

How Can Iowans Effectively Prevent the Commercial Misappropriation of Their Identities? Why Iowa Needs a Right of Publicity Statute

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ABSTRACT: The right of publicity is an individual’s right to control the commercial use of her identity. Thirty-five states in the United States recognize the right of publicity, either through statute or common law, and provide their citizens with a mechanism to prevent unauthorized uses of their identities. Iowa, however, is one of the 15 states that does not expressly recognize the right of publicity in any form, leaving Iowans uncertain about their intellectual property rights in their identities. Due to the recent emergence of social media and digital manipulation technology, which make it easier than ever for advertisers to commercially exploit an individual’s identity, Iowans are particularly vulnerable to the misappropriation of their identities. Therefore, Iowa’s legislature should join the majority of states and adopt a right of publicity statute to provide Iowans with a mechanism to enforce their rights in their identities. The certainty and protection provided by this neutral right of publicity statute will incentivize Iowans to commercialize their identities—enriching Iowa’s society and, perhaps, its economy.

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I. INTRODUCTION

Imagine the following scenario: You are scrolling through Twitter or Facebook and an advertisement for Pepsi (or Coca-Cola) appears. The advertisement features a photo of a familiar face—yours. You do not remember any Pepsi representative asking to use your photograph, and you certainly do not remember getting paid to appear in this advertisement. You probably have two main questions: (1) How do you get Pepsi to stop circulating this advertisement, and (2) how do you get payment from Pepsi for the use of your image in this advertisement?

Ultimately, this hypothetical¹ raises a critical issue: Is there a legal mechanism for people in this type of situation to prevent the unauthorized

1. For a non-hypothetical example of an unauthorized commercial use of a person’s identity, see Danny Lawhon, *Iowa Cracks Down on ‘Smart Pill’ Sellers, and Some Victims Are Getting*

commercial exploitation of their identities? In most states, the answer to this question is yes, as these states have adopted some form of a right of publicity law that provides a mechanism for individuals to prevent unauthorized commercial uses of their identities.² Iowa, however, is one of only 15 states which has not yet recognized the right of publicity in any form.³ So, if this advertisement was circulated in Iowa, you would have no clear mechanism to assert your legal rights. This lack of legal redress not only leaves Iowans vulnerable to commercial exploitations of their identities, but it also makes Iowans uncertain of their property rights in their identities.⁴

This Note argues that Iowa must adopt a right of publicity statute to adequately protect Iowans from the commercial exploitation of their identities. In Part II, this Note provides background on the right of publicity and specifically compares the state of Iowa's right of publicity law to the rest of the United States.⁵ Part III explores the issues Iowans face regarding their identities due to the state's nonexistent protections for the right of publicity.⁶ Finally, in Part IV, this Note proposes that Iowa's legislature adopt a right of publicity statute.⁷ This Part details the necessary issues which Iowa's statute must address⁸ and concludes with proposed statutory language for Iowa's legislature to adopt.⁹

II. THE RIGHT OF PUBLICITY

The right of publicity “is the inherent right of every human being to control the commercial use of his or her identity”¹⁰—it is “a property right in

Their Money Back, DES MOINES REG. (Apr. 18, 2018, 4:13 PM), <https://www.desmoinesregister.com/story/news/crime-and-courts/2018/04/18/fake-ads-smart-pill-drugs-brain-boosters-intellusynagen-iowa-attorney-general/527960002> [<https://perma.cc/K86V-4N5J>] (detailing how “smart pill” manufacturers falsely used photographs to indicate that Iowa-native Ashton Kutcher endorsed their product).

2. See *infra* Section II.D.

3. See *infra* Section II.D. Iowa and North Dakota are the only states in the Eighth Circuit that do not have any right of publicity law. See INT'L TRADEMARK ASS'N, RIGHT OF PUBLICITY STATE OF THE LAW SURVEY 2–4, https://www.inta.org/Advocacy/Documents/2019/INTA_2019_rop_survey.pdf [<https://perma.cc/9BE8-GZR3>] (stating that Arkansas, Nebraska, and South Dakota have right of publicity statutes, while Minnesota and Missouri recognize a common law right of publicity).

4. See *infra* Part III.

5. See *infra* Part II.

6. See *infra* Part III.

7. See *infra* Part IV.

8. See *infra* Sections IV.A–F.

9. See *infra* Section IV.G.

10. 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2020), Westlaw; see also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 569 (1977) (“[P]etitioner had ‘a right of publicity’ that gave him ‘personal control over commercial display and exploitation of his personality and the exercise of his talents.’” (quoting *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454, 459 (Ohio 1976))); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995) (“One who appropriates the commercial value of

one's personality."¹¹ The right of publicity is a state law recognized in either common-law or statutory form.¹² It falls under unfair competition law, making it an intellectual property right as opposed to a privacy right.¹³ In a case for "infringement of the right of publicity," the plaintiff must show (1) she "owns an enforceable right in the identity or persona of a human being;" (2) the "[d]efendant, without permission, has used some aspect of identity or persona in such a way that [the] plaintiff is identifiable from [the] defendant's use; and" (3) the "[d]efendant's use is likely to cause damage to the commercial value of that persona."¹⁴ Celebrities have commonly used this tort to prevent unauthorized uses of their identities;¹⁵ however, a plaintiff does not need to be famous to bring a right of publicity claim.¹⁶ This Part will first explore the history and origins of the right of publicity, as well as the fundamental justifications and primary concerns surrounding this right. This Part will conclude with a state survey of right of publicity laws, with a focus on the right of publicity in Iowa.

A. ORIGINS OF THE RIGHT OF PUBLICITY

To best understand the right of publicity, it is useful to consider the origins of its successor—the right of privacy. "The right of publicity is derived from the right of privacy"¹⁷ The right of privacy got its start around 1890

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"); JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 1* (2018) (describing the right of publicity as "the right to stop others from using our identities, particularly our names and likenesses, without permission").

11. ROTHMAN, *supra* note 10, at 1.

12. *See* 1 MCCARTHY & SCHECHTER, *supra* note 10, § 3:1.

13. *Id.*

14. *Id.* § 3:2 (footnotes omitted).

15. *See, e.g.,* *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 518 (7th Cir. 2014) (holding that basketball star, Michael Jordan, had a valid right of publicity claim after Jewel used his name and number in a congratulatory advertisement in a magazine celebrating his induction into the Hall of Fame); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463–64 (9th Cir. 1988) (holding that Bette Midler had a valid right of publicity claim when the car company had someone imitating her voice and singing her song in a commercial); Jennifer E. Rothman, *Ariana Grande Sues Forever 21 Over Social Media Posts*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (Sept. 10, 2019, 12:30 PM), <https://www.rightofpublicityroadmap.com/news-commentary/ariana-grande-sues-forever-21-over-social-media-posts> [<https://perma.cc/3UJV-TR8D>] ("[P]op sensation Ariana Grande filed a lawsuit against Forever 21 for violation of both her statutory and common law right of publicity under California law" for Instagram posts using a Grande look-alike).

16. ROTHMAN, *supra* note 10, at 2 ("The right of publicity is not only for the famous. Nor need one be a performer or athlete to bring a right of publicity claim."); *see* *KNB Enters. v. Matthews*, 78 Cal. App. 4th 362, 368 (2000) (explaining that nude models could bring a right of publicity claim); *Ippolito v. Ono-Lennon*, 526 N.Y.S.2d 877, 883 (Sup. Ct. 1988) (holding that a back-up musician could bring a right of publicity claim).

17. Annie T. Christoff, *Long Live the King: The Influence of Elvis Presley on the Right of Publicity in Tennessee*, 41 U. MEM. L. REV. 667, 669 (2011) (citation omitted); *see* 1 MCCARTHY &

when Samuel Warren and Louis Brandeis published an article in the *Harvard Law Review* advocating for a common-law right of privacy—or an individual’s “right to be let alone.”¹⁸ The courts’ reactions to this idea were mixed.¹⁹ In 1902, a New York court rejected an attempt to recognize the common-law right of privacy,²⁰ prompting the New York legislature to pass the first right of privacy statute in 1903.²¹ Despite the initial criticism, by the 1940s, American courts had generally accepted the right of privacy.²²

In those early years, however, plaintiffs who wished to use the right of privacy tort to prevent unauthorized commercial uses of their likenesses faced difficulties, as many judges equated the privacy tort with the publication of embarrassing information.²³ Under this view, many judges refused to recognize any harm apart from emotional harm.²⁴ As a consequence, in cases involving well-known plaintiffs, judges could not rationalize how a person already in the public eye would experience any mental distress from commercial uses of her likeness.²⁵ For example, in *O’Brien v. Pabst Sales Co.*, David O’Brien, a famous football player, brought an invasion of privacy action against a beer company after his photo was included on a Pabst Blue Ribbon Beer marketing calendar.²⁶ The Fifth Circuit upheld the district court’s ruling that O’Brien did not have a valid claim for invasion of privacy, stating “that any association of O’Brien’s picture with a glass of beer could not possibly disgrace or reflect upon or cause him damage.”²⁷ This judicial line of thought forced well-known and unknown plaintiffs alike to frame their commercial right of privacy claims in terms of emotional harms, even though these

SCHECHTER, *supra* note 10, § 5:61 (“Like Eve from Adam’s rib, the right of publicity was carved out of the general right of privacy.”).

18. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890); see 1 MCCARTHY & SCHECHTER, *supra* note 10, §§ 1:10–1:11 (discussing Warren and Brandeis’ article and its effect on right of privacy law).

19. 1 MCCARTHY & SCHECHTER, *supra* note 10, § 1:15. Compare *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 73 (Ga. 1905) (recognizing the common law right to privacy), with *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 556 (1902) (refusing to recognize the common law right to privacy).

20. *Roberson*, 171 N.Y. at 556 (“An examination of the authorities leads us to the conclusion that the so-called ‘right of privacy’ [sic] has not as yet found an abiding place in our jurisprudence . . .”).

21. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2019); see 1 MCCARTHY & SCHECHTER, *supra* note 10, § 1:16 (discussing the New York legislature’s response to the *Roberson* case).

22. 1 MCCARTHY & SCHECHTER, *supra* note 10, § 1:18.

23. See *id.* § 1:25.

24. See *id.*

25. See *id.* (“Judges appeared confused as to how to fit the ‘privacy’ label to a plaintiff whose identity already enjoyed widespread recognition. Some seemed to feel that there could be no ‘privacy’ in the name or face of a movie star or famous athlete.”).

26. *O’Brien v. Pabst Sales Co.*, 124 F.2d 167, 168 (5th Cir. 1941).

27. *Id.* at 169–70.

plaintiffs really just sought adequate compensation for the commercial uses of their identities.²⁸

The judicial confusion over the commercial application of the right of privacy ultimately led to the creation of the “right of publicity.”²⁹ The Second Circuit first introduced this term in the 1953 case, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, in which the court recognized that plaintiffs whose identities are misappropriated suffer commercial and financial harms and that these harms are just as valid as the emotional harms.³⁰ By the 1970s, many courts recognized a common-law right of publicity, acknowledging the commercial value people had in their names and likenesses.³¹ Finally, in 1977, the U.S. Supreme Court recognized the right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*, cementing the right’s place as a valid legal cause of action.³²

B. POLICY RATIONALES FOR THE RIGHT OF PUBLICITY

In accepting the right of publicity as a valid legal rule, the Supreme Court acknowledged various policy rationales for this right.³³ Three fundamental justifications for the right of publicity are: (1) protection of individuals’ natural and property rights; (2) provision of economic incentives and benefits to those individuals; and (3) prevention of deceptive and false advertisements.³⁴

1. Natural Rights

A core principle behind the right of publicity is that a person’s right to control the use of her identity is “self-evident.”³⁵ A person’s identity is her property, so she should have the power to control how other persons use it,

28. 1 MCCARTHY & SCHECHTER, *supra* note 10, § 1:25.

29. *See id.* §§ 1:25–1:26 (discussing the development of the right of publicity).

30. *See Haelan Lab’s, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (“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.”); 1 MCCARTHY & SCHECHTER, *supra* note 10, § 1:26 (discussing the *Haelan* case and the “[b]irth of the right of publicity”).

31. 1 MCCARTHY & SCHECHTER, *supra* note 10, §§ 1:31–1:32.

32. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977) (“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”); *see also* 1 MCCARTHY & SCHECHTER, *supra* note 10, § 1:33 (discussing the impact of the *Zacchini* decision on the right of publicity).

33. *See Zacchini*, 433 U.S. at 576 (“Of course, Ohio’s decision to protect petitioner’s right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public.”).

34. *See* 1 MCCARTHY & SCHECHTER, *supra* note 10, §§ 2:1–2:9 (discussing various policy reasons for the right of publicity).

35. *Id.* § 2:2.

including for commercial purposes.³⁶ Under this theory, the basic idea is “that my identity is *mine*—it is my property to control as I see fit.”³⁷ If companies are free to use an individual’s identity for commercial purposes, the individual will unjustly lose that chance to control and profit off her own identity (i.e., her property).³⁸ Individuals have the fundamental right to receive proper compensation for uses of their property, and the right of publicity ensures that individuals can secure this compensation.³⁹

Additionally, individuals have interests in “autonomous self-definition” and should be able to control how the public perceives them.⁴⁰ The right of publicity allows an individual to “prevent[] unauthorized commercial uses of [her] identity that interfere with meanings and values that the public associates with that person.”⁴¹ It allows an individual to shape which meanings and values she would like the public to associate her with.⁴² For example, an individual may wish to avoid any fame or disclosure of her identity altogether, and the right of publicity allows her to do this.⁴³

36. *Id.*; see also Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1352 (2009) (“[I]dentity is a concept completely intrinsic to the individual to whom it is attached and therefore properly subject to that individual’s control.” (citation omitted)).

37. 1 MCCARTHY & SCHECHTER, *supra* note 10, § 2:1.

38. See *Zacchini*, 433 U.S. at 576 (“The rationale for (protecting the right of publicity) is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.” (quoting Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966))); *Munden v. Harris*, 134 S.W. 1076, 1078 (Mo. Ct. App. 1911) (“One may have peculiarity of appearance, and if it is to be made a matter of merchandise, why should it not be for his benefit? It is a right which he may wish to exercise for his own profit, and why may he not restrain another who is using it for gain? If there is value in it, sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?”); Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 873 (1995) (“[T]here is something wrong, a manifest ‘unfairness,’ when one person seeks to trade on the personality of another.” (citation omitted)); 1 MCCARTHY & SCHECHTER, *supra* note 10, § 2:2.

39. See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 151 (3d Cir. 2013) (“[T]he right to exploit the value of [an individual’s] notoriety or fame belongs to the individual with whom it is associated, for an individual’s name, likeness, and endorsement carry value and an unauthorized use harms the person both by diluting the value of the name and depriving that individual of compensation.” (second alteration in original) (internal quotation marks omitted) (citation omitted)).

40. 1 MCCARTHY & SCHECHTER, *supra* note 10, § 2:9; Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 285 (2005).

41. 1 MCCARTHY & SCHECHTER, *supra* note 10, § 2:9.

42. *Id.*

43. See Daniel Gervais & Martin L. Holmes, *Fame, Property, and Identity: The Scope and Purpose of the Right of Publicity*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 181, 195 (2014).

2. Economic Incentives

Another justification for the right of publicity is that the protection afforded will incentivize individuals to commercialize their identities.⁴⁴ With this economic incentive, individuals are more likely to devote time and resources to “develop [their] personalit[ies] and pursue creative endeavors,” which in turn enriches society.⁴⁵ Many courts view this incentive justification as the primary rationale for the right of publicity.⁴⁶

Similarly, many economists reason that the right of publicity rests on a theory of economic efficiency. As the theory goes, protection of “a[n] [individual]’s identity will result in the best and most efficient use of that name and likeness.”⁴⁷ In a state that recognizes the right of publicity, rather than any advertiser being able to use an individual’s identity for free, the advertiser who attributes the most commercial value to the individual’s identity will pay the highest price for the right to use the identity.⁴⁸ Thus, the right of publicity helps an individual reap the full value of her identity through restrictions on the use of her identity.⁴⁹

3. False Advertisements

An additional rationale for the right of publicity is that this “right . . . protects consumers from being deceived into thinking that a public

44. 1 MCCARTHY & SCHECHTER, *supra* note 10, § 2:6.

45. ROTHMAN, *supra* note 10, at 100; *see also* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 577 (1977) (stating that the right of publicity, just like copyright and patent protection, “afford[s] greater encouragement to the production of works of benefit to the public”); *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994) (“Protecting one’s name or likeness from misappropriation is socially beneficial because it encourages people to develop special skills, which then can be used for commercial advantage.”).

46. *See* *Dryer v. Nat’l Football League*, 814 F.3d 938, 943 (8th Cir. 2016) (“The primary rationales underlying the right of publicity . . . are ‘the desire to provide incentives to encourage a person’s productive activities’” (quoting *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007))); 1 MCCARTHY & SCHECHTER, *supra* note 10, § 2:6 (“[The incentive justification] is the rationale most often given in the case law.”).

47. 1 MCCARTHY & SCHECHTER, *supra* note 10, § 2:7; *see* *Gervais & Holmes*, *supra* note 43, at 195.

48. *See* Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 411 (1978) (“There is a perfectly good economic reason for assigning the property right in a photograph used for advertising purposes to the photographed individual: this assignment assures that the advertiser to whom the photograph is most valuable will purchase it. Making the photograph the communal property of advertisers would not achieve this goal.”); 1 MCCARTHY & SCHECHTER, *supra* note 10, § 2:7 (“Posner has argued that the economic rationale for legal recognition of a property right in a name or photo is to assure that the advertiser to whom the name or photo is most valuable will purchase a license to it.”).

49. *See* *Wozencraft*, 15 F.3d at 438 (“[I]f a well-known public figure’s picture could be used freely to endorse commercial products, the value of his likeness would disappear.”); Posner, *supra* note 48, at 411 (“[T]he multiple use of the identical photograph to advertise different products would reduce its advertising value, perhaps to zero.”).

personality has endorsed a specific product or service when that person's identity has been used without permission.”⁵⁰ The right of publicity acts as a legal barrier against both consumer confusion and harms to the individual caused by consumers associating the individual with a certain product.⁵¹ However, this justification does not have much support in the legal community because consumer confusion has no impact on the cause of action for the right of publicity, which focuses on the harm of the individual whose identity has been misappropriated rather than the consumers affected.⁵² The Lanham Act, which provides causes of action for false designation of origin and false advertising, better prevents false endorsements and false advertisements causing consumer confusion.⁵³

C. FREE SPEECH CONCERNS

Despite sound rationales, many scholars are concerned about whether the right of publicity could potentially conflict with the First Amendment's protection of free speech.⁵⁴ This concern is ever present as the right of publicity effectively limits speech by restricting certain uses of an individual's identity.⁵⁵ In *Zacchini*, the Supreme Court's first and only case addressing the right of publicity, the Court acknowledged that courts and legislatures must balance the interests of the right of publicity with the interests of free speech.⁵⁶ With this decision, the Court made clear that while lower courts must take First Amendment concerns into account, these concerns do not

50. ROTHMAN, *supra* note 10, at 102.

51. *Id.*; see 1 MCCARTHY & SCHECHTER, *supra* note 10, § 2:8.

52. See ROTHMAN, *supra* note 10, at 102; 1 MCCARTHY & SCHECHTER, *supra* note 10, § 2:8.

53. See 15 U.S.C. § 1125(a) (2018); 1 MCCARTHY & SCHECHTER, *supra* note 10, § 2:8 (“If legally provable falsity is necessary to state a claim for invasion of the right of publicity, it would be a redundant legal theory [to the Lanham Act].”).

54. 2 MCCARTHY & SCHECHTER, *supra* note 10, § 8:22. See generally Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003) (analyzing how free speech concerns may limit the right of publicity).

55. See ROTHMAN, *supra* note 10, at 138 (“The right of publicity has been wielded to shut down, penalize, and discourage references to, commentary about, and depictions of real people in comic books, news, works of art, movies, dolls, video games, plays, T-shirts, songs, posters, and political campaigns.”).

56. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574–75 (1977) (“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.”); *Sarver v. Chartier*, 813 F.3d 891, 904 (9th Cir. 2016) (“The [*Zacchini*] Court balanced this state interest against the station's countervailing First Amendment interests in broadcasting *Zacchini*'s performance.”); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 152 (3d Cir. 2013) (“In [*Zacchini*], the Court called for a balancing test to weigh the interest underlying the First Amendment against those underpinning the right of publicity. . . . [W]hile the Court did not itself engage in an explicit balancing inquiry, it did suggest that the respective interests in a case should be balanced against each other.” (citation omitted)).

automatically outweigh the right of publicity.⁵⁷ In response, courts have taken a variety of approaches to address the right of publicity's conflict with free speech, from developing balancing tests to distinguishing between commercial and noncommercial speech.⁵⁸

1. Balancing Free Speech and Right of Publicity Interests

The Supreme Court in *Zacchini* did not propose a specific balancing test,⁵⁹ so courts have developed a variety of tests to balance the competing interests of free speech and the right of publicity, including (1) the predominant use test; (2) the *Rogers* test; (3) the transformative use test; and (4) the Eighth Circuit's nature-injury balancing approach.⁶⁰

First, the predominant use test provides that if the accused infringer's predominant purpose for using the individual's identity is to "exploit[] the commercial value of an individual's identity," then the accused use violates the individual's right of publicity.⁶¹ In *Doe v. TCI Cablevision*, the Missouri Supreme Court adopted the predominant use test to determine whether a comic book creator had misappropriated famous hockey player Tony Twist's right of publicity by naming a comic villain after him.⁶² The court concluded that the predominant use of Tony Twist's name in the comic was to sell comic books rather than to create artistic value.⁶³ So, the court rejected the comic book creator's free speech defense, because the interests in protecting Twist's

57. See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 806 (Cal. 2001) ("[T]wo principles enunciated in *Zacchini* apply to this case: (1) state law may validly safeguard forms of intellectual property not covered under federal copyright and patent law as a means of protecting the fruits of a performing artist's labor; and (2) the state's interest in preventing the outright misappropriation of such intellectual property by others is not automatically trumped by the interest in free expression or dissemination of information; rather, as in the case of defamation, the state law interest and the interest in free expression must be balanced, according to the relative importance of the interests at stake." (citation omitted)).

58. See 2 MCCARTHY & SCHECHTER, *supra* note 10, § 8:23 (discussing the various methods courts use to balance free speech concerns with the right of publicity); see also ROTHMAN, *supra* note 10, at 145-46 (same).

59. See *Hart*, 717 F.3d at 152 ("[T]he Court [in *Zacchini*] did not itself engage in an explicit balancing inquiry . . .").

60. 2 MCCARTHY & SCHECHTER, *supra* note 10, § 8:23.

61. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) ("If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some 'expressive' content in it that might qualify as 'speech' in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight." (quoting Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 500 (2003))).

62. *Id.* at 365.

63. *Id.* at 374 ("[T]he use and identity of Twist's name has become predominantly a ploy to sell comic books and related products rather than an artistic or literary expression, and under these circumstances, free speech must give way to the right of publicity.").

right of publicity outweighed First Amendment concerns.⁶⁴ However, courts outside of Missouri rarely use this test because asking courts to weigh the artistic value of uses of identity (or characters in comic books) is considered too subjective.⁶⁵

Alternatively, the *Rogers* test, which the Second Circuit originally developed in the context of trademark law, focuses on whether the use of the plaintiff's likeness or any reference to the plaintiff has any "artistic relevance" to the defendant's work as a whole.⁶⁶ Under this test, courts may afford First Amendment protection to a given artistic work unless it falls into one of two categories. First, if the reference to the plaintiff "has no artistic relevance to the underlying work whatsoever," it will not be protected.⁶⁷ Second, even if the reference does have some artistic relevance to the work, it will not be protected if it "explicitly misleads as to the source or the content of the work."⁶⁸

In *Parks v. LaFace Records*, the Sixth Circuit applied the *Rogers* test to a right of publicity claim brought by Rosa Parks against the musical group OutKast after it released a song titled *Rosa Parks*.⁶⁹ Under the first prong of the *Rogers* test, the court considered whether the song title had any artistic relevance to the contents of the song.⁷⁰ While the only lyric making any connection to Parks was "move to the back of the bus,"⁷¹ OutKast argued that "the song's title was 'metaphorical and symbolic.'"⁷² The court concluded that there was a genuine issue of fact and remanded the case to the district court to have the jury consider these issues.⁷³ If the jury concluded that the song title had no artistic relevance to the contents of the song, then OutKast would be liable for infringement of Parks' right of publicity.⁷⁴ If the jury found that the song title was artistically relevant, then OutKast would only be liable if the jury concluded that the song title was "explicitly misleading as to the content of the [song]."⁷⁵ Ultimately, the jury never got to consider these issues because

64. *Id.*

65. See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 154 (3d Cir. 2013) ("[T]he Predominant Use Test is subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning art critics. These two roles cannot co-exist."); 2 MCCARTHY & SCHECHTER, *supra* note 10, § 8:23 ("This test enjoys little following outside the state of its creation.")

66. *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989).

67. *Id.*

68. *Id.*

69. *Parks v. LaFace Records*, 329 F.3d 437, 460–61 (6th Cir. 2003).

70. *Id.* at 452.

71. *Id.* at 452–53.

72. *Id.* at 454 (quoting *Parks v. LaFace Records*, 76 F. Supp. 2d 775, 780 (E.D. Mich. 1999)).

73. *Id.* at 458.

74. *Id.* at 459.

75. *Id.* (citation omitted).

Parks' estate and OutKast ended up settling the case.⁷⁶ Despite this prominent example, the Sixth Circuit has been the only court to apply the *Rogers* test to right of publicity claims.⁷⁷ Most courts consider this test to be too narrow and ill-suited for the broad right of publicity.⁷⁸

In contrast, the copyright-based transformative use test is the most commonly used balancing test.⁷⁹ This test provides that the right of publicity does not apply to artistic works if "a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness."⁸⁰ For example, in *Comedy III v. Saderup*, the Supreme Court of California applied the transformative use test to the defendant's sale of t-shirts containing charcoal drawings of the Three Stooges.⁸¹ The court held that the defendant's work was not "sufficiently transformative" to afford First Amendment protection; his drawings were too literal, making their primary purpose the exploitation of the Three Stooges' fame.⁸² However, some critics suggest that due to the vagueness of the transformative use test, courts should limit the scope of this test to instances when the accused infringer uses an artistic depiction of an individual's image in a non-advertising context, i.e., the facts in *Comedy III*.⁸³

76. Gary Susman, *Rosa Parks Settles Lawsuit Against Outkast*, ENT. WKLY. (Apr. 15, 2005, 4:00 AM), <https://ew.com/article/2005/04/15/rosa-parks-settles-lawsuit-against-outkast> [https://perma.cc/TCJ3-A8XD].

77. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1281 (9th Cir. 2013) ("[T]he only circuit court to import the *Rogers* test into the publicity arena, the Sixth Circuit, has done so inconsistently."); *Parks*, 329 F.3d at 461 (applying the *Rogers* test to the plaintiff's right of publicity claim); 2 MCCARTHY & SCHECHTER, *supra* note 10, § 8:23 ("Only the Sixth Circuit has used the *Rogers* test to balance free speech with right of publicity claims against uses in expressive works.").

78. *See* Hart v. Elec. Arts, Inc., 717 F.3d 141, 157–58 (3d Cir. 2013) ("We are concerned that [the *Rogers*] test is a blunt instrument, unfit for widespread application in cases that require a carefully calibrated balancing of two fundamental protections: the right of free expression and the right to control, manage, and profit from one's own identity. . . . [T]he right of publicity is broader [than trademark protections] and, by extension, protects a greater swath of property interests. Thus, it would be unwise for us to adopt a test that hews so closely to traditional trademark principles. Instead, we need a broader, more nuanced test, which helps balance the interests at issue in cases such as the one at bar.").

79. 2 MCCARTHY & SCHECHTER, *supra* note 10, § 8:23.

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

81. *Id.* at 809–10.

82. *Id.* at 810–11 ("Turning to [defendant]'s work, we can discern no significant transformative or creative contribution. His undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame. Indeed, were we to decide that [defendant]'s depictions were protected by the First Amendment, we cannot perceive how the right of publicity would remain a viable right other than in cases of falsified celebrity endorsements. Moreover, the marketability and economic value of [defendant]'s work derives primarily from the fame of the celebrities depicted.").

83. *See* 2 MCCARTHY & SCHECHTER, *supra* note 10, § 8:72 ("[T]he 'transformative' test is restricted to the kind of case the court was faced with: an artistic visual depiction of a celebrity image.").

Finally, the Eighth Circuit has adopted its own balancing approach in right of publicity cases, which “weighs the nature of the use against the likely injury to the publicity-holder.”⁸⁴ For example, in *C.B.C. Distribution v. Major League Baseball*, the Eighth Circuit held that the First Amendment protected a fantasy sports company’s use of Major League Baseball players’ names and information (e.g., playing statistics and background data) in its fantasy baseball game.⁸⁵ The court reasoned that this information was already in the public domain and had great “public value” due to baseball’s national importance.⁸⁶ In the court’s view, this interest outweighed any potential injury to the baseball players who are already “rewarded, and handsomely, too, for their participation in games.”⁸⁷

Unfortunately, these various balancing tests have produced inconsistent results among the circuits, with some approaches arguably providing better free speech protections.⁸⁸ For example, the Ninth Circuit, using the transformative use test, held that the First Amendment did not protect the defendant’s use of college football players’ names and likenesses in a video game.⁸⁹ This ruling seems to directly contradict the Eighth Circuit’s holding that the First Amendment protected the use of baseball players’ names and information in a fantasy baseball game.⁹⁰

2. Commercial Speech

Apart from balancing tests, many courts use the distinction between commercial and non-commercial speech to adequately address free speech concerns.⁹¹ Courts generally offer less First Amendment protection to commercial speech because “[i]t deals with the sale of goods, and not with

84. ROTHMAN, *supra* note 10, at 145–46.

85. *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007) (“[W]e hold that CBC’s first amendment rights in offering its fantasy baseball products supersede the players’ rights of publicity . . .”).

86. *Id.* at 823.

87. *Id.* at 824.

88. ROTHMAN, *supra* note 10, at 147–48.

89. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1276 (9th Cir. 2013).

90. *C.B.C. Distrib.*, 505 F.3d at 824.

91. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983) (“[T]he degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or noncommercial speech . . .”); 2 MCCARTHY & SCHECHTER, *supra* note 10, § 8:17 (“[C]ommercial speech occupies a lower position, but a not clearly defined one, in the hierarchy of the First Amendment. A much less compelling countervailing interest is sufficient to place some restriction on ‘commercial speech’ than would be necessary if the speech were noncommercial in nature.”).

the promulgation of ideas.”⁹² Thus, for commercial speech, the right of publicity interests often outweigh the free speech interests.⁹³

“[T]he ‘core notion of commercial speech’ is that it ‘does no more than propose a commercial transaction.’”⁹⁴ However, many courts do not limit commercial speech to this core definition.⁹⁵ Speech often contains both commercial and non-commercial elements, so courts consider factors such as “whether: (1) the speech is an advertisement; (2) the speech refers to a specific product; and (3) the speaker has an economic motivation for the speech” when determining whether there is commercial speech.⁹⁶ Once a court determines that an accused use is commercial speech, this conclusion often defeats any free speech defense against a right of publicity claim.⁹⁷ That said, many courts have also allowed right of publicity claims for non-commercial speech.⁹⁸

92. *Onassis v. Christian Dior-N.Y., Inc.*, 472 N.Y.S.2d 254, 262 (Sup. Ct. 1984), *aff’d*, 488 N.Y.S.2d 943 (App. Div. 1985); *see also 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.” (citation omitted)).

93. *See 2 MCCARTHY & SCHECHTER*, *supra* note 10, § 8:17 (“A much less compelling countervailing interest is sufficient to place some restriction on ‘commercial speech’ than would be necessary if the speech were noncommercial in nature.”); *see also Cent. Hudson Gas*, 447 U.S. at 566 (“In commercial speech cases, then, a four-part analysis has developed [to determine whether the First Amendment protects commercial speech]. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”).

94. *Hoffman v. Cap. Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001) (quoting *Bolger*, 463 U.S. at 66).

95. *See, e.g., Bolger*, 463 U.S. at 67–68 (holding that the use of the plaintiff’s likeness in an informational pamphlet discussing venereal disease was commercial speech); *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 522 (7th Cir. 2014) (holding that the defendant’s use of Michael Jordan’s likeness in a congratulatory magazine advertisement constituted commercial speech); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 415 (9th Cir. 1996) (holding that the defendant’s use of Karim Abdul-Jabbar’s birth name (Lew Alcindor) to answer a trivia question in a commercial constituted commercial speech).

96. *Jordan*, 743 F.3d at 517 (citing *United States v. Benson*, 561 F.3d 718, 725 (7th Cir. 2009)); 2 MCCARTHY & SCHECHTER, *supra* note 10, § 8:18 (“In the vast majority of cases, the imposition of liability for infringement of the right of publicity will not offend constitutional protection given to commercial speech.” (footnote omitted)).

97. *See Jordan*, 743 F.3d at 522 (“[W]e hold that Jewel’s ad in the commemorative issue qualifies as commercial speech. This defeats Jewel’s constitutional defense, permitting Jordan’s case to go forward.”).

98. *See, e.g., Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001) (allowing a right of publicity claim for use of a charcoal drawing of plaintiff’s likeness on a t-shirt); *No Doubt v. Activision Publ’g, Inc.*, 122 Cal. Rptr. 3d 397, 411–12 (Ct. App. 2011) (allowing a right of publicity claim for the use of the plaintiff band’s likeness in a video game); ROTHMAN, *supra* note 10, at 87–88 (“The right [of publicity] has been successfully wielded against a variety of noncommercial speech, including uses in expressive works, from movies, to comic

3. How Are State Statutes Addressing Free Speech?

States with statutory rights of publicity have taken various approaches to address First Amendment concerns in their statutes, rather than relying on the courts to conduct balancing tests.⁹⁹ Under the most common approach, several states have outlined statutory exemptions to the right of publicity.¹⁰⁰ For example, California provides statutory defenses for uses in the “news, public affairs, . . . sports broadcast . . . or any political campaign.”¹⁰¹ In contrast, Utah and Virginia provide no statutory defenses and thus rely on the courts to balance First Amendment interests.¹⁰²

Many states have also taken the approach of specifically limiting their right of publicity causes of action to commercial activities.¹⁰³ For example, Illinois’ law provides that “[a] person may not use an individual’s identity for commercial purposes.”¹⁰⁴ The statute explicitly defines “[c]ommercial purpose” as “the public use or holding out of an individual’s identity (i) on or in connection with the offering for sale or sale of a product, merchandise, goods, or services; (ii) for purposes of advertising or promoting products, merchandise, goods, or services; or (iii) for the purpose of fundraising.”¹⁰⁵

books, to video games, to busts of civil rights heroes, and even to uses in news reporting and political campaigns.”).

99. See ROTHMAN, *supra* note 10, at 3 (“Some states limit their right of publicity to uses in advertising or in connection with products or services, or on merchandising, while other states allow claims arising out of virtually any use of a person’s identity, including uses in news, movies, books, video games, and political campaigns.”).

100. See, e.g., IND. CODE ANN. § 32-36-1-1 (c) (West 2020) (“This chapter does not apply to . . . [l]iterary works . . . [m]aterial that has political or newsworthy value”); ALA. CODE § 6-5-773(b) (2020) (“It is a fair use and not a violation of [this Act] if the use of the indicia of identity is in connection with a news, public affairs, or public interest account, political speech or a political campaign, live or prerecorded broadcast or streaming of a sporting event or photos, clips, or highlights included in broadcasts or streaming of sports news or talk shows, or documentaries, or any advertising or promotion of the same (public interest work), or is part of an artistic or expressive work, such as a live performance, work of art, literary work, theatrical work, musical work, audiovisual work, motion picture, film, television program, radio program or the like (artistic work), or any advertising or promotion of the same, unless the claimant proves, subject to subsection (a), that the use in an artistic work is such a replica as to constitute a copy of the person’s indicia of identity for the purposes of trade.”).

101. CAL. CIV. CODE § 3344(d) (West 2020).

102. UTAH CODE ANN. § 45-3-1 (West 2020); VA. CODE ANN. § 8.01-40 (West 2020).

103. See, e.g., IND. CODE ANN. § 32-36-1-8 (“A person may not use an aspect of a personality’s right of publicity for a commercial purpose”); OHIO REV. CODE ANN. § 2741.02 (West 2020) (“Except as otherwise provided in this section, a person shall not use any aspect of an individual’s persona for a commercial purpose”); NEV. REV. STAT. ANN. § 597.780 (West 2019) (“The provisions of [this Act] . . . apply to any commercial use within this state of a living or deceased person’s name, voice, signature, photograph or likeness regardless of the person’s domicile.”).

104. 765 ILL. COMP. STAT. ANN. 1075/30 (West 2020).

105. *Id.* 1075/5.

D. THE CURRENT LANDSCAPE OF RIGHT OF PUBLICITY LAWS: IOWA AND BEYOND

Due to the important purposes served by the right of publicity, many states have established a legal mechanism to allow individuals to enforce this right. Thirty-five of the 50 states have recognized the right of publicity in some form, either by statute or common law.¹⁰⁶ Twenty-four states have a right of publicity statute,¹⁰⁷ while 11 states only recognize the right at common law.¹⁰⁸ Although the basic foundation of each state's right of publicity is similar, the states vary greatly on certain provisions. For example, states disagree on who can bring a right of publicity claim and what types of uses constitute infringement of that right:

Some states limit their right of publicity to uses in advertising or in connection with products or services, or on merchandising, while other states allow claims arising out of virtually any use of a person's identity, including uses in news, movies, books, video games, and political campaigns. Some states allow only those who are residents (domiciled) in the state (or were at the time of death) to bring claims. Others allow anyone to sue. Some states limit claims to those with commercially valuable identities, while others do not. Some states require the use of a person's actual name, likeness, or voice, but others allow liability for any use that conjures up a person's identity. Some states limit right of publicity actions to the living, while others allow heirs to bring claims on the basis of uses of a deceased person's identity.¹⁰⁹

106. INT'L TRADEMARK ASS'N, *supra* note 3.

107. See *id.* The states with a statutory right of publicity include: Alabama (ALA. CODE §§ 6-5-770 to 6-5-774 (2020)); Arizona (for soldiers only, ARIZ. REV. STAT. ANN. § 12-761 (2020)); Arkansas (ARK. CODE ANN. §§ 47-5-1101 to 47-5-1113 (West 2020)); California (CAL. CIV. CODE § 3344 (West 2020)); Florida (FLA. STAT. ANN. §§ 540.08–540.10 (West 2020)); Hawaii (HAW. REV. STAT. ANN. §§ 482P-1 to 482P-8 (West 2019)); Illinois (765 ILL. COMP. STAT. ANN. 1075/1 to 1075/60); Indiana (IND. CODE ANN. §§ 32-36-1-0.2 to 32-36-1-20); Kentucky (KY. REV. STAT. ANN. § 391.170 (West 2020)); Louisiana (for deceased soldiers only, LA. STAT. ANN. § 14:102.21 (2019)); Nebraska (NEB. REV. STAT. ANN. §§ 20-201 to 20-211 (West 2020)); Nevada (NEV. REV. STAT. ANN. §§ 597.770–597.810); New York (N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2020)); Ohio (OHIO REV. CODE ANN. §§ 2741.01–2741.99); Oklahoma (OKLA. STAT. ANN. tit. 12, §§ 1448–1450 (West 2020)); Pennsylvania (42 PA. STAT. AND CONS. STAT. ANN. § 8316 (West 2020)); Rhode Island (9 R.I. GEN. LAWS ANN. §§ 9-1-28 to 9-1-28.1 (West 2020)); South Dakota (S.D. CODIFIED LAWS §§ 21-64-1 to 21-64-12 (2020)); Tennessee (TENN. CODE ANN. §§ 47-25-1101 to 47-25-1108 (West 2020)); Texas (TEX. PROP. CODE ANN. §§ 26.001–26.015 (West 2019)); Utah (UTAH CODE ANN. §§ 45-3-1 to 45-3-6); Virginia (VA. CODE ANN. § 8.01-40); Washington (WASH. REV. CODE ANN. §§ 63.60.040–63.60.080 (West 2020)); and Wisconsin (WIS. STAT. ANN. § 995.50 (West 2020)).

108. The states that only recognize a common law right of publicity include: Connecticut, Georgia, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, South Carolina, and West Virginia. See INT'L TRADEMARK ASS'N, *supra* note 3.

109. ROTHMAN, *supra* note 10, at 3.

In contrast to the majority of states, Iowa has not yet recognized a statutory or common law right of publicity.¹¹⁰ In 1999, an Iowa “district court . . . predicted that Iowa would recognize a[] . . . right of publicity,”¹¹¹ but, more than 20 years later, that prediction has yet to come true.¹¹² While not the same, Iowa does recognize a common law right of privacy and the invasion of privacy tort.¹¹³ The Iowa Supreme Court adopted the invasion of privacy tort based on the Restatement (Second) of Torts,¹¹⁴ which provides that “[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”¹¹⁵ Yet, no Iowa court has applied the misappropriation branch of the invasion of privacy tort in a case.¹¹⁶ Therefore, Iowans have no guidance on how to properly assert their rights in their identities.

III. ANALYZING THE DANGERS FACING IOWANS AND THEIR IDENTITIES

This Part analyzes the dangers Iowans face with respect to unauthorized uses of their identities due to the nonexistence of a right of publicity law in the state. The main dangers the proposed right of publicity statute aims to resolve include (1) Iowans’ uncertainty about their intellectual property rights;¹¹⁷ (2) social media and deepfake technology, which make it easier for advertisers to misappropriate an individual’s identity;¹¹⁸ and (3) Iowa’s need for a neutral statute, devoid of special interest group bias.¹¹⁹

A. IOWANS NEED CERTAINTY IN THEIR INTELLECTUAL PROPERTY RIGHTS

With no right of publicity law, Iowans have no certainty about their intellectual property rights in their personas. Theoretically, one could argue

110. Jennifer E. Rothman, *Iowa*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY (July 19, 2019), <https://www.rightofpublicityroadmap.com/law/iowa> [<https://perma.cc/RV2U-P8E2>]; see MATTHEW A. WARNER-BLANKENSHIP, RIGHT OF PUBLICITY LAWS: IOWA (2020), Westlaw 6-525-9166.

111. See Rothman, *supra* note 110 (discussing Sharp-Richardson v. Boyds Collection, Ltd., No. C 96-0344 MJM, 1999 WL 33656875, at *15 (N.D. Iowa Sept. 30, 1999) (“[T]his Court believes that the Iowa Supreme Court, if faced directly with a ‘right of publicity[.]’ claim, would allow such a claim to proceed.”)).

112. See *id.* (stating that Iowa does not recognize the right of publicity); WARNER-BLANKENSHIP, *supra* note 110.

113. See Rothman, *supra* note 110 (discussing Winegard v. Larsen, 260 N.W.2d 816, 818 (Iowa 1977) (“We recognize a common law tort for invasion of privacy in Iowa.” (citing Bremmer v. J. Trib. Publ’g Co., 76 N.W.2d 762 (Iowa 1956)))).

114. Howard v. Des Moines Reg. & Trib. Co., 283 N.W.2d 289, 291 (Iowa 1979) (“We have adopted the principles of the tort delineated in Restatement (Second) of Torts [§] 652 (1977).” (citing *Winegard*, 260 N.W.2d at 822)).

115. RESTATEMENT (SECOND) OF TORTS § 652C (1977).

116. Rothman, *supra* note 110; WARNER-BLANKENSHIP, *supra* note 110.

117. See *infra* Section III.A.

118. See *infra* Section III.B.

119. See *infra* Section III.C.

that Iowans have adequate protection over their personas under the misappropriation branch of the common law right of privacy,¹²⁰ but no Iowa court has applied this branch of the doctrine.¹²¹ So, potential plaintiffs have no precedent to follow nor do they have any predictability under this theory, increasing the risks of an expensive litigation. In addition, as detailed in Section II.A, there has been ample judicial confusion over application of the right of privacy to commercial harms.¹²²

Not only does this uncertainty make Iowans less inclined to litigate unauthorized uses of their identities, it makes Iowans less inclined to invest in and develop their identities.¹²³ This idea is consistent with the incentive justification for the right of publicity: Without the right of publicity, individuals are less likely to commercialize their identities.¹²⁴

One shift that demonstrates the increased need for Iowans to have certainty over their intellectual property rights in their identities is the recently proposed legislation to compensate student-athletes for uses of their names and likenesses. In response to the NCAA's updated policy allowing college student-athletes to receive compensation for commercial uses of their names and likenesses¹²⁵ and California's Fair Pay to Play Act,¹²⁶ several states have introduced legislation to provide compensation to student-athletes.¹²⁷ On January 21, 2020, Iowa Senators Nate Boulton and Brad Zaun introduced a similar student-athlete compensation bill to go in effect in 2023.¹²⁸ Under this bill,¹²⁹ Iowa universities would not be allowed to prevent college athletes

120. See *Winegard v. Larson*, 260 N.W.2d 816, 822 (Iowa 1977) ("The right of privacy is invaded by . . . appropriation of the other's name, or likeness . . .").

121. See *supra* Section II.D.

122. See *supra* Section II.A.

123. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) ("[T]he [right of publicity] protection provides an economic incentive for [individuals] to make the investment required to produce a performance of interest to the public.").

124. See *supra* Section II.B.2.

125. Thomas Baker, *5 Issues to Keep an Eye on with the NCAA's New NIL Policy*, FORBES (Nov. 1, 2019, 11:40 AM), <https://www.forbes.com/sites/thomasbaker/2019/11/01/examining-the-ncaas-evolving-nil-policy-keep-an-eye-on-the-following-issues/#2a2586227591> [<https://perma.cc/3HVJ-V3PR>].

126. Jack Kelly, *Newly Passed California Fair Pay to Play Act Will Allow Student Athletes to Receive Compensation*, FORBES (Oct. 1, 2019, 12:36 PM), <https://www.forbes.com/sites/jackkelly/2019/10/01/in-a-revolutionary-change-newly-passed-california-fair-pay-to-play-act-will-allow-student-athletes-to-receive-compensation/#56d7e5d257do> [<https://perma.cc/MF3Y-8HMR>].

127. Baker, *supra* note 125 (stating that California, "Colorado, Florida, Illinois, Kentucky, Minnesota, Nevada, New York, Pennsylvania, South Carolina, and Washington" have all introduced student-athlete compensation legislation).

128. James Q. Lynch, *Iowa Senate Bill Calls for Trust Funds for College Athletes*, GAZETTE (Jan. 21, 2020), <https://www.thegazette.com/subject/news/government/iowa-legislature-college-university-sports-ncaa-athlete-money-trust-fund-20200122> [<https://perma.cc/KMQG-Z2YY>].

129. S.F. 2330, 88th Gen. Assemb., Reg. Sess. (Iowa 2020).

from profiting from their names and likenesses by precluding their eligibility.¹³⁰

However, without a right of publicity statute, there is no clear mechanism for student-athletes to enforce their newly established rights to profit from commercial uses of their identities. If a company uses a student-athlete's image in an advertisement without her consent, what legal redress does she have? Iowa conflicts with the majority approach, as most of the states that have introduced similar legislation have recognized the right of publicity in some form.¹³¹ The student-athlete compensation bill is directed primarily at the actions of universities and athlete eligibility, not the actions of third-party advertisers.¹³² Accordingly, it does not provide a mechanism for student-athletes to sue third parties for unauthorized commercial uses of their names and likenesses.¹³³ Again, Iowa is behind the curve, leaving Iowa's student-athletes uncertain about their rights.

With the proposed right of publicity statute, Iowans will have certainty about their rights and the incentive to create and make investments in their personas, ultimately benefiting society and promoting economic growth.¹³⁴

B. RISE OF SOCIAL MEDIA AND "DEEFAKE" TECHNOLOGY

Not only are Iowans uncertain about their rights in their personas, they are also vulnerable due to the ample publicity dangers associated with social media outlets and digital manipulation technology (more commonly known as "deepfake" technology). Given the pervasive prevalence of social media in Iowans' lives as well as the recent rise in deepfake technology, it is easier than ever for advertisers to misappropriate an individual's identity.¹³⁵

130. Lynch, *supra* note 128; see also Evan Gourvitz, *INSIGHT: Student-Athletes on Cusp of Compensation with 'Right of Publicity' Changes*, BLOOMBERG L. (Dec. 20, 2019, 3:00 AM), <https://news.bloomberglaw.com/us-law-week/insight-student-athletes-on-cusp-of-compensation-with-right-of-publicity-changes> [<https://perma.cc/6XCG-PZ9L>] ("Essentially, . . . if and when these reforms go into effect, college student-athletes will—or, at least theoretically, *should*—be able to exploit their rights of publicity in the same manner as professional athletes, and to seek compensation for the use of their names and images for commercial purposes."). However, Iowa universities may require the athletes to deposit some (or all) of their earnings into trust funds that the athletes will not be able to access until they are no longer eligible to participate in their sports. Lynch, *supra* note 128.

131. See *supra* notes 107–08, 127 and accompanying text.

132. S.F. 2330, 88th Gen. Assemb., Reg. Sess. (Iowa 2020).

133. *Id.*

134. See Thomas G. Field, Jr., *What Is Intellectual Property?*, in FOCUS ON INTELLECTUAL PROPERTY RIGHTS 2, 2 (2006), https://photos.state.gov/libraries/korea/49271/dwoa_122709/Focus-On-Intellectual-Property-Rights.pdf [<https://perma.cc/Q9XE-DT4W>] ("[Countries protect intellectual property rights] because they know safeguarding these property rights fosters economic growth, provides incentives for technological innovation, and attracts investment that will create new jobs and opportunities for all their citizens.").

135. See Lisa Eadicicco, *There's a Terrifying Trend on the Internet That Could Be Used to Ruin Your Reputation, and No One Knows How to Stop It*, BUS. INSIDER (July 10, 2019, 10:01 AM), <https://www.businessinsider.com/dangerous-deepfake-technology-spreading-cannot-be-stopped-2019-7>

Individuals are especially vulnerable to violations of their rights of publicity on social media platforms, which have become much more prevalent within the last decade.¹³⁶ For example, in 2011, a group of plaintiffs sued Facebook for alleged violations under California's right of publicity statute arising from Facebook's use of "Sponsored Stories."¹³⁷ These "stories" were paid advertisements that appeared on Facebook users' home pages, showing that one of the users' friends had "liked" the advertiser, along with the friend's profile, name, and photo.¹³⁸ The plaintiffs' claims survived Facebook's motion to dismiss, with the district court finding that the plaintiffs alleged a sufficient commercial harm under California's statute.¹³⁹ Ultimately, Facebook ended up paying \$20 million to settle this lawsuit.¹⁴⁰ Additionally, social media users post personal information and photographs all over social media platforms, providing advertisers with easy access to individuals' names and likenesses, which they may commercially misappropriate.¹⁴¹

In addition to the dangers posed by social media, individuals are also vulnerable to uses of "deepfake" technology to misappropriate their identities. Deepfake technology employs artificial-intelligence and machine-learning algorithms to create fake and doctored photos, videos, and

[<https://perma.cc/Z7VG-7T5C>] ("The rise of deepfakes, or videos created using AI that can make it look like someone said or did something they have never done, has raised concerns over how such technology could be used to spread misinformation and damage reputations.").

136. Cydney Tune & Lori Levine, *The Right of Publicity and Social Media: A Challenging Collision*, LICENSING J., June/July 2015, at 13; see also Daniel Garrie, *CyberLife: Social Media, Right-of-Publicity and Consenting to Terms of Service*, THOMSON REUTERS: LEGAL EXEC. INST. (July 19, 2017), <https://www.legalexecutiveinstitute.com/cyberlife-social-media-right-of-publicity> [<https://perma.cc/FVB3-U6SC>] ("While celebrities have traditionally been the plaintiffs in right-of-publicity cases, the rise of social media in the past decade has led to a slew of right-of-publicity claims by non-celebrities as the identities of millions of people have suddenly become visible, accessible, and in some cases, profitable.").

137. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 790 (N.D. Cal. 2011).

138. *Id.* at 791.

139. *Id.* at 806–10.

140. Brian Feldman, *Facebook Reaches Settlement in Sponsored Stories Lawsuit*, ATLANTIC (Aug. 27, 2013), <https://www.theatlantic.com/technology/archive/2013/08/facebook-reaches-settlement-sponsored-stories/311753> [<https://perma.cc/L4Y6-DWTS>]. However, in response to these types of high-liability lawsuits, social media platforms like Facebook have updated their terms of service to state that users consent to commercial uses of their personas on the site. Garrie, *supra* note 136.

141. Brian D. Wassom, *Uncertainty Squared: The Right of Publicity and Social Media*, 63 SYRACUSE L. REV. 227, 245 (2013) ("Because the very point of 'social' media is the exchange of *personal* information, photos, and other content, the percentage of such information that carries with it the potential for incorporating someone's identity is much higher than in other forums."). For example, if an Instagram user posted a photo of herself drinking a can of Pepsi, Pepsi may easily find this photo and use it in its next Instagram advertisement.

recordings (“deepfakes”)¹⁴² “that look and sound just like the real thing.”¹⁴³ Individuals use deepfakes to fool people into thinking that a particular person, often a celebrity, did or said something that he or she never actually did or said.¹⁴⁴

Celebrities and non-celebrities alike are susceptible to uses of deepfake technology to doctor their identities into various types of situations, from pornographic material to advertisements. Some prominent examples of deepfakes include a doctored video of former President Obama calling Trump an expletive¹⁴⁵ and fake pornographic scenes of Scarlett Johansson.¹⁴⁶ Although political and pornographic uses of deepfake technology appear to be more common, advertisers can just as easily use deepfake technology to create a video or image of an individual endorsing a product.¹⁴⁷ For instance, advertisers could create a fake video of Ashton Kutcher drinking a Busch Light beer or of Hawkeye football coach Kirk Ferentz talking about his love for Pancheros burritos.¹⁴⁸ Although these types of doctored endorsements likely have not occurred in Iowa yet,¹⁴⁹ it is important that the Iowa legislature preemptively addresses these concerns as Iowans (and not just actors like Kutcher) are vulnerable to this type of exploitation of their identities.

States have become increasingly concerned with the capabilities of this digital manipulation technology.¹⁵⁰ For example, New York has recently

142. Amanda G. Ciccattelli, *In Honor of April Fools' Day: Diving Into Deepfakes*, IPWATCHDOG (Apr. 1, 2019), <https://www.ipwatchdog.com/2019/04/01/honor-april-fools-day-diving-deep-fakes/id=107878> [<https://perma.cc/3W8F-GBVS>].

143. J.M. Porup, *How and Why Deepfake Videos Work—and What Is at Risk*, CSO (Apr. 10, 2019, 3:00 AM), <https://www.csoonline.com/article/3293002/deepfake-videos-how-and-why-they-work.html> [<https://perma.cc/D7YU-PZWK>].

144. Sarah Scoles, *These New Tricks Can Outsmart Deepfake Videos—For Now*, WIRED (Oct. 17, 2018, 7:00 AM), <https://www.wired.com/story/these-new-tricks-can-outsmart-deepfake-videos-for-now> [<https://perma.cc/CUA5-VYR2>].

145. USA Today, *Tricked by the Fake Obama Video? Deepfake Technology, Explained*, YOUTUBE (Apr. 30, 2019), <https://www.youtube.com/watch?v=EtEPE85gw94> [<https://perma.cc/GP3K-9CAJ>].

146. Drew Harwell, *Fake-Porn Videos Are Being Weaponized to Harass and Humiliate Women: 'Everybody Is a Potential Target'*, WASH. POST (Dec. 30, 2018, 7:00 AM), <https://www.washingtonpost.com/technology/2018/12/30/fake-porn-videos-are-being-weaponized-harass-humiliate-women-everybody-is-potential-target> [<https://perma.cc/GW4P-9HTF>].

147. See *A Brief History of the Right of Publicity*, RIGHT OF PUBLICITY (July 31, 2015), <https://rightofpublicity.com/briefhistory-of-rop> [<https://perma.cc/ZDK5-X5Q7>], adapted from Jonathan L. Faber, *Indiana: A Celebrity-Friendly Jurisdiction*, 43 RES GESTAE, Mar. 2002 (“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.”).

148. See *id.*

149. Or at least have not been litigated. See *supra* Section II.D.

150. See *A Brief History of the Right of Publicity*, *supra* note 147 (“One issue of particular importance to [California] Senate Bill 209’s supporters involved issues spawning from the rapid advancement of digital manipulation technology . . .”).

introduced a bill to amend its right of publicity statute to “address[] the ability of technology to create digital avatars and make[] regulations regarding their use.”¹⁵¹ This amendment would make advertisers liable for uses of a “digital replica”¹⁵² of a deceased performer’s identity.¹⁵³ The bill also addresses uses of digital manipulation technology to create pornographic material and makes these uses a violation of the right of privacy.¹⁵⁴

In contrast, Iowa only protects its citizens from deepfake technology through criminal laws prohibiting the distribution of “photograph[s] or film[s] showing another person in a state of full or partial nudity or engaged in a sex act” without consent.¹⁵⁵ Although this law does not expressly address digital manipulations, it likely would apply to pornographic deepfakes. These deepfakes comport to the words of the statute; nothing in the law says that the photographs have to show an act that the person *actually* did.¹⁵⁶ However, this criminal law does not cover the main concerns the proposed right of publicity statute seeks to address—commercial exploitations of a person’s identity (e.g., Ashton Kutcher drinking a Busch Light).¹⁵⁷ Even if Iowa had a criminal law to prohibit these commercial deepfakes, it would not properly compensate

151. S.B. S5959D, 2019–2020 Leg., Reg. Sess. (N.Y. 2019).

152. *Id.* (“[D]igital replica’ means a newly created, original, computer-generated, [or] electronic performance by an individual in a separate and newly created, original expressive sound recording or audiovisual work in which the individual did not actually perform, that is so realistic that a reasonable observer would believe it is a performance by the individual being portrayed and no other individual. A digital replica does not include the electronic reproduction, computer generated or other digital remastering of an expressive sound recording or audiovisual work consisting of an individual’s original or recorded performance, nor the making or duplication of another recording that consists entirely of the independent fixation of other sounds, even if such sounds imitate or simulate the voice of the individual.”).

153. *Id.* (“Any person who uses a deceased performer’s digital replica in a scripted audiovisual work as a fictional character or for the live performance of a musical work shall be liable for any damages sustained by the person or persons injured as a result thereof if the use occurs without prior consent from the person or persons in subdivision four of this section, if the use is likely to deceive the public into thinking it was authorized by the person or persons specified in subdivision four of this section. A use shall not be considered likely to deceive the public into thinking it was authorized by the person or persons specified in subdivision four of this section if the person making such use provides a conspicuous disclaimer in the credits of the scripted audiovisual work, and in any related advertisement in which the digital replica appears, stating that the use of the digital replica has not been authorized by the person or persons specified in subdivision four of this section.”).

154. *Id.* (“A depicted individual shall have a cause of action against a person who, discloses, disseminates or publishes sexually explicit material related to the depicted individual, and the person knows or reasonably should have known the depicted individual in that material did not consent to its creation, disclosure, dissemination, or publication. . . . ‘[D]epicted individual’ means an individual who appears, as a result of digitization, to be giving a performance they did not actually perform or to be performing in a performance that was actually performed by the depicted individual but was subsequently altered to be in violation of this section.”).

155. IOWA CODE § 708.7 (2017).

156. *See id.*

157. *See id.*

individuals for the use of their personas, hence the need for a civil cause of action.

C. IMPORTANCE OF A NEUTRAL STATUTE

Iowa should not wait until the commercial exploitation of Iowans becomes more prevalent to adopt a right of publicity statute; it must adopt a neutral statute sooner rather than later. This vacancy not only leaves Iowans uncertain about their rights and vulnerable to deepfake uses of their identities, but it also leaves open the possibility that a special interest group will have too much influence in the drafting of the statute.¹⁵⁸ Iowa needs to ensure that its right of publicity law protects the actual interest of Iowans, rather than the interests of free speech proponents or a specific industry.¹⁵⁹

By way of example, this issue of special interest group bias plagued North Carolina's attempt to pass a right of publicity statute.¹⁶⁰ In 2009, the movie and video game industries took an active role in North Carolina's right of publicity legislative efforts, seeking to modify the right's language and narrow the scope of the right.¹⁶¹ For example, the bill included a video-game exception to the right of publicity after extensive lobbying efforts by the video game industry.¹⁶² This bill never passed, and North Carolina has yet to create a statutory right of publicity.¹⁶³

Iowa must learn from North Carolina's mistakes and adopt a neutral right of publicity statute that adequately protects the interests of Iowans, free from undue influence. If a certain company has too much influence in drafting the statute, the statute will protect that company's rights to commercially misappropriate individuals' identities, rather than adequately protecting individuals' publicity rights, which is the primary purpose of a right of publicity statute. Right of publicity scholar Jonathan Faber said it best:

[I]t is only fitting for [Iowa] to have a right of publicity statute that is competitive with other states, rather than allow its law to be shaped by those who seek to commercialize rights of publicity interests without encumbrance or respect for the rights of the person from

158. See Jonathan Faber, *Lessons Learned: Legislative Right of Publicity Efforts Throughout U.S. Could Be Instructive for North Carolina's Legislature*, FRONT ROW (N.C. Bar Ass'n Sports & Ent. L. Section), June 2013, at 6, <https://rightofpublicity.com/pdf/articles/seljune2013-jonathanfaber.pdf> [<https://perma.cc/2TB5-UEPV>] (discussing how North Carolina's legislature must adopt a neutral right of publicity statute free from special group interest).

159. See *id.* at 5–6.

160. See generally *id.* (discussing North Carolina's right of publicity bill that did not pass into law).

161. *Id.* at 5.

162. *Id.* ("Such an exemption would equate to a massive, inequitable, and unprecedented gift to the video game publishers and manufacturers at the expense of individual personalities and whose inclusion in the game programming obviously has value to the video game producers.").

163. *Id.* at 4.

whom they seek to profit.¹⁶⁴

IV. IOWA'S RIGHT OF PUBLICITY STATUTE

To correct these deficiencies created by Iowa's lack of right of publicity law and give Iowans certainty in their intellectual property rights, Iowa's legislature should enact a right of publicity statute. As mentioned in Section II.D, the states with right of publicity statutes take many different approaches in addressing what protections the statute provides.¹⁶⁵ Iowa needs to consider these approaches and produce a law that best suits Iowans' specific interests. The most important issues to address in this statute include (1) who is protected by the right; (2) what is protected by the right; (3) whether this right should extend postmortem; (4) how the statute should address digital manipulation concerns; (5) First Amendment exceptions; and (6) available remedies.¹⁶⁶ This Part will address each of these issues in turn, considering how other state statutes have addressed these questions and determining the best course of action for Iowa.¹⁶⁷ This Part will conclude with proposed statutory language for Iowa's right of publicity statute, which addresses these relevant issues.¹⁶⁸

A. WHO IS PROTECTED?

One primary consideration is who is protected under the statute and hence who can bring a right of publicity claim in Iowa. A few state courts have suggested that the right of publicity only applies to celebrities.¹⁶⁹ However, as discussed in Part II, the majority view is that the right of publicity extends to celebrities and non-celebrities alike.¹⁷⁰ "Celebrity" a subjective term,¹⁷¹ 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

164. *Id.* at 6. While Jonathan Faber made this comment in the context of North Carolina, it applies equally to the situation in Iowa. *See id.*

165. *See supra* Section II.D.

166. *See* INT'L TRADEMARK ASS'N, *supra* note 3 (comparing state right of publicity laws based on whose rights are protected, aspects protected, post-mortem rights and duration, remedies, proper forum, and defenses/exceptions).

167. *See infra* Sections IV.A–F.

168. *See infra* Section IV.G.

169. *See, e.g.,* Ali v. Playgirl, Inc., 447 F. Supp. 723, 729 (S.D.N.Y. 1978) ("[T]his right of publicity is usually asserted only if the plaintiff has 'achieved in some degree a celebrated status.'" (citation omitted)); Delan v. CBS, Inc., 458 N.Y.S.2d 608, 615 (App. Div. 1983) ("Plaintiff has not demonstrated that he is in any fashion a public personality." (citation omitted)); Cox v. Hatch, 761 P.2d 556, 564 (Utah 1988) ("The plaintiffs do not allege that their appearances have any intrinsic value or that they enjoy any particular fame or notoriety.").

170. *See supra* Part II.

171. *See* 1 MCCARTHY & SCHECHTER, *supra* note 10, § 4:2 ("However, the status of celebrity is quite relative. No two people would necessarily agree on a list of celebrities. One person's 'celebrity' is another person's 'Who's that?'").

claim.¹⁷² Additionally, in light of the increased prevalence of social media, “normal” people are just as vulnerable to violations of their rights of publicity as are celebrities.¹⁷³ Therefore, Iowa’s right of publicity should extend to all persons—famous or not.

Moreover, some states limit their statutory protection to citizens of that particular state.¹⁷⁴ For example, Alabama limits its statutory right to “natural person[s] . . . who at any time resided in this state or died while in this state or whose estate is, or was, probated in any county in this state.”¹⁷⁵ However, most statutory rights of publicity do not provide this limitation and allow any person to bring a cause of action.¹⁷⁶ Iowa should follow the majority of states and allow any person to bring a right of publicity claim under its statute. Iowa has an interest in protecting its citizens, but its interest should also extend to all persons whose personas are misappropriated within Iowa. For example, an advertiser should not be able to use an Illinois citizen’s persona within Iowa without any repercussions.¹⁷⁷ Advertisers should know that Iowa will not

172. See *id.* § 4:17 (“If defendant uses a relatively unknown person’s identity to promote sales, it follows that defendant thought that the identity had commercial value. If defendant thought so, then on what grounds could a court deny the existence of commercial value?” (footnote omitted)).

173. See *supra* Section III.B.

174. See, e.g., ALA. CODE § 6-5-771 (2020) (limiting its statutory right of publicity to “natural person[s] . . . who at any time resided in this state or died while in this state or whose estate is, or was, probated in any county in this state”); OHIO REV. CODE ANN. § 2741.03 (West 2020) (“[T]his chapter applies only to the following: (A) The right of publicity in the persona of an individual whose domicile or residence is in this state on or after the effective date of this section; (B) The right of publicity in the persona of an individual who died on or after January 1, 1998, and whose domicile or residence was in this state on the date of the individual’s death.”); 42 PA. STAT. AND CONS. STAT. ANN. § 8316 (West 2020) (limiting the cause of action to “a living person or a deceased person who was domiciled within this Commonwealth at the time of such person’s death”).

175. ALA. CODE § 6-5-771.

176. See, e.g., CAL. CIV. CODE § 3344 (West 2020) (“Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.”); FLA. STAT. ANN. § 540.08 (West 2019) (“No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use”); VA. CODE ANN. § 8.01-40 (West 2020) (“Any person whose name, portrait, or picture is used without having first obtained the written consent of such person, or if dead, of the surviving consort and if none, of the next of kin, or if a minor, the written consent of his or her parent or guardian, for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person’s name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use.”).

177. See IND. CODE ANN. § 32-36-1-9 (West 2020) (“A person who: (1) engages in conduct within Indiana that is prohibited under section 8 of this chapter; (2) creates or causes to be

tolerate the commercial misappropriation of any person's likeness, no matter the person's citizenship. One could argue that a citizenship limitation is essential to ensure that Iowa courts are not overcrowded with right of publicity suits. However, the rules of personal jurisdiction easily dispel these concerns.¹⁷⁸ For example, a California citizen whose identity was used by an advertiser in California will not be able to bring a right of publicity claim in Iowa.¹⁷⁹ Accordingly, Iowa should extend this right to *every* person, regardless of whether they are famous or citizens of the state.

B. WHAT IS PROTECTED?

Iowa's right of publicity statute must also address what aspects of an individual's identity the statute will protect. Most state statutes explicitly list out what aspects of an individual's persona they protect. These lists generally include name and likeness, but states often extend this list to other protected attributes, including voice, signature, photograph, portrait, impersonation, image, distinctive appearance, gestures, or mannerisms.¹⁸⁰ However, some courts have acknowledged the problems with these "laundry list[s]" of statutory-protected attributes.¹⁸¹ Most importantly, if there is a list of five protected attributes, advertisers will try to find a sixth identifiable characteristic outside of the statutory list.¹⁸²

created within Indiana goods, merchandise, or other materials prohibited under section 8 of this chapter; (3) transports or causes to be transported into Indiana goods, merchandise, or other materials created or used in violation of section 8 of this chapter; or (4) knowingly causes advertising or promotional material created or used in violation of section 8 of this chapter to be published, distributed, exhibited, or disseminated within Indiana; submits to the jurisdiction of Indiana courts.").

178. See *Universal Coops., Inc. v. Tasco, Inc.*, 300 N.W.2d 139, 143 (Iowa 1981) ("Whether a state court may exercise jurisdiction consistent with the due process clause depends on whether the defendant has 'certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945))).

179. See *id.*; see also IOWA CODE § 617.3 (2020) (stating that a non-Iowa resident who commits a tort in Iowa against an Iowa resident submits to the personal jurisdiction of Iowa courts).

180. See, e.g., CAL. CIV. CODE § 3344 (providing protections for "uses [of] another's name, voice, signature, photograph, or likeness"); IND. CODE § 32-36-1-7 (providing protections for a "personality's: (1) name; (2) voice; (3) signature; (4) photograph; (5) image; (6) likeness; (7) distinctive appearance; (8) gestures; or (9) mannerisms."); KY. REV. STAT. ANN. § 391.170 (West 2020) (delineating "property rights in [a person's] name and likeness"); 42 PA. STAT. AND CONS. STAT. ANN. § 8316 (West 2020) (protecting "[a]ny attribute of a natural person that serves to identify that natural person to an ordinary, reasonable viewer or listener, including, but not limited to, name, signature, photograph, image, likeness, voice or a substantially similar imitation of one or more thereof"); VA. CODE ANN. § 8.01-40 (protecting "name, portrait, or picture").

181. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992) ("[Earlier cases] teach the impossibility of treating the right of publicity as guarding only against a laundry list of specific means of appropriating identity.").

182. See *id.* ("A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth.").

For this reason, Iowa's statute should not limit what aspects of an individual's identity it protects to a "laundry list." Instead, it should follow the approach taken by Alabama and Pennsylvania in their statutes.¹⁸³ Alabama's right of publicity statute provides liability for commercial "use[s] of the indicia of identity of a person."¹⁸⁴ The statute defines "indicia of identity" as "those attributes of a person that serve to identify that person to an ordinary, reasonable viewer or listener" and provides examples of what types of attributes this language may cover.¹⁸⁵ Iowa should take a similar approach by stating in its statute that the protected attributes are not limited to those listed in the statute, extending protection to any other "attributes . . . that serve to identify that person."¹⁸⁶ This approach will prohibit any strategic advertiser from avoiding statutory liability by misappropriating an identifiable characteristic outside of the statutory list. Additionally, this approach will prevent the need for Iowa's legislature to constantly amend its statute as new forms of technological appropriation arise.

C. POSTMORTEM RIGHTS

Iowa's legislature must also consider whether Iowa's statutory right of publicity should extend postmortem, so that heirs or devisees may enforce an individual's publicity after the individual dies.¹⁸⁷ A majority of states with some form of right of publicity law extend this right postmortem. "[Twenty-six] states recognize a postmortem right of publicity: 18 by statute and eight by common law."¹⁸⁸ The main justification for extending this right postmortem

183. See ALA. CODE § 6-5-771 (2020) (providing statutory protection for uses of "those attributes of a person that serve to identify that person to an ordinary, reasonable viewer or listener, including, but not limited to, name, signature, photograph, image, likeness, voice, or a substantially similar imitation of one or more of those attributes"); 42 PA. STAT. AND CONS. STAT. ANN. § 8316 (protecting "[a]ny attribute of a natural person that serves to identify that natural person to an ordinary, reasonable viewer or listener, including, but not limited to, name, signature, photograph, image, likeness, voice or substantially similar imitation of one or more thereof").

184. ALA. CODE § 6-5-772.

185. *Id.* § 6-5-771.

186. *See id.*

187. See 2 MCCARTHY & SCHECHTER, *supra* note 10, § 9:3 ("The question over which much judicial, legislative, and scholarly debate has raged is whether the right of publicity should have a postmortem duration. That is, should the right die with the person identified or should it continue after death and be able to be devised and descend to heirs?").

188. *Id.* § 9:17. The states with statutory rights of publicity that extend postmortem include: Alabama, Arkansas, California, Florida, Hawaii, Illinois, Indiana, Kentucky, Nebraska, Nevada, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Virginia, and Washington. See INT'L TRADEMARK ASS'N, *supra* note 3. The states with a common law postmortem right of publicity include: Arizona, Connecticut, Georgia, Michigan, Minnesota, New Jersey, South Carolina and Utah. 2 MCCARTHY & SCHECHTER, *supra* note 10, § 9:17.

is that “the right of publicity is a property right” not a personal right.¹⁸⁹ Unlike personal rights, property rights are commonly transferable and descendible after death.¹⁹⁰ Thus, the right of publicity should extend beyond death as well.¹⁹¹ Another theory supporting the postmortem right of publicity is unjust enrichment. That is, a third party should not be able to freely use an individual’s persona for commercial gain just because she died and, as a result, unjustly benefit from that individual’s death.¹⁹²

Although the trend appears to be in favor of a postmortem right of publicity, some courts and scholars have declined to extend this right beyond death based on concerns about granting a potential monopoly to the heirs or devisees of the publicity-holder.¹⁹³ For example, in *Memphis Development Foundation v. Factors Etc., Inc.*, the Sixth Circuit held that Tennessee’s right of publicity did not extend beyond death.¹⁹⁴ Applying the incentive rationale,¹⁹⁵ the court reasoned that a postmortem right of publicity would not sufficiently encourage an individual to engage in creative activities to benefit society.¹⁹⁶ Further, the court reasoned that an inheritable commercial right would

189. *Id.* § 10:7 n.1; *see also* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (comparing the right of publicity to other forms of intellectual property, including copyrights and patents).

190. *See* *Hodel v. Irving*, 481 U.S. 704, 715 (1987) (“There is no question . . . that the right to pass on valuable property to one’s heirs is itself a valuable right.”).

191. *See* *Herman Miller, Inc. v. Palazetti Imps. & Exps., Inc.*, 270 F.3d 298, 326 (6th Cir. 2001) (“We believe that the weight of authority indicates that the right of publicity is more properly analyzed as a property right and, therefore, is descendible.”); Howard I. Berkman, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOK. L. REV. 527, 545 (1976) (“Essentially, the issue of descent is a corollary of the right of publicity; once the publicity right is accurately depicted as a property right, the conclusion that it passes on death flows as a matter of course.”).

192. *See* *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 705 (Ga. 1982) (“If the right of publicity dies with the celebrity, the economic value of the right of publicity during life would be diminished because the celebrity’s untimely death would seriously impair, if not destroy, the value of the right of continued commercial use. Conversely, those who would profit from the fame of a celebrity after his or her death for their own benefit and without authorization have failed to establish their claim that they should be the beneficiaries of the celebrity’s death.”); Ben C. Adams, *Recent Development: Inheritability of the Right of Publicity Upon the Death of the Famous*, 33 VAND. L. REV. 1251, 1261 (1980) (“[I]t seems more equitable for the celebrity’s heirs, rather than outside parties, to benefit from the celebrity’s hard-earned success.”).

193. *See* *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 957 (6th Cir. 1980) (rejecting the postmortem right of publicity); ROTHMAN, *supra* note 10, at 154 (“The right of publicity should . . . either not survive after death or be more modest in scope postmortem . . .”).

194. *Memphis Dev.*, 616 F.2d at 957.

195. *See supra* Section II.B.2.

196. *Memphis Dev.*, 616 F.2d at 959 (“The desire to exploit fame for the commercial advantage of one’s heirs is . . . a weak principle of motivation. It seems apparent that making the right of publicity inheritable would not significantly inspire the creative endeavors of individuals in our society.”).

create a small monopoly, whereas if this right were in the public domain, it would promote more economic growth.¹⁹⁷

However, statutory limitations to the postmortem right will better balance these concerns about a monopoly with the valid justifications for a postmortem right. Because of these justifications (i.e., unjust enrichment and descendible property rights), Iowa's statute should recognize a postmortem right of publicity, but the statute should also contain sufficient limitations to avoid monopoly and free speech concerns.

The next issue that follows is what limits Iowa's legislature should place on the statute's postmortem right. The states with statutory postmortem rights of publicity vary greatly in how they limit this right,¹⁹⁸ creating many options for Iowa to consider. First, states vary in how they limit the duration of the right, i.e., in determining how many years after death an individual's heirs or devisees may enforce this right.¹⁹⁹ The duration of postmortem rights ranges from ten years to 100 years after death.²⁰⁰ However, some states allow the rights to continue beyond the statutory time period so long as the exploitation is continuous.²⁰¹ While Tennessee's postmortem right extends ten years after death, if the heirs or devisees of the right continually exploit the identity after this ten-year period, then the postmortem right may last forever.²⁰² Second,

197. See *id.* at 959–60 (“There is no indication that changing the traditional common law rule against allowing heirs the exclusive control of the commercial use of their ancestor’s name will increase the efficiency or productivity of our economic system. . . . It seems fairer and more efficient for the commercial, aesthetic, and political use of the name, memory and image of the famous to be open to all rather than to be monopolized by a few. An equal distribution of the opportunity to use the name of the dead seems preferable. The memory, name and pictures of famous individuals should be regarded as a common asset to be shared, an economic opportunity available in the free market system.”). However, in 1984, Tennessee enacted a right of publicity statute which extends this right postmortem. See TENN. CODE ANN. § 47-25-1104 (West 2020) (extending the right ten years after death).

198. See ROTHMAN, *supra* note 10, at 98 (“Some states require that the deceased be someone who had a commercially valuable personality while alive, or even that the person had commercially exploited her identity during life, but others do not. . . . Many states limit postmortem rights to those who died domiciled in the state, but others, such as Washington and Hawaii, allow anyone to sue if the use of the identity is made within the state. The duration of postmortem rights also varies widely depending on the jurisdiction, from lasting ten years after a person’s death, to thirty, to forty, to fifty, to seventy, to one hundred years, to forever.”).

199. *Id.*

200. See, e.g., OHIO REV. CODE ANN. § 2741.02 (West 2020) (extending the right 60 years after death); OKLA. STAT. ANN. tit. 12, § 1448 (West 2020) (extending the right 100 years after death); 42 PA. STAT. AND CONS. STAT. ANN. § 8316 (West 2020) (extending the right 30 years after death); TENN. CODE ANN. § 47-25-1104 (extending the right ten years after death); VA. CODE ANN. § 8.01-40 (West 2020) (extending the right 20 years after death).

201. ROTHMAN, *supra* note 10, at 98.

202. See TENN. CODE ANN. § 47-25-1104 (“Commercial exploitation of the property right by any executor, assignee, heir, or devisee if the individual is deceased shall maintain the right as the exclusive property of the executor, assignee, heir, or devisee until such right is terminated The exclusive right to commercial exploitation of the property rights is terminated by proof of the non-use of the name, likeness, or image of any individual for commercial purposes by an

some states distinguish between individuals who have valuable commercial identities and those who do not.²⁰³ For example, Washington extends its postmortem right ten years for an individual without a commercially valuable persona and 75 years for a “personality” (i.e., an individual with a commercially valuable persona).²⁰⁴ Finally, some states require heirs or devisees to register their claim to a deceased individual’s right of publicity to enforce the postmortem right against any infringers.²⁰⁵

Thus, the Iowa legislature should first consider the difficult query as to how long Iowa’s right of publicity should extend postmortem. Jennifer Rothman, a right of publicity scholar who has expressed some skepticism about extending this right postmortem, suggests that postmortem rights should last “no more than one generation, . . . [or] for a shorter postmortem period of ten to twenty-five years.”²⁰⁶ Rothman reasons that an overly broad postmortem right may grant the heirs or devisees of an individual’s right of publicity a “commercial windfall,” contradicting the fundamental purpose of the right.²⁰⁷ In light of this recommendation and to properly balance the previously mentioned justifications and concerns, Iowa’s statute should allow an heir or devisee to enforce an individual’s right of publicity for up to 25 years after that individual’s death.

Second, the Iowa legislature should consider whether the statute should provide greater protection for more commercially valuable personalities or require the continued commercial exploitation of the identity. The short answer is no. Iowa’s postmortem right of publicity should extend to *all* persons, famous or not. The intent of this statute is to provide Iowans (not just celebrities) with certainty about their intellectual property rights in their personas and to protect Iowans from unauthorized commercial uses of their

executor, assignee, heir, or devisee to such use for a period of two (2) years subsequent to the initial ten (10) year period following the individual’s death.”). *But see* ALA. CODE § 6-5-771 (2020) (“There is a right of publicity in any indicia of identity, both singular and plural, of every person, whether or not famous, which right endures for the life of the person and for 55 years after his or her death, whether or not the person commercially exploits the right during his or her lifetime.”).

203. See ROTHMAN, *supra* note 10, at 98.

204. WASH. REV. CODE ANN. §§ 63.60.020, 63.60.040 (West 2020); *see also* KY. REV. STAT. ANN. § 391.170 (West 2020) (extending the postmortem right 50 years for “public figures”); S.D. CODIFIED LAWS § 21-64-1 (2020) (limiting the postmortem right to a “personality” whose identity has “commercial value”).

205. See ARK. CODE ANN. § 4-75-1106 (West 2020) (“Unless a claim of property rights under this subchapter is registered under this section, a successor in interest shall not recover damages from a person or obtain any other legal or equitable remedy on the claim for a commercial use prohibited by this subchapter unless the person knew of the claim of the successor in interest before the person undertook efforts or expense to make the commercial use.”); ROTHMAN, *supra* note 10, at 98 (“Some states require registration of the names of the deceased for whom postmortem rights are sought; others have no such requirement.”).

206. ROTHMAN, *supra* note 10, at 184.

207. *Id.* at 112.

identities—during life and death.²⁰⁸ Furthermore, the states that do require the continued commercial exploitation of the identity as a prerequisite to enforcing the right of publicity postmortem do so in regards to postmortem rights that may extend beyond the statutory limit and may last forever.²⁰⁹ With the limited duration of Iowa’s statutory postmortem right of publicity, there is no concern that an heir or devisee will “hoard” an individual’s identity without commercially exploiting it and preventing any commercial uses of the valuable identity for generations.²¹⁰ Therefore, Iowa does not need an additional limitation for continued commercial exploitation.

Finally, Iowa’s legislature should determine whether the statute should require heirs or devisees to register with the state to enforce the postmortem right of publicity. Faber criticizes registry systems, as they only provide “nominal benefits and almost unavoidable drawbacks.”²¹¹ Heirs or devisees often do not know about or use these registry systems, and the systems in some states are full of false registrations.²¹² Due to the limited effectiveness and complications of the registration systems, Iowa should not require registration. However, Iowa’s statute should clarify in whom the postmortem right of publicity vests after an individual’s death. This approach will serve the purposes of a registration system—i.e., ensuring that the publicity right vests in the proper party—more efficiently while avoiding the considerable drawbacks. For example, Texas’ statute explicitly provides that if an individual did not transfer her right of publicity to another person either while she was alive or in her will, the right of publicity vests in the surviving spouse, children, or parents.²¹³ Similarly, Iowa’s right of publicity statute should provide that if an individual has not transferred or devised her right of publicity, then Iowa’s

208. See *supra* Section IV.A (discussing that every individual, famous or not, has a right of publicity in Iowa).

209. See TENN. CODE ANN. § 47-25-1104 (West 2020) (extending the postmortem right of publicity ten years after an individual’s death and providing that if the heir or devisee continually commercially exploits the individual’s identity, the right may extend forever).

210. See ROTHMAN, *supra* note 10, at 112 (“A postmortem right may be appropriate, but only if it is more limited in scope . . . rather than granting a broad right and commercial windfall to distant relatives and corporations.”).

211. Faber, *supra* note 158, at 4.

212. *Id.* (“I have worked to clean up false or misleading registrations in California’s registry concerning some of the clients I have represented.”).

213. TEX. PROP. CODE ANN. § 26.005 (West 2019) (“If the ownership of the property right of an individual has not been transferred at or before the death of the individual, the property right vests as follows: (1) if there is a surviving spouse but there are no surviving children or grandchildren, the entire interest vests in the surviving spouse; (2) if there is a surviving spouse and surviving children or grandchildren, one-half the interest vests in the surviving spouse and one-half the interest vests in the surviving children or grandchildren; (3) if there is no surviving spouse, the entire interest vests in the surviving children of the deceased individual and the surviving children of any deceased children of the deceased individual; or (4) if there is no surviving spouse, children, or grandchildren, the entire interest vests in the surviving parents of the deceased individual.”).

intestate succession laws control in whom this right vests after the individual's death. Specifically, the statute should state that the laws codified in the Iowa Code, title 15, chapter 633 control, particularly sections 633.210–633.212 and section 633.219.²¹⁴

In summary, Iowa's right of publicity statute should provide a postmortem right of publicity extending 25 years after an individual's death, with no limitations regarding that individual's fame or the continued commercial exploitation of her persona. Further, this statute should not require any registration system, but it should explicitly state that Iowa's intestate succession laws apply regarding who inherits this right after an individual's death.

D. HOW TO ADDRESS DIGITAL MANIPULATION

Iowa's legislature must also consider how Iowa's statute should address digital manipulation concerns. As addressed in Section III.B, deepfake technology makes it easier than ever for advertisers to misappropriate an individual's identity, as they can depict an individual in a situation that never actually occurred.²¹⁵ Thus, Iowa should take a proactive approach in its right of publicity statute to explicitly address these digital manipulation concerns. Currently, New York is the only state attempting to address deepfake technology in its right of publicity statute.²¹⁶ In its bill to amend the right of publicity statute, New York provides right of publicity protections for "digital replica[s]" of deceased performers.²¹⁷ Due to New York's prevalence in the entertainment industry, this amendment is primarily concerned with expressive depictions of celebrities' performances.²¹⁸

214. IOWA CODE §§ 633.210–633.212, 633.219 (2020) (delineating the rules of descent to the surviving spouse or children).

215. See *supra* Section III.B.

216. See *supra* notes 151–54 and accompanying text.

217. S.B. S5959D, 2019–2020 Leg., Reg. Sess. (N.Y. 2019).

218. See *id.* ("Any person who uses a deceased performer's digital replica in a scripted audiovisual work as a fictional character or for the live performance of a musical work shall be liable for any damages sustained by the person or persons injured as a result thereof if the use occurs without prior consent from the person or persons in subdivision four of this section, if the use is likely to deceive the public into thinking it was authorized by the person or persons specified in subdivision four of this section."). This bill has also raised First Amendment concerns, specifically for entertainment companies such as Disney, whose President of Government Relations asserted in a letter to legislators that "if adopted, this legislation would interfere with the right and ability of companies like ours to tell stories about real people and events. The public has an interest in those stories, and the First Amendment protects those who tell them." John Villasenor, *Artificial Intelligence, Deepfakes, and the Uncertain Future of Truth*, BROOKINGS: TECHTANK (Feb. 14, 2019), <https://www.brookings.edu/blog/techtank/2019/02/14/artificial-intelligence-deepfakes-and-the-uncertain-future-of-truth> [<https://perma.cc/R2NP-A2TG>].

While there are many talented Iowans,²¹⁹ Iowa's primary focus in addressing digital manipulation in its right of publicity statute should be to protect all Iowans from commercially damaging uses of their identities, rather than digital replicas of performances. But there is not much guidance in other state statutes specifically addressing this concern. Taking a similar but more inclusive approach than New York's bill, Iowa's statute should explicitly provide protection for "digital recreations" of an individual's persona.²²⁰ With this express language, there will be no question whether the right of publicity applies to deepfakes. Additionally, due to the potential emotionally damaging effects of deepfakes,²²¹ the statute should provide for increased penalties for these misappropriations to deter the misuse of this technology.²²²

E. BALANCING FIRST AMENDMENT CONCERNS

Another issue for Iowa's legislature to consider is how Iowa's statute should address free speech concerns; specifically, whether the statute should delineate defenses to the right of publicity. As discussed in Section II.C.3, states that recognize a statutory right of publicity have taken different strategies to address free speech concerns, but the majority of these statutes carve out specific free speech defenses.²²³ Iowa should follow this majority trend and delineate free speech defenses in its right of publicity statute. Explicitly carving out statutory exemptions conforms with the primary goal of the right of publicity statute—creating more certainty in Iowans' intellectual property rights. As discussed in Section II.C.1, courts have taken various approaches to balance free speech with the right of publicity, and many of these approaches are inconsistent, creating unpredictability for individuals and third parties who wish to use these individuals' identities.²²⁴ For example, Iowa resides in the Eighth Circuit, which applies its own subjective balancing approach, "weigh[ing] the nature of the use against the likely injury to the

219. For example, Iowa is "home" to American Idol winner Maddie Poppe and actor Ashton Kutcher. See Courtney Crowder, *Maddie Poppe Becomes the First Iowan to Win 'American Idol'*, DES MOINES REG. (May 23, 2018, 10:40 AM), <https://www.desmoinesregister.com/story/entertainment/2018/05/21/maddie-poppe-american-idol-finale/629941002> [<https://perma.cc/Z3XT-9NP7>]; Matthew Leimkuehler, *Ashton Kutcher on Iowa: 'The More Places I Go, the More I Realize How Great it is Here'*, DES MOINES REG. (Apr. 9, 2017, 11:14 AM), <https://www.desmoinesregister.com/story/entertainment/2017/04/08/ashton-kutcher-almost-owe-everything-who-am-where-come/100141392> [<https://perma.cc/U2TZ-9N6H>].

220. See S.B. 5959D.

221. See Justin Thomas, *Deepfake Videos Will Make It Difficult to Believe Our Eyes and Ears*, NATIONAL (July 21, 2019), <https://www.thenational.ae/opinion/comment/deepfake-videos-will-make-it-difficult-to-believe-our-eyes-and-ears-1.888768> [<https://perma.cc/G8G3-DE7K>] ("Humiliation is a powerful and painful emotion, and deepfakes can be used to embarrass, harass and even blackmail their targets.").

222. The potential for increased damages for deepfakes will be addressed in *infra* Section IV.F, which discusses the statute's remedies.

223. See *supra* Section II.C.3.

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

publicity-holder.”²²⁵ Iowa should not leave these free speech concerns open to the subjective interpretation of the courts and should instead create more predictability for Iowans through statutory exemptions.

The next issue is what, if any, exemptions Iowa’s right of publicity statute should provide. While some states have more detailed statutory exemptions than others,²²⁶ most of these exemptions relate to uses that have newsworthy value, concern public affairs, or have expressive value (e.g., literary or artistic works).²²⁷ To derive the full benefits from the right of publicity statute,²²⁸ Iowa should limit its statutory exceptions to the core forms of speech that the First Amendment protects,²²⁹ rather than detailing an expansive list of exceptions. Iowa’s statute should explicitly provide that it does not apply to uses in the news, in expressive works, or in connection with public affairs. To further clarify these exceptions and provide more predictability, Iowa should define and provide examples for each of these exceptions, similar to the approach taken in Arkansas’ statute.²³⁰ Accordingly, Iowa’s statute should clarify that an

225. ROTHMAN, *supra* note 10, at 145–46; *see also* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 823–24 (8th Cir. 2007) (applying this balancing approach).

226. *Compare* ALA. CODE § 6-5-773(b) (2020) (“It is a fair use and not a violation of [this Act] if the use of the indicia of identity is in connection with a news, public affairs, or public interest account, political speech or a political campaign, live or prerecorded broadcast or streaming of a sporting event or photos, clips, or highlights included in broadcasts or streaming of sports news or talk shows, or documentaries, or any advertising or promotion of the same (public interest work), or is part of an artistic or expressive work, such as a live performance, work of art, literary work, theatrical work, musical work, audiovisual work, motion picture, film, television program, radio program or the like (artistic work), or any advertising or promotion of the same, unless the claimant proves, subject to subsection (a), that the use in an artistic work is such a replica as to constitute a copy of the person’s indicia of identity for the purposes of trade.”), *with* CAL. CIV. CODE § 3344(d) (West 2020) (“For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required . . .”).

227. *See, e.g.*, ARK. CODE ANN. § 4-75-1110 (West 2020) (carving out exemptions for news, expressive works, and works of public interest); CAL. CIV. CODE § 3344 (carving out exemptions for news and public affairs); FLA. STAT. § 540.08(4) (a) (2020) (carving out exemptions for news reports, literary productions, and “presentation[s] having a current and legitimate public interest”); 765 ILL. COMP. STAT. ANN. 1075/35 (West 2020) (carving out exemptions for expressive works, news, or public affairs); IND. CODE § 32-36-1-1(c) (2020) (carving out exemptions for literary works, and material with “political or newsworthy value”); OHIO REV. CODE ANN. § 2741.09 (West 2020) (carving out exemptions for literary works and material with “political or newsworthy value”).

228. *See supra* Section II.B for a discussion of the policy rationales for the right of publicity.

229. 2 MCCARTHY & SCHECHTER, *supra* note 10, § 8:22 (explaining that “‘non-commercial,’ purely expressive speech that is only concerned with political, social and entertainment subjects” should be afforded more free speech protection (footnote omitted)); *see also* Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 339 (2010) (“The First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” (citations omitted)).

230. *See* ARK. CODE ANN. § 4-75-1110(a)(1) (“It is not a violation of this subchapter if the name, voice, signature, photograph, or likeness of an individual is used: (A) In connection with

“expressive work” may contain a literary work, artistic work, musical work, parody, or social commentary, and “uses in connection with public affairs” may include uses in a political campaign or informative uses of material with newsworthy and political value.²³¹

As an example application of this statutory language, a news channel reporting on a recent celebrity’s death will not invoke right of publicity protections because this use constitutes a “use in the news” and an informative use of newsworthy material. However, a company capitalizing on a celebrity’s death with a promotional photo of the celebrity with the company’s product would not fit into the enumerated exceptions.²³² This use of the celebrity’s name and likeness is not an informative use of material with newsworthy or political value; it is a commercial use of the celebrity’s identity for promotional purposes.

Along these lines, Iowa should follow the majority of state statutes and provide that unauthorized *commercial* uses of a person’s identity constitute a violation of the right of publicity.²³³ By limiting the scope of this right to commercial uses, the statute will further ensure the proper balance with free speech concerns.²³⁴ As with the statutory exemptions, Iowa’s statute should explicitly define what constitutes a commercial use of an individual’s identity. Following the approach of the Indiana and Illinois statutes, Iowa’s statute should define commercial use as a use in connection with any advertising, or offering a product or service for sale, or fundraising.²³⁵

a news, public affairs, or sports broadcast, including the promotion of and advertising for a sports broadcast, an account of public interest, or a political campaign; (B) In: (i) A play, book, magazine, newspaper, musical composition, visual work, work of art, audiovisual work, radio or television program if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work; (ii) A work of political, public interest, or newsworthy value, including a comment, criticism, parody, satire, or a transformative creation of a work of authorship . . .”).

231. See *e.g.*, *id.*; IND. CODE § 32-36-1-1 (c).

232. See, *e.g.*, Alexandra Gibbs, *Cinnabon Deletes and Apologizes for Its Carrie Fisher Tribute After Twitter Backlash*, CNBC (Dec. 29, 2016, 1:14 AM), <https://www.cnbc.com/2016/12/28/cinnabon-deletes-and-apologizes-for-its-carrie-fisher-tribute-after-twitter-backlash.html> [<https://perma.cc/F8CW-FLZA>] (detailing Cinnabon’s use of “an image of Princess Leia made out of cinnamon and a cinnamon roll” as a “tribute” to the actress Carrie Fisher after her death).

233. See *supra* Sections II.C.2–3 (discussing commercial speech limitations in connection with First Amendment concerns).

234. See 2 MCCARTHY & SCHECHTER, *supra* note 10, § 8:22 (“[C]ommercial speech’ . . . receives a lesser degree of protection than ‘non-commercial’ . . . speech.”).

235. See 765 ILL. COMP. STAT. ANN. 1075/5 (West 2020) (defining “commercial purpose” as “the public use or holding out of an individual’s identity (i) on or in connection with the offering for sale or sale of a product, merchandise, goods, or services; (ii) for purposes of advertising or promoting products, merchandise, goods, or services; or (iii) for the purpose of fundraising”); see also IND. CODE § 32-36-1-2 (defining “commercial purpose” as “the use of an aspect of a personality’s right of publicity as follows: (1) On or in connection with a product, merchandise, goods, services, or commercial activities. (2) For advertising or soliciting purchases of products, merchandise, goods, services, or for promoting commercial activities. (3) For the purpose of fundraising.”).

In summary, Iowa's right of publicity statute should balance free speech concerns by providing statutory defenses for uses in the news, in expressive works, or in connection with public affairs, and by limiting right of publicity causes of action to commercial uses of an individual's identity.

F. REMEDIES

As there is no valuable right without a remedy,²³⁶ Iowa's statute must address what remedies courts may provide to individuals whose identities have been misappropriated. Specifically, Iowa's statute should provide (1) injunctive relief; (2) compensatory damages; (3) punitive damages; and (4) attorney's fees as remedies for a violation of an individual's right of publicity. This combination of remedies will provide the appropriate deterrent effect and encourage potential infringers to restrict their behavior in accordance with the statute.

Iowa's statute should expressly state that the rights and remedies provided in the statute do not limit any other rights and remedies provided by law. Many state right of publicity statutes include a similar clause.²³⁷ Illinois' statute articulates this point particularly well, stating that "the rights and remedies provided under this Act are supplemental to any other rights and remedies provided by law including, but not limited to, the common law right of privacy."²³⁸ Iowa should adopt a similar clause specifying that the right of privacy is not limited under this statute. This clause is especially important in light of the recent emergence of deepfake technology.²³⁹ When a defendant violates a plaintiff's right of publicity under this statute, particularly through the use of deepfake technology, the plaintiff will likely bring a common-law right of privacy cause of action to recover any additional emotional damages that may not fit into the statutory right of publicity.²⁴⁰ Adding this clause to

236. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803).

237. See, e.g., CAL. CIV. CODE § 33.44(g) (West 2020) ("The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law."); HAW. REV. STAT. ANN. § 48-2P-6(f) (West 2019) ("The remedies provided for in this section are cumulative and are in addition to any others provided for by law."); TENN. CODE ANN. § 47-25-1106(e) (West 2020) ("The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law."); TEX. PROP. CODE ANN. § 26.014 (West 2019) ("This chapter does not affect a right an individual may have in the use of the individual's name, voice, signature, photograph, or likeness before the death of the individual."). But see ARK. CODE ANN. § 4-75-1111 (West 2020) ("Remedies granted by this subchapter shall constitute the exclusive basis for asserting a claim for the unauthorized commercial use of the name, voice, signature, photograph, or likeness of an individual.").

238. 765 ILL. COMP. STAT. ANN. 1075/60.

239. See *supra* Section III.B.

240. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. a (AM. L. INST. 1995) ("The appropriation of another's identity may also cause emotional or reputational injuries. Compensation for such injuries is generally available under the rules governing liability for invasion of privacy."); see also 2 MCCARTHY & SCHECHTER, *supra* note 10, § 11:27 ("The focus of injury in invasion of privacy cases is upon human dignity and peace of mind . . . and results in

Iowa's statute will ensure that plaintiffs can recover the full extent of damages caused by the misappropriation of their identities.

1. Injunctive Relief

Many states explicitly provide for injunctive relief in their right of publicity statutes.²⁴¹ For example, Florida's statute provides that an individual whose right of publicity has been violated "may bring an action to enjoin such unauthorized publication, printing, display or other public use."²⁴² Most of the statutes providing injunctive relief utilize this type of language,²⁴³ with a few exceptions. Illinois' statute references the portion of the Code of Civil Procedure governing the issuance of injunctions, declaring that a court may grant injunctive relief if the plaintiff has satisfied the specific elements of that law.²⁴⁴ Alabama's statute simply states that "[a] violation of [the statute] is deemed to constitute a rebuttable presumption of irreparable harm for the purposes of injunctive relief."²⁴⁵

Iowa should similarly provide injunctive relief as a remedy for a violation of an individual's right of publicity to prevent any further misappropriation.²⁴⁶ More specifically, the statute should state that a court may grant injunctive relief to enjoin the unauthorized commercial use. In Iowa, "a party seeking an injunction must prove '(1) an invasion or threatened invasion of a right; (2) that substantial injury or damages will result unless the request for an injunction is granted; and (3) that there is [not another] adequate [means of

damages for mental distress." (footnote omitted)); *id.* § 11:30 ("The measure of damage in a case of infringement of the right of publicity focuses upon the commercial injury to plaintiff.").

241. See ARK. CODE ANN. § 4-75-1109(b); FLA. STAT. ANN. § 540.08(2) (West 2020); HAW. REV. STAT. ANN. § 482P-6; 765 ILL. COMP. STAT. ANN. 1075/50; IND. CODE § 32-36-1-12(2) (2020); NEV. REV. STAT. ANN. § 597.810(1)(a) (West 2019); N.Y. CIV. RIGHTS LAW § 51 (McKinney 2019); OHIO REV. CODE ANN. § 2741.07(D)(3) (West 2020); 42 PA. STAT. AND CONS. STAT. ANN. § 8316(a) (West 2020); 9 R.I. GEN. LAWS § 9-1-28 (West 2020); S.D. CODIFIED LAWS § 21-64-5(1) (2020); TENN. CODE ANN. § 47-25-1106(a); UTAH CODE ANN. § 45-3-4 (West 2020); VA. CODE ANN. § 8.01-40(A) (2020); WASH. REV. CODE ANN. § 63.60.060(1) (West 2020); WIS. STAT. ANN. § 995.50(1)(a) (West 2020).

242. FLA. STAT. ANN. § 540.08(2).

243. See, e.g., ARK. CODE ANN. § 4-75-1109 ("[T]he court may issue an injunction to prevent or restrain the unauthorized commercial use of the name, voice, signature, photograph, or likeness of the individual."); HAW. REV. STAT. § 482P-6 ("The circuit courts of this State may grant injunctions on reasonable terms to prevent or restrain the unauthorized use of a right recognized by this chapter."); 42 PA. STAT. AND CONS. STAT. ANN. § 8316(a) ("[A party harmed by violation of the statute] may bring an action to enjoin such unauthorized use . . .").

244. 765 ILL. COMP. STAT. ANN. 1075/50 ("Upon a showing of cause as required by Article XI of the Code of Civil Procedure[] for the issuance of injunctive relief, the court may issue such temporary restraining orders, preliminary injunctions, and permanent injunctions as may be appropriate under this Act." (footnote omitted)).

245. ALA. CODE § 6-5-774(2) (2020).

246. See 2 MCCARTHY & SCHECHTER, *supra* note 10, § 11:21 ("In intellectual property cases, a permanent injunction is a standard remedy to prevent defendant from continuing its infringement.").

protection] available.”²⁴⁷ Any unauthorized use of a plaintiff’s identity that qualifies as a violation of the proposed statute will likely meet these requirements, so it is sufficient for the statute to provide injunctive relief without the restrictions employed in the Illinois and Alabama statutes.

2. Compensatory Damages

In addition to injunctive relief, Iowa’s statute must provide compensatory damages for an individual whose statutory rights are violated.²⁴⁸ There are two main issues that Iowa’s statute must address with regard to compensatory damages: (1) Should the statute allow collection of actual damages and/or infringer’s profits? If so, what should the statute require the plaintiff to prove with respect to these damages? And, (2) should the statute provide a minimum statutory limit for compensatory damages?

First, Iowa’s statute should explicitly provide compensatory damages for both the actual damages sustained by the plaintiff (e.g., the commercial value or fair market value of her identity or the damage to her professional reputation)²⁴⁹ and the defendant’s profits attributable to the unauthorized use. Most state statutes provide that plaintiffs may recover for actual damages and infringer’s profits, so long as the court does not use the infringer’s profits to calculate the actual damages.²⁵⁰ The main justification for allowing plaintiffs to recover the infringer’s profits is the theory of unjust enrichment: The defendant will be unjustly enriched if the court permits the defendant to

247. *Ney v. Ney*, 891 N.W.2d 446, 451 (Iowa 2017) (alterations in original) (quoting *Sear v. Clayton Cnty. Zoning Bd. of Adjustment*, 590 N.W.2d 512, 515 (Iowa 1999)).

248. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. a (AM. L. INST. 1995) (“State statutes that protect the right of publicity generally authorize the recovery of monetary relief.”).

249. See 2 MCCARTHY & SCHECHTER, *supra* note 10, § 11:30 (“The measure of damage in a case of infringement of the right of publicity focuses upon the commercial injury to plaintiff. The most obvious measure of damage is an award of the fair market value of the property right in plaintiff’s identity which defendant has used without permission. An infringement may also cause additional damage either to the future earning potential of plaintiff’s professional career or to the licensable publicity value of plaintiff’s identity and persona.”).

250. See, e.g., CAL. CIV. CODE § 3344(a) (West 2020) (“[T]he person who violated the section shall be liable to the injured party [for] . . . the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages.”); S.D. CODIFIED LAWS § 21-64-5 (2020) (allowing the plaintiff to recover “the actual damages, including profits derived from the unauthorized use”); TEX. PROP. CODE ANN. § 26.013 (West 2019) (allowing the plaintiff to recover “the amount of any damages sustained, as a result of the unauthorized use” and “the amount of any profits from the unauthorized use that are attributable to that use”); see also 2 MCCARTHY & SCHECHTER, *supra* note 10, § 11:34 (“[A] recovery of the infringer’s profits attributable to the [right of publicity] infringement is an ‘ordinarily available’ remedy.” (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. d (AM. L. INST. 1995))). But see 42 PA. STAT. AND CONS. STAT. ANN. § 8316 (West 2019) (providing that a plaintiff may “recover damages for any loss or injury sustained by such [unauthorized] use”); VA. CODE ANN. § 8.01-40 (West 2020) (providing that a plaintiff may “recover damages for any injuries sustained by reason of such use”).

profit from its unauthorized commercial exploitation of the plaintiff's identity.²⁵¹

Permitting the award of defendant's profits presents another issue: What is the plaintiff expected to prove with regard to these profits? Most of the state statutes that speak to this issue provide that the plaintiff must submit evidence "of the [defendant's] gross revenue attributable to such use," but the defendant must provide evidence of "her deductible expenses."²⁵² Iowa's statute should similarly provide that courts must calculate compensatory damages using the actual damages sustained by the plaintiff plus the infringer's profits attributable to such use. To provide clarity and predictability to the parties and the courts, the statute should follow the trend of other state statutes and provide that the plaintiff must prove the "gross revenue attributable to the unauthorized use" when calculating the defendant's profits, while the defendant may submit evidence of deductible expenses.²⁵³

The next issue to address is whether Iowa's statute should provide a minimum statutory limit on recovery. Over 40 percent of the state right of publicity statutes provide a minimum statutory limit. Under these limits, a plaintiff may recover the prescribed statutory amount or the actual damages, whichever is greater.²⁵⁴ These statutory damages range from \$750 to \$10,000.²⁵⁵ As discussed in Section IV.A, Iowa's right of publicity statute

251. See 2 MCCARTHY & SCHECHTER, *supra* note 10, § 11:34 ("The unjust enrichment approach: defendant has made an unpermitted use of plaintiff's property to gain sales and profits. Even if this has caused no identifiable loss to plaintiff, the infringer has been unjustly enriched and should disgorge all or some of its profits. These profits should go to plaintiff. Sometimes the unjust enrichment approach is rationalized as a way of deterring a willful infringer from repeating the infringement, as an example to other potential infringers or as a way of making infringement an unprofitable business venture.").

252. CAL. CIV. CODE § 3344(a); *see also* HAW. REV. STAT. § 482P-6 (2019) ("To prove profits under this subsection, the injured party or parties may submit proof of gross revenues attributable to the infringement, and the infringing party may be required by the court to provide evidence of the infringing party's deductible expenses."); S.D. CODIFIED LAWS 21-64-5(3) ("In determining a defendant's profits, the plaintiff is required to prove the gross revenue attributable to the unauthorized use, and the defendant is required to prove properly deductible expenses . . ."); TEX. PROP. CODE ANN. § 26.013(b) ("The amount of [defendant's] profits . . . may be established by a showing of the gross revenue attributable to the unauthorized use minus any expenses that the person who committed the unauthorized use may prove.").

253. See TEX. PROP. CODE ANN. § 26.013(b).

254. Ten out of the 24 statutes provide statutory damages. See ALA. CODE § 6-5-774 (2020); CAL. CIV. CODE § 3344; HAW. REV. STAT. 482P-6; 765 ILL. COMP. STAT. ANN. 1075/40 (West 2020); IND. CODE § 32-36-1-10 (2020); NEV. REV. STAT. ANN. § 597.810 (West 2019); OHIO REV. CODE ANN. § 2741.07 (West 2020); S.D. CODIFIED LAWS 21-64-5; TEX. PROP. CODE ANN. § 26.013; WASH. REV. CODE § 63.60.060 (2020).

255. See CAL. CIV. CODE § 3344(a) (providing minimum statutory damages of \$750); HAW. REV. STAT. § 482P-6(b) (providing minimum statutory damages of \$10,000); 765 ILL. COMP. STAT. ANN. 1075/40(a)(2) (providing minimum statutory damages of \$1,000); IND. CODE § 32-36-1-10(1)(A) (providing minimum statutory damages of \$1,000); OHIO REV. CODE ANN.

should protect all individuals, whether or not they are famous. However, non-famous individuals, especially those who have not commercially exploited their own identities, may have difficulty proving actual damages, or if they can prove some actual damages, these damages might be relatively small.²⁵⁶ These potentially low damages will do nothing to deter advertisers from commercially misappropriating these individuals' identities.²⁵⁷ Accordingly, Iowa should adopt a minimum statutory limit of \$2,500 to discourage the misappropriation of *any* individual's identity and to ensure access to justice for all individuals, not just celebrities.

3. Punitive Damages

Iowa's right of publicity statute should also provide punitive damages. These damages are especially important in light of the recent emergence of deepfake technology.²⁵⁸ Iowa's statute must take a proactive approach to deter the use of this extremely harmful technology, and one way to do this is to provide punitive damages for any use of this technology in violation of the statute.²⁵⁹ Several state right of publicity statutes provide for punitive damages.²⁶⁰ While a few state statutes simply provide that a court may award punitive damages,²⁶¹ most statutes require that the infringer acted knowingly, willfully, or intentionally in misappropriating an individual's identity.²⁶²

§ 2741.07(A)(1)(b) (providing that the jury may award statutory damages of \$2,500 up to \$10,000).

256. See ROTHMAN, *supra* note 10, at 183 (“[Private figures] have sometimes been barred from bringing right of publicity claims because they lack commercial value . . .”).

257. *Id.* (“To adequately protect private figures, or at least those without (commercially) valuable identities, it is appropriate to provide statutory damages to deter unwanted uses when actual damages are likely small or nonexistent.”).

258. See *supra* Section III.B.

259. See *Clark v. Celeb Pub., Inc.*, 530 F. Supp. 979, 984 (S.D.N.Y. 1981) (“The purpose of an award of punitive damages is to deter acts deemed socially unacceptable . . .”).

260. See ALA. CODE § 6-5-774(1)(b) (2020); CAL. CIV. CODE § 3344(a); 765 ILL. COMP. STAT. ANN. 1075/40(b); IND. CODE § 32-26-1-10(2); NEV. REV. STAT. ANN. § 597.810(1)(b)(1) (West 2019); N.Y. CIV. RIGHTS LAW § 51 (McKinney 2019); OHIO REV. CODE ANN. § 2741.07(A)(1)(c); OKLA. STAT. ANN. tit. 12, § 1449(A) (West 2020); 9 R.I. GEN. LAWS ANN. § 9-1-28 (West 2020); S.D. CODIFIED LAWS § 21-64-5(4) (2020); TEX. PROP. CODE ANN. § 26.013(a)(3) (West 2019); UTAH CODE ANN. § 45-3-4 (West 2020); VA. CODE ANN. § 8.01-40(A) (West 2020).

261. See, e.g., CAL. CIV. CODE § 3344(a) (“Punitive damages may also be awarded to the injured party or parties.”); OKLA. STAT. ANN. tit. 12, § 1449(A) (“Punitive damages may also be awarded to the injured party or parties.”); TEX. PROP. CODE ANN. § 26.013(a)(3) (“A person [violating] this chapter is liable to the person who owns the property right for . . . the amount of any exemplary damages that may be awarded . . .”); UTAH CODE ANN. § 45-3-4 (“An individual whose personal identity has been abused under [this statute] . . . is entitled to . . . exemplary damages . . .”).

262. See, e.g., 765 ILL. COMP. STAT. ANN. 1075/40(b) (“Punitive damages may be awarded against a person found to have willfully violated Section 30 of this Act.”); IND. CODE § 32-36-1-10(2) (“Treble or punitive damages, as the injured party may elect, if the violation under section 8 of this chapter is knowing, willful, or intentional.”); N.Y. CIV. RIGHTS LAW § 51 (“[I]f the defendant shall have knowingly used such person's name, portrait, picture or voice in such

Following this trend, Iowa's statute should provide that a court may award punitive damages if the defendant knowingly used the plaintiff's identity in violation of the statute. Further, Iowa's statute must take a proactive approach to deter the use of the extremely harmful deepfake technology by expressly stating that any use of digital manipulation in violation of the statute warrants a grant of punitive damages. Both of these provisions will further deter infringers from misappropriating an individual's identity.²⁶³

4. Attorney's Fees

Finally, Iowa's statute should allow for an award of attorney's fees. Although the typical "American view" is that each party will pay for her own attorney's fees,²⁶⁴ many states' right of publicity statutes permit a plaintiff to recover attorney's fees.²⁶⁵ Permitting recovery of attorney's fees in Iowa's statute will help to remove the burden of an expensive litigation for individuals (especially non-famous individuals) who wish to assert their rights of publicity.²⁶⁶ The judicial system should not permit advertisers to commercially exploit an individual's identity without consequence just because a plaintiff cannot afford a lawsuit. This provision further ensures every individual will have access to justice under the right of publicity statute, not just well-off individuals.

G. PROPOSED STATUTORY LANGUAGE

In light of the recommendations provided in Sections IV.A–F, this Note proposes the following right of publicity statute for Iowa's legislature to adopt:

manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages."); VA. CODE ANN. § 8.01-40(A) ("[I]f the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award punitive damages.").

263. See *Clark*, 530 F. Supp. at 984 ("The purpose of an award of punitive damages is to deter acts deemed socially unacceptable . . .").

264. See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967) ("The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.").

265. See CAL. CIV. CODE § 3344(a); HAW. REV. STAT. § 482P-6(e) (2019); 765 ILL. COMP. STAT. ANN. 1075/55; IND. CODE § 32-36-1-12(1); OHIO REV. CODE ANN. § 2741.07(D)(1); OKLA. STAT. ANN. tit. 12, § 1449(A); TEX. PROP. CODE ANN. § 26.013(a)(4); UTAH CODE ANN. § 45-3-4; WASH. REV. CODE § 63.60.060(5) (2020); WIS. STAT. ANN. § 995.50(1)(c) (West 2020).

266. See Michael D. Green, *From Here to Attorney's Fees: Certainty Efficiency and Fairness in the Journey to the Appellate Courts*, 69 CORNELL L. REV. 207, 210 (1984) ("The escalating costs of litigation and the evolution and growth of private class actions and public interest litigation have contributed to a dramatic increase in the frequency and significance of attempts to shift attorney's fees." (footnotes omitted)).

Iowa's Right of Publicity Act

Section 1. Definitions.

As used in this Act:

- (a) "Right of publicity" means each individual's right to control the commercial uses of the individual's identity.²⁶⁷
- (b) "Person" means any natural person or entity.²⁶⁸
- (c) "Commercial purpose" means the use of an individual's identity on or in connection with the offering for sale or sale of a product, merchandise, goods, or services; for purposes of advertising or promoting products, merchandise, goods, or services; or for the purpose of fundraising.²⁶⁹
- (d) "Individual" means any natural person, living or deceased.²⁷⁰
- (e) "Indicia of identity" means any attribute that serves to identify an individual including, but not limited to, name, likeness, voice, or photograph.²⁷¹
- (f) "Expressive work" means a literary work, artistic work, musical work, parody, or social commentary.²⁷²
- (g) "Uses in connection with public affairs" means uses in a political campaign or informative uses of material with newsworthy and political value.²⁷³
- (h) "Digital manipulation technology" means technology or algorithms that can be used to create doctored and fictional videos, images, recordings, or other recreations depicting indicia of an individual's identity.²⁷⁴

Section 2. Right of Publicity Recognized.²⁷⁵

- (a) This Act establishes an individual's right of publicity, which is each individual's exclusive right to control the commercial use of the individual's name, likeness, voice, photograph, or other indicia of identity.²⁷⁶
- (b) An individual's right of publicity extends twenty-five (25) years after the individual's death and is freely transferable, descendible, and divisible. If an individual does not transfer the individual's right of

267. This language is adopted from ALA. CODE § 6-5-771 (2020).

268. This language is modeled after ARK. CODE ANN. § 4-75-1103 (West 2020).

269. This language is adopted from 765 ILL. COMP. STAT. ANN. 1075/5.

270. This language is modeled after ARK. CODE ANN. § 4-75-1103.

271. This language is modeled after ALA. CODE § 6-5-771.

272. This language is inspired by ARK. CODE ANN. § 4-75-1110.

273. This language is inspired by *id.* and IND. CODE ANN. § 32-36-1-1(c) (West 2020).

274. See *supra* Section III.B.

275. This section is modeled after 765 ILL. COMP. STAT. ANN. 1075/10 (West 2020).

276. This language is adopted from Alabama's right of publicity statute. ALA. CODE § 6-5-771.

publicity at or before death, Title 15, Chapter 633 of the Iowa Code governs the succession of the rights provided in this Act.²⁷⁷

Section 3. Unauthorized Uses of an Individual's Identity.

Except as otherwise provided in this Act, no person may use an individual's name, likeness, voice, photograph, or other indicia of identity, or any digital replication thereof, for a commercial purpose, without consent, during the individual's lifetime or for twenty-five (25) years after that individual's death.²⁷⁸

Section 4. Exemptions.²⁷⁹

This Act does not apply to any use of an individual's name, likeness, voice, photograph, or other indicia of identity:

- (1) In the news;
- (2) In an expressive work; or
- (3) In connection with public affairs.

Section 5. Rights and Remedies.

(a) If the court finds a violation of an individual's right of publicity under Section 3, the individual or owner of the individual's right of publicity may recover and the court may order:

- (1) An injunction to enjoin such unauthorized use;
- (2) Actual damages caused by the unauthorized use or \$2500, whichever is greater;
- (3) Defendant's profits attributable to the unauthorized use;
- (4) Punitive damages; and
- (5) Reasonable attorney's fees and costs.²⁸⁰

(b) In determining the defendant's profits, the plaintiff must prove the gross revenue attributable to the unauthorized use, and the defendant must prove deductible expenses.²⁸¹

(c) When a person violates Section 3 through the use of digital manipulation technology, that person must pay punitive damages to the injured individual.²⁸²

(d) The rights and remedies provided in this Act are supplemental to any other rights and remedies provided by law including, but not limited to the common law right of privacy.²⁸³

277. This language is inspired by TEX. PROP. CODE ANN. § 26.005 (West 2019).

278. This section is modeled after IND. CODE ANN. § 32-26-1-8.

279. This section is modeled after ARK. CODE ANN. § 4-75-1110 (West 2020).

280. This section is modeled after S.D. CODIFIED LAWS § 21-64-5 (2020).

281. *Id.*

282. *See supra* Section IV.F.3.

283. This language is adopted from 765 ILL. COMP. STAT. ANN. 1075/60 (West 2020).

V. CONCLUSION

The right of publicity is an individual's inherent right to restrict and control the commercial use of her persona. Most states recognize the right of publicity in statutory or common-law form and provide their citizens with an enforcement mechanism to prevent the unauthorized commercial use of their identities. Iowa, however, is still among the minority of states that do not recognize this right in any form. Not only does this lack of right of publicity law leave Iowans uncertain about their intellectual property rights in their identities, it makes Iowans vulnerable to the misappropriations of their identities. Social media and the recent emergence of manipulation technology make it easier than ever for advertisers to commercially exploit an individual's identity, leaving Iowans more susceptible than residents of other states to commercial exploitation of their personas.

Therefore, Iowa should adopt a right of publicity statute providing a mechanism for Iowans to enforce their rights in their personas. Iowa's legislature should adopt this statute sooner rather than later to implement a neutral statute free from any special interest group's control, and provide the best protections for Iowans. To provide these protections, Iowa's statute should recognize each individual's right of publicity, which should extend up to 25 years postmortem. The statute should also provide a mechanism for individuals to obtain injunctive relief and damages resulting from the unauthorized commercial use of their identities, while addressing free speech concerns.

Iowa is home to many unique, creative, and talented individuals, and all these individuals deserve proper protection for their identities. Iowa can provide this necessary protection and certainty by adopting this Note's proposed right of publicity statute.