

# Lights, Camera, Cause of Action: Bringing a Right of Publicity Statute to Iowa that Balances First Amendment Concerns

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*ABSTRACT: The right of publicity enables people to control the commercial use of their identities. This control implicates the First Amendment by dictating when and how the public may use a person’s name, image, or likeness in speech. Iowa belongs to a minority of states that do not possess a right of publicity statute or common law. This lack of guidance regarding when the public may use a person’s identity threatens to chill free speech, creates inefficient judicial outcomes, and upsets the balance that Congress has already struck between other intellectual property rights and the First Amendment. This Note argues that Iowa should adopt a right of publicity statute that incorporates copyright law’s fair use doctrine to avoid these undesirable outcomes. This Note also outlines the history of the right of publicity and states’ current approaches to resolving tension between the right of publicity and the First Amendment, identifies three reasons why Iowa needs a right of publicity statute that incorporates copyright law’s fair use doctrine, and proposes statutory language for the Iowa legislature to adopt.*

INTRODUCTION .....	506
I. THE RIGHT OF PUBLICITY .....	508
A. THE ORIGINS OF THE RIGHT OF PUBLICITY: MORE THAN PRIVACY 2.0 .....	509
B. THE INHERENT TENSION BETWEEN THE FIRST AMENDMENT AND THE RIGHT OF PUBLICITY .....	513
C. CURRENT APPROACHES TO ADDRESSING FIRST AMENDMENT CONCERNS .....	513
1. Preempting First Amendment Concerns Through Federal Intervention .....	513

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2. Exempting Categories of Speech from Broad Right of Publicity Statutes.....	515
3. Relegating “Commercial Speech” to Reduced Constitutional Protection .....	516
4. Common Law Frameworks.....	517
5. The Right of Publicity Today.....	518
II. WHY IOWA NEEDS A RIGHT OF PUBLICITY STATUTE THAT PREEMPTIVELY BALANCES FIRST AMENDMENT CONCERNS.....	519
A. <i>PREVENTING THE RIGHT OF PUBLICITY FROM CHILLING FREE SPEECH</i> .....	521
B. <i>CREATING MORE EFFICIENT JUDICIAL OUTCOMES</i> .....	524
C. <i>ALIGNING THE RIGHT OF PUBLICITY WITH OTHER INTELLECTUAL PROPERTY RIGHTS</i> .....	526
III. A RIGHT OF PUBLICITY STATUTE THAT PREEMPTIVELY BALANCES FIRST AMENDMENT CONCERNS.....	528
A. <i>AN INSTRUCTIVE LIST OF FAIR USE EXAMPLES</i> .....	529
B. <i>A COMPREHENSIVE BALANCING TEST</i> .....	530
1. Factor 1: The Purpose and Character of the Use .....	531
2. Factor 2: The Nature of the Plaintiff’s Identity.....	532
3. Factor 3: The Amount and Substantiality of the Portion Used in Relation to the Plaintiff’s Identity as a Whole .....	533
4. Factor 4: The Effect of the Use on the Commercial Value of the Plaintiff’s Identity .....	534
C. <i>PROPOSED STATUTORY LANGUAGE</i> .....	535
CONCLUSION .....	535

## INTRODUCTION

On July 1, 2021, college athletes woke up to Christmas in July: The NCAA began allowing college athletes to profit off of their names, images, and likenesses.<sup>1</sup> This announcement shook the nation, giving athletes like Jordan Bohannon, a basketball player at the University of Iowa who fought tirelessly

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1. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy> [<https://perma.cc/D92Z-MA3G>].

for college athletes' right of publicity,<sup>2</sup> cause for celebration.<sup>3</sup> But once the celebration subsided, athletes were left with one question: "What is my right of publicity and how can I profit off of it?"<sup>4</sup> Although many college athletes could turn to their state statutes or common law for answers,<sup>5</sup> Iowa athletes had nowhere to turn.<sup>6</sup> Iowa does not have a statute or a single state court case addressing the right of publicity,<sup>7</sup> which leaves Iowans in the dark about their ability to control the commercial use of their identities and more importantly, when that control violates the public's freedom of speech. The right

2. Chloe Peterson, *Name, Image, Likeness: A New Era for College Athletes*, THE DAILY IOWAN (July 6, 2021), <https://dailyiowan.com/2021/07/06/name-image-likeness-a-new-era-for-college-athletes> [<https://perma.cc/6RUX-5SYJ>] ("Jordan Bohannon has been advocating for name, image, and likeness rights for college athletes since 2019."). Bohannon also stole a March Madness rug from the NCAA tournament in 2019. *Id.* He tweeted a picture of the stolen rug with the caption: "Give us the ability to make money off our own name and we'll give you your rug back. You have 24 hours, @NCAA." *Id.* (quoting Jordan Bohannon (@JordanBo\_3), TWITTER (Mar. 31, 2019, 1:27 PM), [https://twitter.com/JordanBo\\_3/status/1112421166185136128?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1112421166185136128%7Ctwtgr%5E%7Ctwtcon%5Es1\\_c1o&ref\\_url=https%3A%2F%2Fdailyiowan.com%2F2021%2F07%2F06%2Fname-image-likeness-a-new-era-for-college-athletes%2F](https://twitter.com/JordanBo_3/status/1112421166185136128?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1112421166185136128%7Ctwtgr%5E%7Ctwtcon%5Es1_c1o&ref_url=https%3A%2F%2Fdailyiowan.com%2F2021%2F07%2F06%2Fname-image-likeness-a-new-era-for-college-athletes%2F)).

3. *Id.* ("As July 1 rolled around, many Iowa student-athletes jumped at the chance to profit off of their name, image, and likeness.").

4. *Id.* (quoting University of Iowa men's basketball player Keegan Murray as saying, "There's gonna be a lot of opportunities . . . I think, me, I need to learn more about it. I don't really want to jump right into an NIL or just jump in every opportunity I can get.").

5. *See id.* ("Twenty states currently have passed specific laws set to legalize NIL for student-athletes. As of July 1, 10 of them went into effect. Iowa was not one of them, as its NIL law died in the legislature this past spring.").

6. *Id.* ("Iowa doesn't have a law right now on NIL . . . So it's really up to the university to put down their guidelines . . . ." (quoting Caitlin Clark, an Iowa women's basketball player)); Jennifer E. Rothman, *Iowa*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (July 19, 2019), <https://www.rightofpublicityroadmap.com/law/iowa> [<https://perma.cc/P7SR-44CX>]; Brutlag Hosick, *supra* note 1 ("Individuals can engage in NIL activities that are consistent with the law of the state where the school is located.").

7. In a 1977 case, the Iowa Supreme Court recognized that the invasion of privacy tort can cover one's name or likeness but did not apply this rule. *Winegard v. Larsen*, 260 N.W.2d 816, 822-23 (Iowa 1977). Similarly, an Iowa federal district court opined as early as 1999 that the Iowa Supreme Court would recognize a plaintiff's right of publicity if faced with such a claim. *Sharp-Richardson v. Boyds Collection, Ltd.*, No. C 96-0344, 1999 WL 33656875, at \*15 (N.D. Iowa Sept. 30, 1999). As of the publication of this Note, however, the Iowa Supreme Court has yet to do so. *See Griner v. King*, No. 21-cv-4024, 2021 WL 5106047, at \*10 (N.D. Iowa Oct. 20, 2021) (observing that while "[t]he Iowa Supreme Court recognizes the tort of 'invasion of privacy,'" it "ha[s] not elaborated on the 'appropriation' form of this tort" (quoting *Winegard*, 260 N.W.2d at 822) (citing Madison J. Murhammer Colon, Note, *How Can Iowans Effectively Prevent the Commercial Misappropriation of Their Identities? Why Iowa Needs a Right of Publicity Statute*, 106 IOWA L. REV. 411, 427 (2020))). A right of publicity suit nearly reached Iowa state court in 2020 when Ruthie Bisignano's estate sued a Des Moines brewery for featuring her name and likeness on its best-selling beer, "Ruthie." *See Clark Kauffman, Iowa State Senator Tony Bisignano Embroiled in Legal Fight Over 'Buxom Barmaid' of the 1950s*, DES MOINES REG. (Apr. 15, 2022, 7:42 AM), <https://www.desmoinesregister.com/story/news/politics/2022/04/15/state-senator-embroiled-legal-fight-over-buxom-barmaid-1950-s/7324422001> [<https://perma.cc/6WU7-5EFB>]. Although the suit was still pending, however, Bisignano's estate transferred it to federal court. *Id.*

of publicity, which gives private individuals the legal right to both protect their identities from unwanted usage and profit off of their identities,<sup>8</sup> also necessarily punishes the public for using another person's name, image, and likeness in speech.<sup>9</sup>

This Note argues that Iowa should adopt a right of publicity statute that incorporates copyright law's fair use doctrine. Part II provides an overview of the right of publicity,<sup>10</sup> including how the right developed,<sup>11</sup> its inherent tension with the First Amendment,<sup>12</sup> and the various ways states have attempted to resolve this tension.<sup>13</sup> Part III examines why Iowa needs a right of publicity statute, specifically one that balances First Amendment concerns preemptively by incorporating copyright law's fair use doctrine instead of leaving courts to weigh these interests in each case.<sup>14</sup> To resolve these problems, Part IV proposes incorporating copyright law's fair use doctrine into a right of publicity statute and provides statutory language for doing so.<sup>15</sup>

### I. THE RIGHT OF PUBLICITY

The right of publicity is a state-law based intellectual property right that entitles a person to use their identity for commercial purposes.<sup>16</sup> A person's "identity" is commonly understood as encompassing their name, image, and likeness.<sup>17</sup> Infringing one's right of publicity implicates notions of both property and unfair competition law.<sup>18</sup> For example, if Wilson uses Naomi Osaka's image to sell tennis rackets without her consent, Wilson is both trespassing on and unfairly competing with Osaka's right to control the commercial use of her own identity.<sup>19</sup> States have developed a blend of statutes and common law decisions to protect their residents' names, images, and likenesses.

Although these right of publicity laws vary from state to state, plaintiffs who sue for infringement of their right of publicity must generally prove three elements: (1) that they have a legal right in their name, image, or likeness;

8. See *infra* Part II.

9. See *infra* Section II.B.

10. See *infra* Part II.

11. See *infra* Section II.A.

12. See *infra* Section II.B.

13. See *infra* Section II.C.

14. See *infra* Part III.

15. See *infra* Part IV.

16. See 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2022).

17. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995) ("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 . . .").

18. See 1 MCCARTHY & SCHECHTER, *supra* note 16, § 10:9; JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 1* (2018) (describing the right of publicity "as a property right in one's personality").

19. See 1 MCCARTHY & SCHECHTER, *supra* note 16, § 10:9.

(2) that the defendant used an identifiable aspect of their name, image, or likeness; and (3) that such use is likely to harm the commercial value of the plaintiff's name, image, or likeness.<sup>20</sup> The right of publicity gives everyone a legal right in the commercial use of their name, image, and likeness.<sup>21</sup> As a result, the first element is extremely easy for plaintiffs to prove. In addition, most courts do not require right of publicity plaintiffs to prove that the defendant intended to damage the commercial value of the plaintiff's name, image, or likeness or even that the defendant succeeded in achieving such damage to meet the third element.<sup>22</sup> In contrast, some courts do require plaintiffs in right of publicity cases to show that the defendant intended to commercially benefit from using the plaintiff's name, image, or likeness.<sup>23</sup> The most common consideration within this third element is the nature of the use—for example, an unauthorized use of another person's name, image, or likeness in a *commercial setting*.<sup>24</sup>

For many people, especially those who live in states without right of publicity statutes or common law decisions like Iowa, the right of publicity may be a relatively unfamiliar area of the law. However, the doctrine overlaps with more familiar intellectual property rights, like copyright and trademark.<sup>25</sup> Copyright and trademark laws also prevent the public from misappropriating pieces of one's identity; copyright law protects creative works, while trademark law protects logos, symbols, and branding.<sup>26</sup> And just like copyright and trademark laws, right of publicity laws inherently conflict with the free speech protections of the First Amendment.<sup>27</sup> This Part will begin by exploring the origins and development of the right of publicity, as well as the tension between the right of publicity and the First Amendment. This Part will conclude with an overview of current approaches to resolving this tension and other groundbreaking developments in the field, before turning to the right of publicity (or complete lack thereof) in Iowa.

#### A. THE ORIGINS OF THE RIGHT OF PUBLICITY: MORE THAN PRIVACY 2.0

The right of publicity originally developed from the right of privacy, a common law tort that American courts began recognizing in the 1940s.<sup>28</sup> The

20. *See id.* § 3:2.

21. *Id.*

22. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 371 (Mo. 2003).

23. *Id.* at 370–71.

24. *See* 1 MCCARTHY & SCHECHTER, *supra* note 16, § 3:2.

25. *See id.* § 1:3.

26. *See* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 101, 111 (2020).

27. *Id.* at 89 (“Because the right of publicity restricts what can be said, shown, or heard, it potentially conflicts with freedom of speech.”); *see* 2 MCCARTHY & SCHECHTER, *supra* note 16, § 8:22.

28. *See* 1 MCCARTHY & SCHECHTER, *supra* note 16, § 5:61; *see also* Murhammer Colon, *supra* note 7, at 414–15. In her Note, Murhammer Colon also advocates for Iowa to adopt a right of publicity statute, ultimately recommending a well-tailored statute that protects every Iowan's right

Iowa Supreme Court describes the right of privacy “as the right of an individual to be let alone, to live a life of seclusion, to be free from unwarranted publicity.”<sup>29</sup> As shown by this definition’s own use of the word “publicity” to describe the right of privacy, these two rights clearly share similarities.<sup>30</sup> For example, both rights shield plaintiffs from types of unwanted public attention.<sup>31</sup> As a result of this similarity, many celebrities originally attempted to use the right of privacy to limit unauthorized uses of their names, images, and likenesses.<sup>32</sup> In 1953, however, the Second Circuit developed a distinct right of publicity after recognizing that there is an inherent problem with applying privacy law to the commercial use of celebrities’ identities.<sup>33</sup>

In today’s world of social media platforms and content-saturated streaming services, the names, images, and likenesses of celebrities are practically ubiquitous. It therefore makes little sense that placing Jimmy Fallon’s face on a shirt violates his right “to live a life of seclusion” when he personally broadcasts his face on national television every weeknight.<sup>34</sup> In fact, creating such a shirt may actually aid rather than hinder Fallon’s fame by assisting in disseminating his image across the globe.<sup>35</sup> At the same time, however, someone other

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of publicity regardless of whether they are a celebrity or have been dead for up to twenty-five years. *Id.* at 452–53. Rather than incorporating copyright law’s fair use doctrine into this statute to protect Iowans’ free speech, however, Murhammer Colon opts to exempt specific categories of free speech, including the use of Iowans’ names, images, and likenesses: “(1) [i]n the news; (2) [i]n an expressive work; or (3) [i]n connection with public affairs.” *Id.* at 453. As I discuss in Section II.C.2 and as Murhammer Colon herself recognizes, however, “if there is a list of five protected attributes, advertisers will try to find a sixth identifiable characteristic outside of the statutory list.” *Id.* at 436; see discussion *infra* Section II.C.2. In this Note, distinguishable from Murhammer Colon’s argument, I advocate for Iowa to adopt a right of publicity statute that better protects Iowans’ right to free speech by incorporating copyright law’s fair use doctrine. See *infra* Part IV. This not only prevents the right of publicity from chilling free speech but also creates more efficient judicial outcomes and realigns the right of publicity with other intellectual property rights. See discussion *infra* Part III.

29. *Bremmer v. Journal-Tribune Pub. Co.*, 76 N.W.2d 762, 764 (Iowa 1956).

30. See generally 1 MCCARTHY & SCHECHTER, *supra* note 16, § 5:61 (describing the right of privacy and “the right of publicity . . . [as] coexisting side by side”).

31. *Id.* (“While appropriation privacy focuses upon human dignity and mental stress, the right of privacy focuses upon the proprietary and commercial value of a person’s identity.”).

32. See *Haelan Lab’s, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867 (2d Cir. 1953); 1 MCCARTHY & SCHECHTER, *supra* note 16, § 1:25; Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U.L. REV. 553, 554 (1960) (“[M]uch of the confusion and conflict in the decisions arose because litigants chose to sue in almost every case for invasion of privacy (premised on injury to feelings), rather than for the appropriation for commercial exploitation of property rights in name, likeness, etc. . . .”).

33. 1 MCCARTHY & SCHECHTER, *supra* note 16, § 1:25 (“So-called celebrity plaintiffs began to appear in court. . . . The unspoken thought seemed to be: ‘How can you claim indignity and hurt feelings from seeing your picture in an ad for automobiles when your face is in the newspapers almost every day?’”).

34. *Bremmer*, 76 N.W.2d at 764; 1 MCCARTHY & SCHECHTER, *supra* note 16, § 1:25.

35. *O’Brien v. Pabst Sales Co.*, 124 F.2d 167, 170 (5th Cir. 1941) (“[T]he publicity [the celebrity plaintiff] got was only that which he had been constantly seeking and receiving . . .”).

than Fallon would profit off of that shirt, despite Fallon contributing all the time, effort, and money necessary to become famous in the first place. Acknowledging this failure of privacy law to adequately protect the commercial value of celebrities' identities, the Second Circuit created a new right in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*:

This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.<sup>36</sup>

*Haelan* paved the way for recognizing the right of publicity as a fully protectible intellectual property right.<sup>37</sup> Courts and legislatures in other states soon followed *Haelan's* lead and began recognizing the right of publicity as going beyond a mere shield of privacy to act as a sword that plaintiffs can wield to protect the commercial value of their names, images, and likenesses.<sup>38</sup> Additionally, because the plaintiff in *Haelan* was a famous baseball player, many states also initially understood the right of publicity as applying only to celebrities.<sup>39</sup> Today, however, the majority of jurisdictions that recognize the right of publicity also extend this right to all persons, regardless of their fame.<sup>40</sup>

Two decades after *Haelan*, the U.S. Supreme Court addressed the right of publicity for its first and only time.<sup>41</sup> In *Zacchini v. Scripps-Howard Broadcasting Co.*, a news program televised a performer's entire human cannonball act without his consent.<sup>42</sup> The performer sued, claiming that the news program's actions eliminated the incentive for spectators to pay to see his act in person.<sup>43</sup>

36. *Haelan*, 202 F.2d at 868.

37. Stacey L. Dogan, *Haelan Laboratories v. Topps Chewing Gum: Publicity as a Legal Right*, in *INTELLECTUAL PROPERTY AT THE EDGE* 17, 17 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., 2014).

38. See MCCARTHY & SCHECHTER, *supra* note 16, § 5:61 ("[W]hile it is accurate to state that the right of publicity 'evolved from' or is 'derived from' the appropriation type of invasion of privacy, it is inaccurate and untrue to say that the right of publicity is just another name for the appropriation type of invasion of privacy." (footnotes omitted)).

39. *See id.* § 1:3.

40. *Id.* ("The right of publicity is not merely a legal right of the 'celebrity,' but is a right inherent to everyone to control the commercial use of identity and persona . . ."); Murhammer Colon, *supra* note 7, at 434 ("[T]he majority view is that the right of publicity extends to celebrities and non-celebrities alike." (footnote omitted)).

41. *See generally* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (officially recognizing a performer's right of publicity).

42. *Id.* at 563-64.

43. *See id.* at 564.

The news program defended its use of the performer's name, image, and likeness on free speech grounds, arguing that the First Amendment entitles the press "to report [on] matters of legitimate public interest."<sup>44</sup> The Court disagreed, acknowledging a performer's broad right of publicity.<sup>45</sup> It noted that although the First Amendment does privilege some forms of speech, it does not entitle a news program to threaten the economic value of a performer's act by broadcasting their entire performance.<sup>46</sup> Additionally, the Court believed that condoning the news program's use of the performer's name, image, and likeness would reduce incentives for future performers to produce acts that interest the public.<sup>47</sup> Unlike *Haelan*, which made no mention of the First Amendment,<sup>48</sup> *Zacchini* explicitly addressed the inherent conflict between a defendant's freedom of speech and a plaintiff's right of publicity. However, the Court easily resolved this conflict in favor of the plaintiff without providing a concrete explanation of how or why it did so:

Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner.<sup>49</sup>

*Zacchini* continues to stand as the Supreme Court's only interaction with the right of publicity.<sup>50</sup> Although states can choose whether to follow *Haelan*'s example of recognizing the right of publicity as a distinct intellectual property right, states that do so *must* consider *Zacchini* when deciding how to resolve conflicts between the First Amendment and the right of publicity.<sup>51</sup> Luckily, for states that are more concerned about protecting the public's freedom of speech, *Zacchini* only applies to right of publicity laws that enable the public to use the *entirety* of works involving another person's name, image, and likeness.<sup>52</sup> In its holding, the Court specifically distinguished between news

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44. *Id.* at 565.

45. *Id.* at 566 ("There is no doubt that petitioner's complaint was grounded in state law and that the right of publicity which petitioner was held to possess was a right . . .").

46. *Id.* at 575-76.

47. *Id.* at 576.

48. See generally *Haelan Lab's, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953) (vesting a right of publicity in a baseball player without concern for the defendant's free speech rights).

49. *Zacchini*, 433 U.S. at 574-75.

50. See MCCARTHY & SCHECHTER, *supra* note 16, § 1:33.

51. See *Zacchini*, 433 U.S. at 573-75.

52. Douglas G. Baird, Note, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co.*, 30 STAN. L. REV. 1185, 1189 (1978) ("The Court's ultimate holding

programs that depict a performer's entire act from those that incidentally use a performer's name or picture.<sup>53</sup> As a result, right of publicity laws that permit the public to use parts of another person's identity or transform that identity into an entirely new work do not violate *Zacchini*.

*B. THE INHERENT TENSION BETWEEN THE FIRST AMENDMENT AND  
THE RIGHT OF PUBLICITY*

The First Amendment prohibits the federal government from abridging the freedom of speech.<sup>54</sup> The Fourteenth Amendment, which forbids states from “abridg[ing] the privileges or immunities of citizens of the United States,” extends the First Amendment’s free speech requirements to state governments as well.<sup>55</sup> Iowa has also adopted a free speech provision in its state constitution, giving every Iowan the right to “speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right.”<sup>56</sup> It also instructs that “[n]o law shall be passed to restrain or abridge the liberty of speech.”<sup>57</sup> In May 2021, the Iowa legislature reinforced the state’s dedication to protecting First Amendment rights by requiring higher education institutions “to ensure the fullest degree of intellectual freedom and free expression allowed under the [F]irst [A]mendment to the Constitution of the United States.”<sup>58</sup> Because right of publicity laws control when and how the public may use a person’s name, image, and likeness in written or verbal speech, a state-sponsored statute of this kind has the potential to directly violate the First Amendment.<sup>59</sup>

*C. CURRENT APPROACHES TO ADDRESSING FIRST AMENDMENT CONCERNS*

1. Preempting First Amendment Concerns Through  
Federal Intervention

The federal government has recognized the inherent tension between the First Amendment and other intellectual property rights like copyright and trademark, and it has intervened in those areas to eliminate First Amendment

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in *Zacchini* is sufficiently narrow that it does not strictly foreclose state courts from finding in their own law the proper accommodation of public access and performer incentive.”).

53. *Zacchini*, 433 U.S. at 576.

54. U.S. CONST. amend. I.

55. U.S. CONST. amend. XIV, § 1; *Gitlow v. People of New York*, 268 U.S. 652, 666 (1925) (“[F]reedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

56. IOWA CONST. art. I, § 7.

57. *Id.*

58. H.F. 744, 89th Gen. Assemb., Reg. Sess. (Iowa 2021).

59. See *supra* note 27 and accompanying text.

concerns before they arise in court.<sup>60</sup> In 1976, Congress passed the federal Copyright Act.<sup>61</sup> This act expressly limits copyright owners' abilities to exclude others from using their creative works through the doctrine of fair use.<sup>62</sup> Fair use preserves free speech by allowing the public to use copyrighted works for criticism, commentary, news reporting, teaching, scholarship, and research purposes.<sup>63</sup> At the same time, however, the doctrine allows copyright owners to maintain control over their works by requiring every "fair use" to pass a four-factor balancing test that investigates: "(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."<sup>64</sup> And because the fair use doctrine is a federal statute, it preempts and replaces any free speech balancing tests that states may have developed independently so that courts are no longer balancing these interests differently in each case.<sup>65</sup> Congress enacted similar free speech exceptions within trademark law in 1988.<sup>66</sup> These exceptions allow individuals to use another person's trademark in comparative advertising campaigns, as well as to describe their own products if such use is fair and in good faith.<sup>67</sup> Despite raising similarly troubling free speech issues, the right of publicity, as opposed to copyright and trademark laws, remains solely governed by state law.<sup>68</sup> Each state currently decides how much First Amendment protection to extend under their own constitution to members of

60. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) ("In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations.").

61. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-810).

62. 17 U.S.C. § 107 (2018).

63. *Id.*

64. *Id.*

65. Specifically, 17 U.S.C. § 301(a) states:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in 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, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

*Id.* § 301(a).

66. *See* 15 U.S.C. § 1115.

67. *Id.* § 1115(b)(4); Post & Rothman, *supra* note 26, at 153 ("[Trademark] laws have long tolerated some degree of confusion when a defendant has acted in good faith and fairly to describe its own goods or services, or to comment on another's product when doing so requires reference to a mark or a common term or symbol.").

68. Post & Rothman, *supra* note 26, at 89 ("[U]nauthorized uses of identity are regulated for many different reasons that are frequently jumbled together in vague state proscriptions enforced either through common-law torts or legislation.").

the public who use another person's name, image, and likeness in speech, as well as whether to extend any free speech protection at all.<sup>69</sup>

## 2. Exempting Categories of Speech from Broad Right of Publicity Statutes

A common approach that states use to resolve the tension between the public's freedom of speech and the right of publicity is to exempt certain categories of protected speech from otherwise broad right of publicity statutes.<sup>70</sup> These categories of speech mainly include the use of another person's identity in the news, in an expressive work, or in connection with public affairs.<sup>71</sup> Arkansas's right of publicity statute exempts even more specific categories of speech in addition to these broader categories, such as the use of another person's identity in "a sports broadcast, an account of public interest, or a political campaign."<sup>72</sup> This categorical approach may appear to provide a straightforward solution to a seemingly irresolvable conflict between a person's right to control the commercial use of their identity and the public's right to use other people's identities in speech.<sup>73</sup> However, applying it immediately proves troublesome.<sup>74</sup> On one hand, states that only exempt a few categories of protected speech risk subjecting other, non-exempted forms to liability simply because the speech did not occur within those strict exemptions.<sup>75</sup> On the other hand, states that attempt to accommodate ambiguous types of speech by creating more vague categorical exemptions, such as exempting all speech "in the news," risk jeopardizing predictable and efficient judicial outcomes by increasing the amount of analysis courts must perform to determine right of publicity violations in each case.<sup>76</sup> For example, should a court treat

69. *Id.* at 90 ("In some states, the right is confined to commercial contexts, and in others it is not. In some states, plaintiffs asserting the right must establish that they have commercially valuable identities, and in others they do not." (footnote omitted)).

70. Murhammer Colon, *supra* note 7, at 425 ("[S]everal states have outlined statutory exemptions to the right of publicity. For example, California provides statutory defenses for uses in the 'news, public affairs, . . . sports broadcast . . . or any political campaign.'" (ellipsis in original) (quoting CAL. CIV. CODE § 3344(d) (West 2020))).

71. *Id.* at 444 ("While some states have more detailed statutory exemptions than others, most of these exemptions relate to uses that have newsworthy value, concern public affairs, or have expressive value . . ." (footnote omitted)).

72. ARK. CODE ANN. § 4-75-1110(a)(1)(A) (West 2020).

73. Murhammer Colon, *supra* note 7, at 444 (advocating for a strict categorical approach "[t]o derive the full benefits from the right of publicity statute").

74. See Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 67 (1994) ("[C]ategorization, in and of itself, is far too simplistic . . . the competing interests on each side of the equation must be thoroughly examined.").

75. See *id.* at 56 ("[T]he categorization process itself can be difficult in that many uses defy separability into these three discrete categories.").

76. See Post & Rothman, *supra* note 26, at 160 ("Difficulties of constitutional categorization become especially complicated when uses occur outside of traditional media, as for instance on t-shirts or coffee mugs.").

a personal blog that posts the latest University of Iowa men's basketball updates as engaging in speech that is "in the news"? If this blog also posts images of the players, is the author violating those players' right of publicity or is the author exempted from liability? This increased exposure to liability and unpredictability that accompanies the categorical approach may "chill" future speech by disincentivizing speakers from ever speaking in the first place, a frightening possibility that is addressed in more detail in Section III.A.<sup>77</sup> Although the categorical approach has the benefit of exempting specific types of speech from otherwise broad right of publicity statutes, it is unlikely to be efficiently and predictably executed.

### 3. Relegating "Commercial Speech" to Reduced Constitutional Protection

A third approach that states currently use to address free speech concerns within right of publicity laws is to categorize the speech in question as "commercial speech."<sup>78</sup> The U.S. Supreme Court has long maintained that commercial speech should receive less First Amendment protection than other types of speech, such as public discourse and self-expression.<sup>79</sup> This is largely due to the fact that commercial speech "relate[s] solely to the economic interests of the speaker and its audience" rather than the expression of creativity or ideas.<sup>80</sup> In the right of publicity context, states that use this approach only allow plaintiffs to sue for unauthorized uses of their identities that occur in commercial speech.<sup>81</sup> However, differentiating between purely commercial speech and expressive speech proves much easier said than done.<sup>82</sup> If speech incorporates both commercial and expressive elements, how much expression should be required to outweigh the commercial aspects of the speech? Even when states employ the traditional test for determining whether speech is truly "commercial"—which requires examining whether the speech is an advertisement, a reference to a specific product, and economically motivated<sup>83</sup>—some states still allow right of publicity claims for the non-commercial, expressive speech that survives this test.<sup>84</sup> As a result, categorizing actionable

77. See *infra* Section III.A.

78. Murhammer Colon, *supra* note 7, at 423 ("[M]any courts use the distinction between commercial and non-commercial speech to adequately address free speech concerns.").

79. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–63 (1980) ("The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

80. *Id.* at 561.

81. Murhammer Colon, *supra* note 7, at 423.

82. See Kwall, *supra* note 74, at 107 ("[M]any types of informational and entertainment uses can have strong commercial overtones.").

83. *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 517 (7th Cir. 2014) (citing *United States v. Benson*, 561 F.3d 718, 725 (7th Cir. 2009)).

84. Murhammer Colon, *supra* note 7, at 424 ("[M]any courts have also allowed right of publicity claims for non-commercial speech."); ROTHMAN, *supra* note 18, at 87–88 ("The right

speech as “commercial” in a right of publicity statute is not a reliable method of protecting the public’s freedom of speech.

#### 4. Common Law Frameworks

A fourth, and final, approach that states use to resolve the tension between the First Amendment and the right of publicity is common law frameworks. There are four main frameworks that courts currently employ: (1) the *Rogers v. Grimaldi* test; (2) the transformative use test; (3) the balancing approach; and (4) the predominant use test. The Second Circuit developed the *Rogers v. Grimaldi* test to determine when the use of another person’s trademark qualifies as protected speech.<sup>85</sup> Courts have applied this test within the right of publicity context, allowing plaintiffs to sue if the defendant’s use of their identity has no artistic relevance to the defendant’s underlying work.<sup>86</sup> If the use has some artistic relevance to the underlying work, plaintiffs can sue only if the use “explicitly misleads as to the source or the content of the work.”<sup>87</sup> The *Rogers v. Grimaldi* test therefore establishes a high bar for plaintiffs to meet in order to defeat a defendant’s First Amendment rights.<sup>88</sup> The second test, the transformative use test, similarly draws from existing intellectual property doctrines. First created to address “the purpose and character of the use” factor of the fair use doctrine, the transformative use test preferences defendants’ First Amendment rights by allowing them to use others’ likenesses so long as they sufficiently transform it into their “own expression rather than the celebrity’s likeness.”<sup>89</sup> The third framework, the balancing approach, gives greater deference to a plaintiff’s injuries following infringement of their identity, weighing “the nature of the use against the likely injury to the publicity-holder.”<sup>90</sup> Lastly, the predominant use test inquires into a defendant’s intentions, holding them liable for infringing a plaintiff’s right of publicity if their “product . . . predominantly exploits the commercial value of an individual’s

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[of publicity] has been successfully wielded against a variety of noncommercial speech, including uses in expressive works, from movies, to comic books, to video games, to busts of civil rights heroes, and even to uses in news reporting and political campaigns.”).

85. See generally *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989) (creating the *Rogers v. Grimaldi* framework to decide a trademark infringement case).

86. In 2003, Rosa Parks sued Outkast for violating her right of publicity with their song entitled “Rosa Parks.” See *Parks v. LaFace Recs.*, 329 F.3d 437, 441–44 (6th Cir. 2003). The Sixth Circuit extended the *Rogers v. Grimaldi* test to the right of publicity context, requiring Parks to prove that the song’s title was “wholly unrelated” to its content in order to survive summary judgement. *Id.* at 461.

87. *Rogers*, 875 F.2d at 999.

88. *Id.* at 1000 (“This construction of the Lanham Act . . . insulates from restriction titles with at least minimal artistic relevance that are ambiguous or only implicitly misleading but leaves vulnerable to claims of deception titles that are explicitly misleading as to source or content, or that have no artistic relevance at all.”).

89. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001).

90. ROTHMAN, *supra* note 18, at 145–46.

identity.”<sup>91</sup> As with states’ other approaches to resolving the tension between the First Amendment and the right of publicity, these state common law frameworks offer the public some free speech protection. However, because courts must balance the public’s interest in free speech against a plaintiff’s right of publicity in each individual case, these frameworks can also lead to unpredictable and inconsistent judicial outcomes for plaintiffs and defendants alike.<sup>92</sup>

### 5. The Right of Publicity Today

The right of publicity landscape has changed rapidly since its inception in 1953. At least thirty states have right of publicity common law or statutes<sup>93</sup> and even notorious anti-right-of-publicity giants, like the NCAA, have begun acknowledging every individual’s right to control the commercial use of their name, image, and likeness.<sup>94</sup> On July 1, 2021, the NCAA implemented an interim policy that allows college athletes to “engage in [name, image, and likeness] activities that are consistent with the law of the state where the [ir] school is located.”<sup>95</sup> This policy represents a radical departure from the NCAA’s strict regulations regarding the ability of college athletes to accept sponsorships and endorsements, which the organization had previously implemented to preserve the “amateurism” of college athletics.<sup>96</sup> Further, the policy instructs college athletes who attend schools in states with established right of publicity laws to look to those laws for guidance regarding the scope of their newfound ability to profit off of their names, images, and likenesses.<sup>97</sup> For college athletes attending schools in states without right of publicity laws, however, the NCAA merely states that they “can engage in this type of activity without violating NCAA rules related to name, image and likeness.”<sup>98</sup>

91. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003).

92. Rebecca Tushnet, *A Mask that Eats into the Face: Images and the Right of Publicity*, 38 COLUM. J.L. & ARTS 157, 182 (2015) (“[C]ase-by-case determination of transformativeness has significant costs for risk-averse creators that should be taken into account in any ‘balancing’ endeavor.”); Post & Rothman, *supra* note 26, at 127–28 (“The unpredictability caused by the ‘courts’ sloppy and often inconsistent tests for weighing the right of publicity and First Amendment rights’ chills speech and incentivizes jurisdictional gamesmanship.” (footnote omitted) (quoting Martin H. Redish & Kelsey B. Shust, *The Right of Publicity and the First Amendment in the Modern Age of Commercial Speech*, 56 WM. & MARY L. REV. 1443, 1472 (2015))).

93. 1 MCCARTHY & SCHECHTER, *supra* note 16, § 1:2.

94. Brutlag Hosick, *supra* note 1.

95. *Id.*

96. Ben Kercheval & Dennis Dodd, *NCAA Approves Interim Name, Image and Likeness Policy Removing Restrictions for College Athletes to Earn Money*, CBS SPORTS (June 30, 2021, 5:44 PM), <https://www.cbssports.com/college-football/news/ncaa-approves-interim-name-image-and-likeness-policy-removing-restrictions-for-college-athletes-to-earn-money> [<https://perma.cc/E6JS-BCMH>].

97. Brutlag Hosick, *supra* note 1.

98. *Id.*

Iowa is one such state that does not possess a right of publicity statute or common law.<sup>99</sup> Although this complete lack of guidance regarding the right of publicity has not necessarily prevented Iowans from taking advantage of the commercial value of their names, images, and likenesses (like Jordan Bohannon, who launched his own apparel line the very same day as the NCAA's announcement),<sup>100</sup> it nonetheless inhibits Iowans from fully understanding and protecting the commercial use of their identities. More importantly, a greater number of Iowans are exerting their right of publicity following the NCAA's announcement while, simultaneously, technological improvements are making it easier than ever to misappropriate others' identities. To prevent Iowans from exposing themselves to potential constitutional violations every time they use another person's name, image, and likeness in their speech, Iowa needs a law that balances First Amendment concerns preemptively by incorporating copyright law's fair use doctrine instead of leaving courts to weigh these interests in each case, or in Iowa's case, giving courts no guidance at all. As a result, Iowa needs to adopt not only a right of publicity statute, but a right of publicity statute that incorporates copyright law's fair use doctrine to simultaneously protect its citizens' right to free speech *and* right to control their identities.

## II. WHY IOWA NEEDS A RIGHT OF PUBLICITY STATUTE THAT PREEMPTIVELY BALANCES FIRST AMENDMENT CONCERNS

This Part analyzes why Iowa needs a right of publicity statute that preemptively balances a person's right to control the commercial use of their identity with the public's right to use others' identities in speech by incorporating copyright law's fair use doctrine into the statute itself rather than leaving courts to weigh these interests in each case. This balance is inherently necessary in the intellectual property field because the cost of copying works like poems, or even the latest iPhone, is relatively low compared to the upfront cost of creating the work.<sup>101</sup> Although members of the public can copy a poem essentially for free and reverse engineer an iPhone in a matter of days, the original creators of these works must invest substantial time, effort, and resources to first invent them.<sup>102</sup> If a creator is unable to recoup that investment because members of the public can simply copy and profit off of

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99. Rothman, *supra* note 6.

100. Peterson, *supra* note 2; Jordan Bohannon (@JordanBo\_3), TWITTER (June 30, 2021, 9:20 PM), [https://twitter.com/JordanBo\\_3/status/1410422921550520325/photo/1](https://twitter.com/JordanBo_3/status/1410422921550520325/photo/1) ("Just under 3 hours until the official launch of the first J30 shirt!!! Website goes live at midnight . . . [.]").

101. Jeanne C. Fromer, *The Intellectual Property Clause's Preemptive Effect*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 265, 268 (Shyamkrishna Balganeshe ed., 2013) ("The dominant premise underlying American patent and copyright laws is that the incentive of exclusive rights is granted to creators for a limited time to encourage their productions, which are valuable to society.").

102. *Id.*

their creations for free, creators have little incentive to create in the first place.<sup>103</sup> Intellectual property laws that give creators temporary monopolies over their works, and thus the right to prevent others from copying and profiting off them, are therefore necessary to incentivize creators to create those works.<sup>104</sup> At the same time, however, these monopolies inhibit free speech<sup>105</sup> and progress in general by suppressing the public's ability to freely comment on, criticize, and build upon others' works.<sup>106</sup>

To resolve this inherent conflict between works of intellectual property and the First Amendment, Congress has built safeguards into federal copyright, patent, and trademark statutes to balance First Amendment concerns preemptively rather than leaving courts to weigh them in each case.<sup>107</sup> One of these safeguards includes limiting intellectual property owners' monopolies over their works to a certain number of years. For copyrighted works, this term is the creator's life plus an additional seventy years.<sup>108</sup> For patented works, this term is twenty years from the date of filing a patent application.<sup>109</sup> After these terms end, the works enter the public domain so that members of the public can freely use them.<sup>110</sup> Another safeguard that Congress has installed is limiting the scope of intellectual property owners' monopolies so that the public can use a work before it enters the public domain as long as the use is fair.<sup>111</sup> By deciding precisely when a poem versus an iPhone enters the public domain, as well as precisely when the public can fairly use a poem but not an iPhone, Congress has struck a preemptive balance between intellectual property owners' rights over their works and the public's right to use those works in speech. This balance may be imperfect, as allowing a creator to have a monopoly over

103. *Id.*

104. *Id.*

105. Jennifer E. Rothman, *Copyright, Custom, and Lessons from the Common Law*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW*, *supra* note 101, at 230, 241 (“Fair use is more than simply a mechanism for optimizing the production of creative works; it prevents copyright law from unreasonably interfering with the free speech and liberty rights of others.”).

106. JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 40–41 (2008) (“The public domain is not some gummy residue left behind when all the good stuff has been covered by property law. The public domain is the place we quarry the building blocks of our culture.”).

107. Post & Rothman, *supra* note 26, at 147 (“[T]he Supreme Court has been careful to explain that copyright enjoys relative immunity from First Amendment review because ‘copyright law contains built-in First Amendment accommodations’ that reduce its impact on communication.” (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003))).

108. U.S. COPYRIGHT OFF., *DURATION OF COPYRIGHT* (2022), <https://www.copyright.gov/circs/circ15a.pdf> [<https://perma.cc/LZ68-TFBR>].

109. 35 U.S.C. § 154(a)(2) (“[S]uch grant shall be for a term beginning on the date on which the patent issues and ending 20 years from the date on which the application for the patent was filed in the United States . . .”).

110. BOYLE, *supra* note 106, at 39 (“Material in the public domain is free of property rights. You may do with it what you wish.”).

111. *See supra* Section II.C.1.

their work for even one day limits the public's ability to use that work, but it is nonetheless necessary for works of intellectual property to exist.<sup>112</sup> It also prevents courts from having to weigh these interests in each case, which increases the predictability, efficiency, and consistency of judicial outcomes.

Although giving people monopolies over their names, images, and likenesses raises similar First Amendment concerns,<sup>113</sup> Congress has yet to strike a preemptive balance between a person's right to control the commercial use of their identity and the public's right to use that person's identity in speech. Instead, each state currently determines this balance for themselves, with alarmingly disparate results.<sup>114</sup> Iowa, on the other hand, has not even considered this balance, let alone preemptively determined it by limiting the term of a person's monopoly over their identity or permitting fair use exceptions of another person's identity, for example.<sup>115</sup> Iowa therefore needs to adopt not only a right of publicity statute, but a right of publicity statute that incorporates copyright law's fair use doctrine to ensure the statute: (1) prevents the right of publicity from chilling free speech<sup>116</sup>; (2) creates more efficient judicial outcomes<sup>117</sup>; and (3) aligns the right of publicity with other intellectual property rights.<sup>118</sup>

#### A. PREVENTING THE RIGHT OF PUBLICITY FROM CHILLING FREE SPEECH

Iowa needs a right of publicity statute that incorporates copyright law's fair use doctrine in order to prevent the right of publicity from chilling free speech. As discussed in Part II, some states attempt to dispose of First Amendment concerns by exempting inflexible categories of speech, treating certain types of speech as constitutionally insignificant, or applying a hodge-podge of common law frameworks.<sup>119</sup> However, the unpredictability of these methods threatens to chill free speech.<sup>120</sup> For example, when Vanna White recovered \$403,000 from Samsung for depicting a robot standing next to a quasi-Wheel of Fortune board while wearing a wig and gown, one advertising lawyer began informing clients to "either obtain permission from the celebrity, or scrap [the advertisement]" entirely since "you just don't know which way

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112. Fromer, *supra* note 101, at 266 ("The IP Clause effectuates a balance between granting incentives to authors and inventors to create certain valuable works and promoting the public interest of having access to those works . . .").

113. *See supra* Section II.B.

114. *See supra* Section II.C.

115. *See supra* note 7 and accompanying text.

116. *See infra* Section III.A.

117. *See infra* Section III.B.

118. *See infra* Section III.C.

119. *See supra* Section II.C.

120. Post & Rothman, *supra* note 26, at 91 ("The [right of publicity's] jagged and unpredictable reach chills speech in extensive and immeasurable ways.").

a jury's going to come out."<sup>121</sup> Another lawyer revealed after this case "that in the real world, where millions of dollars are depending on our decision . . . we're going to walk away from it."<sup>122</sup> If members of the public cannot predict when using another person's name, image, or likeness in speech will expose them to liability, their safest and cheapest option (in order to avoid a costly licensing agreement, lawsuit, or settlement) is not to speak in the first place.<sup>123</sup> If Iowa wants to protect the "uninhibited, robust, and wide-open"<sup>124</sup> nature of free speech, it should adopt a right of publicity statute that creates more predictable judicial outcomes, which in turn prevent the right of publicity from chilling free speech.

A right of publicity statute that incorporates copyright law's fair use doctrine will create more predictable judicial outcomes by balancing First Amendment concerns preemptively rather than leaving courts to balance these interests in each case. When the federal government preempted state copyright laws and created a single test for determining when the public's use of a copyrighted work is fair, it also struck a definitive balance between the public's First Amendment rights and creators' intellectual property rights.<sup>125</sup> Now, courts no longer have to weigh vague policy considerations regarding the First Amendment and intellectual property rights in each case.<sup>126</sup> Instead, they can spend their time analyzing more tangible and fact-specific factors—like the purpose of the use, the nature of the copyrighted work, the amount of copyrighted material used, and the effect of the use on the copyrighted work's market value—and determining whether more of those factors lean toward fair use or infringement.<sup>127</sup> Removing this unnecessary balancing from courts' dockets ensures that every judge applies the same, objective criteria to every case, thus reducing the possibility of courts reaching opposite

121. See Stephen R. Barnett, *First Amendment Limits on the Right of Publicity*, 30 TORT & INS. L.J. 635, 658 (1995) (quoting Recording: Program on The Outer Limits of the Right of Publicity, held by the American Bar Association (Aug. 9, 1994) (on file with University of Iowa) (statement of Howard Weingrad)). See generally *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (holding that Vanna White's right of publicity extends to robot-lookalikes despite Samsung's parody defense); see also NANCY C. CORNWELL, FREEDOM OF THE PRESS: RIGHTS AND LIBERTIES UNDER THE LAW 112 (2004) (observing that the court in *White v. Samsung Electronics of America* awarded Vanna White \$403,000 for Samsung's depiction of "a well-dressed robot standing in front of a game board").

122. See Barnett, *supra* note 121, at 658 (ellipsis in original) (quoting Recording: Program on The Outer Limits of the Right of Publicity, held by the American Bar Association (Aug. 9, 1994) (on file with University of Iowa) (statement of Stuart L. Friedel)).

123. See Post & Rothman, *supra* note 26, at 91.

124. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

125. H.R. REP. NO. 94-1476, at 65 (1976) ("Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, . . . no generally applicable definition is possible, and each case raising the question must be decided on its own facts.").

126. See 17 U.S.C. § 107.

127. See *id.*

conclusions in cases with similar facts. This bizarre phenomenon of reaching opposite conclusions based on similar facts still occurs in states that utilize common law frameworks to balance First Amendment interests with the right of publicity.<sup>128</sup>

Consider, for example, a state supreme court and a federal appellate court with jurisdiction over that state applying two different common law frameworks to reach opposite outcomes—based on the same state’s laws and an almost identical set of facts. In *C.B.C. Distribution and Marketing v. Major League Baseball Advanced Media*, the Eighth Circuit examined whether the First Amendment protected a defendant who had used the names of professional baseball players in an online fantasy baseball game.<sup>129</sup> Applying the balancing approach previously mentioned in Section II.C.4 and Missouri law, the Eighth Circuit found that the defendant’s use was protected free speech.<sup>130</sup> Conversely, the Missouri Supreme Court applied the predominant purpose test, also mentioned in Section II.C.4, to the use of a professional hockey player’s name in a comic book and found that the First Amendment did not protect this use.<sup>131</sup> Regardless of which court correctly balanced the defendants’ First Amendment rights with the plaintiffs’ right to control the commercial use of their identities, these two cases teach the public a vital lesson: In a world where two courts can apply the same law to nearly identical facts only to reach opposite outcomes, it is better to be safe and silent, than sorry. Thus, even though unpredictable judicial outcomes are not unique to the right of publicity,<sup>132</sup> unpredictability is uniquely harmful in areas where the public’s free speech is at stake, as even minor judicial errors risk chilling countless instances of future speech.<sup>133</sup>

Greater predictability in judicial outcomes, gained by incorporating copyright law’s fair use doctrine into a right of publicity statute, will have a dual benefit for Iowans—encouraging people to protect their identities while also giving the public clear guidelines on when they can use other people’s names, images, and likenesses in speech. First, it will encourage more Iowans to enforce their right of publicity, as they will now be more certain of their

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128. Murhammer Colon, *supra* note 7, at 423 (“[T]hese various balancing tests have produced inconsistent results among the circuits, with some approaches arguably providing better free speech protections.”).

129. *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 820–21 (8th Cir. 2007); see Post & Rothman, *supra* note 26, at 128.

130. *C.B.C. Distrib.*, 505 F.3d at 825; see Post & Rothman, *supra* note 26, at 128.

131. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 365, 374, 376 (Mo. 2003); see Post & Rothman, *supra* note 26, at 128–29.

132. See, e.g., Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 325–26 (2003) (“[In joint employer litigation, c]ourts decide rather arbitrarily which factors to employ and, without articulated interpretative frameworks to guide their decisions, courts oscillate between different versions of the factors, resulting in inconsistencies within circuits.”).

133. See *supra* Section II.C.

right to control the commercial use of their identities. When “potential plaintiffs have no precedent to follow nor . . . any predictability,” they are “less inclined to litigate unauthorized uses of their identities” and “less inclined to invest in and develop their identities.”<sup>134</sup> Second, incorporating copyright law’s fair use doctrine into Iowa’s right of publicity statute will also enable members of the public to incorporate others’ identities into their speech more confidently, which improves the quality of the social dialogue, facilitates entertaining associations and parodies, and streamlines communication. By providing clear guidelines on when and how the public can use another person’s identity in speech, Iowa can expand the number of “fair” conversation topics while simultaneously subjecting existing topics of conversation to even closer scrutiny.<sup>135</sup> But without a right of publicity statute that incorporates copyright law’s fair use doctrine, Iowans are unable to take full advantage of these dual benefits. A right of publicity statute that balances First Amendment concerns preemptively through predictable fair use exceptions helps prevent the right of publicity from chilling free speech by giving the public more confidence regarding when their use of another person’s identity shifts from free speech into infringement.

#### B. CREATING MORE EFFICIENT JUDICIAL OUTCOMES

A right of publicity statute that incorporates copyright law’s fair use doctrine will also create more efficient judicial outcomes by resolving many First Amendment concerns before they arise in court. By incorporating copyright law’s fair use doctrine into a right of publicity statute, the Iowa legislature can eliminate disputes over the use of another person’s identity that clearly qualify as fair use. In trademark law, for example, 15 U.S.C. § 1115 specifically permits the use of another person’s descriptive trademark “to describe [one’s own] goods or services.”<sup>136</sup> By specifying circumstances when a trademark owner’s right to exclude others from using their trademark must yield to the public’s right to use that trademark in speech, federal trademark law eliminates gratuitous disputes before they ever reach courts’ already overbooked dockets. As a result, Company A need not sue Company B to know that Company B’s use of Company A’s HONEYCOMBE trademark to describe a “honeycomb-shaped” dehumidifier qualifies as fair use.<sup>137</sup> Additionally, outlining clear fair uses of trademarks clarifies the rights of every party in advance, thus reducing

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134. Murhammer Colon, *supra* note 7, at 428.

135. Baird, *supra* note 52, at 1195 (observing that copyright law’s fair use doctrine enables “the press . . . to encroach on the ownership of copyrighted works enough to ensure the full scrutiny of those works in the public forum”).

136. 15 U.S.C. § 1115(b)(4).

137. This example is based on the trademark infringement dispute in *Munters Corp. v. Matsui Am., Inc.*, 909 F.2d 250, 252–53 (7th Cir. 1990) (holding that Matsui’s use of the word “honeycomb” to describe its dehumidifiers would not confuse purchasers of Munters’ HONEYCOMBE dehumidifiers).

the number of lawsuits brought simply to define the scope of parties' intellectual property or free speech rights. Iowa can achieve this same judicial efficiency while still extending legal protection to Iowans' names, images, and likenesses by incorporating copyright law's fair use doctrine into a right of publicity statute.

This increase in efficiency could not come at a better time for the state of Iowa. The NCAA's announcement regarding college athletes' newfound ability to profit off their names, images, and likenesses opened the floodgates for right of publicity claims. Iowa does not have any professional major-league sport teams, which leaves college sports as the state's primary source of athletic entertainment.<sup>138</sup> College athletes in Iowa thus occupy a coveted position in comparison to other states' college athletes for selling merchandise based on their names, images, and likenesses.<sup>139</sup> Although this powerful spotlight will certainly aid Iowa college athletes in profiting off of their identities, it also provides a powerful incentive for others to try to misappropriate that profit for themselves. This misappropriation could include explicit infringement, such as replicating the T-shirts available for sale on Jordan Bohannon's website that display his name,<sup>140</sup> but it could also include more transformative uses, such as cutting up Bohannon's shirts and reassembling the pieces to create an entirely new work of art. Without a right of publicity statute that outlines fair uses of another person's name, image, and likeness, Iowans are left in the dark about when to bring a right of publicity claim. This increases the risk that courts will be overwhelmed with an influx of lawsuits that could have easily been dismissed as fair use. University of Iowa head football coach Kirk Ferentz aptly conveyed the magnitude of Iowans' confusion regarding their right of publicity when he responded to the NCAA's announcement by admitting that "[m]ost of us are . . . learning as we go."<sup>141</sup>

However, the NCAA's announcement represents only the tip of the right of publicity iceberg for Iowa courts. As technology such as deep fakes, social media filters, and CGI continues to improve, appropriating others' identities has, and only continues to, become easier. One only needs to see a startlingly

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138. Ashwin Yedavalli, *Yedavalli: Iowa Won't Get a Big Four Sports Team*, IOWA STATE DAILY, (June 8, 2018), [https://www.iowastatedaily.com/opinion/yedavalli-iowa-wont-get-a-big-four-sports-team/article\\_aeffe6f4-6535-11e8-8b09-6b6d6df1990c.html](https://www.iowastatedaily.com/opinion/yedavalli-iowa-wont-get-a-big-four-sports-team/article_aeffe6f4-6535-11e8-8b09-6b6d6df1990c.html) [<https://perma.cc/7DAR-SPPY>] ("Currently, Iowa is home to both minor league teams and teams in independent leagues . . . . However, we must drive over to Minneapolis, Chicago, Kansas City, Mo. or St. Louis (depending on your location) for the nearest major league sporting event.").

139. Peterson, *supra* note 2 ("In the new age of NIL, the most successful athletes on and off the court will make the most money.").

140. Bohannon, *supra* note 100.

141. Kennington Lloyd Smith III, *University of Iowa Announces Name, Image, and Likeness Program for Student-Athletes*, HAWK CENT. (June 25, 2021, 12:03 PM) (quoting University of Iowa head football coach Kirk Ferentz), <https://www.hawkcentral.com/story/sports/2021/06/25/university-iowa-announces-name-image-likeness-department-student-athletes-hawkeyes-kirk-ferentz/5346381001> [<https://perma.cc/M7PZ-PC9Y>].

young Carrie Fisher in the most recent *Star Wars* film or a perfectly recreated Peter Cushing (who died in 1994) in the 2016 *Rogue One* film to know that modern technology presents an eerie threat to a person's ability to control the use of their identity.<sup>142</sup> Not only can technology resuscitate celebrities from beyond the grave, but it can also place people in locations they have never visited and make them say things they have never said.<sup>143</sup> These powerful tools provide infringers such as advertisers and internet trolls with more opportunities to misappropriate others' identities for their own gain. As this type of appropriation becomes easier, more people will have right of publicity claims to advance in court, which will only increase courts' caseloads. A right of publicity statute that incorporates copyright law's fair use doctrine to resolve First Amendment concerns before they arise in court therefore serves as a powerful tool for eliminating gratuitous suits, defining parties' rights, and creating a more efficient court system in the modern age of technology.

C. ALIGNING THE RIGHT OF PUBLICITY WITH OTHER INTELLECTUAL  
PROPERTY RIGHTS

A right of publicity statute that resolves First Amendment concerns preemptively through the use of copyright law's fair use doctrine rather than leaving courts to balance those concerns in each case will align the right of publicity with other intellectual property rights and produce more just outcomes. As discussed in Section II.C.1 and Part III, copyright and trademark law contain specific provisions to ensure the First Amendment has sufficient "breathing space . . . to survive."<sup>144</sup> Even patent law, which does not have a comparable fair use doctrine, sends inventions into the public domain for the public to freely use after twenty years.<sup>145</sup> Without a right of publicity statute or a single common law case to speak of,<sup>146</sup> however, Iowans have nowhere to turn to better understand their right of publicity. And without a right of publicity statute that incorporates familiar free speech protections like copyright law's fair use doctrine, Iowans cannot even look to other areas of

142. See *STAR WARS: EPISODE IX – THE RISE OF SKYWALKER* (LucasFilm Ltd. 2019); *ROGUE ONE: A STAR WARS STORY* (LucasFilm Ltd. 2016).

143. See *A Concise History of the Right of Publicity*, RIGHT OF PUBLICITY (Jan. 28, 2022), <https://rightofpublicity.com/brief-history-of-rop> [<https://perma.cc/qj99-5TG2>], adapted from Johnathan L. Faber, *Indiana: A Celebrity-Friendly Jurisdiction*, RES GESTAE, Mar. 2000, at 24, 30 ("Advertisers can now create the impression that John Wayne actually drank Coors beer, that Fred Astaire developed his dancing technique with a Dirt Devil, that Lucille Ball shopped at Service Merchandise, and that Ed Sullivan spoke glowingly of the M-Class Mercedes.").

144. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (ellipsis in original) (quoting Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 433 (1963)); see *supra* Section II.C.1. and Part III.

145. 35 U.S.C. § 154(a)(2) ("[S]uch grant shall be for a term beginning on the date on which the patent issues and ending 20 years from the date on which the application for the patent was filed in the United States . . .").

146. See *supra* note 7 and accompanying text.

intellectual property for guidance regarding their right of publicity and how that right interacts with the public's First Amendment rights. This disparity among Iowans' intellectual property rights is not only confusing, as Iowans who are familiar with other areas of intellectual property cannot apply that knowledge to their right of publicity, but it also produces nonsensical and unfair judicial outcomes.

Consider, for example, a Hawkeye wrestling video game that prominently features Dan Gable's trademark, DAN GABLE ULTIMATE.<sup>147</sup> If Gable were to sue the video game developer for trademark infringement, the First Amendment provisions within trademark law would bar him from recovering.<sup>148</sup> In situations where it is unclear whether a trademark implicates political discourse or entertainment, courts err on the side of protecting a defendant's free speech rights over a plaintiff's trademark rights.<sup>149</sup> "[V]ideo games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) . . . . That suffices to confer First Amendment protection."<sup>150</sup> However, states' current approaches to the right of publicity do not demonstrate this same deference to the First Amendment. Even in situations in which courts would undoubtedly limit a person's trademark rights to protect the public's First Amendment rights, courts have proved unwilling to similarly limit a person's right of publicity.<sup>151</sup> And without statutes that expressly limit the term of a person's monopoly over their identity or specify fair use exemptions, courts have little guidance on when to stop expanding the right of publicity.<sup>152</sup> As long as a defendant misappropriated a plaintiff's identity in a harmful manner, the plaintiff has a valid right of publicity claim.<sup>153</sup> Consequently, Gable could almost certainly recover for the use of his name within the trademark DAN GABLE ULTIMATE under right of publicity law even though he could not recover for the use of the trademark itself under trademark law.<sup>154</sup>

This example shows the current disparity in recovery between the right of publicity and comparable intellectual property rights, which creates

147. See DAN GABLE ULTIMATE, Registration No. 3,267,039. This example is based on the dual right of publicity and trademark infringement dispute in *VIRAG, S.R.L. v. Sony Comput. Ent. Am. LLC*, No. 15-cv-01729, 2015 WL 5000102 (N.D. Cal. Aug. 21, 2015) (upholding a plaintiff's right of publicity claim but dismissing their trademark claim on First Amendment grounds for the same incident of infringement), *aff'd*, 699 F. App'x 667 (9th Cir. 2017).

148. See *VIRAG*, 2015 WL 5000102, at \*8.

149. *Id.*

150. *Id.* (quoting *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011)).

151. Rebecca Tushnet, *Raising Walls Against Overlapping Rights: Preemption and the Right of Publicity*, 92 NOTRE DAME L. REV. 1539, 1540 (2017) ("Even in such cases of flat-out conflict between trademark's and the right of publicity's respective First Amendment limits, courts have been unwilling to limit the right of publicity.>").

152. See *id.* at 1541.

153. See *supra* text accompanying note 20.

154. See *VIRAG*, 2015 WL 5000102, at \*7, \*13.

nonsensical judicial outcomes and enables plaintiffs to use the right of publicity to circumvent the First Amendment restrictions in other intellectual property rights. The Dan Gable example perfectly illustrates the type of nonsensical judicial outcomes that courts can reach due to this current disparity. How can the First Amendment protect a video game developer's right to use the trademark DAN GABLE ULTIMATE while simultaneously subjecting the developer to liability for the use of Dan Gable's name within that same trademark? This outcome is also unfair, as defendants can avoid liability in a trademark case on First Amendment grounds only to face liability for the same incident of infringement in a right of publicity case.<sup>155</sup> Because the boundaries of the right of publicity are so poorly defined, plaintiffs are able to manipulate the right for their own advantage, often at the expense of the public's freedom of speech.<sup>156</sup> For example, in *Newcombe v. Adolf Coors Co.*, Coors ran an advertisement that depicted the plaintiff, a recovering alcoholic, endorsing their beer.<sup>157</sup> The plaintiff sued Coors for defamation but could not meet the stringent elements of a defamation claim, such as showing that the advertisement was "libelous on its face."<sup>158</sup> This proved to be no obstacle for the plaintiff, however, as he easily circumvented the defamation elements he could not prove by also suing—and successfully recovering from—Coors for violating his right of publicity.<sup>159</sup> By adopting a right of publicity statute that incorporates copyright law's fair use doctrine, the Iowa legislature can better align the right of publicity with other intellectual property rights. This alignment will not only alleviate confusion among Iowans regarding the scope of their control over their identities, but it will also prevent plaintiffs from gaining an unfair advantage over unintentional infringers and circumventing important restrictions Congress and the Supreme Court have implemented in comparable areas of the law.

### III. A RIGHT OF PUBLICITY STATUTE THAT PREEMPTIVELY BALANCES FIRST AMENDMENT CONCERNS

In order to prevent the right of publicity from chilling free speech,<sup>160</sup> create more efficient judicial outcomes,<sup>161</sup> and align the right of publicity with

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155. *See id.*

156. *See* Tushnet, *supra* note 151, at 1540–41.

157. *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 689 (9th Cir. 1998).

158. *Id.* at 694–95.

159. *Id.* at 691–94; *see also* Tushnet, *supra* note 151, at 1540–41 (discussing *Cross v. Facebook, Inc.*, a California case where a plaintiff comparably "evad[ed] the well-justified limits on defamation law" by suing under right of publicity law instead). After the publication of Tushnet's article, however, the California Court of Appeal reversed the ruling in *Cross v. Facebook, Inc.* after finding that the defendant did not "use" the plaintiff's identity as required under California right of publicity law. *See* *Cross v. Facebook, Inc.*, 222 Cal. Rptr. 3d 250, 265–67 (Ct. App. 2017).

160. *See supra* Section III.A.

161. *See supra* Section III.B.

other intellectual property rights,<sup>162</sup> Iowa needs a right of publicity statute that incorporates copyright law's fair use doctrine. As discussed in Section II.C.1. and Part III, the federal government has built safeguards into other intellectual property rights to strike a preemptive balance between a person's monopoly over their works of intellectual property and the public's right to use those works in speech.<sup>163</sup> One such safeguard is copyright law's fair use doctrine, which assists in striking this preemptive balance by outlining precisely when the public may use copyrighted works in their own works.<sup>164</sup> The most important elements of the fair use doctrine include: (1) a list of fair use examples; and (2) a comprehensive balancing test.<sup>165</sup> This Part will examine these conventional fair use factors and how states can tailor them to the right of publicity context. This Part will also propose how Iowa should combine these factors to create its own, preemptively balanced right of publicity statute.

#### A. AN INSTRUCTIVE LIST OF FAIR USE EXAMPLES

An important element that Iowa should consider when creating a right of publicity statute that incorporates copyright law's fair use doctrine is a list of examples that may constitute fair use of another person's identity. In the copyright context, these examples include criticism, commentary, news reporting, teaching, scholarship, and research.<sup>166</sup> By including these examples in the statute itself rather than in the statute's commentary or allowing courts to develop these examples over time, Congress has given courts specific direction on the types of fair use it intends to fall within the statute.<sup>167</sup>

A counterargument is that including a list of fair use examples in a right of publicity statute is no different than some states' current approach of exempting categories of speech from right of publicity laws.<sup>168</sup> This argument is incorrect, as the two are sufficiently distinct. States that exempt categories of speech from their right of publicity statutes bind themselves to exempting only those specific categories. Although this method of "protecting" the public's First Amendment rights can potentially create more consistent outcomes by decreasing judicial discretion, it also can neither adapt to new forms of speech, nor stretch to fit more ambiguous forms of speech because speech must either fall into a clear category like "a sports broadcast" or receive no First Amendment

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162. See *supra* Section III.C.

163. See *supra* Section II.C.1 and Part III.

164. See *supra* Section II.C.1 and Part III.

165. See *supra* Section II.C.1.

166. See 17 U.S.C. § 107.

167. *More Information on Fair Use*, COPYRIGHT.GOV (May 2021), <https://www.copyright.gov/fair-use/more-info.html> [<https://perma.cc/C698-8JH3>] ("Section 107 of the Copyright Act provides the statutory framework for determining whether something is a fair use and identifies certain types of uses—such as criticism, comment, news reporting, teaching, scholarship, and research—as examples of activities that *may* qualify as fair use." (emphasis added)).

168. See *supra* Section II.C.2.

protection at all.<sup>169</sup> The examples in copyright law's conventional fair use doctrine, on the other hand, are an instructive, non-binding list of uses that *may* (rather than *must*) constitute fair use.<sup>170</sup> The U.S. Copyright Office directs that while courts are more likely to treat these examples as fair, the list is by no means meant to suggest that all criticism or all scholarship is automatically fair.<sup>171</sup>

Despite this important distinction between an instructive list of examples and a binding set of categories, the two methods exempt several of the same types of speech such as news reporting and commentary (if such commentary is on public affairs).<sup>172</sup> Iowa would therefore not be deviating too far from conventional methods of balancing First Amendment concerns by adopting a list of fair use examples in its right of publicity statute. It would instead be improving upon existing right of publicity doctrines to better protect Iowans' First Amendment rights. Iowa should also include the same six examples as copyright law's conventional fair use doctrine because Congress has already identified these six categories as potentially important areas of free speech. And although not every piece of criticism, commentary, news reporting, teaching, scholarship, or research will automatically qualify as a fair use of another person's identity—as courts must still analyze every use under the comprehensive balancing test discussed in the next Section—including these categories in Iowa's right of publicity statute will give courts specific direction on the types of speech that are more likely to be fair. Because Iowa will gain all the benefits of providing examples without the drawbacks of exempting specific categories of speech, it should include an instructive, non-binding list of fair use examples in its right of publicity statute.

### B. A COMPREHENSIVE BALANCING TEST

Iowa should also include a comprehensive balancing test in its right of publicity statute to emphasize the most crucial First Amendment concerns for courts. After providing courts with an instructive list of fair use examples, copyright law's fair use doctrine provides a four-factor balancing test to identify fair uses.<sup>173</sup> These four conventional factors are: "(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount

169. See *supra* Section II.C.2.

170. H.R. REP. NO. 94-1476, at 66 (1976) ("[T]he fair use doctrine in section 107 offers some guidance . . . . However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. . . . [T]here is no disposition to freeze the doctrine in the statute . . . .").

171. *More Information on Fair Use*, *supra* note 167 ("Courts look at how the party claiming fair use is using the copyrighted work, and are more likely to find that nonprofit educational and noncommercial uses are fair. This does not mean, however, that all nonprofit education and noncommercial uses are fair and all commercial uses are not fair . . . .").

172. See *supra* Section II.C.2; see also *supra* text accompanying notes 70–71.

173. 17 U.S.C. § 107.

and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”<sup>174</sup> Iowa should tweak some of these factors to adapt them to the right of publicity context, but they nonetheless provide an effective framework for determining which uses of another person’s identity are fair. And more importantly, this framework captures the most successful aspects of the common law frameworks discussed in Section II.C.4., such as the ability to adapt to new and ambiguous types of speech,<sup>175</sup> while replacing the most ineffective aspects of these frameworks, such as amorphous investigations into whether a use “predominantly exploits the commercial value of an individual’s identity,”<sup>176</sup> with clear, predefined factors that courts can use to determine whether a certain use leans more toward fair use or infringement.

### 1. Factor 1: The Purpose and Character of the Use

The first factor that Iowa should include in its comprehensive balancing test is the purpose and character of the use. In copyright law, this factor examines whether the copier’s use of a copyrighted work includes one of the six fair use examples.<sup>177</sup> Courts also look at whether the copying: (1) was transformative; (2) used more of the copyrighted work than was necessary to achieve the intended purpose; (3) had a commercial purpose; and (4) was done in bad faith.<sup>178</sup> All four of these inquiries map nicely onto the right of publicity context, but the transformative inquiry within the purpose and character of the use factor warrants special mention.

“Transformative uses are those that add something new, with a further purpose or different character”<sup>179</sup> rather than simply altering the medium of the copyrighted work (such as converting Queen’s song *Killer Queen* into a spoken word poem, for example). A potential objection is that applying this transformative inquiry to the right of publicity context wrongfully categorizes realistic depictions of identity, such as showing one’s image on the nightly news, as an unfair use.<sup>180</sup> However, this argument makes the mistake of treating the transformative inquiry as the sole basis of fair use, rather than treating it

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174. *Id.*

175. *See supra* Section II.C.4.

176. *See supra* Section II.C.4; *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003).

177. *See, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (holding that a parody of Roy Orbison’s song “Pretty Woman” “provide[s] social benefit, by shedding light on an earlier work, and, in the process, creating a new one . . . like other comment or criticism”).

178. *See Google LLC v. Oracle Am., Inc.*, 141 S.Ct. 1183, 1202–04 (2021) (listing these four inquiries under the umbrella of the purpose and character of the use factor).

179. *More Information on Fair Use*, *supra* note 167.

180. *See, e.g.*, Tushnet, *supra* note 151, at 1556–57 (arguing that “the transformativeness standard leads to the conclusion that realistic depictions of a celebrity are infringing, but that implies that news stories and photographs—at the core of protected noncommercial speech—should be considered infringing”).

as one of four inquiries within a factor that itself is only one of four factors in a comprehensive balancing test. By placing the transformative inquiry into a much larger fair use framework, in which various other factors must also be considered, courts avoid the nonsensical outcomes that accompany the common law transformative use frameworks discussed in Section II.C.4.<sup>181</sup> If, for example, the use of one's identity is not transformative because it realistically depicts the person's name, image, or likeness, it may still qualify as a fair use under the other factors as a piece of news reporting or poignant commentary on a matter of public interest, such as a celebrity biopic.

This more nuanced view matches several states' current approaches to balancing First Amendment concerns with the right of publicity. In California, for example, the "newsworthiness" of a use is an important inquiry into the fair use of another person's identity.<sup>182</sup> Even though the use of another person's name, image, or likeness in the news is not necessarily transformative, the larger purpose and character of this use outweigh its lack of transformation.<sup>183</sup> Thus, retaining the transformative inquiry in the right of publicity context helps courts differentiate between expressions that truly transform others' identities and those that merely replicate others' identities for their commercial value, while still extending sufficient First Amendment protection to realistic depictions.

## 2. Factor 2: The Nature of the Plaintiff's Identity

The second factor that Iowa should include in its comprehensive balancing test is the nature of the plaintiff's identity. This factor is typically the nature of the copyrighted work under copyright law's conventional fair use doctrine,<sup>184</sup> but Iowa should modify it to be the nature of the plaintiff's identity in order to fit the right of publicity context. As discussed in Section II.A, most jurisdictions recognize a right of publicity for all individuals rather than solely for celebrities.<sup>185</sup> It may therefore seem counterintuitive to inquire into the nature of a person's identity, such as their level of fame, in determining whether the use of their identity is fair. Under most states' current right of publicity

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181. See *supra* Section II.C.4. Compare *Hilton v. Hallmark Cards*, 599 F.3d 894, 911 (9th Cir. 2010) (applying solely the "transformative use" common law framework to find that placing Paris Hilton's head in a cartoon greeting card was not transformative because "the basic setting is the same" as her show *The Simple Life*), with *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 n.2 (9th Cir. 2001) (applying the same "transformative use" common law framework to find that replacing Dustin Hoffman's real body with another person's body was transformative because "Hoffman's body was eliminated and a new, differently clothed body was substituted in its place").

182. CAL CIV. CODE § 3344.1(a)(2) (West 2022) ("[A] play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works, shall not be considered a product, article of merchandise, good, or service . . .").

183. See *id.*

184. See 17 U.S.C. § 107.

185. See *supra* note 40 and accompanying text.

laws, however, a plaintiff must always prove that the defendant's use is likely to harm the commercial value of their identity.<sup>186</sup> As a result, celebrities are far more likely to prevail on right of publicity claims than the average person, since celebrities already have significant commercial value attached to their identities. Including this factor in a comprehensive balancing test ensures that courts properly account for the increased commercial value of plaintiffs' identities. In addition, this factor reinforces a necessary element of right of publicity claims, which ensures that plaintiffs fully prove their case before assigning liability to instances of free speech.

And just as with the transformative inquiry under the first factor, this will not bar the average person from succeeding in a right of publicity claim if, for example, their local grocery store uses their image in an advertisement. This factor is merely one of four factors that courts should analyze in order to determine whether a use leans more toward fair use or infringement. If the grocery store's use was in no way transformative, had a strong commercial purpose, and was done in bad faith, a court could still easily find that the grocery store infringed an average person's right of publicity if these factors outweigh the fact that the use is unlikely to harm the relatively low commercial value of an average person's identity. Because of these benefits, Iowa should include it in its comprehensive balancing test.

3. Factor 3: The Amount and Substantiality of the Portion Used in Relation to the Plaintiff's Identity as a Whole

The third factor that Iowa should include in its comprehensive balancing test is the amount and substantiality of the portion used in relation to the plaintiff's identity as a whole. In copyright law's conventional fair use doctrine, this factor examines the amount of the copyrighted work that the defendant copied, looking primarily at whether the copying goes to the heart of the original copyrighted work.<sup>187</sup> This factor is already well-adapted to the right of publicity context, as plaintiffs advancing right of publicity claims must always prove that the defendant used an identifiable aspect of their identity.<sup>188</sup> If a defendant uses an aspect of a plaintiff's identity that is too small or insignificant to identify the plaintiff specifically, then the plaintiff has no cognizable claim even under states' current approaches to the right of publicity.<sup>189</sup> For example, the sole use of many people's first names would be insufficient to identify them. But if a person's first name goes to the heart of their identity, such as Beyoncé, then this factor leans more heavily in favor of

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186. See source cited *supra* note 20 and accompanying text.

187. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994) (finding that the amount and substantiality of the portion used in relation to the copyrighted work as a whole factor requires inquiring into whether "a work [is] composed primarily of an original, particularly its heart, with little added or changed").

188. See source cited *supra* note 20 and accompanying text.

189. See source cited *supra* note 20 and accompanying text.

infringement. Because this factor further assists in differentiating between fair uses and infringement, Iowa should include it in its comprehensive balancing test.

4. Factor 4: The Effect of the Use on the Commercial Value of the Plaintiff's Identity

The fourth and final factor that Iowa should include in its comprehensive balancing test is the effect of the use on the commercial value of the plaintiff's identity. Conventionally, this factor examines the effect of the use on the potential market for a copyrighted work.<sup>190</sup> Iowa should therefore alter this factor slightly so that it applies to an element that plaintiffs must typically already show in right of publicity claims: harm to the commercial value of their identities.<sup>191</sup> This factor somewhat mirrors the second factor—the nature of the plaintiff's identity—but each factor remains its own distinct inquiry into the fairness of a certain use. Although the second factor involves a simple inquiry into the nature of the plaintiff's identity, such as whether it is commercially valuable, this fourth factor asks whether the defendant's use has or will harm that commercial value.

This factor also mirrors the second factor in paying greater deference to celebrities' right of publicity claims, as celebrities are likely to have the most commercially valuable identities and thus stand to suffer the most harm from misappropriation of their names, images, and likenesses. But just as with the second factor, the average person still has ample opportunities to advance right of publicity claims if this fourth factor is included in Iowa's comprehensive balancing test. Returning to the grocery store example, the mere fact that the store chose to use an average person's name, image, or likeness in their advertisements demonstrates that the person's identity is at least somewhat commercially valuable to the store.<sup>192</sup> As such, this factor will not bar average people from advancing right of publicity claims. As with the other factors, this fourth factor will also not restrain the public from freely criticizing or making comments about others. These uses are far more transformative than the typical, profiteering forms of misappropriation and are also specifically included in the list of fair use examples that illustrate the types of speech that are more likely to constitute a fair use of another person's identity. Iowa should therefore include this factor in its comprehensive balancing test.

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190. 17 U.S.C. § 107.

191. See source cited *supra* note 20 and accompanying text.

192. See Murhammer Colon, *supra* note 7, at 434 (“‘Celebrity’ [is] a subjective term, and if an advertiser finds a ‘non-celebrity’s’ persona valuable enough to misappropriate it, then that person should be able to bring a right of publicity claim.” (footnote omitted)).

*C. PROPOSED STATUTORY LANGUAGE*

An Iowa right of publicity statute that incorporates copyright law's fair use doctrine is as follows:

The fair use of any person's name, image, or likeness for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of the right of publicity. In determining whether the use made of the person's name, image, or likeness in any particular case is a fair use the factors to be considered shall include—

- (1) The purpose and character of the use;
- (2) The nature of the plaintiff's identity;
- (3) The amount and substantiality of the portion used in relation to the plaintiff's identity as a whole; and
- (4) The effect of the use on the commercial value of the plaintiff's identity.

This language is modeled after 17 U.S.C. § 107, which is a federal statute that codifies copyright law's fair use doctrine.<sup>193</sup>

#### CONCLUSION

The right of publicity is a state-law based intellectual property right that entitles a person to control the commercial use of their name, image, and likeness. Across the United States, an increasing number of states and organizations are recognizing the right of publicity, as evidenced by the NCAA's recent announcement regarding college athletes' ability to profit off their names, images, and likenesses and a majority of states now possessing either right of publicity statutes or common law. Iowa has yet to adopt a right of publicity statute, which leaves Iowans in the dark about their rights over the commercial use of their identities and how those rights interact with the First Amendment. Without a right of publicity statute that balances First Amendment concerns preemptively through copyright law's fair use doctrine, Iowa courts must currently balance these concerns in each case. This not only risks chilling free speech but leaves courts without an efficient method of handling the influx of right of publicity claims that the NCAA's announcement and technological advancements will inevitably bring. Further, Iowa is sacrificing a rare opportunity to align the right of publicity with other intellectual property rights. In order to avoid these undesirable outcomes, Iowa should adopt a right of publicity statute that incorporates copyright law's fair use doctrine. This statute should include a list of instructive fair use examples, as well as a comprehensive balancing test that analyzes the purpose and character of a use,

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193. 17 U.S.C. § 107.

the nature of a plaintiff's identity, the amount and substantiality of the portion used in relation to the plaintiff's identity as a whole, and the effect of the use on the commercial value of the plaintiff's identity. By adopting a framework that Congress has already decided strikes the proper balance between the First Amendment and intellectual property rights, Iowa can simultaneously protect its citizens' right to free speech *and* right to control their identities.