interest" in his identity via its commercial. The court said the use of the various distinctive, distinguishing characteristics without authorization violated Motschenbacher's right of publicity. With this decision, the Ninth Circuit extended the right of publicity to allow a personality to have exclusive rights over a type or style of car. The court, therefore, expanded protection to encompass physical markers, not physically attached to a personality.

The Sixth Circuit decided *Carson v. Here's Johnny Portable Toilets, Inc.*,¹⁰³ in 1983. The host and star of "The Tonight Show," Johnny Carson, brought a suit against the Here's Johnny Portable Toilets, for renting "Here's Johnny" portable toilets.¹⁰⁴ Each night since the show began in 1962, Carson was introduced with the expression "Here's Johnny."¹⁰⁵ Carson licensed the clothing company, Johnny Carson Apparel, Inc., to use his picture, name, and "Here's Johnny" on the company's promotional material, in advertisements and on clothing labels. The toilet company, however, never received a license from Carson to use the phrase, so the court found that the company had infringed Carson's right of publicity.

Applying Michigan's right of publicity law, the court reasoned that anything used without authorization in commercial advertising that conjures up an association with a

¹⁰³ 698 F.2d 831 (6th Cir. 1983).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

personality violates that personality's right of publicity. As a result, the court held that Carson had the right to prevent anyone from exploiting the phrase, "Here's Johnny," commercially for the duration of his life. Further, his heirs or assignees could exploit commercially the right because Michigan allows for postmortem right of publicity.

Neither Carson's or Motschenbacher's name or image was involved in either case. Yet, both circuit courts saw the need to expand the right. These types of expansions exceed the scope of the right to protect a personality from commercial exploitation. A personality is defined as a human being; therefore, protecting the style of car a personality drives does not comport with the policy reasons for the right of publicity, nor does protecting a generic phrase. Protecting generic phrases or race cars do not benefit the public, as artists are not encouraged to be creative by the protection of generic phrases, thus, this type of expansion only harms the public.

b. *Sound-Alike Performance*

The Ninth Circuit decided *Midler v. Ford Motor Co.*,¹⁰⁶ in 1988. In this case, Ford, a vehicle manufacturer, hired an imitator to sing one of Entertainer Bette Midler's songs for its car marketing advertisement. Ford had a license to use the song and the advertisement did not use Midler's name or picture. Midler, a nationally known singer and actress, brought a right of publicity claim against Ford. The Ninth Circuit found in favor of Midler and held that Ford had infringed Midler's right of publicity by hiring someone to imitate her voice while singing one of her songs.

¹⁰⁶ 849 F.2d 460 (9th Cir. 1998).

The Ninth Circuit decided *Waits v. Frito-Lay, Inc.*,¹⁰⁷ in 1992. The *Waits* case is another example of the Ninth Circuit expanding the right of publicity's protectable attributes. Frito-Lay, a snack food company, hired an advertising agency to produce an advertising campaign for a new product. The agency wrote a commercial and song to echo some of the words in Waits' song "Step Right Up." The agency also hired a singer to imitate Waits' voice since Waits, a professional singer with a deep, raspy voice, did not do commercial endorsements.

The Frito-Lay commercial premiered on over 250 radio stations in 1988. When Waits heard it, he brought a suit against Frito-Lay and the advertising agency claiming 'voice misappropriation.' The Ninth circuit coined this term in *Midler* in 1988. The court found that Waits' right of publicity was infringed because the commercial "featured a deliberate imitation of Waits' voice."¹⁰⁸ The court held that a personality could protect an individual style of singing.

These Ninth Circuit decisions expanded the right to prevent sound-alikes and protect styles of singing. California's right of publicity statute only protects the use of a personality's actual voice, not the imitation of a personality's voice. Therefore, the district court in *Midler* found that there was "no legal principle preventing imitation."¹⁰⁹ Although the circuit court admitted the statute did not protect imitation of a personality's voice, it created a 'voice misappropriation' tort under California common law and found that the tort was relatable to a violation of the right of publicity. By the circuit court creating the tort and reversing the district court's summary judgment for Ford, the court held that imitating a personality's distinctive voice should be actionable under the right of publicity.

¹⁰⁷ 978 F.2d 1093 (9th Cir. 1992).

¹⁰⁸ *Id.* at 1098.

¹⁰⁹ *Midler*, 849 F.2d at 462.

This type of expansion frustrates the purpose of copyright, as copyright has a goal of preserving the public domain and preventing artists, authors and the like from protecting ideas. Imitations of sound recordings are allowed by the copyright sound recording amendment.¹¹⁰ Instead of expanding the right of publicity in *Midler*, the court should have affirmed the district court's ruling in *Midler* that her right of publicity claim was preempted by copyright and that Midler had a cause of action under the Lanham Act.¹¹¹ The expansion in *Midler* continued in *Waits*, which was also a Lanham Act cause of action.

Also, by certain jurisdictions expanding the right of publicity and other jurisdictions such as New York, not following suit, the disparity among states is becoming even greater. Additionally, these expansions limit future performers' creativity, as well as the quantity and type of works available to the public.¹¹²

c. *Evokes an Image*

The Ninth Circuit decided *White v. Samsung Electronics*¹¹³ in 1992. Four years after the *Midler* decision, the Ninth Circuit further expanded publicity rights. Samsung Electronics, an electronic company, used a robot dressed like Vanna White standing in front of a *Wheel of Fortune* board in its advertisement for VCRs. White, the *Wheel of Fortune* game show co-host, sued Samsung for infringement of her right of publicity. Samsung argued that the 'fair

¹¹⁰ 17 U.S.C. §114(b) (exclusive rights of copyright owner do not extend to creation of other sound recordings even though such sounds imitate or simulate those in the copyrighted sound recording).

¹¹¹ Lanham Act section 43(a), 15 U.S.C.A § 1125(a)(1) makes it an offense to misrepresent information in a way that is likely to deceive consumers about the origin or approval of such information.

¹¹² Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 221 (2002).

¹¹³ 971 F.2d 1395 (9th Cir. 1992).

use'¹¹⁴ defense should apply because the advertisement did not include a photo of White or her name; it simply parodied her persona.

The district court held that none of White's protected attributes were violated based on California law. The Ninth Circuit, however, reversed the district court and disagreed with the 'fair use' defense based on parody. The court further expanded the right to include 'evoking an image based on a role' as a protected attribute by holding that Samsung used White's persona by conjuring up her image in the mind of the public.

This decision, as Judge Kozinski stated in his dissent to the denial of an en banc review,¹¹⁵ extended the right of publicity much too far. He said the decision to deny review of the case is a good example of overprotection.¹¹⁶ The overprotection of intellectual property rights is just as detrimental as under-protection because of the stifling effect overprotection has on the same creative forces it is supposed to foster.¹¹⁷ Further, California's right of publicity statute does not protect a personality from parody. Therefore, to correct a perceived wrong done to White, the court created law to protect an 'evoked image' as an attribute. Cases in this area widen the gap between right of publicity claimants and their true identities.¹¹⁸

Thus, when the Ninth Circuit in *Wendt v. Host International*¹¹⁹ (discussed above),¹²⁰ decided in 1999, held that simply evoking a celebrity's persona is sufficient to infringe the

¹¹⁴ Black's Law Dictionary 16(c) (9th ed. 2009): A parody is a form of critiquing or ridiculing an original work. Parodies are "protected as free speech." For copyright, a work is protected if it is a fair use of the original work.

¹¹⁵ 989 F.2d 1512 (1993).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1513 stated Judge Alex Kozinski.

¹¹⁸ See Jeffrey Malkan, *Stolen Photographs: Personality, Publicity, and Privacy*, 75 TEX. L. REV. 779, 781 (1997).

¹¹⁹ 125 F.3d 806 (9th Cir. 1997)

right of publicity, Judge Kozinski's said "*White's* voracious logic swallows up rights conferred by Congress under the Copyright Act."¹²¹ The *White* case is a good example of overprotection, as it extended the right of publicity well beyond the most standard protected attributes of the right. Judge Kozinski warned the court that, by allowing the expansion in *White*, it was jeopardizing creativity by depleting the public domain¹²² because intellectual property rights are supposed to only protect against particular types of appropriation. The expansions in *White* and *Wendt* put no necessary limits on this intellectual property right like other intellectual property rights have. The court found no derivative work in *Wendt*, nor any idea-expression dichotomy or fair use exceptions in *White*.¹²³

2. *Personality Quest for Expansive Protection*

The right of publicity, in jurisdictions like California and Indiana, has expanded to the point that personalities think that any reference or perceived reference to them qualifies as a violation of their right.¹²⁴

a. *Lindsay Lohan against E*Trade Securities, LLC*¹²⁵

Lindsay Lohan, an actress arrested on more than one occasion for drunk driving,¹²⁶ filed a 100 million dollar lawsuit against E*Trade Securities, an investment company, for misappropriation of her name. E*Trade is famous for producing baby commercials to

¹²⁰ *Id.* is discussed in section B of this Part.

¹²¹ *Wendt*, 197 F.3d 1284.

¹²² Risa J. Weaver, *Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute*, DUKE L. & TECH. REV. 2, ¶ 10 (2010).

¹²³ *White*, 971 F.2d 1395 (9th Cir. 1992).

¹²⁴ Stacey L. Dogan and Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161 (2006).

¹²⁵ Index No.: 10-004579, Supreme Court of the State of New York County of Nassau, (March 8, 2010)

¹²⁶ Crimesider Staff, "Free Lindsay Lohan": Judge ends actress' probation begun over drunk driving arrests, CBSNEWS.COM (Mar. 29, 2012), http://www.cbsnews.com/8301-504083_162-57406569-504083/free-lindsay-lohan-judge-ends-actress-probation-begun-over-drunk-driving-arrests/ (last visited Apr 25, 2012).

advertise its services.¹²⁷ In 2010, the investment company produced another baby commercial, and this time one of the babies was named “Lindsay.” During the commercial, one baby asked about the “milkaholic Lindsay” then the supposed “milkaholic Lindsay” baby pops on screen, seemingly drunk asking “Milk-a-what?”

Although the commercial did not identify Lindsay Lohan,¹²⁸ she asserted that she has achieved single-name recognition and E*Trade used her name to sell its product. Her claim does not meet the first element of a right of publicity claim because she is not well-known by just her first name, ‘Lindsay,’¹²⁹ nor did the advertisement use her full name or include any images of Lohan. Unlike Oprah, Cher or Madonna, Lohan’s first name is not a brand and she is not well known as or referred to as ‘Lindsay.’¹³⁰ Although E*Trade’s attorneys thought the claims were “meritless,” E*Trade settled with Lohan.¹³¹ Because of courts’ history and willingness to expand the right of publicity to fit the claim, one can assume that was the reason E*Trade settled the suit.

¹²⁷ Jackie Kass, *The Sunday Funnies: E Trade baby commercial returns for Super Bowl 2012*, EXAMINER.COM (Feb. 4, 2012), <http://www.examiner.com/article/the-sunday-funnies-e-trade-baby-commercial-returns-for-super-bowl-2012>.

¹²⁸ Complaint, *Lindsay Lohan v. E*Trade Securities LLC et al.*, (N.Y. Sup. 2010) (No. 10-004579), available at http://tmz.vo.llnwd.net/o28/newsdesk/tmz_documents/0309_etrade_wm_01.pdf (last visited Feb. 28, 2012).

¹²⁹ Daily Mail Reporter, *Just Call Me Lindsay: Miss Lohan Drops her Last Name to Severe Ties with her Father*, DAILYMAIL.CO.UK (Mar 26, 2011), <http://www.dailymail.co.uk/tvshowbiz/article-1370120/Lindsay-Lohan-drops-sever-ties-father-Michael.html> (last visited Apr. 25, 2012). See also *Lindsay Lohan Is Changing Her Name, Her Mom Says*, FOXNEWS.COM (Mar 25, 2011), available at <http://www.foxnews.com/entertainment/2011/03/25/lindsay-lohan-changing-mom-says/> (last visited Apr. 25, 2012).

¹³⁰ *Id.*

¹³¹ Kieran Crowley, *Lindsay Lohan Wants \$100M Over E-Trade Ad*, NewYorkPost.com, Mar. 9, 2010, available at http://www.nypost.com/p/news/national/lohan_such_baby_jVdQWABj9z0MgXzCv1Nh1O (last visited Feb. 27, 2012).

b. *Burck v. Mars, Inc.*¹³²

E*Trade should have looked for precedent in the *Burck v. Mars* decision, decided in 2008 by the district court for the Southern District of New York. In this case, Robert Burck, a street performer, also known as the Naked Cowboy, sued Mars, a famous candy manufacturer, for violation of his right of publicity under New York's right of publicity statute. Mars created a billboard and mural in New York City with M&M candies pictured as well as ran animated cartoon advertisements. One of the candies was a blue M&M character wearing a white cowboy hat, boots and underwear with a guitar similar to how Burck dresses.

Only the first element of New York's three-element test was disputed, which was whether Mars used Burck's name, portrait, picture or voice in its advertisement. The court equated the case to *White v. Samsung*¹³³ (discussed above). The court found that using suggestive characteristics or evoking aspects of a personality without literally using the personality's picture or portrait was not actionable under New York's right of publicity statute. Therefore, the court held that Mars did not violate Burck's right of publicity, unlike the Ninth circuit, which allowed White to proceed with a right of publicity claim based on a suggestive character under common law and win.

III. Arguments For and Against a Federal Right of Publicity Statute

A. Argument for Enacting a Federal Right of Publicity Statute

Several reasons bolster the argument for enacting a federal right of publicity statute, including that a federal statute will reduce confusion and uncertainty; it will prevent or

¹³² *Burck v. Mars, Inc.*, 571 F.Supp.2d 446 (S.D.N.Y. 2008).

¹³³ 971 f. 2d 1395 (9th Cir., 1992).

minimize conflicts between state right of publicity law and copyright law; it will ensure that litigants are treated uniformly among the states; and it will reduce the incentive to engage in forum shopping.

1. *Minimize Uncertainty*

The current right of publicity system's lack of definitive boundaries has resulted in considerable confusion among potential litigants.¹³⁴ Personalities often are not sure whether their right of publicity is protected or even what attributes are protected.¹³⁵ Defendants may not be aware of when they can use a personality's particular attributes. With the many variations in states' right of publicity laws, courts are either not applying the copyright preemption test or are applying it inconsistently.

Additionally, by providing certainty, a federal right of publicity statute will encourage personalities to engage in more creative and novel endeavors nationally, as the cost of enforcing their rights would be greatly reduced.¹³⁶ The personality could bring a claim against a particular infringing company in one federal court and that decision would apply nationally. The infringing company, therefore, would be nationally banned from committing that infringing act, such as making a commercial including a personality's image.

Further, as noted in the various case examples provided, right of publicity claims often end up in federal court because right of publicity claims are often coupled with federal issues,

¹³⁴ Christopher Pesce, *The Likeness Monster: Should the Right of Publicity Protect Against Imitation*, 65 N.Y.U.L. REV. 782 (1990).

¹³⁵ Blair Joseph Cash, "*Hasta La Vista, Funny Guys*": *Arnold Schwarzenegger's Fictional Voice Misappropriation Lawsuit Against Comedians Imitating His Voice and the Case for a Federal Right of Publicity Statute*, 18 J. INTELL. PROP. L. 207, 229 (2010).

¹³⁶ Krishan Thakker, *The Federalism Case Against a Federal Right to Publicity*, 2011 U. DENV. SPORTS & ENT. LAW J. 97, 118 (2011).

which is problematic. Federal courts should not be deciding how to apply state laws that vary so widely. A federal right of publicity would eliminate this problem.

2. *Resolve Conflict*

As discussed above,¹³⁷ major conflict exists between the right of publicity and copyright law, which a federal statute would resolve.

In creating the federal law, Congress would consider and address the demonstrated conflicts between the right of publicity and copyright. Specifically, federal courts will have a uniform federal law to apply, thus eliminating the issue of courts confusing various state laws and reversing their own decisions when determining if a right of publicity claim is preempted by the Copyright Act. This occurred in *Toney v. L'Oreal* (discussed above).¹³⁸ The Seventh Circuit reversed itself, as the district court held that Toney's right of publicity claim was preempted based on the Seventh Circuit's 1986 decision in *Baltimore Orioles v. Major League Baseball Players Association*¹³⁹ case. However, the Seventh Circuit, found no copyright preemption in *Toney*.

To reduce and possibly eliminate the conflicts, the statute could include the various measures that do affect the right of publicity, as it did in the federal trademark law to protect people from misrepresentations.¹⁴⁰ By including measures to address conflicts, each court will apply the same criteria to determine whether the right of publicity should be preempted so that like cases, such as *Facenda* and *The Romantics*, would have similar outcomes.

¹³⁷ The conflict between the right of publicity and copyright law is discussed in Part II.

¹³⁸ *Toney*, 406 F.3d 905 is discussed in Part II. See also note 86.

¹³⁹ 805 F.2d 663 (1986).

¹⁴⁰ Krishan Thakker, *The Federalism Case Against a Federal Right to Publicity*, 2011 U. DENV. SPORTS & ENT. LAW J. 97, 117 (2011).

3. Reduce Compliance Cost

The current process of each state determining what attributes to protect under the right of publicity leads to personalities and non-personalities receiving no protection to too much protection. Forum choice directly affects many aspects of one's right of publicity case, including the specific rights and attributes protected.¹⁴¹ As discussed above,¹⁴² depending on the state in which the suit is brought, a particular right may or may not be protected.

For personalities to bring suit, in various states for the same infringement to ensure their rights are not exploited, is costly and inefficient.¹⁴³ Secondly, the extensive research attorneys must conduct to decipher the laws of the various jurisdictions is burdensome and costly. As noted, several states do not recognize the right of publicity. Thirdly, requiring potential advertisers to research the laws of the various jurisdictions to ensure they are not infringing a personality right of publicity is equally taxing.¹⁴⁴ Lastly, the concern of damages must be addressed. If personalities could bring suit in one federal court against defendants who have exploited commercially their attribute in multiple states, they could receive multiple damages from the same company for the same infringement.¹⁴⁵

Additionally, an injunction imposed by a court may only be applicable in the state where the infringement occurred. The issue is whether an injunction granted by a court in one state is effective over the behavior in a different state. A good example of this problem is

¹⁴¹ Blair Joseph Cash, "*Hasta La Vista, Funny Guys*": *Arnold Schwarzenegger's Fictional Voice Misappropriation Lawsuit Against Comedians Imitating His Voice and the Case for a Federal Right of Publicity Statute*, 18 J. INTELL. PROP. L. 207, 229 (2010).

¹⁴² Discussed in Part II.

¹⁴³ Usha Rodrigues, *Race to the Stars: A Federalism Argument for Leaving the Right of Publicity in the Hands of the States*, 87 VA. L. REV. 1201, 1223 (2001).

¹⁴⁴ Matthew Savare, Comment, *The Price of Celebrity: Valuing the Right of Publicity in Calculating Compensatory Damages*, 11 UCLA ENT. L. REV. 129, 146 (2004).

¹⁴⁵ Rodrigues, *supra* note 143 at 1223.

demonstrated by New York courts. New York courts have stated that New York's right of publicity law does not apply to infringement concerning commercial exploitation of personalities' attributes in other states.¹⁴⁶

The variations in the right of publicity law among the states, according to Intellectual Property Attorney and Professor Eric Goodman, means "Lawyers cannot give their clients anything even resembling an unqualified opinion under the current scheme..."¹⁴⁷ Instituting a federal right of publicity would eliminate these concerns, as there would be one uniform law for each jurisdiction to follow and all decisions would apply nationwide. Personalities, therefore, would not have to bring multiple suits, and attorneys and defendants could rely on one governing law, which would reduce costs.

4. Eliminate Forum Shopping

Forum shopping is a method where parties seek or "shop" for jurisdictions with laws that favor their position.¹⁴⁸ The vast discrepancies among the states regarding the right of publicity have created a chronic forum shopping issue.¹⁴⁹ A federal right of publicity statute will eliminate forum shopping because the same rights will be protected everywhere; thus, it will not matter where the personality initiates the suit.

¹⁴⁶ Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. 227, 244 (1999) (citing *Shamsky v. Garan, Inc.*, 632 N.Y.S. 2d 930 (N.Y. Sup. Ct. 1995)).

¹⁴⁷ Krishan Thakker, *The Federalism Case Against a Federal Right to Publicity*, 2011 U. DENV. SPORTS & ENT. LAW J. 97, 120 (2011).

¹⁴⁸ Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. 227, 244 (1999).

¹⁴⁹ *Id.*

The current state-based domicile-at-death rule¹⁵⁰ does not adequately address the problem of forum shopping. This rule only addresses cases in which a cause of action regarding the descendible rights' of a deceased personality should be brought. However, the preference of a personality's heirs is to bring right of publicity claims in jurisdictions like California, Indiana, Oklahoma, or Tennessee, as they have the broadest right of publicity statutes.

Living personalities can choose which jurisdiction to bring a claim for right of publicity infringement when the infringement takes place in many states.¹⁵¹ For example, Marilyn Monroe's estate sued a photography archive and licensing company in Indiana in 2005. The estate claimed that the company violated Monroe's postmortem right of publicity under Indiana's law, although Monroe lacked a connection with Indiana while she was alive.¹⁵²

Another example involves California-based Bruce Lee Enterprises. In 2009, that company initiated suit in Indiana against a New York and New Jersey-based clothing company, claiming that the clothing company had infringed its right of publicity under Indiana law.¹⁵³

This type of forum shopping will leave potential defendants guessing, as they will never know ahead of time which law they may be subjected to in a right of publicity case. Having

¹⁵⁰ *Id.* States that follow this rule apply the right of publicity statute of the state where the personality was domiciled when he died.

¹⁵¹ Laura Hock, Comment, *What's in a Name? Fred Goldman's Quest to Acquire O.J. Simpson's Right of Publicity and the Suit's Implications for Celebrities*, 35 PEPP. L. REV. 347, 363 (2008) (citing 2 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY §§ 11:13 (2d ed. 2007), also available at <http://digitalcommons.pepperdine.edu/plr/vol35/iss2/4/>).

¹⁵² Kevin L. Vick and Jean-Paul Jassy, *Why a Federal Right of Publicity is Necessary*, 28 COMM. L. 14, 16 (2011).

¹⁵³ *Id.* (citing Bruce Lee Enters., LLC v. Ecko. Complex, LLC, No. 09-CV-0398 WTL-DML (S.D. Ind. Filed Apr. 1, 2009). While the court granted the defendants' transfer of venue motion, the court recommended that Indiana right of publicity law be applied.).

an attorney explain all of the possible outcomes based on what state or states a personality may decide to bring a right of publicity suit is just not feasible as discussed above.

5. *Limit Litigation*

A public policy reason exists for federalizing the right of publicity. A federal statute will reduce litigation because a judicial decision on a case for the right of publicity will apply nationally. Therefore, personalities will not have to bring multiple suits for the same infringement. Further, advertising and retail companies will know which attributes are protected, and may stray away from using those protected attributes since they know they can potentially use other attributes.

Personalities will not be forced to bring litigation in various jurisdictions to protect their rights of publicity, and injunctions against particular infringing activities will apply nationwide. It is arguable that introducing a federal statute will increase litigation because the right of publicity would be litigated in those nineteen states that currently do not recognize the right of publicity. This argument is weak because it fails to consider the fact that a federal right will mean that a decision by one court on the matter will apply in all states. Currently, personalities would have to bring approximately thirty-one¹⁵⁴ different suits for the same infringing actions, whereas a single federal right of publicity will require only one suit.

Personalities have to bring numerous suits because advertisers and retailers commercially exploit personalities across state borders, but the current right of publicity regime does not allow a personality to recover from or prohibit infringement by these entities by bringing suit

¹⁵⁴ This number assumes that no states honor other states' injunctions.

in one jurisdiction. Personalities have to initiate suit in every state where their right of publicity is being infringed if the state does not enforce a judgment from another state. Therefore, while more states will hear right of publicity cases, there will be fewer right of publicity cases overall as a personality only has to bring one right of publicity suit under a federal right of publicity statute. Further, personalities and defendants will have a clear understanding of what attributes are protected. The proposed federal statute, discussed below,¹⁵⁵ will only protect a limited number of attributes; therefore, many of the current kinds of claims will no longer have merit.

6. Regulate Internet Infringement

Allowing states to create right of publicity laws may have made sense when the right was in its infancy; however, this is a different time.¹⁵⁶ With ever changing and fast-growing technology such as the Internet, a federal right of publicity has become more and more of a necessity. Thus, Melville Nimmer, a leading scholar on copyright, seriously doubted that the individual state law scheme for the right of publicity adequately satisfies the demands of the 21st century Internet Age.¹⁵⁷ With the current Internet Age, companies are confronted with the issue of what state laws apply when they place advertisements on the Internet. The expansive Internet use significantly increases personalities' potential for economic loss, as those protected attributes are typically not fixed in a tangible medium, which means they can

¹⁵⁵ Specifics on what a federal right of publicity statute should include are discussed in Part VI.

¹⁵⁶ Risa J. Weaver, *Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute*, DUKE L. & TECH. REV. 2, ¶ 37 (2010) (citing Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 202, 203 (1954).

¹⁵⁷ Risa J. Weaver, *Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute*, DUKE L. & TECH. REV. 2, ¶ 37 (2010) (citing Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 202, 203 (1954).

be more easily appropriated and exploited without approval.¹⁵⁸ A federal right of publicity statute will make compliance with personalities' rights of publicity easier, as companies will only have to be aware of one uniform statute when they create Internet advertisements.

B. Arguments against Enacting a Federal Right of Publicity Statute

A federal statute will provide uniformity, reduce the confusion and uncertainty, prevent or minimize copyright law and other potential federal law conflicts, and reduce the incentive to engage in forum shopping and litigation.

Opponents of a federal right of publicity statute offer various arguments ranging from states' retaining autonomy to the right of publicity being a property right that states should regulate. The following arguments and concerns will be addressed in this section: (1) the right of publicity is a property right and property rights are state-based rights; (2) a federal statute will force those states that do not recognize the right of publicity to recognize it; and (3) many variations of the right of publicity exist making it difficult to determine which form should be adopted.

1. States Should Regulate Property Rights

The strongest argument against a federal right of publicity statute is that the right of publicity should be regulated by the state because property rights are created and regulated by the states.¹⁵⁹ True, states must retain autonomy, but the problems of inconsistency outweigh those concerns. Allowing states to have deference over this law is admirable and furthers federalism concerns, but lack of uniformity issues raise greater concerns because

¹⁵⁸ Richard S. Robinson, *Preemption, the Right of Publicity, and a New Federal Statute*, 16 CARDOZO ARTS & ENT. L.J. 183, 206 (1998).

¹⁵⁹ Krishan Thakker, *The Federalism Case Against a Federal Right to Publicity*, 2011 U. DENV. SPORTS & ENT. LAW J. 97, 127 (2011).

personalities facing the same circumstance are treated significantly different based on jurisdiction. For example, personalities' publicity rights are not descendible if they are domiciled in New York at the time of death, whereas, their publicity rights are descendible if they are domiciled in California at death.

Differences between the statutes concerning protectable attributes and postmortem rights result in mass confusion among personalities, entities, attorneys, and courts. The significant differences among the states regarding the right of publicity are therefore sufficient to limit state autonomy on this matter. Federal government regulation will eliminate lack of uniformity issues and reduce confusion. Currently, federal statutes govern copyright and patent laws. They are federal laws because the purpose for those laws is to promote the progress of science and useful arts. The right of publicity should be a federal right as well, as that appears to be the Framers' clear intention. The Framers indicated that state regulation of works of authorship would be inefficient. This idea is demonstrated clearly in Federalist Paper 43 where James Madison notes that the federal law should govern intellectual property matters.

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.¹⁶⁰

¹⁶⁰ The Federalist No. 43 (James Madison) <http://www.constitution.org/fed/federa43.htm>.

From this quote, it can be inferred that the Framers intended for federal law to regulate all varied areas of intellectual property.¹⁶¹

2. *States Should Have the Option to Recognize a Property Right*

The issue of forcing states to recognize and enforce a law they have chosen not to adopt¹⁶² is another argument against a federal law and relates to the issue of autonomy. While several states recognize the right of publicity, some do not, and no good reason, goes the argument, justifies overriding those state choices.

This argument is outweighed in light of all the problems that result from not having a federal right of publicity statute. Further, the fact that the majority of the states do recognize some form of the right and only a few states do not strengthens the argument for a federal right, as this demonstrates that lawmakers in general believe a right of publicity should be recognized. The easiest way to ensure it is recognized is to enact a federal law. A federal right of publicity would ensure all persons' right of publicity is protected. Additionally, the fact that some states do not recognize the right does not mean that no valid moral or economic considerations exist for a uniform law. An important economic consideration is the commercial value of personalities' attributes.

The lack of a federal right of publicity means that corporations and other businesses can diminish personalities' commercial value and deprive them of the opportunity to make money. Those states that fail to recognize the right, therefore, are depriving personalities in their states of pecuniary gain because personalities should have the right to decide if and

¹⁶¹ Jane C. Ginsburg, *U.S. Federalism and Intellectual Property*, 12 COLUM. J. EUR. L. 463 (1996).

¹⁶² Blair Joseph Cash, "*Hasta La Vista, Funny Guys*": *Arnold Schwarzenegger's Fictional Voice Misappropriation Lawsuit Against Comedians Imitating His Voice and the Case for a Federal Right of Publicity Statute*, 18 J. INTELL. PROP. L. 207, 226 (2010).

when their attributes will be used. Thus, states that do not recognize the right of publicity allow companies to violate personalities' right to their attributes and diminish the value in those attributes.¹⁶³ They should have this right because of the work and effort that they have expended to create the commercial value in their attributes.¹⁶⁴

3. *No Methodology Exists to Determine the Best Law*

Another argument concerns the issue of which form of the many variations of the law to adopt. It is argued that competition among the states should form the uniform right, as states will compete to have celebrities reside in their state and will adjust their laws accordingly.¹⁶⁵ Additionally, the right has not had sufficient time to develop.¹⁶⁶ Allowing states to develop and improve the right will allow the best version of the law to materialize.¹⁶⁷ This argument addresses the issue that the right of publicity is not a clear right, which is actually a good reason to enact a federal law. Also, the idea that the right is so new and has not had the opportunity to develop is not a valid argument because the right of publicity has received recognition since 1953; therefore, the right has had the opportunity to develop for fifty-nine years. While it will be difficult to determine which form of the law should be enacted, it would include looking at the scope of each law and determining if features of a law support

¹⁶³ *Id.* (citing Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383 (1999)).

¹⁶⁴ Matthew Savare, Comment, *The Price of Celebrity: Valuing the Right of Publicity in Calculating Compensatory Damages*, 11 UCLA ENT. L. REV. 129, 146 (2004) (citing Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 195-96 (1993)).

¹⁶⁵ Krishan Thakker, *The Federalism Case Against a Federal Right to Publicity*, 2011 U. DENV. SPORTS & ENT. LAW J. 97, 124-126 (2011).

¹⁶⁶ Blair Joseph Cash, "*Hasta La Vista, Funny Guys*": *Arnold Schwarzenegger's Fictional Voice Misappropriation Lawsuit Against Comedians Imitating His Voice and the Case for a Federal Right of Publicity Statute*, 18 J. INTELL. PROP. L. 207, 226 (2010) (citing David L. Shapiro, *Federalism: A Dialogue* 85 (Northwestern University Press 1995)).

¹⁶⁷ *Id.*

the policy reasons for a right of publicity and have limits and boundaries like other federal intellectual property laws – copyright, patent and trademark.

IV. Federal Statute

A. Federal Right of Publicity Statute should be Enacted

A federal right of publicity statute is required to provide clarity, reduce litigation, incorporate moral and economic considerations, reduce forum shopping, and more. It is inefficient for a business that wants to use a personality's attribute nationally to have to know all the various state laws and apply the most burdensome requirements to avoid liability.¹⁶⁸

Further, as discussed above, state right of publicity statutes are interfering with federal intellectual property rights, particularly copyright. Also, some courts do not adequately address copyright preemption when considering whether a right of publicity claim is valid, which devalues copyright. Thus, a federal right of publicity is needed to eliminate these concerns and issues.

Lastly, a federal right of publicity statute is required to prevent individual states from affecting commerce in other states and from expanding the right of publicity so far as to destroy its purpose and have a substantial effect on other intellectual property rights. A federal right will improve the overall status of the right of publicity and ensure that the public's interest is balanced with the interests of personalities.

¹⁶⁸ International Trademark Association, *Policy and Advocacy: Board Resolutions U.S. Federal Right of Publicity*, Mar. 3, 1998, <http://www.inta.org/Advocacy/Pages/USFederalRightofPublicity.aspx> (last visited Feb. 3, 2012).

B. What the Federal Statute Should Include

The federal statute should address the primary purpose of the right of publicity law. As discussed above,¹⁶⁹ the purposes for the right of publicity are to prevent commercial unjust enrichment and to encourage personalities to engage in creative endeavors. Therefore, a federal right of publicity statute will help by limiting the pool of protected attributes; thereby, leaving broad categories such as the style of singing, a particular gesture or generic phrase in the public domain for everyone to use and enjoy.

A federal statute should only protect the name, likeness and image of a personality (or individual). These attributes should be protected because they most directly relate to a person's individuality. Further, name, image and likeness are the first attributes protected under the privacy right and later under the right of publicity. Also, all states that recognize the right of publicity protect these attributes; therefore, these are clearly deemed important, protectable attributes.¹⁷⁰ Additionally, protecting only these attributes will fulfill the primary purpose and goals of the right of publicity, as intellectual property rights are supposed to only protect against particular types of appropriation. These attributes are specific and will ensure personalities can protect the value of their hard work to achieve fame and notoriety while encouraging them to continue to perform and contribute to the public domain for the public's benefit.

The federal statute should also include a section on a descendible postmortem right of publicity because it provides an additional incentive for personalities to work harder and

¹⁶⁹ The purpose and policy reasons underlying the right of publicity are discussed in Part I.

¹⁷⁰ Jonathan D. Reichman, *Getting the Deal Through: Right of Publicity—United States*, (Kenyon & Kenyon LLP/New York, N.Y.), 2012, at 79, available at <http://www.kenyon.com/newspublications/publications/2011/~//media/Files/Publication%20PDFs/2011/ROP2012%20Kenyon%20%20Kenyon.ashx> (last visited Feb. 8, 2012).

achieve more, enriching the public domain. Personalities are more likely to do so if their heirs can benefit from the labor they expended during their lifetimes. Further, a majority of the states that recognize the right of publicity already recognize a postmortem right.¹⁷¹ Including a postmortem right is essential, as it guarantees prevention of unjust enrichment by people who would exploit commercially the fame and notoriety personalities achieved during their lifetime.¹⁷² Allowing corporations and businesses to exploit commercially a personality's attributes without permission is unjust because the personality invested and worked to build the commercial value in their attributes so they and their families could reap the benefits. Including the postmortem right of publicity, therefore, will satisfy the underlying policy for the right of publicity.

Postmortem rights of publicity should be limited in the same way copyright duration is limited. The same free speech and free enterprise considerations balanced in limiting copyright duration are relevant to a descendible right of publicity.¹⁷³ Applying similar criteria to the right of publicity's duration as applied to determine copyright's duration should achieve the necessary balance between the autonomy over one's attributes and the public's interest in the availability of ideas and information.¹⁷⁴ Further, the copyright postmortem durational scheme can provide the legislature guidance for the postmortem right of publicity.¹⁷⁵

¹⁷¹ *Id.* at 80.

¹⁷² Andrew B. Sims, *Right of Publicity: Survivability Reconsidered*, 49 *FORDHAM L. REV.* 453, 498-499 (1981).

¹⁷³ Andrew B. Sims, *Right of Publicity: Survivability Reconsidered*, 49 *FORDHAM L. REV.* 453, 498-499 (1981).

¹⁷⁴ Randall T.E. Coyne, *Toward a Modified Fair Use Defense in Right of Publicity Cases*, 29 *WM. & MARY L. REV.* 781, 821 (1988).

¹⁷⁵ Sims, *supra* note 154 (citing *Lugosi v. Universal Pictures*, 25 *Cal. 3d* 813, 847-48 (1979)).

The difficulty lies in determining the actual duration for postmortem right of publicity. The right of publicity is different from copyright in that personalities' commercial values quickly and drastically decline soon after death.¹⁷⁶ Therefore, a limited durational period, such as ten years should be imposed,¹⁷⁷ unless the assignees or heirs continue to commercially exploit the attributes after the death of the personality, as the Tennessee statute requires.

The statute should specify who is eligible to receive right of publicity protection. It should continue with the general trend, which allows non-personalities to receive protection along with personalities, as copyright and patent does not discriminate as to who can receive protection for their works or inventions. This section should also include definitions, as found in many of the state statutes, to avoid confusion. It should first define the right of publicity. A good definition to use is that provided by Professor McCarthy, the author of "The Rights of Publicity and Privacy."¹⁷⁸ That treatise provides an extensive examination of the right of publicity and McCarthy's right of publicity definition.¹⁷⁹ He states the right of publicity is "the inherent right of every human being to control the commercial use of his or her identity."¹⁸⁰ Next, it should define key terms. For example, Indiana's right of publicity statute includes a definition of personality that implies that if one's publicity has no commercial value, one will not be able to recover more than nominal damages even if his right is infringed.¹⁸¹ Nominal damages for non-personalities are sufficient, as they do not

¹⁷⁶ *Id.* (citing *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 285 (S.D.N.Y. 1977)).

¹⁷⁷ *Id.*

¹⁷⁸ J. THOMAS, MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* (2d ed. Rev. Mar. 2002).

¹⁷⁹ Jeremy T. Marr, *Constitutional Restraints on State Right of Publicity Laws*, 44 B.C. L. REV. 863, 865 (2003).

¹⁸⁰ *Id.* (citing J. THOMAS, MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* 1:3, :4 (2d ed. Rev. Mar. 2002)).

¹⁸¹ IND. CODE ANN. § 32-36-1-6 (2002).

have commercial value but should be permitted to recover some damages when wronged. Damages should also take into consideration how much the infringer benefitted.

V. Conclusion

The United States is in need of a federal right of publicity statute for several reasons, most notably to eliminate the lack of uniformity among the states, conflicts with copyright law, and overprotection. The lack of uniformity among the states causes several problems: individuals are uncertain of what rights are protected, federal courts are expanding state laws, rights of publicity litigation is increasing,¹⁸² and like cases are treated differently within and between jurisdictions.

Right of publicity conflicts with copyright are abundant, as the right of publicity is very similar to and often overlaps copyright, which is problematic. Many courts have held that copyright does not preempt a right of publicity claim when they clearly should. As a result, copyright holders, licensees and the public are harmed because these decisions devalue the purpose of copyright law.

Finally, overprotection of publicity rights also harms the public. A goal of intellectual property rights is to incentivize entertainers, authors, creators, and others to create appealing works and performances. The current scheme of right of publicity laws, however, is spoiling this purpose and appropriating the rights granted to copyright holders. The overprotection of publicity rights is removing the same material and ideas placed in the public domain by copyright law. The *Wendt v. Host International*¹⁸³ case, where the court held that the actors

¹⁸² Consor Intellectual Asset Management, *CONSOR Intellectual Asset Management Expands its Right of Publicity Litigation Support Services*, <http://www.consor.com/ip-news/consor-intellectual-asset-management-expands-its-right-of-publicity-litigation-support-services.html> (last visited Mar. 25, 2012).

could lay claim to the characters they played in “Cheers” television show against the copyright owners right to license the characters for a derivative work, is a good example.

The right of publicity as a state-based property right is ineffective. The time has come for a federal right of publicity statute. Federal regulation will ensure uniformity among the states, remove the conflicts between the right of publicity and copyright law, and prevent overprotection. Federal regulation will allow right of publicity and copyright laws to coexist for the betterment of society. Federal regulation of the right of publicity will ensure that personalities, attorneys and businesses alike all know what constitutes right of publicity infringement, thus, reducing litigation. Federal regulation will define the appropriate scope for the right of publicity by drawing on copyright, trademark and patent laws to ensure that the public domain is protected. Thus, it is now time for Congress to legislate on the matter.

¹⁸³ *Wendt v. Host International*, 125 F.3d 806 (9th Cir. 1997).

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