Righting the Wrong of Publicity: A Novel Proposal for a Uniform Federal Right of Publicity Statute

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The Ninth Circuit's decision in In re NCAA Student-Athlete Name & Licensing Litigation *highlights the enlargement of protection of celebrities' "identities" under California's right of publicity scheme. A comparison of California's and New York's right of publicity laws exposes the wider issues that cause confusion and uncertainty regarding right of publicity throughout the country. Such issues include ambiguous definitions of "identity," conflicts with federal copyright law, jurisdictional problems, and First Amendment free speech issues. This Note explores the roots of right of publicity law and how its current forms foment disarray across the nation. Paying particularly close attention to California and New York, where right of publicity cases are rife, and the law varies greatly, this Note argues for a uniform federal right of publicity statute. Further, this Note sets out a novel approach for a statute that incorporates the original economic rationale behind right of publicity law and a number of carve outs designed to protect artists' First Amendment rights. Such a statute would inject much needed uniformity and fairness into a fractured system.*

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TABLE OF CONTENTS

INTRODUCTION

In 2013, in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* (*Keller*), the Ninth Circuit held that videogame maker EA Sports' use of the likeness of former National Collegiate Athletic Association ("NCAA") player Samuel Keller in a popular videogame constituted a violation of his right of publicity.[1] The decision in *Keller* highlights the existing uncertainty with regard to the right of publicity among district and circuit courts.[2]

The Ninth Circuit has led a trend of broadly applying the common law right of publicity to works that merely "evoke" a celebrity's image in addition to the statutory right that covers name, signature, likeness, and

1. 724 F.3d 1268, 1284 (9th Cir. 2013).

2. *See* Kent Jordan & Robert Wilkinson, Note, *A Review of 2011 Video-Game Litigation and Selected Cases*, 15 SMU SCI. & TECH. L. REV. 271, 274 (2012); *see also* Talor Bearman, Note, *Intercepting Licensing Rights: Why College Athletes Need a Federal Right of Publicity*, 15 VAND. J. ENT. & TECH. L. 85, 88 (2012). *Compare, e.g.*, Midler v. Ford Motor Co., 849 F.2d 460, 463–64 (9th Cir. 1988) (finding celebrity singer's right of publicity violated due to unremunerated value of her voice where a voice similar to hers was used in a car commercial), *with* Chambers v. Time Warner, No. 00-Civ.-2839 (JSR), 2003 WL 749422, at *5 (S.D.N.Y. Mar. 5, 2003) (declaring a celebrity's right of publicity violated when the publication is patently false or used in a "blatant, 'selfish commercial exploitation'"). The term "right of publicity" refers to common law and/or statutory rights to protect and benefit from the value of one's "identity."

voice.[3] Meanwhile, courts within the Ninth Circuit have departed from the traditional "transformative use" exception within right of publicity jurisprudence to focus on *depictions* of the plaintiff and completely ignore whether the allegedly infringing work was transformed as a whole, resulting in a new work not fully dependent on the celebrity's depiction.[4] As a result of this approach to the right of publicity, *Keller* leaves noncommercial works of art, such as films, books, and paintings, vulnerable to right of publicity attacks from celebrities and their estates, which threatens artists' First Amendment rights to free speech.[5]

Other courts have taken a fundamentally different approach to such right of publicity disputes and have modeled their analyses instead on the Lanham Act,[6] which regulates trademarks. The Second Circuit and New York state courts, for instance, commonly reject claims in which the defendant has not used the celebrity's likeness to endorse a specific product and sustain claims where the defendant used the likeness for "blatant 'selfish commercial exploitation.'"[7]

The current circuit split and various approaches to the right of publicity in different states put many artists and companies at an unfair disadvantage. Confusion over which states' right of publicity applies, coupled with the uncertainty of whether a work falls under exceptions carved out by the different courts, leads to the stifling of innovation and unfair competition in certain artistic markets.[8] This uncertainty is further complicated because most statutory and common law right of publicity laws conflict with existing copyright law. For example, several actors have successfully brought right of publicity claims involving characters who they have played, even though said characters were legally licensed to others through copyright agreements.[9]

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3. *E.g.*, White v. Samsung Elec. Am., Inc. (*White I*), 971 F.2d 1395, 1399 (9th Cir. 1992); No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397, 409 (Cal. Ct. App. 2011); CAL. CIV. CODE § 3344 (West 2014).

4. Davis v. Elec. Arts Inc., No. 10-03328 RS, 2012 WL 3860819, at *5 (N.D. Cal. Mar. 29, 2012); *Keller*, 724 F.3d at 1276. The transformative use exception is an "affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame." *Davis*, 2012 WL 3860819, at *3 (quoting Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 810 (Cal. 2001)) (internal quotation marks omitted) (discussing the transformative use exception as applied by California courts).

5. *Keller*, 724 F.3d at 1290 (Thomas, J., dissenting). I refer to works of art apart from purely commercial speech, in which the likeness is not used to endorse the purchase of a particular product.

6. *See generally* 15 U.S.C. § 1125 (2015).

7. *Chambers*, 2003 WL 749422, at *5; *SEE* Groden v. Random House, Inc., 61 F.3d 1045, 1049 (2d Cir. 1995) ("Not every use of an individual's name, portrait, or picture for commercial purposes without his consent, however, violates [New York's right of publicity statutes]."). *See* Rand v. Hearst Corp., 298 N.Y.S.2d 405, 409 (N.Y. App. Div. 1969).

8. Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, COMM. LAW., Aug. 2011, at 14.

9. *See generally* Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199 (2002) (exploring cases brought by characters from the popular television shows *Cheers* and *The Little Rascals*).

Because right of publicity laws vary significantly from state to state, and their application by different courts produces inconsistent results, this Note argues that Congress should create an all-encompassing federal right of publicity statute. An effective statute should include a carve out for authors' use of celebrity likenesses in "noncommercial" transformative works to protect authors' First Amendment right to free expression. This proposal conforms to many Second Circuit decisions, which rightly limit right of publicity claims to protecting celebrities' right to be free from unauthorized *commercial* use of their likenesses while allowing authors to create artistic, transformative works without the worry of legal challenges from celebrities whose likenesses are incorporated into such works.[10] This proposed statute would also reverse the Ninth Circuit's dangerous trend, typified by its decision in *Keller*, of elevating the California right of publicity above First Amendment protections. Furthermore, such a federal statute would reconcile right of publicity law with copyright law, inject consistency into the field, and benefit the creative arts industry as a whole. By balancing the protection of celebrities' commercial value with artists' right to self-expression, this proposed federal statute would promote the free exchange of ideas and preserve the investment that celebrities make in their own public personae.

Part I of this Note provides a brief description of the origins and rationales for the right of publicity and explains its transformation by the Ninth Circuit's landmark decision in *Keller*. Part II examines how the *Keller* decision illustrates the overreaching application of California's right of publicity to the detriment of the creative arts industry, and contrasts that system with New York's statutory right of publicity. Part III critiques the current state of right of publicity, particularly California's "property approach," and argues that the inconsistent application of the right of publicity and copyright preemption causes significant confusion for litigants and courts. Part IV proposes a federal right of publicity statute as a solution to the fractured and disproportionately applied right of publicity that currently exists. This proposed statute would protect artist's First Amendment rights while simultaneously safeguarding celebrities' right to profit from their hard-earned public personae.

10. *See* Arrington v. N.Y. Times Co., 434 N.E.2d 1319, 1321 (N.Y. 1982) (finding that the New York equivalent of the statutory right of publicity was drafted "narrowly to encompass only the commercial use of an individual's name or likeness and no more"); *see also* Edme v. Internet Brands, Inc., 968 F. Supp. 2d 519, 528 (E.D.N.Y. 2013); Kane v. Comedy Partners, No. 00-Civ.-158 (GBD), 2003 WL 22383387, at *3 (S.D.N.Y. Oct. 16, 2003).

I. RIGHT OF PUBLICITY: EARLY CONCEPTIONS

A. RIGHT OF PUBLICITY ORIGINS: PRIVACY RIGHTS

The right of publicity originally evolved out of privacy rights.[11] The right of privacy, as articulated in an 1890 law review article by Samuel Warren and Louis Brandeis, protected individuals from the disclosure of embarrassing private facts.[12] The right of privacy also recognized the right "to be let alone" in the face of the commercial and technological innovations that increasingly invaded one's private life.[13] However, most celebrity plaintiffs' efforts to stop commercial use of their name or likeness fit poorly into the right of privacy standard.[14] Because the right of privacy was designed to protect "dignitary interests," as opposed to economic ones, remedies in privacy cases required a showing of emotional distress.[15] Therefore, courts routinely denied celebrities relief for the unauthorized use of their names or likenesses because, as the courts reasoned, celebrities needed and wanted public exposure.[16] In response to the limitations on the right of privacy, William Prosser outlined the modern right of publicity in 1960, which is defined as the appropriation of a person's name or likeness for another's advantage.[17]

The actual term "right of publicity" first appeared in the case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* in 1953.[18] In *Haelan*, the Second Circuit first laid out the policy behind the right of publicity: famous people often receive money for their endorsement of a product, and if they cannot exclusively assign this right, they might not otherwise receive payment for services as celebrity advertisers.[19]

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11. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 194–95 (1890). The authors argue for invasion of privacy as a cause of tort action, the underlying premise being that everyone has a property interest in their personality. *Id.* at 211.

12. *Id.* at 215–16 (explaining, in part, that "[t]he general object in view is to protect the privacy of private life").

13. Mark Bartholomew, *A Right Is Born: Celebrity, Property, and Postmodern Lawmaking*, 44 CONN. L. REV. 301, 309 (2011) (citations omitted); Warren & Brandeis, *supra* note 11, at 205.

14. Bartholomew, *supra* note 13, at 310.

15. *Id.*

16. *E.g.*, O'Brien v. Pabst Sales Co., 124 F.2d 167, 170 (5th Cir. 1941) (reasoning that for a professional football player whose photograph was used in a beer commercial without his permission, "the publicity he got was only that which he had been constantly seeking and receiving"); Pallas v. Crowley-Milner & Co., 54 N.W.2d 595, 597 (Mich. 1952) (holding that plaintiff had waived her privacy right against advertiser because she had become known as a performer and model); *see also* 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:25 (2014) ("Locked into the rubric of a 'right to be let alone and private,' privacy law seemed unable to accommodate the claims of those whose identity was already public.").

17. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

18. 202 F.2d 866, 868 (2d Cir. 1953).

19. *Id.* This parallels the Lanham Act's creation of a false endorsement action with regard to trademark. *See* J. Thomas McCarthy & Paul M. Anderson, *Protection of the Athlete's Identity: The Right of Publicity, Endorsements and Domain Names*, 11 MARQ. SPORTS L. REV. 195, 205–06 (2001).

The Supreme Court first considered the right of publicity in 1977, in *Zacchini v. Scripps-Howard Broadcasting Company*.[20] In *Zacchini*, the Court likened the need to protect the commercial value of an entertainer's reputation to the economic philosophy that underlies copyright law.[21] The Court held that "the protection provides an economic incentive for [the performer] to make the investment required to produce a performance of interest to the public."[22]

As the right of publicity developed over the years, scholars posited four key justifications for the right.[23] First, the "labor theory," based on Lockean principles, postulates that every celebrity achieved her level of fame through "'time, effort, skill, and even money'" in the creation of her public persona, and is thus entitled to the fruits of her labor.[24] Therefore, under this theory, courts should protect celebrities' right to benefit from the cultivation of their identities.[25]

Second, the "economic incentive" rationale—which underlies copyright, trademark, and patent law—states that "affording protection to publicity rights induces and encourages people to invest time, effort, and resources to produce works or products that benefit society."[26] As Chief Justice Bird stated in *Lugosi v. Universal Pictures*, "providing legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition."[27] Some commentators, however, have expressed skepticism of this theory because of the unlikelihood that endorsement deals for celebrities provide significant additional incentive to cultivate one's identity beyond already lucrative employment contracts.[28]

Third, and arguably most compelling, the "unjust enrichment" theory is described as "the straightforward [theory] of preventing unjust

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20. 433 U.S. 562, 563 (1977).

21. *Id.* at 576.

22. *Id.*

23. Paul Czarnota, *The Right of Publicity in New York and California: A Critical Analysis*, 19 VILL. SPORTS & ENT. L.J. 481, 503–13 (2012).

24. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 175 (1993) (connecting theories of John Locke to publicity rights jurisprudence).

25. *See Zacchini*, 433 U.S. at 573 (emphasizing the "right of the individual to reap the reward of his endeavors"); Lugosi v. Universal Pictures, 603 P.2d 425, 438 (Cal. 1979) (recognizing that "[y]ears of labor may be required before one's skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return"); Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661, 664 (N.Y. App. Div. 1977) (acknowledging the plaintiff's proprietary interest in his persona because "[he had] invested 40 years in developing his personality as Mr. New Year's Eve").

26. Czarnota, *supra* note 23, at 506.

27. 603 P.2d at 441 (Bird, C.J., dissenting).

28. *See* Steven C. Clay, Note, *Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts*, 79 MINN. L. REV. 485, 505–06 (1994) (arguing against economic incentive presumption that endorsements provide incentive for athletic greatness); *see also* Madow, *supra* note 24, at 209–10.

enrichment by the theft of good will. No social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay."[29] This theory relies on the idea that the right of publicity protects an individual from the theft of aspects of her economically valuable identity for the commercial advantage of another.[30]

Finally, the fourth justification for right of publicity "derives from the economic and social importance of the entertainment industr[y]."[31] This rationale embraces the idea that because right of publicity actions are usually filed within the state where the celebrity resides, states that rely heavily on their entertainment industries have an incentive to "afford[] strong protection to celebrities, and their publicity rights, to encourage and foster further growth and development of the respective entertainment industries."[32]

Regardless of which policy is most persuasive, the right of publicity has rapidly spread throughout the country, taking on various forms in state statutes or case law.[33] As of 2010, thirty-one states recognize the right of publicity—eleven exclusively through statute, twelve through the common law, and eight through a combination of the two.[34] Currently, California maintains both a statutory and common law right of publicity.[35] New York, on the other hand, recognizes only a statutory right.[36] California's right of publicity jurisprudence bears particular scrutiny given how dramatically this area of law has transformed since its inception.

B. California's Right of Publicity Pre-*Keller*

Prior to *Keller*, the Ninth Circuit and California courts examining the state's right of publicity law often granted right of publicity claims

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29. Harry Kalven, Jr., *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 Law & Contemp. Probs. 326, 331 (1966) (citing "unjust enrichment" as compelling justification for the right of publicity).

30. *See* Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) ("What [the defendants] sought was an attribute of Midler's identity. Its value was what the market would have paid for Midler to have sung the commercial in person."); Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 261 (N.Y. App. Div. 1984) ("[T]here is no free ride. The commercial hitchhiker seeking to travel on the fame of another will have to learn to pay the fare or stand on his own two feet.").

31. Czarnota, *supra* note 23, at 511.

32. *Id.* at 513.

33. *See* John Gillison, Note, *California's Right of Publicity Undergoes a Significant Transformation:* Comedy III Productions, Inc., v. Gary Saderup, Inc., 29 W. St. U. L. Rev. 359, 362–63 (2002).

34. Blair Joseph Cash, Note, *"Hasta La Vista, Funny Guys": Arnold Schwarzenegger's Fictional Voice Misappropriation Lawsuit Against Comedians Imitating His Voice and the Case for a Federal Right of Publicity Statute*, 18 J. Intell. Prop. L. 207, 211 (2010).

35. Bridgette Marie de Gyarfas, *Right of Publicity v. Fiction-Based Art: Which Deserves More Protection?*, 15 Loy. L.A. Ent. L.J. 381, 385 (1995).

36. *See* Stephano v. News Grp. Publ'ns, Inc., 474 N.E.2d 580, 586–87 (N.Y. 1984) (finding no common law right of publicity claim exists because the New York Civil Rights Law encompasses right of publicity claims).

only when the work in question was obviously commercial speech.[37] This is because commercial speech warrants a lower level of First Amendment protection than noncommercial speech.[38] However, when the allegedly infringing work did more than simply "propose a commercial transaction," or when any commercial aspects were "inextricably entwined" with expressive elements of the work as a whole, courts often refused right of publicity protection.[39] By distinguishing between "commercial" and "noncommercial" use, the California courts struck a balance between protecting artists' right to express themselves and holding parties liable when they take advantage of celebrities' fame to promote sales of specific products.[40]

For example, in *Aldrin v. Topps Company, Inc.*, the Central District of California denied astronaut Buzz Aldrin's right of publicity claim against a trading card company that used his photo on its cards without his permission because the company's use was not "commercial."[41] The court defined commercial speech as doing "'no more than propos[ing] a commercial transaction,' and simply advertis[ing] something for business purposes." The *Aldrin* court found that the "speech" in the trading card was the product itself, and was therefore protected.[42] Thus, prior to *Keller*, California courts intimated that the right of publicity only protected the economic interests of celebrities. The courts were primarily concerned with whether companies or individuals used a celebrity's likeness to sell products without the celebrity's authorization. As explained by California state courts, such unauthorized use circumvented celebrities' ability to benefit from their identity's economic value, that is, through licensing fees to advertisers.[43] Depictions used outside of the advertising realm were generally protected because they were not considered purely commercial speech.[44]

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37. *See, e.g.*, Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1184–86 (9th Cir. 2001); Aldrin v. Topps Co., Inc., No. CV 10-09939 DDP (FMOx), 2011 WL 4500013, at *2–3 (C.D. Cal. Sept. 27, 2011); *cf.* White v. Samsung Elec. Am., Inc. (*White II*), 989 F.2d 1512, 1519 (9th Cir. 1993) (Kozinski, J., dissenting) ("The majority dismisses the First Amendment issue out of hand because [Defendant's] ad was commercial speech.").

38. *See* Florida Bar v. Went For It, Inc., 515 U.S. 618, 623–24 (1995); *Hoffman*, 255 F.3d at 1184–85.

39. *Hoffman*, 255 F.3d at 1184–85.

40. *Id.* at 1184–86. There are different levels of commercial and noncommercial speech. In the interest of brevity, "noncommercial speech" as used in this Note refers to speech that does not merely "propose a commercial transaction."

41. *Aldrin*, 2011 WL 4500013, at *2–3.

42. *Id.* at *2 (quoting Hilton v. Hallmark Cards, 599 F.3d 894, 905 n.7 (9th Cir. 2010)). In other words, the court distinguished between speech used to sell an item from speech contained *within* the item for sale.

43. *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 805 (Cal. 2001) ("[D]epictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment."); Winter v. DC Comics, 69 P.3d 473, 477 (Cal. 2003).

44. Lugosi v. Universal Pictures, 603 P.2d 425, 441 n.16 (Cal. 1979) (Bird, C.J., dissenting).

In addition to the noncommercial speech exception to the right of publicity, California courts traditionally recognized a transformative use exception, which the California Supreme Court established in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*[45] The courts based this exception, in part, on the fair use test employed in copyright law.[46] The transformative use exception prevents a celebrity from succeeding on a right of publicity claim against an author whose work incorporates aspects of that celebrity's identity, so long as the work represents a transformation of the identity into something new and distinct.[47] The policy behind this exception mirrors the policy behind the copyright fair use exception: authors should be free to build on previous works in the expression of their own artistic visions.[48]

Prior to *Keller*, the test for the transformative use exception was whether a "celebrity likeness [was] one of the 'raw materials' from which an original work [was] synthesized, or whether the depiction or imitation of the celebrity [was] the very sum and substance of the work in question."[49] The courts used this test to determine whether the product containing a celebrity's likeness was so transformed that it became "primarily the defendant's own expression rather than the celebrity's likeness."[50] For example, the California Supreme Court, in *Comedy III*, found that a t-shirt which depicted an exact rendering of each of the Three Stooges failed this test because the images served as the practical substance of the work rather than one of many raw materials combined to form a distinct work.[51] Furthermore, the "inquiry [was] . . . more quantitative than qualitative, asking whether the literal and imitative or the creative elements predominate[d] in the work."[52] The transformative use analysis also accounted for the economic component of each possible violation by considering whether "the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted."[53]

Before *Keller* and its contemporaries, application of the *Comedy III* test focused on the allegedly infringing work as a whole to determine whether it was transformative enough to qualify as the defendants' own

45. 21 P.3d 797, 810 (Cal. 2001); *see also* Davis v. Elec. Arts Inc., No. 10-03328 RS, 2012 WL 3860819, at *3 (N.D. Cal. Mar. 29, 2012); *Winter*, 69 P.3d at 477; *Hoffman*, 255 F.3d at 1184–86.

46. *See Comedy III*, 21 P.3d at 807–08 (focusing particularly on the first fair use factor, "the purpose and character of the [new] use" in crafting the "transformative use" exception).

47. *See id.* at 808.

48. *See id.* at 807.

49. *Id.* at 809.

50. *Id.*

51. *Id.* at 810.

52. *Id.* at 809.

53. *Id.* at 810.

expression, rather than merely the celebrity likeness itself.[54] For example, in *Winter v. DC Comics*, musicians Johnny and Edgar Winter sued a comic book publisher for using their likenesses as characters in one of its comic books.[55] The court rejected their claims because the "plaintiffs [were] merely part of the raw materials from which the comic books were synthesized."[56] Thus, the *Winter* court focused on the comic books as a whole and recognized their value as independent works of art despite the incorporation of the rockers' likenesses.

II. THE EVOLUTION OF PUBLICITY RIGHTS ACROSS CIRCUITS

A. RIGHT OF PUBLICITY IN THE NINTH CIRCUIT AFTER *KELLER*

The California cases leading up to and including *Keller* represent a fundamental shift in how California courts and the Ninth Circuit approach the right of publicity. In *Keller*, the Ninth Circuit found that a videogame publisher violated a former college football player's right of publicity.[57] Sam Keller, who played quarterback for the Universities of Arizona and Nebraska, sued EA Sports for the use of his likeness in its popular "NCAA Football" videogame.[58] The game consisted of lifelike gameplay that included avatars of each team's players but omitted the actual names of the players.[59] The dissent in *Keller* rightly pointed out that the majority found that EA Sports had indeed violated Keller's right of publicity even though NCAA bylaws forbid its players from earning any money from their college athlete status.[60] However, this decision is incongruent with how courts have traditionally applied the noncommercial speech and transformative use exceptions.

First, EA Sports' use of Keller's likeness within the game is not purely commercial speech insofar as his likeness is not employed to simply "propose a commercial transaction."[61] All professional works of art are, of course, commercial in the sense that they are bought and sold in commerce. However, the First Amendment affords less protection only to those works that directly propose a commercial transaction.[62] Here, as

54. Winter v. DC Comics, 69 P.3d 473, 478–79 (Cal. 2003); *In re* NCAA Student-Athlete Name & Likeness Licensing Litig. (*Keller*), 724 F.3d 1268, 1285 (9th Cir. 2013) (Thomas, J., dissenting) ("The salient question is whether the entire work is transformative, and whether the transformative elements predominate, rather than whether an individual persona or image has been altered.").

55. *Winter*, 69 P.3d at 476.

56. *Id.* at 479.

57. *Keller*, 724 F.3d at 1284.

58. *Id.* at 1271.

59. *Id.*

60. *See id.* at 1289 (Thomas, J., dissenting).

61. Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1184–86 (9th Cir. 2001); *cf.* Aldrin v. Topps Co., Inc., No. CV-10-09939-DDP (FMOx), 2011 WL 4500013, at *2–3 (C.D. Cal. Sept. 27, 2011).

62. *Hoffman*, 255 F.3d at 1184–86.

in *Aldrin*, the game *is* the speech, not a mere transaction proposal, and therefore should receive greater First Amendment protection.[63] Keller's avatar is merely one in a line of many characters integral to the gameplay itself, not an advertisement for the game. However, the Ninth Circuit did not conduct a commercial/noncommercial speech analysis; instead it focused largely on the transformative use defense.[64] Had the court employed such an analysis and found that the game qualified for heightened protection, it would then have moved on to an "actual malice" standard, which would likely have ended in a finding that the speech was protected by the First Amendment.[65]

Second, the *Keller* court erroneously applied the *Comedy III* transformative use test. The court almost entirely focused on the literal depiction of the Keller character rather than on the other elements of the game, which directly conflicts with the wording of *Comedy III*'s transformative use test.[66] In *Comedy III*, the court consistently referred to the transformative elements of the work *as a whole*, rather than those of the individual likenesses.[67] Furthermore, the *Keller* court ignored other aspects of the *Comedy III* transformative use test, including whether the marketability and economic value of the challenged work derived primarily from the fame of the celebrity depicted or whether the artist's skill and talent was manifestly subordinated to the overall goal of creating a conventional portrait of the celebrity.[68] Finally, the Ninth Circuit largely relied on an aspect of the transformative use test from a California appellate court decision (which is nonbinding on the Ninth Circuit) that went unmentioned in *Comedy III*.[69] It heavily weighed the

63. *See id.*

64. *See generally Keller*, 724 F.3d 1268.

65. *See Hoffman*, 255 F.3d at 1184–85. "Actual malice" is a standard applied to publications that include false and defamatory material "with knowledge of falsity or with a reckless disregard for the truth." Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 658 (1989). Therefore, because *Keller* involved no allegation of defamatory or misleading speech, it is doubtful that the court would have found actual malice.

66. *Comedy III* consistently refers to the transformative elements of "the work" rather than the individual rendering of the celebrities. *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808–10 (Cal. 2001).

67. *Id.*

68. In its transformative use analysis, the *Keller* court focused almost entirely on the fact that the game realistically portrays college football players "in the context of college football games," but neglected to mention the relative fame (or lack thereof) of the plaintiffs or whether the goal of the game manufacturer was simply to create a conventional portrait of the football players. *See Keller*, 724 F.3d at 1279.

69. In *Keller*, the Ninth Circuit relied heavily on *No Doubt v. Activision*, which factored in the "context" in which the celebrity was placed within an artistic work. *Id.* at 1278. The court in *No Doubt* found that, because the work portrayed the plaintiffs' likenesses in the context of "doing exactly what they do as celebrities," the work in question was not transformative enough to withstand a right of publicity claim. No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 387, 410–12 (Ct. App. 2001).

fact that Keller was displayed in the videogame playing football, the setting in which he gained his fame.[70]

The Ninth Circuit's selective application of the *Comedy III* transformative use test is difficult to reconcile with the facts of *Keller*. Keller's likeness was one of the hundreds of other characters available for players to select.[71] Therefore, the game creators' skill and talent cannot be said to be subordinate to the goal of creating a portrait of Keller alone. Additionally, the court ignored the creative elements of the entire work outside the literal depiction of Keller.[72] In so doing, the court departed from a literal interpretation of the *Comedy III* test, which calls for an investigation into whether a "'*work* contains significant transformative elements.'"[73] Such a view restricts an artist's ability to create a work that includes a literal depiction of a celebrity, even if the additional creative elements dwarf the depiction and combine to form "the defendant's own expression."[74] Finally, it is hard to imagine that all of the designers' and programmers' skill and talent that went into the production of a highly complicated and realistic game were used solely to depict Keller so as to commercially exploit his fame rather than to simply create a realistic and entertaining videogame.[75]

Third, in deciding in favor of Keller, the court ignored the fundamental basis for the right of publicity, namely the protection of an individual's financial interest in her own likeness.[76] In California's earliest cases, which analyzed both statutory and common law rights of publicity, the courts underscored that the right of publicity was created to protect a person's interest in her own commercial value.[77] Keller and his

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70. *Keller*, 724 F.3d at 1279.

71. Mary Catherine Moore, Note, *There is No "I" in NCAA: Why College Sports Video Games Do Not Violate College Athlete's Rights of Publicity Such to Entitle Them to Compensation for Use of Their Likenesses*, 18 J. INTELL. PROP. L. 269, 286–87 (2010).

72. *Keller*, 724 F.3d at 1285 (Thomas, J., dissenting).

73. *Id.* (emphasis added) (citing Comedy III Prods., Inc. v. Gary Saderup, Inc. 21 P.3d 797, 808 (Cal. 2001)).

74. *Id.* at 1274 (citing *Comedy III*, 21 P.3d at 809).

75. *See Comedy III*, 21 P.3d at 810.

76. *See id.* (recognizing protection of an individual's financial interest in her own likeness as fundamental basis for right of publicity).

77. In fact, in adopting the common law right of publicity, the Ninth Circuit distinguished Prosser's first three categories of the right to privacy from the fourth, which it eventually adopted as the right of publicity. The first three privacy categories encompass a "direct wrong of a personal character resulting in injury to the feelings without regard to any effect . . . on the . . . pecuniary interest . . . of the individual," whereas the fourth contemplates "the identity appropriated [having] a *commercial value* [wherein] the injury may be largely, or even wholly, of an *economic or material nature*." Motschenbacher v. R. J. Reynolds Tobacco Co., 498 F.2d 821, 824 (9th Cir. 1974) (emphasis added). The California Supreme Court came to a similar conclusion in *Guglielmi v. Spelling-Goldberg Productions*. 603 P.2d 454, 457 (Cal. 1979) (Bird, C.J., concurring) ("A prominent person has a substantial economic interest in the commercial use of his name and likeness. This is entitled to protection under the common law."); Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979)

fellow plaintiffs, however, retained no commercial interest in their likenesses when or after they played college football.[78] As previously stated, NCAA bylaws forbid all of its players from accepting compensation from any source relating to their college careers, during or after their playing years.[79] Because the language of the bylaws precludes college players from accepting payment for licensing their likenesses, EA Sports cannot be said to have *appropriated* Keller's commercial interest in his own likeness. Nonetheless, the Ninth Circuit found for Keller, noting that "'[y]ears of labor may be required before one's skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial promotion. For some, the investment may eventually create considerable commercial value in one's identity.'"[80] However, the court remained silent as to whether Keller ever created commercial value in his identity and ignored the fact that regardless of the efforts he undoubtedly spent in honing his football skills, the NCAA prohibited him from collecting any economic return through commercial promotion. Therefore, the court departed from its own precedent and separated the right of publicity from economic harm, at least insofar as it applies to lost profits or economic opportunities. This holding invites a new spate of plaintiffs who no longer have to demonstrate the economic value of their identities to prevail on right of publicity claims.

The Ninth Circuit's decision in *Keller* broadens California's right of publicity law to encompass almost any work, however creative, that incorporates an accurate likeness of a celebrity in the context in which the celebrity gained her fame.[81] The court also seems to have abandoned its higher level of protection for noncommercial speech against right of publicity claims.[82] As the dissent rightly pointed out, this endangers the creative use of prominent figures in many artistic contexts.[83] In addition, the decision further confuses the standard for right of publicity in California and conflicts with many cases countrywide that protect the First Amendment rights in such works.[84] The *Keller* decision appears also to abandon the requirement that the plaintiff maintain an economic

(determining that California's statutory right of publicity "means in essence that . . . the public . . . endows the name and likeness of the person involved with commercially exploitable opportunities").

78. *See* Moore, *supra* note 71, at 284.

79. *Id.* at 278–79.

80. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig. (*Keller*), 724 F.3d 1268, 1280 (9th Cir. 2013) (quoting *Comedy III*, 21 P.3d at 804–05).

81. *Id.* at 1274–75.

82. *See id.* at 1271 (citing Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 574–75 (1977)).

83. *Id.* at 1290 (Thomas, J., dissenting) ("[The majority's] logic jeopardizes the creative use of historic figures in motion pictures, books, and sound recordings.").

84. *Id.* ("The majority's holding . . . cannot be reconciled with the many cases affording such works First Amendment protection.").

interest in her identity.[85] This decision, and the general overbreadth of California's right of publicity as explored below, contrasts starkly with the Second Circuit's treatment of New York's right of publicity law.[86]

B. Right of Publicity in the Second Circuit

Unlike California, New York does not recognize a common law right of publicity.[87] In fact, New York's right of publicity is found within its privacy rights statutes.[88] Privacy rights differ from traditional rights of publicity in that the right to privacy usually protects an individual from the misappropriation of her name or likeness only, whereas the "right of publicity protects an individual whose 'name, likeness, or *other indicia of identity*' has been misappropriated."[89] By contrast, New York's statutory right of publicity does not even protect an individual's likeness, but only one's "name, portrait, picture, or voice."[90]

Furthermore, because the New York right of publicity spawns directly from the right of privacy, courts within the Second Circuit apply the right quite differently than does the Ninth Circuit, especially with regard to celebrities.[91] The Second Circuit recognizes a public figure exception, which states that "in the case of a public figure—who by the very nature of being a public figure has no complete privacy—no liability exists when her name is used without consent."[92] New York courts recognize two caveats to the public figure exception: (1) if the publication is "knowingly false"; or (2) the work is considered a "blatant 'selfish, commercial exploitation' of the individual's personality."[93]

The statute itself restricts its application to works related to advertising or trade purposes, which limits the statute, in the celebrity context, only to situations where the celebrity's *economic value* (insofar as their ability to license their name/portrait/voice) has been allegedly

85. *See id.* at 1282 (majority opinion).

86. *Id.* at 1279.

87. *See* Andrew T. Coyle, Note, *Finding a Better Analogy for the Right of Publicity*, 77 Brook. L. Rev. 1133, 1155 (2012); *see also* 1 McCarthy, *supra* note 16, § 6.3 (identifying Alabama, Arizona, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, South Carolina, Texas, Utah, West Virginia, and Wisconsin's recognition of a right of publicity through common law, but not New York).

88. *See* Pirone v. MacMillan, Inc., 894 F.2d 579, 585 (2d Cir. 1990) ("[T]he 'right of publicity' is encompassed under the Civil Right Law as an aspect of the right of privacy."); *see also* 1 McCarthy, *supra* note 16, § 6.3 (identifying New York recognition of a right to publicity by statute).

89. Cash, *supra* note 34, at 216; *see* Restatement (Second) of Torts § 652A (1977); Restatement (Third) of Unfair Competition § 46 (1995).

90. N.Y. Civ. Rights Law § 51 (McKinney 2014).

91. *See* Cash, *supra* note 34, at 215.

92. Rand v. Hearst Corp., 298 N.Y.S.2d 405, 410 (N.Y. App. Div. 1969), *aff'd*, 26 N.Y.2d 806 (N.Y. 1970).

93. *Id.*

misappropriated.[94] A further distinction between California's and New York's treatment of the right of publicity concerns the geographic scope of the right. In California, the right of publicity reaches outside the state so long as the plaintiff resides in California.[95] By contrast, the New York statute only applies to violations that take place within state lines, that is, when the violating publication or work is distributed within the state.[96] Additionally, unlike California's right of publicity, New York courts restrict the right of publicity to the concrete aspects of an individual, as opposed to pen names, stage names, surnames, personae, or fictional characters.[97] Lastly, the Second Circuit has refused to recognize a postmortem right of publicity, whereas California does.[98] Therefore, New York's right of publicity is much more limited and provides greater First Amendment protection to artistic works than California's law.

III. THE CURRENT STATE OF THE RIGHT OF PUBLICITY

The current nature of right of publicity law presents a litany of issues for both the courts and would-be litigants. Because right of publicity law differs from state to state, federal courts are commonly burdened with interpreting different state laws, often in relation to a single party in a single action.[99]

Keller provides the perfect example. Because the videogame at issue was sold throughout the country, the plaintiffs invoked both Indiana's statutory right of publicity and California's statutory and common law rights of publicity.[100] This type of venue/forum gamesmanship forces courts to adjudicate the same conduct under different rules. Furthermore, such a strategy greatly tips the balance in favor of plaintiffs because it expands the scope of applicable law under which the court may find infringement. Indiana, for example, protects the broadest range of personality interests, including gestures and

94. *See* N.Y. CIV. RIGHTS LAW § 51.

95. *See* Wendt v. Host Int'l, Inc., 197 F.3d 1284, 1288 (9th Cir. 1999) (Kozinski, J., dissenting) ("Plaintiffs are using California law to stop Host from displaying a copyrighted work in Kansas City and Cleveland."); *White II*, 989 F.2d 1512, 1518 (9th Cir. 1993) (Kozinski, J., dissenting).

96. *See* Cuccioli v. Jekyll & Hyde Neue Metropol Bremen Theater Produktion GMBH & Co., 150 F. Supp. 2d 566, 575 (S.D.N.Y. 2001); *cf.* Pearce v. Manhattan Ensemble Theater, Inc., 528 F. Supp. 2d 175, 182 (S.D.N.Y. 2007).

97. *See* Seth A. Dymond, *So Many Entertainers, So Little Protection: New York, the Right of Publicity, and the Need for Reciprocity*, 47 N.Y.L. SCH. L. REV. 447, 459 (2003); *compare* Naked Cowboy v. CBS, 844 F. Supp. 2d 510, 519 (S.D.N.Y. 2012) (underscoring that "right of privacy 'does not extend to fictitious characters adopted or created by celebrities'" (quoting Burck v. Mars, Inc., 571 F. Supp. 2d 446, 453 (S.D.N.Y. 2008))), *and* N.Y. CIV RIGHTS LAW § 51, *with* Wendt v. Host Int'l, Inc., 125 F.3d 806, 810–11 (9th Cir. 1997) (discussing California right of publicity law that extends to actor's depictions of fictional characters).

98. *See* Dymond, *supra* note 97, at 467–68.

99. *See* Moore, *supra* note 71, at 274–75.

100. *See id.* at 281–83, 286.

mannerisms.[101] Where will it end? There is nothing to stop plaintiffs from invoking every state's right of publicity against a successful videogame producer or other national publisher of artistic material.

A. Statutory/Common Law Rights of Publicity

Conflicting statutory and common law rights of publicity within the same and among different states can often create additional confusion and inconsistency.[102] In common law right of publicity jurisdictions, judges must navigate claims without firm statutory guidelines, increasing the likelihood that different judges will reach different outcomes on similar subject matter.[103] Statutory rights of publicity also come with their own set of problems.[104] For example, some states' statutes enforce postmortem rights of publicity while others do not, and statutory jurisdictions vary widely in terms of remedies.[105]

B. Varying Geographical Scope

Geographical issues further compound confusion in the application of the right of publicity.[106] For example, because California's common law right of publicity extends to defendants outside of California for conduct occurring within the state and to conduct outside of California by defendants located within the state, and New York's statutory right of publicity only covers works published within New York, plaintiffs may be encouraged to forum shop.[107] Furthermore, unsuspecting defendants who reside in New York and publish allegedly infringing works that depict a California-based celebrity outside California and New York may find themselves haled into court in California to defend a right of publicity claim.

C. Federal Copyright Issues

A further source of inconsistency arises when a state's right of publicity conflicts with federal copyright laws, as it does in California.[108] In *Wendt v. Host*, for example, two actors in the popular *Cheers* television

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101. *See* Cash, *supra* note 34, at 222.

102. *See id.* at 221, 225–26.

103. *Id.* at 219.

104. *Id.* at 219–20.

105. *Id.* at 222–23. For example, some states offer varying statutory damages, whereas others may only allow injunctive relief given the difficulty in calculating damages. *Id.* at 223.

106. P. Stephen Fardy, *Feet of Clay: How the Right of Publicity Exception Undermines Copyright Act Preemption*, 12 Tex. Intell. Prop. L.J. 443, 454 (2004).

107. *See* Cuccioli v. Jekyll & Hyde Neue Metropol Bremen Theater Produktion GMBH & Co., 150 F. Supp. 2d 566, 575 (S.D.N.Y. 2001) ("[O]ut-of-state uses of plaintiff's likeness for trade or advertising purposes are not actionable under New York law."); *White II*, 989 F.2d 1512, 1518 (9th Cir. 1993) (Kozinski, J., dissenting).

108. *See* Cash, *supra* note 34, at 220–21.

show prevailed on a right of publicity claim against a chain of bars.[109] The chains displayed two robots fashioned after the characters at several of their locations.[110] The Ninth Circuit found for the plaintiffs, even though it determined that the robotic features did not constitute a likeness under the statutory right of publicity because the robots did not look sufficiently similar to the actors.[111] Furthermore, the court found the defendant violated plaintiffs' rights of publicity despite the fact that the defendant had obtained a copyright license on those characters.[112] In effect, the court suspended the copyright holder's right to derivative works. The court also gave the actors a property right over characters in which they had no part creating.[113]

In reaching its conclusion in *Wendt,* the Ninth Circuit relied heavily on its previous decision in *White v. Samsung Electronics America, Inc.*[114] There, the court held that the use of a cartoon, wig-wearing robot in a television advertisement violated *Wheel of Fortune* cohost Vanna White's right of publicity.[115] Although the case did not directly invoke copyright law because Samsung did not purchase a license from the copyright holder, this decision still raises serious copyright concerns.[116] Because the copyright owner created the "physically identifiable character of 'Vanna White,'" she represents a large part of the show's copyrightable subject matter and may even be a "copyrightable character in her own right."[117] This decision illustrates how the common law right of publicity in California has been broadened to remove federally guaranteed protections from legitimate copyright holders and reinvest those protections as property rights in celebrities' own identities.

The decision in *White* also emphasized the possible circumvention of the copyright parody exception.[118] In copyright law, works that are considered sufficiently parodic of the originals are generally exempt from infringement under the "fair use" doctrine.[119] Had the *Wheel of Fortune* copyright holders filed suit against Samsung, the court could have decided in favor of Samsung under the fair use exception; it could have deemed the robotic cartoon a parody, and thus, non-infringing.[120]

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109. Wendt v. Host Int'l, Inc., 125 F.3d 806, 809 (9th Cir. 1997).
110. *Id.*
111. *Id.* at 810.
112. *Id.* at 811.
113. *See* Fardy, *supra* note 106, at 465.
114. *Wendt*, 125 F.3d at 811.
115. *White I*, 971 F.2d 1395, 1397 (9th Cir. 1992).
116. *See* Fardy, *supra* note 106, at 460.
117. *Id.*
118. *Id.* at 460–61.
119. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 569 (1994).
120. *See id.* at 579–80; Burnett v. Twentieth Century Fox Film Corp., 491 F. Supp. 2d 962, 971 (C.D. Cal. 2007) (dismissing a copyright infringement claim brought by comedienne Carol Burnett

The parody exception serves to deter litigants from bringing suit against alleged copyright infringers who satirize other authors' works.[121] Therefore, the *White* decision "inhibits the ability of advertisers to present parodies of celebrities to the public and limits a copyright owner's right to license derivative works if they portray a celebrity."[122] As Judge Kozinski of the Ninth Circuit noted in his scathing dissent in *White*, "[i]n a case where the copyright owner isn't even a party—where no one has the interests of copyright owners at heart—the majority creates a rule that greatly diminishes the rights of copyright holders in this circuit."[123]

The Ninth Circuit has also found that the state right of publicity law trumps copyright holders' licensing rights with regard to musical compositions.[124] In *Midler v. Ford Motor Company*, the Ninth Circuit held that Ford violated singer Bette Midler's common law right of publicity when it ran a commercial featuring a "sound-alike" artist singing one of Midler's songs.[125] The court ruled for Midler, even though Ford's advertising company had properly purchased the license to the song from the song's composer.[126] The decision prohibited the licensee from "fully exploiting the license it had obtained for the song that Midler sang by creating liability for hiring a Midler voice imitator."[127] Again, the Ninth Circuit removed a right from the copyright holder, instead, giving it, as a property right, to a celebrity who had no part in the creation of the work.

By contrast, New York jurisprudence not only refuses to recognize a common law right of publicity,[128] but also rejects the notion that its statutory right of publicity protects plaintiffs from "look-alikes."[129] Furthermore, it remains unclear whether New York courts would apply the voice provision of the statute to "sound-alikes."[130] This illustrates a tendency in the Second Circuit to restrict its application of New York's right of publicity to plaintiffs' actual voices and visages, rather than imputing imitator's characteristics to them. Thus, the Second Circuit protects artists who, through no fault of their own, sound like other more established or well-known artists. Restricting violations to appropriations

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against the producer of *The Family Guy* television show because a cartoon depiction of her on the show qualified as parody under the "fair use" exception test).

121. *See* Fardy, *supra* note 106, at 460–61.

122. *Id.* at 461.

123. *White II*, 989 F.2d 1512, 1518 (9th Cir. 1993) (Kozinski, J., dissenting).

124. *See* Fardy, *supra* note 106, at 455–59.

125. Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

126. *Id.* at 462.

127. Fardy, *supra* note 106, at 457.

128. *See* Stephano v. News Grp. Publ'ns, Inc., 474 N.E.2d 580, 584 (N.Y. 1984) (holding that a professional model could not assert a cause of action for the right of publicity when his picture was published in a magazine article without his consent).

129. *See* Dymond, *supra* note 97, at 406; Alison Sachs, Note, *It's Up to You, New York—It's Time for a Statutory Right of Publicity*, 20 COLUM.-VLA J.L. & ARTS 59, 68 (1995).

130. *See* Dymond, *supra* note 97, at 466; *see also* Sachs, *supra* note 129, at 68.

of actual, physical aspects of the plaintiff encourages a fertile landscape in which new artists can thrive.

D. Amorphous Definition of "Identity"

Finally, the Ninth Circuit has expanded California's common law right of publicity to stratospheric levels. California's statutory right protects a limited number of personality interests: name, voice, signature, photograph, or likeness.[131] However, as it stands today, the common law right has no such restrictions. Initially, the only differences between the statutory and common law rights of publicity were that the former required a "knowing use" and contemplated "remedies [that] are cumulative and in addition to any provided by law," whereas the latter rejected "mistake and inadvertence" as a defense.[132] In listing these differences, the California Court of Appeals did not mention other ways of appropriating one's identity that would be available in one cause of action over another.[133] However, the Ninth Circuit continues to expand and reshape California's common law right of publicity, making it nearly unrecognizable from the form it took when it was last examined by the California Supreme Court in *Guglielmi v. Spelling-Goldberg Productions*, in 1979.[134]

In *Guglielmi*, the California Supreme Court rejected a postmortem common law right of publicity claim brought by renowned silent actor Rudolph Valentino's cousin against producers of a TV movie that fictionalized his uncle's life.[135] The court found that although the film fictionalized Valentino's life, the film warranted the same level of constitutional protection as "the town crier with the daily news or the philosopher with his discourse on the nature of justice."[136] Furthermore, the court dismissed the plaintiff's assertion that defendant's use of Valentino's name and likeness increased the value or marketability of the film, which would have diminished its constitutional protection.[137] The court

131. Cal. Civ. Code § 3344(a) (West 2014).

132. Eastwood v. Superior Court, 198 Cal. Rptr. 342, 346 n.6 (Cal. Ct. App. 1983).

133. Judy Lucas, *California's Right of Publicity: A Ninth Circuit Favorite*, 3 J. Legal Advoc. & Prac. 82, 84 (2001).

134. *See id.* at 85 ("Generally a federal court, in deciding a case based on state law, applies the law as it believes the highest court in the state would apply it. However, the California Supreme Court has not had the opportunity to decide a [common law] right of publicity case since 1979."); *see also* Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 457 (Cal. 1979) (Bird, C.J., concurring) (applying common law right of publicity only to famous silent film actor Rudolph Valentino's name and likeness although the complaint additionally alleged personality).

135. *Guglielmi*, 603 P.2d at 455.

136. *Id.* at 459 (Bird, C.J., concurring).

137. *Id.* This is because increased marketability denotes a higher level of commerciality and thus, less protection. Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1185–86 (differentiating the level of First Amendment protection for purely commercial "'speech that does no more than propose a commercial transaction'" and speech whose "commercial aspects are 'inextricably entwined' with expressive elements" (citations omitted)).

reasoned that (1) "[t]he First Amendment is not limited to those who published without charge"; (2) "[f]iction writers may be able to more persuasively, more accurately express themselves by weaving into the tale persons or events familiar to their readers"; and (3) "the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics."[138] The court's recognition that works of art are fundamentally economic in nature, and its proposition that artists should be allowed to incorporate prominent persons into their works, underscored the court's concern for protecting a professional artist's First Amendment right to artistic speech even if that speech includes aspects of a celebrity's identity. Furthermore, the court fashioned its common law right of publicity only with regard to name and likeness, not intangible aspects of Valentino's "identity."[139]

The Ninth Circuit, however, has taken upon itself the task of expanding the definition so as to include any aspect of a celebrity's identity, tangible or not. No longer does California's common law right of publicity protect only personality interests covered by statute or merely extend causes of action based on mistaken misappropriation. As *Wendt*, *Midler,* and *White* demonstrate, the Ninth Circuit has imbued in celebrities protectable property interests unrelated to their names, likenesses, and even mannerisms. *Wendt* stands for the proposition that actors maintain a property interest in characters in which they had no hand creating, and to which the infringing material bears dubious likeness.[140] *Midler* grants property rights to a celebrity singer over *someone else's* voice as used in the performance of a composition whose copyright is owned by *someone else*.[141] Finally, *White* expands the concept of protectable identity rights to include the amorphous evocation of a celebrity's identity.[142]

By broadening the definition of the common law right of publicity, the Ninth Circuit endangers First Amendment protection for purveyors of both quasi-commercial and noncommercial speech and squarely pits right of publicity protection against federal copyright protection.[143] As a result, emerging artists may find themselves limited in their commercial opportunities if their voice happens to sound like another, more established artist's voice. Even more disturbing, young performers and artists may be barred from sharing their craft if they even "evoke" the persona of another celebrity in audiences' minds.[144] The former Chief Judge of the Ninth Circuit, Judge Kozinski, has enumerated a laundry list

138. *Guglielmi*, 603 P.2d at 459–60.
139. *Id.* at 462; *cf. White I*, 971 F.2d 1395, 1401 n.3 (9th Cir. 1992).
140. *See supra* Part III.C; Wendt v. Host Int'l, Inc., 125 F.3d 806, 811–12 (9th Cir. 1997).
141. *See supra* Part III.C; Midler v. Ford Motor Co., 849 F.2d 460, 462–63 (9th Cir. 1988).
142. *White I*, 971 F.2d at 1401 n.3.
143. *See* Lucas, *supra* note 133, at 90.
144. *See White II*, 989 F.2d 1512, 1516 (9th Cir. 1993) (Kozinski, J., dissenting).

of concerns about the court's expansion of California's common law right of publicity, including: the stifling of creative forces; the reduction of the public domain; exclusion of the right of parody; and the enforcement of California's right of publicity "way beyond California's borders."[145]

In addition to expanding the reach of California's common law right of publicity, the Ninth Circuit has also misconstrued the California Supreme Court's transformative use exception, further limiting artists' ability to incorporate celebrities' likenesses into their works. The transformative use exception focuses on the transformative elements of an entire work.[146] By contrast, the Ninth Circuit in *Keller* focused on the degree of similarity between the plaintiff and the likeness itself.[147] *Keller* also created a de facto property right in one's identity even when an artist's identity lacks economic value, which is at fundamental odds with the key rationale underpinning the right of publicity in the first instance.[148] The current state of disarray throughout the nation, typified by the differences between the Ninth and Second Circuits' application of the right of publicity and the Ninth Circuit's overexpansion of celebrities' rights in this regard, necessitates a uniform federal right of publicity.[149]

Under the current state of right of publicity law, many plaintiffs may be unaware of the states in which their right of publicity is protected, how much of their personae is protected, and which remedies they may seek for a violation. Furthermore, defendants may freely act in one state even after being found liable for the same conduct under the laws of a different state.[150] Many plaintiffs may be forced to file different actions in different states to seek relief for the same conduct. What's more, plaintiffs may receive different types of relief or none at all in each action.[151] Authors of creative works that include elements which may "evoke" the personality of an individual are expected to know widely differing laws if they wish to publish their works in more than one state in order to protect themselves from litigation. For these reasons, all potential litigants would benefit from a federal uniform right of publicity statute.

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145. *See id.* at 1519; *Wendt*, 197 F.3d at 1288 (Kozinski, J., dissenting).

146. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig. (*Keller*), 724 F.3d 1268, 1285 (9th Cir. 2013) (Thomas, J., dissenting) (pointing out that the *Comedy III* transformative use test, when properly read, applies to a creative work as a whole).

147. *Id.*

148. *See supra* Part III; Moore, *supra* note 71, at 277–78.

149. Because advertising and commercial artistic works pervade all channels of interstate commerce, Congress may presumably pass such a law under the Commerce Clause. *See* U.S. CONST. art. I, § 8, cl. 3.

150. For example, a defendant may be liable for an infringing advertisement in a state that recognizes a right of publicity action, but then subsequently publish the same advertisement in a state with more lax or no right of publicity law.

151. Bearman, *supra* note 2, at 100.

IV. UNIFORM FEDERAL RIGHT OF PUBLICITY STATUTE: A PROPOSAL

Rights of publicity vary dramatically by state, and courts have applied those rights inconsistently. The resulting entertainment "legalscape" necessitates a uniform federal right of publicity statute to inject stability and confidence into this area of law. Such a statute would prevent one state's laws from applying to unsuspecting out-of-state defendants because all states would have to abide by the federal law. This Note proposes a four-factor federal statute designed to protect both artists' creativity and the economic value of celebrities' hard-earned fame, while also maintaining the integrity of the federal copyright system and freedom of speech guaranteed by the First Amendment.

A. DEFINED IDENTITY PROPERTIES

First and foremost, the statute would protect a clearly delineated and exhaustive list of personality interests: likeness, signature, and voice. This would maintain consistency throughout the country and resolve questions of what constitutes "property" with regard to identity.[152] Furthermore, it would free up artists and performers to cultivate their own personae without having to worry about inadvertently appropriating established celebrities' "identities." This discrete list would only protect corporeal characteristics belonging to the individual, resolving the difficulties in a case like *Midler*. Under this law, a court facing a case similar to *Midler* would not be able to invest in the plaintiff rights to someone else's voice.[153] Moreover, copyright holders to compositions would not lose their licensing rights where a "sound-alike" is hired to perform her song. Celebrity singers might complain that such a statute would open up the floodgates for "sound-alike" artists to profit from their "distinctive voices," siphoning off their commercial value. However, in copyright law, Congress already allows sound-alike recordings in order to prevent monopolies on musical compositions.[154] Furthermore, the publication of sound-alike recordings arguably increases the visibility of the original artist, creating more commercial opportunities for them. Finally, the use of "likeness" allows for some flexibility. Images come in many shapes, sizes, and styles, and therefore, terms like "photograph" and "portrait" are too restrictive and easy to navigate around.

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152. It will correct issues of ambiguity and overbroadness that arise from decisions such as *White*, what Judge Kozinski terms an "exclusive right to something as broad and amorphous as [the plaintiff's] 'identity'." *White II*, 989 F.2d 1512, 1517 (9th Cir. 1993) (Kozinski, J., dissenting).

153. As the court pointed out in *Midler*, the statutory right of publicity is of no avail because it only covers a "person injured by another who uses *the person's* 'name, voice, signature.'" Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (emphasis added).

154. *See* Rothman, *supra* note 9, at 219–20.

B. Purely Commercial Works

Second, the statute should restrict prohibited uses to purely commercial works. "Purely commercial works" shall be defined as works that simply advertise a product, propose a commercial transaction, or exploit the individual's likeness as its primary purpose.[155] This definition would reinforce the Ninth Circuit's reasoning pre-*Keller*.[156] Further, it harmonizes this concept with New York's statutory requirement that the infringing work be for "advertising purposes or for the purposes of trade"[157] and the Second Circuit's "blatant selfish exploitation" standard.[158]

What's more, restricting the applicability of the federal statute to purely commercial works comports with the logic behind the Lanham Act's trademark false endorsement jurisprudence. The Lanham Act provides for a false endorsement cause of action, which "'prohibits the use in commerce of a symbol or device likely to deceive consumers as to the sponsorship or approval of goods or services.'"[159] By providing a similar cause of action under a federal right of publicity statute for the misappropriation of non-trademarkable characteristics of a celebrity's identity, such as likeness and voice, the statute would provide for false endorsement actions for subject matter not covered by the Lanham Act. Finally, the "commercial purposes" clause implicitly incorporates the "newsworthy exception" already observed by most courts.[160] According to this exception, because news publications—though technically for-profit endeavors—do not inherently serve to propose commercial transactions, they may freely use celebrities' likenesses to report the news, so long as such uses are truthful.[161] The "purely commercial use" restriction would therefore retain the newsworthy exception.

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155. This final term, "exploitation of the individual's likeness is the primary purpose of the work," would apply to cases such as *Comedy III*, where the product—in that case t-shirts depicting the Three Stooges—while not used for advertising or to propose a commercial transaction, has the celebrities' likeness as its primary appeal. *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 802, 805 (Cal. 2001).

156. The definition previously adhered to in *Hoffman v. Capital Cities/ABC, Inc.*, in which the court found a magazine pictorial featuring a digitally altered image of Dustin Hoffman in his female role in the film *Tootsie* donning a designer dress was not in violation of Hoffman's right of publicity because the creative elements were so intertwined with the commercial elements as to not qualify as "purely commercial speech" that "does no more than propose a commercial transaction." Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1184–86 (9th Cir. 2001).

157. N.Y. Civ. Rights Law § 51 (McKinney 2014).

158. Chambers v. Time Warner, Inc., No. 00-Civ.-2839 (JSR), 2003 WL 749422, at *5 (S.D.N.Y. Mar. 5, 2003); Rand v. Hearst Corp., 298 N.Y.S.2d 405, 410 (N.Y. App. Div. 1969).

159. Traci S. Jackson, Comment, *How Far Is Too Far? The Extension of the Right of Publicity to a Form of Intellectual Property Comparable to Trademark/Copyright*, 6 Tul. J. Tech. & Intell. Prop. 181, 184 (2004) (citation omitted).

160. *See* Gil Peles, *The Right of Publicity Gone Wild*, 11 UCLA Ent. L. Rev. 301, 303 (2004); *see also, e.g.*, Hilton v. Cards, 599 F.3d 894, 912 (9th Cir. 2009); Messenger v. Gruner + Jahr Printing & Publ'g, 208 F.3d 122, 126 (2d Cir. 2000).

161. Obviously defamation laws would still apply.

C. Economic Harm

Third, the federal statute would include a requirement that the appropriation diminish the economic value of the individual's identity in order to merit a cause of action. This provision will resuscitate the right of publicity's initial justification as a property right because it ensures that infringement only occurs when something of actual value is taken from an individual. It would correct one of the issues that arises from the *Keller* decision, which ignored the right of publicity's original impetus and opened the courts to plaintiffs receiving damages even when they fail to demonstrate the economic value of their personae.[162]

D. Transformative Use Exception

Fourth, the statute will codify the California Supreme Court's transformative use test, excepting works which contain "significant transformative elements" or in which "the value of the work does not derive primarily from the [individual's] fame."[163] The statute will ensure that "work" will be defined as "work as a whole" so that the transformative elements will not apply only to the actual likeness of the individual. This will assure that a talented artist, who accurately and skillfully depicts her subject and incorporates it into a work of art that contains several transformative elements, will be protected from a right of publicity claim. Furthermore, it will correct the Ninth Circuit's misreading of the *Comedy III* test in *Keller* and allow videogame manufacturers use of players' likenesses so long as such likenesses are merely "raw materials" from which the overall work is synthesized.

Conclusion

Because over half of all states provide a right of publicity in different incarnations, some statutory, some common law, some a combination of both, and other states provide no such right at all, a uniform federal right of publicity is long overdue. Given the confusion and uncertainty surrounding the current state of right of publicity jurisprudence, plaintiffs are at a disadvantage when they seek to protect their hard-earned fame. Likewise, under the current scheme, defendants who provide valuable commentary on public figures or transformative works of art are subject to the erosion of their First Amendment rights when they incorporate aspects of prominent figures into their work. The creation of a uniform federal right of publicity will mitigate the confusion and uncertainty under the current right of publicity framework and put both sides of any potential litigation on more equal footing with regard

162. *See supra* Part III.

163. Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 802, 810 (Cal. 2001).

to their respective rights. Furthermore, by incorporating the aforementioned provisions, the statute will rein in overreaching decisions such as *Keller*. It will also ensure First Amendment protection for current and future artists and celebrities, while also protecting public figures from predatory commercial practices. Such a statute will reaffirm the basic principles from which the right of publicity emerged. In doing so, the statute will promote the twin social values of encouraging the cultivation of public personae and preserving free speech vital to artists' self-expression and a vibrant creative industry.

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