

Protecting the Commercial Value of Iowans’ Identity Nationwide: A Response to Colon’s Proposed State Statute

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ABSTRACT: I read with interest Madison J. Murhammer Colon’s How Can Iowans Effectively Prevent the Commercial Misappropriation of Their Identities? Why Iowa Needs a Right of Publicity Statute. While I agree with her that Iowans need protection since Iowa is one of just 15 states without a state right of publicity statute, this Essay proposes that it would be better for Iowans to work toward a federal, rather than state, statute. Without a federal statute, whether a right of publicity exists and how broad the protection is depends upon the state in which one is asserting such a right. Relying on state law makes it difficult to protect one’s rights beyond state borders and to plan the cost of compliance with the law of multiple jurisdictions. There is support for a federal statute from a wide variety of sources, including the American Bar Association.

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I. INTRODUCTION

In *How Can Iowans Effectively Prevent the Commercial Misappropriation of Their Identities? Why Iowa Needs a Right of Publicity Statute*, Madison J. Murhammer Colon asserts that Iowa, as one of only “15 states [in the United States] that does not expressly recognize the right of publicity in any form, leav[es] Iowans uncertain about their intellectual property rights in their identities.”¹ She engages in a discussion of the history of the right of publicity and the risks to Iowans without a state statute, culminating in proposed statutory language.² While I absolutely agree that Iowans need protection, I would propose instead a federal statute protecting the commercial value of identity nationwide. Since each state has approached the right of publicity in its own way, the governing law is inconsistent and uncertain, making it difficult for holders and acquirers of these rights to act definitively. Due to the pervasive use of social media and the Internet for international distribution of sponsored content, a federal right of publicity statute similar to the one recommended herein would offer more protection to Iowans than a state statute. Without federal protection, Iowans will remain at risk.

II. COMMERCIAL VALUE OF IDENTITY

A. BACKGROUND AND HISTORY

In his *Second Treatise on Government*, John Locke wrote, “Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself.”³ That is the foundation of the current right of publicity, which, as Colon notes, is a property right protecting one’s right to commercialize their name, image, and likeness,⁴ which evolved from a personal privacy right.⁵

The value associated with a celebrity’s popularity has been used by a variety of brands to connect with consumers for centuries. Josiah Wedgwood, the founder of Wedgwood pottery, first used endorsements from British royals

1. Madison J. Murhammer Colon, *How Can Iowans Effectively Prevent the Commercial Misappropriation of Their Identities? Why Iowa Needs a Right of Publicity Statute*, 106 IOWA L. REV. 411, 411 (2020).

2. See *id.*

3. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT CH. V, § 27 (Project Gutenberg 2010) (1690) (ebook), <http://www.gutenberg.org/files/7370/7370-h/7370-h.htm> [<https://perma.cc/CK8X-Q8FM>].

4. Colon, *supra* note 1, at 413–14.

5. See *id.* at 414–15.

in the 1760s.⁶ Later, Mark Twain “endorsed Fountain Pens, had his own co-brand of Mark Twain cigars, clothing, shaving accessories, Old Crow Whisky” and even railroads.⁷ Silent films, radio, and vaudeville became new opportunities for celebrity endorsements.⁸ “By 1975, one in eight TV commercials featured a celebrity.”⁹ As technology progressed, the value of a celebrity’s name, image, and likeness became more valuable to both the celebrity and the brand with “television and other media creat[ing] marketable celebrity identity value.”¹⁰ Celebrities can endorse products on the radio, television, Internet, or social media for tens of millions of dollars, and such advertising may be on a national or even international scale.¹¹ Mark Rooks, Pepsi’s Senior Marketing Manager of Multicultural Marketing, said that celebrity endorsement is “truly vital to our customer base. Not only does that celebrity bring new value, excitement, or humor but they bring an energy and memorability that you don’t get sometimes with non-celebrity advertising.”¹² Commercial exploitation today is very different than it was in Wedgwood’s and Twain’s day. A localized form of protection that might have protected them centuries ago is not enough to protect Iowans in today’s global marketplace.

B. STATE STATUTES

As Colon notes, courts recognized the right of publicity as early as 1953 to protect these inherent commercial rights of identity as property and

6. *Celebrity Endorsement – Through the Ages*, IBS CASE DEV. CTR. (2004), <http://ibscdc.org/Free%20Cases/Celebrity%20Endorsement%20Through%20the%20Ages%20p1.htm> [<https://perma.cc/26MT-5RLL>].

7. *History of Celebrity Endorsements and Product Placements*, CELEBRITY CRED, <http://celebritycred.com/history-of-endorsements> [<https://perma.cc/8XDM-Z6Eg>].

8. *See id.*

9. *Celebrity Endorsement – Through the Ages*, *supra* note 6. Nike signed Tiger Woods in 1996 to endorse its golf balls, and then realized growth of \$50 million in revenue by 2002. *Id.*

10. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992), *superseded by statute*, CAL. CIV. CODE § 3344 (West 1984), *as recognized in* *Thé v. Rydberg*, No. CV 11-6471, 2012 WL 13009128 (C.D. Cal. Jan. 18, 2012).

11. Stacy Jones, *How Hollywood Celebrities Are Used For Global Endorsements*, HOLLYWOOD BRANDED (July 2, 2018, 10:30 AM), <http://blog.hollywoodbranded.com/how-hollywood-celebrities-are-used-for-global-endorsements> [<https://perma.cc/DB6U-VW6C>] (“[I]n both South Korea and Japan, about 70% of commercials now feature a celebrity. . . . [I]t is now celebrities rather than military heroes who symbolize knowledge and trust in the eyes of Chinese consumers. India has learned to channel its well-known Bollywood celebrities . . .”). Lisa Rinna, actress and “Real Housewife,” was paid \$2 million for one advertisement for Depend adult diapers in 2015. Golfer Michelle Wie made between \$4 and \$5 million annually endorsing Nike. Jennifer Aniston’s endorsement of Emirates Airlines garnered \$5 million and Justin Timberlake said “I’m Lovin’ It” to McDonald’s \$6 million payout. But those amounts pale in comparison to Floyd Mayweather’s \$25 million from endorsements on his fight clothes and George Clooney’s \$40 million for Nespresso endorsements. Sofia Vergara (*Modern Family* star) has made \$94.5 million from her endorsements of Head & Shoulders, Pepsi, Quaker Oats, and CoverGirl. Andrew Lisa, *Celebrity Endorsement Deals With Insane Payouts*, GOBANKINGRATES (Dec. 18, 2020), <http://www.gobankingrates.com/net-worth/celebrities/celebrity-endorsement-deals-paid-how-much/#4> [<https://perma.cc/2GQM-744Z>].

12. *Celebrity Endorsement – Through the Ages*, *supra* note 6.

protect them from misappropriation, with state statutes coming later.¹³ “The right of publicity prevents the unauthorized commercial use of an individual’s name, likeness, or other recognizable aspects of one’s persona. It gives an individual the exclusive right to license the use of their identity for commercial promotion.”¹⁴ But that concept of value has been further broken down into economic and noneconomic categories.¹⁵ “[S]timulating athletic and artistic achievement, promoting the efficient allocation of resources, and protecting consumers” are the economic justifications of a right of publicity in comparison with the noneconomic justifications of “safeguarding natural rights, securing the fruits of celebrity labors, preventing unjust enrichment, and averting emotional harm.”¹⁶

Taking that a step further, since rights of publicity are viewed as property and property can be passed to an estate upon death, it would follow that rights of publicity should be descendible too.¹⁷ John Locke’s theory was that individuals’ rights to the fruits of their labor should be protected. If property rights, as fruits of labor, were descendible, then so should be rights of publicity as merely a different type of property.¹⁸ Post-mortem rights are extremely valuable to the estates that receive them.¹⁹ However, only some state statutes include post-mortem rights.²⁰

According to J. Thomas McCarthy, a proponent of the right of publicity, “[e]ach [state] statute is really ‘one of a kind’ in that it is largely a product of its time and place.”²¹ The state law development of the right of publicity has not been a smooth path, with one court suggesting it had been “spasmodic,” because there is no federal right of publicity to either guide or pre-empt any state law.²² It is time for that to change.

13. Colon, *supra* note 1, at 416.

14. *Publicity*, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/publicity> [<https://perma.cc/U8VH-L2U6>].

15. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 973 (10th Cir. 1996).

16. *Id.*; see also *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 824 (8th Cir. 2007) (“Economic interests that states seek to promote include the right of an individual to reap the rewards of his or her endeavors and an individual’s right to earn a living.”).

17. See, e.g., *Edison v. Edison Polyform Mfg. Co.*, 67 A. 392, 395 (N.J. Ch. 1907) (extending the term “property rights” to include the use of one’s name and pictorial representation).

18. *Haelan Lab’ys, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

19. See, e.g., SHERRI L. BURR, *ENTERTAINMENT LAW: CASES AND MATERIALS ON ESTABLISHED AND EMERGING MEDIA* 341 (2017) (“During her 36 years of life, Marilyn Monroe earned less than \$1 million in total, yet her estate annually generates eight times that amount as it exploits her publicity rights.”).

20. Colon, *supra* note 1, at 437.

21. 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 6:5 (2d ed.).

22. *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 822 (8th Cir. 2007) (“An action based on the right of publicity is a state-law claim.”); *Lugosi v. Universal Pictures*, 603 P.2d 425, 439–40 n.14 (Cal. 1979) (Bird, J., dissenting) (“Despite this increasing trend toward recognizing a distinct right to control the commercial exploitation of

III. THE NEED FOR A FEDERAL RIGHT OF PUBLICITY STATUTE

Without a federal statute, whether a right of publicity exists and how broad the protection is depends upon the state in which one is asserting such a right. Relying on the law of 50 different states makes it difficult to know not only what the law is, but also how to plan the cost of complying with the law of multiple jurisdictions. In addition, a single federal statute will discourage forum shopping.²³ Author Melinda Eades summarized these points well:

The unpredictability for litigants is distressing, to say the least. Plaintiffs run the risk of later learning that they have set up their licensing schemes in the wrong state upon the untimely death of their cash-cow licensor. Defendants run the risk of printing a poster or advertisement that must be kept out of states with extremely broad protective statutes, or of being forced to comply with a state's most restrictive guidelines.²⁴

A. SOCIAL MEDIA AND TECHNOLOGY DRIVE THE NEED FOR A FEDERAL RIGHT OF PUBLICITY

Colon's assertion that one of the dangers facing Iowans without a right of publicity statute is social media²⁵ is true, and it is also a key reason why a federal right would be better than a state right.²⁶ "Before the social media invasion, it is unlikely that any of us who practice in this area of law would have conceived of a case wherein the plaintiffs are average citizens trying to prevent others from commercially exploiting their identifies."²⁷ While the right of publicity has been evolving, it has not kept up with technology. In addition to radio and television, we now have video games, the Internet, social media, smart phones, and even holograms, which adds more opportunities not only for commercial exploitation of one's identity, but also for third

one's name and likeness, the development of this right has been spasmodic. This is in part a consequence of courts adjudicating claims which might be categorized as invasions of plaintiff's right of publicity as privacy claims. . . . The resulting confusion often noted by commentators, has impeded the development of the right.").

23. Melinda R. Eades, Note, *Choice of Law and the Right of Publicity: Domicile as an Essential First Step*, 66 BROOK. L. REV. 1301, 1301 (2001) ("Choice of law analyses in right of publicity cases can lead to disturbingly disparate results. Sharp differences in state laws render the application of one state's law over another the deciding factor in many right of publicity actions."). See e.g., John Gomis, *Publicity Law: The Line Between Creativity and Identity Theft*, LAW STREET (Oct. 21, 2014), <https://legacy.lawstreetmedia.com/issues/entertainmentandculture/is-the-current-landscape-of-publicity-rights-laws-properly-balancing-artists-and-non-artists-rights/> [https://perma.cc/PZ3M-WKCA] (noting that forum shopping is when a party chooses to bring their case in the state with the law most favorable to that party).

24. Eades, *supra* note 23, at 1302.

25. Colon, *supra* note 1, at 429 ("Given the pervasive prevalence of social media in Iowans' lives as well as the recent rise in deepfake technology, it is easier than ever for advertisers to misappropriate an individual's identity.").

26. *Id.*

27. Lynne M.J. Boisineau, *Giving the Right of Publicity a Much-Needed Makeover for the Social Media Revolution*, 5 LANDSLIDE 24, 27 (2012).

parties to infringe on one's rights of publicity. Hologram concerts, such as the Tupac hologram at the Coachella Valley Music and Arts Festival in California, are one example of such technology.²⁸ A hologram concert is when a deceased musician's image, in this case Tupac Shakur's image, is projected through a hologram at a concert to create a new performance.²⁹ Hologram concerts are a relatively new concept but are increasing in popularity, and a federal right of publicity would provide protection from and guidance for the use of such technology.³⁰ Otherwise, the hologram tour promoter would need to research the law of each state before setting up the tour.

Deceased celebrities are also appearing in creative works long after their deaths. In some cases, these creative works are digital reimaginations, and in other cases, old footage is reworked into new films.³¹ In these cases, rather than casting actors in films, producers need to acquire rights of publicity to include these actors' identities in their films through various digital processes.

Finally, the rise in social media has led to right of publicity claims by people who are not celebrities. No one could have predicted the huge impact that social media would have on the right of publicity. Commentator Lynne M.J. Boisineau has explained the ways in which social media can be used to use another person's identity:

A person's "name" can be used as a Twitter handle, as the profile name of a Facebook page, as a YouTube channel, as a character in a video game, or in the title of a smartphone app. Similarly, a person's "portrait," "picture," or "likeness" can come in the shape of a digital image that can be copied and pasted thousands of times in any of the scenarios above, as well as appearing as a video on YouTube, a "pin" on Pinterest, as the wallpaper on a cell phone, or as an avatar on a smartphone app. A person's "voice" can be used in a podcast, as the navigational guide on your GPS, or as a narrator of an electronic book; recorded as a "voice memo" on a smartphone and posted on a social media site; attached as digital file to an electronic message; and so on.³²

28. *Id.* at 28.

29. *Id.* ("[A hologram is] an illusion of the deceased musician created utilizing a high-definition 3D holographic video projection system involving a custom rigging and mechanical solution.").

30. Victor Fiorillo, *It's Official: Dead Musicians Are Now Touring as Holograms*, PHILA. MAG. (Sept. 19, 2018, 11:05 AM), <http://www.phillymag.com/news/2018/09/19/hologram-concert-roy-orbison-tupac> [<https://perma.cc/7RE7-Y8QG>] (noting that there have been hologram performances of Tupac Shakur, Ol' Dirty Bastard, Michael Jackson, Ronnie James Dio, and Roy Orbison).

31. See Alexia Fernandez, *Carrie Fisher's Final Movie Role — See a Glimpse of her Emotional Scene in Star Wars: Episode IX*, PEOPLE (Apr. 12, 2019, 9:33 PM), <http://people.com/movies/carrie-fisher-emotional-scene-star-wars-episode-ix> [<https://perma.cc/6K7W-N2HT>]; Erin Winick, *Actors Are Digitally Preserving Themselves to Continue Their Careers Beyond the Grave*, MIT TECH. REV. (Oct. 16, 2018), <http://www.technologyreview.com/s/612291/actors-are-digitally-preserving-themselves-to-continue-their-careers-beyond-the-grave> [<https://perma.cc/2JVN-KN7P>].

32. Boisineau, *supra* note 27, at 26.

Of course, each of the above examples from social media may not result in successful claims, but they are examples of how evolving technology has raised the need for federal protection of the right of publicity and how a myriad of claims could be raised in the future. Demonstrating that anyone can successfully assert right of publicity claims, LinkedIn agreed to a \$13 million settlement after using its members' identities to promote its platform.³³ In another class action that ultimately settled, parents argued in *Fraleigh v. Facebook, Inc.* that their minor children's Facebook profiles were used to suggest endorsement of various products.³⁴ Plaintiffs survived a motion to dismiss by showing "a direct, linear relationship between the value of their endorsement of third-party products, companies, and brands to their Facebook friends, and the alleged commercial profit gained by Facebook."³⁵

Unlike celebrity endorsements, which may have value because of a consumer's admiration of a celebrity, these endorsements to friends of individuals who have their identities used without authorization for commercial purposes are arguably more influential because of the personal connection. Facebook COO Sheryl Sandberg stated "that '[m]arketers have always known that the best recommendation comes from a friend. . . . This, in many ways, is the Holy Grail of advertising.'"³⁶ Some might argue that the Communications Decency Act (CDA) immunizes Internet service providers from claims based on content posted by third parties.³⁷ In a case like *Fraleigh*, however, in which Facebook was accused "not of publishing tortious content, but rather of creating and developing commercial content that violates their statutory right of publicity," the CDA does not provide immunity from either state or federal intellectual property claims, which would include a federal right of publicity.³⁸

Another unauthorized use of a person's likeness in social media is known as "twitterjacking," a term for when someone sets up an account, pretends to be a celebrity, athlete, executive, or other well-known individual, and tweets

33. See *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190 (N.D. Cal. 2014); Nathaniel Mott, *Check Your Mail for a \$20 Payment from LinkedIn This Week*, INVERSE (Oct. 21, 2016, 8:37 AM), <http://www.inverse.com/article/22544-perkins-linkedin-settlement-lawsuit-checks-start-arrive> [<https://perma.cc/3CF2-5NRG>].

34. *Fraleigh v. Facebook, Inc.*, 830 F. Supp. 2d 785, 799 (N.D. Cal. 2011) ("[Plaintiffs] allege that their individual, personalized endorsement of products, services, and brands to their friends and acquaintances has concrete, provable value in the economy at large, which can be measured by the additional profit Facebook earns from selling Sponsored Stories compared to its sale of regular advertisements.").

35. *Id.* at 800.

36. *Id.* at 799; see *Celebrity Endorsement – Through the Ages*, *supra* note 6.

37. See 47 U.S.C. § 230(c)(1) (2018) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."); see *Perfect 10, Inc. v. CCBill LLC*, 481 F.3d 751, 768 (9th Cir. 2007) (holding that a right of publicity is intellectual property and therefore an Internet service provider is immune from liability for a right of publicity claim).

38. *Fraleigh*, 830 F. Supp. 2d at 801; see *Perfect 10, Inc.*, 481 F.3d at 768; *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009) ("Section 230(c)(1) does not provide immunity for either federal or state intellectual property claims.").

unauthorized messages to followers of that account.³⁹ Twitter has created “Verified Accounts” to help users identify trusted sources, and companies may link their Twitter profiles to their official websites to guide consumers. This solution though, just leads followers to the true accounts and does not eliminate the fraudulent accounts.⁴⁰

In today’s global economy, marketing is worldwide and often online, which means that the misappropriation of one’s name and likeness is not confined to local entities, such as a general store in small town Elk Horn or an advertisement in *The Daily Iowan*. Global advertising was \$623 billion in 2019, and social media supports an increasing share of all such advertising and endorsements.⁴¹ A global study revealed that advertisers are forecasted to set aside 49 percent of their budgets for online advertising by 2021.⁴² Such enormous budgets for online advertising, which is international in scope, signal that now is the time for a federal right of publicity statute.

B. SUPPORT FOR A FEDERAL RIGHT OF PUBLICITY STATUTE

The idea of a federal statute is not new, having been proposed in the mid-1990s by the International Trademark Association,⁴³ yet it still has not happened. There is support for a federal statute from a wide variety of sources, including the American Bar Association, which recommended such a federal statute “in order to curb significant forum shopping and to provide advertisers and celebrities with the precise boundaries of protection.”⁴⁴ To be fair, there has been opposition by various lobbying groups, but the topic continues to be raised and promoted.⁴⁵ Since the Uniform Law Commission declined to

39. Joshua Rhett Miller, *‘Twitterjacking’—Identity Theft in 140 Characters or Less*, FOX NEWS (May 16, 2015), <http://www.foxnews.com/story/twitterjacking-identity-theft-in-140-characters-or-less> [<https://perma.cc/B3SE-E7XS>].

40. See *About Verified Accounts*, TWITTER, <http://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts> [<https://perma.cc/A8Z3-AF7V>].

41. JONATHAN BARNARD, ZENITH MEDIA, *ADVERTISING EXPENDITURE FORECASTS MARCH 2019*, at 1 (2019), <http://www.zenithmedia.com/wp-content/uploads/2019/03/Adspend-forecasts-March-2019-executive-summary.pdf> [<https://perma.cc/3M3E-PM5B>].

42. *Id.* at 7.

43. See Int’l Trademark Ass’n, *U.S. Federal Right of Publicity* (Mar. 3, 1998), <https://www.inta.org/wp-content/uploads/public-files/advocacy/board-resolutions/U.S.-Federal-Right-of-Publicity-03.03.1998.pdf> [<https://perma.cc/9SFS-36G4>].

44. Alain J. Lapter, *How the Other Half Lives (Revisited): Twenty Years since Midler v. Ford A Global Perspective on the Right of Publicity*, 15 TEX. INTELL. PROP. L.J. 239, 243 (2007); see *Committee No. 205: Unfair Competition—Trade Identity*, 1995 ABA SEC. INTELL. PROP. L. ANN. REP. 202, 250 (discussing a right of publicity statute); Kathy Heller, *Deciding Who Cashes in on the Deceased Celebrity Business*, 11 CHAP. L. REV. 545, 566 (2008); *U.S. Federal Right of Publicity*, *supra* note 43, at 1; see, e.g., Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL J. ART & ENT. L. 227 (1999); Richard S. Robinson, *Preemption, the Right of Publicity, and a New Federal Statute*, 16 CARDOZO ARTS & ENT. L.J. 183 (1998); Sean D. Whaley, *“I’m a Highway Star”: An Outline for a Federal Right of Publicity*, 31 HASTINGS COMM’NS. & ENT. L.J. 257 (2009); Brittany A. Adkins, Comment, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity Act*, 40 CUMB. L. REV. 499 (2010).

45. Jonathan L. Faber & Wesley A. Zirkle, *Spreading Its Wings and Coming of Age: With Indiana’s Law as a Model, the State-Based Right of Publicity is Ready to Move to the Federal Level*, 45 RES.

create a uniform act on the right of publicity at its 2018 annual meeting,⁴⁶ some have argued that a federal statute would be better than a proposed uniform act. For example, the United States Copyright Office suggested: "If Congress wished to address some of the uncertainty and ambiguity created by the lack of harmonization among state right of publicity laws, Congress might consider adopting a federal right of publicity law."⁴⁷ Since advertising campaigns are broadcast nationally and products endorsed by celebrities are sold in interstate commerce, Congress has the authority to pass a federal right of publicity statute under the Commerce Clause.⁴⁸

It is not a stretch to recognize a right of publicity at the federal level. While no federal right of publicity statute currently exists, Colon noted that the Supreme Court has acknowledged the right of publicity in an Ohio case, *Zacchini v. Scripps-Howard Broadcasting Co.*⁴⁹ In addition, the Lanham Act provides federal protection against false endorsement,⁵⁰ which is similar to a violation of the right of publicity, and the American Law Institute has added right of publicity to the Restatement (Third) of Unfair Competition.⁵¹

IV. PROPOSED FEDERAL RIGHT OF PUBLICITY STATUTE

The proposal here is for a federal civil law, not a criminal statute. While some states do have criminal consequences for misappropriation, a criminal statute is beyond the scope of this Essay's proposal.⁵² Instead, the focus here is to achieve consistency and avoid forum shopping with a federal, civil statute, which would preempt state law by express language therein.⁵³ This Essay's

GESTÆ 31, 37 (2001) ("While these efforts over the years have lost momentum under the strain of unresolved debate by powerful lobbying forces . . . the idea of federalizing the Right of Publicity is consistently renewed by scholars, organizations and special interest groups.").

46. See *Annual Meeting of the Executive Committee*, UNIF. L. COMM'N 6 (July 23, 2018), <http://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=2986559b-3c7c-658b-06a8-7dfcoobac2d3&forceDialog=o> [https://perma.cc/JD2E-5G44].

47. REG. OF COPYRIGHTS, U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 117 (Apr. 2019), <http://www.copyright.gov/policy/moralrights/full-report.pdf> [https://perma.cc/YQY5-6WLP].

48. U.S. CONST. art. I, § 8, cl. 3.

49. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 572–77 (1977) (recognizing the right of publicity and holding that a television news broadcast of a commercial entertainer's performance that aired without consent was not protected by the First Amendment); see also Colon, *supra* note 1, at 416.

50. 15 U.S.C. § 1125(a) (2018).

51. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995).

52. For original proposal of this kind see Nanci K. Carr, *Social Media and the Internet Drive the Need for a Federal Statute to Protect the Commercial Value of Identity*, 22 TUL. J. TECH. & INTELL. PROP. 31 (2020).

53. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987) ("[W]hen acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms."); see 17 U.S.C. § 301(a) (2018) (providing that "no person is entitled to any such right . . . under the common law or statutes of any State."). But see N.Y. CIV. RIGHTS LAW § 50 (McKinney 2014) ("A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a

proposal includes the rights to be protected, transferability, post- and mortem rights, statutory damages, and exceptions for expressive works and activities protected by the First Amendment.⁵⁴

A. RIGHTS TO BE PROTECTED

The federal statute should protect more than one's name, voice, signature, photograph, and likeness. It should incorporate the Restatement (Third) of Unfair Competition's statement of the right of publicity, which includes a broader definition of identity: "One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate . . ."⁵⁵ It is important that the protected rights not be limited specifically to name and image, because the exploited rights, and often the misappropriated rights, are broader than that.⁵⁶

For example, Johnny Carson's long-running reign as the king of late night television was well known for Ed McMahon's welcoming introduction, "Here's Johnny."⁵⁷ That phrase was "generally associated with Carson by a substantial segment of the television viewing public," so much so that Carson licensed the use of that phrase to "a chain of restaurants called 'Here's Johnny Restaurants'" and later to an apparel manufacturer for men's clothing and to another company for men's toiletries.⁵⁸ However, Here's Johnny Portable Toilets, Inc., a Michigan corporation, did not seek Carson's permission to use the phrase coupled with "The World's Foremost Comedian," so Carson sued.⁵⁹ While the United States District Court dismissed the suit since Johnny Carson's name or likeness was not used,⁶⁰ the United States Court of Appeals for the Sixth Circuit reversed, stating that the right of publicity requires

that a celebrity has a protected pecuniary interest in the commercial exploitation of his identity. If the celebrity's identity is commercially

misdemeanor."); REG. OF COPYRIGHTS, *supra* note 47, at 118 (suggesting that a federal right of publicity should "serve as a 'floor' for right of publicity protections, while allowing individual states to adopt more extensive protections in the event they determine that such additional protections would be beneficial. This approach would be consistent with the approach taken by Congress in passing the Lanham Act [15 U.S.C. § 1125(a)] and the Defend Trade Secrets Act [Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (codified in scattered sections of 18 U.S.C.)], both of which elected not to preempt state law and accordingly allowed for the continued development of state laws in the shadow of the federal statute.") (footnotes omitted).

54. See REG. OF COPYRIGHTS, *supra* note 47, at 118-19.

55. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995); see *id.*; CAL. CIV. CODE § 3344(a) (West 1984).

56. Colon makes an excellent point that including a "laundry list" of protected attributes would likely be unsuccessful as there will always be something that falls outside the list that should be protected. Colon, *supra* note 1, at 436-37.

57. See Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 838 (6th Cir. 1983).

58. *Id.* at 832-33.

59. *Id.* at 833.

60. Carson v. Here's Johnny Portable Toilets, Inc., 498 F. Supp. 71, 77 (E.D. Mich. 1980), *aff'd in part, vacated in part, remanded*, 698 F.2d 831 (6th Cir. 1983).

exploited, there has been an invasion of his right whether or not his “name or likeness” is used. Carson’s identity may be exploited even if his name, John W. Carson, or his picture is not used.⁶¹

As California recognizes, one’s voice can be just as valuable as one’s name, image, and likeness.⁶² This point was noted when Bette Midler sued Ford for using an impersonator to sound like her in a television commercial, and when Tom Waits’ unique, raspy voice was misappropriated in a radio commercial for Salsa Rio Doritos.⁶³ Both artists successfully recovered large monetary awards even though neither of their names or photos were used.⁶⁴ The Internet, including social media, makes it very easy to upload and copy video and sound files, which means there are many opportunities for misappropriation of the rights of publicity related to voice and images.

The definition of likeness was also extended in Vanna White’s case against Samsung in *White v. Samsung Electronics America, Inc.*⁶⁵ Ms. White is the blonde letter turner on the “Wheel of Fortune” game show and is known for wearing evening gowns on the show. In its advertisement, Samsung used a robot wearing an evening gown and a blonde wig near a game board that suggested it was the “Wheel of Fortune.”⁶⁶ The court in *White* noted that “[t]he identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice.”⁶⁷

Borrowing from the secondary meaning concept of trademark law, if slogans, race cars, and evening gowns can be so associated with a person as to identify them, it is that identity that should be protected by a federal right of publicity.⁶⁸

61. *Carson*, 698 F.2d at 835; *see also* *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974) (holding that the unauthorized use of a picture of the distinctive race car of Lothar Motschenbacher, a well-known professional race car driver, violated Motschenbacher’s right of publicity, even though neither his name or likeness were used).

62. *See* CAL. CIV. CODE § 3344(a) (West 1984).

63. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (“[W]hen a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California.”); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1111 (9th Cir. 1992), *abrogated by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) (noting that there was sufficient evidence “to support the jury’s finding that consumers were likely to be misled by the commercial into believing that Waits endorsed SalsaRio Doritos.”).

64. *Midler*, 849 F.2d at 463; *Waits*, 978 F.2d at 1112.

65. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), *superseded by statute*, Cal. Civ. Code § 3344 (West 1984), *as recognized in* *Thé v. Rydberg*, No. CV 11-6471, 2012 WL 13009128 (C.D. Cal. Jan. 18, 2012).

66. *Id.* at 1396.

67. *Id.* at 1399.

68. *Inwood Lab’ys., Inc. v. Ives Lab’ys., Inc.*, 456 U.S. 844, 851 n.11 (1982) (“To establish secondary meaning, a manufacturer must show that, in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.”).

B. TRANSFERABILITY

The federal statute should clearly state that the right of publicity is a property right, similar to the California statute.⁶⁹ This will prevent the unjust enrichment of those who seek to profit either from the time and effort a celebrity has invested in developing the value of his image or from a tragedy that creates value after death.⁷⁰ As a property right, the right of publicity can be assigned, as celebrities often do with their own loan-out companies.⁷¹ For example, a Texas statute provides for transferability by stating that “[t]he property right is freely transferable, in whole or in part.”⁷² The proposed federal right of publicity statute should follow this language, however, since the right of publicity is not ordinary property because of its relationship to the person’s identity, it cannot be a direct parallel. For example, the federal statute should further provide that such a federal right of publicity is not seizable by the government to satisfy a tax debt nor to be split in a divorce settlement. Reaching back to John Locke, one’s property right in his person should be controlled exclusively by himself.⁷³

C. POST-MORTEM RIGHTS

Without post-mortem rights, a federal statute would be of little value. As demonstrated above,⁷⁴ post-mortem rights of publicity can be very valuable, and in some cases, the commercial value arises because of death.⁷⁵ The post-mortem rights of states that recognize those rights vary between 30 to 100 years, or even forever, after the death of the individual.⁷⁶ This Essay proposes that the federal statute should follow California’s right of publicity statute and extend post-mortem rights for 70 years. This approach is consistent with the federal Copyright Act⁷⁷ and is reasonable since five states

69. See CAL. CIV. CODE § 3344.1(b) (West 2012) (“The rights recognized under this section are property rights . . .”).

70. *Id.*; *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977); *Tennessee ex rel. Elvis Presley Int’l Mem’l Found. v. Crowell*, 733 S.W.2d 89, 98 (Tenn. Ct. App. 1987).

71. A loan-out company is a corporation formed by a celebrity for tax planning and limitation of liability purposes. A celebrity assigns its services to the loan-out, and where permitted, its rights of publicity. An interested party engages the loan-out to provide the services or rights of the celebrity, all payment flows through the loan-out, and all liability is with the loan-out. See generally David J. Cook, *When is a Right of Publicity License Granted to a Loan-Out Corporation a Fraudulent Conveyance?*, 20 U. DENV. SPORTS & ENT. L.J. 1 (2017); Russ Alan Prince, *What is a Celebrity Loan Out Corporation?*, FORBES (Oct. 27, 2014, 6:26 AM), <http://www.forbes.com/sites/russalanprince/2014/10/27/what-is-a-celebrity-loan-out-corporation/#1f89e55e335e> [https://perma.cc/SYT2-LJM6].

72. TEX. PROP. CODE ANN. § 26.004(a) (West 1987).

73. See Locke, *supra* note 3.

74. See Burr, *supra* note 19 and associated text.

75. See *Celebrity Endorsement – Through the Ages*, *supra* note 6; Keenan C. Fennimore, *Reconciling California’s Pre, Post, and Per Mortem Rights of Publicity*, 22 IND. INT’L & COMPAR. L. REV. 377, 378 n.14 (2012) (coining “the term ‘per mortem’ to describe the right of publicity as established for identities with commercial value *because of their death*”).

76. Colon, *supra* note 1, at 439 n.198.

77. 17 U.S.C. § 302(a) (2018).

already afford that much protection.⁷⁸ An additional step that may give comfort to those resistant to post-mortem rights is to require a registry in order to put potential licensees on notice of the owner of a decedent's identity.⁷⁹ California, Nevada, and Texas require that the successor in interest to a decedent's post-mortem rights file a claim with the respective Secretary of State.⁸⁰ The federal statute should go a step further to include per-mortem rights as well, which are the rights of publicity for those who are celebrities because of their death.⁸¹

D. STATUTORY DAMAGES

In the absence of actual damages, the federal statute should provide for statutory damages of \$1,000 in order to deter violations.⁸² While it may be easier to quantify actual damages for a celebrity that is actively exploiting her identity, statutory damages would help any individual whose identity has been misappropriated regardless of celebrity status. In addition, punitive damages

78. California, Hawaii, and South Dakota extend rights of publicity for 70 years post-mortem, and Indiana and Oklahoma extend them for 100 years. CAL. CIV. CODE § 3344.1 (West 2012); HAW. REV. STAT. ANN. § 482P-4(a) (West 2009); S.D. CODIFIED LAWS § 21-64-2 (2021); IND. CODE ANN. § 32-36-1-8(a) (2019); OKLA. STAT. ANN. tit. 12, § 1448(G) (West 1986).

79. See CAL. CIV. CODE § 3344.1(f)(1) (West 2012) ("A successor in interest to the rights of a deceased personality under this section or a licensee thereof shall not recover damages for a use prohibited by this section that occurs before the successor in interest or licensee registers a claim of the rights [with the Secretary of State].").

80. *Id.*; NEV. REV. STAT. ANN. § 597.800(3)–(4) (West 1993); TEX. PROP. CODE ANN. § 26.006–.008 (West 1987).

81. Following the sale of T-shirts protesting the Iraq War that listed the names of Americans who died in service, California expanded its statute to include per-mortem rights. See CAL. CIV. CODE § 3344.1(h) (West 2012) (providing that the right of publicity extends to "any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, or because of his or her death"); see S. JUDICIARY COMM., 2009-2010 REG. SESS., AB 585 B. ANALYSIS (Cal. 2009), http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0551-0600/ab_585_cfa_20090629_135953_sen_comm.html [<https://perma.cc/ggKS-MYTR>] (noting the case of *Frazier v. Boomsma*, No. 07-CV-8040-PHX-NVW, 2008 WL 3982985 at *1 (D. Ariz. Aug. 20, 2008), involving the failed action against a peace activist who sold T-shirts with "They Died" superimposed over the names of 3,461 soldiers that died in Iraq inspired the change in the California statute); Fennimore, *supra* note 75, at 378 n.14 (coining "the term '*per mortem*' to describe the right of publicity as established for identities with commercial value *because of their death*").

82. Statutory damages are stated in a statute rather than damages calculated based on a plaintiff's damages. See, e.g., CAL. CIV. CODE § 3344(a) (West 1984) (providing that one can recover "an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages" and that "[i]n establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses"); IND. CODE § 32-36-1-10(1) (2019) ("A person who violates section 8 of this chapter may be liable for . . . [d]amages in the amount of . . . one thousand dollars (\$1,000) . . ."); TEX. PROP. CODE ANN. § 26.013 (West 1987) (providing for \$2500 in statutory damages).

should be available for knowing, willful, or intentional acts, and the prevailing party should be able to recover attorney fees.⁸³

E. EXCEPTIONS: EXPRESSIVE WORKS AND FIRST AMENDMENT PROTECTED ACTIVITIES

While protected rights should be broad, those rights should not interfere with First Amendment protection of news accounts and matters of public interest.⁸⁴ While Colon raises this as an issue,⁸⁵ it is another difficult line to draw from state to state, and is another area which would benefit from federal guidance. Consider the case of the famed pilot Chuck Yeager, who sued Cingular Wireless for using his name and achievement of breaking the sound barrier without consent.⁸⁶ Cingular argued that it used historic facts and did not violate Yeager's rights, but Yeager successfully argued that his achievement was not used for an historic purpose by Cingular, but rather to call attention to Cingular's emergency response programs.⁸⁷ A federal statute also cannot interfere with First Amendment protection of expressive works, as noted in the California statute⁸⁸ and as held by the Florida Supreme Court in a case involving the producers of the movie, "The Perfect Storm," in which the names and likenesses of fisherman killed at sea were permitted in both the movie and the advertisements for the movie.⁸⁹

V. CONCLUSION

I agree with Colon's assertion that "Iowa is home to many unique, creative, and talented individuals, and all these individuals deserve proper protection for their identities."⁹⁰ However, we cannot continue to expect plaintiffs, whether from Iowa or elsewhere, to bring suits in 50 different states in order to protect their rights of publicity. A clear basis for a federal statute exists, there is support for a federal statute, and now is the time to enact a federal statute. Colon carefully constructed a fair, unbiased statute, but I

83. See CAL. CIV. CODE § 3344(a) (West 1984) ("Punitive damages may also be awarded to the injured party or parties."); IND. CODE § 32-36-1-10(2) ("Treble or punitive damages, as the injured party may elect, if the violation . . . is knowing, willful, or intentional."); IND. CODE § 32-36-1-12(1) ("[T]he court . . . shall award to the prevailing party reasonable attorney's fees, costs, and expenses . . .").

84. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 805 (N.D. Cal. 2011) ("[E]ven newsworthy actions may be subjects of § 3344 liability when published for commercial rather than journalistic purposes."); see *Rosemont Enters., Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122, 129 (N.Y. Sup. Ct. 1968), *aff'd*, 301 N.Y.S.2d 948 (N.Y. App. Div. 1969) ("Just as a public figure's 'right of privacy' must yield to the public interest so too must the 'right of publicity' bow where such conflicts with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.").

85. See Colon, *supra* note 1, at 443.

86. See *Yeager v. Cingular Wireless LLC*, 673 F. Supp. 2d 1089 (E.D. Cal. 2009).

87. *Id.* at 1099 ("[T]he use of plaintiff's name was carefully crafted as part of a strategy to promote defendant's brand.").

88. CAL. CIV. CODE § 3344.1(a)(2) (West 2012) (providing a First Amendment expressive works defense for such works and their associated advertisements).

89. *Tyne v. Time Warner Ent. Co.*, 901 So. 2d 802, 810 (Fla. 2005).

90. Colon, *supra* note 1, at 454.

would encourage her to promote that at a federal, rather than state level. Just as Josiah Wedgwood could not possibly have imagined that technology and social media would develop 250 years into his future, today's technology-savvy generations are also unable to predict our future. Enacting a federal right of publicity statute would be a strong step toward protecting those rights today and in the foreseeable future.
