

**FACT & FICTION: AMENDING RIGHT OF PUBLICITY
STATUTES TO INCLUDE LIFE STORY AND FICTIONAL
CHARACTER RIGHTS**

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“The image is one thing and the human being is another. It’s very hard to live up to an image, put it that way.”

– Elvis Presley¹

I. INTRODUCTION

Life imitates art and art imitates life.² But when art usurps from life, the rights of the individual whose life story has been appropriated become murky. And when life utilizes the representation of characters that have become famous in art, rights for the actors who have brought these characters to life are additionally unclear.

One such solution is to create a codified right of publicity in these two circumstances, thus granting individuals a proprietary right in their own life stories as well as permitting actors to control the use of the personas that they have cultivated on screen.

The concept of the right of publicity has existed within the scope of intellectual property law for over half of a century.³ In *Haelan Laboratories Inc. v. Topps Chewing Gum, Inc.*,⁴ the Second Circuit Court of Appeals created a complement to the pre-existing statutory right to privacy.⁵ The court explained that “it is common knowledge that many prominent persons . . . 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.”⁶

Today, the right is recognized through various state statutes and common law, and involves the appropriation of a persona’s name, likeness, or picture without consent—a violation of the commercial tort of unfair competition.⁷ In a society that is saturated with stars, obsessed with fame, and in constant reverence of celebrity, the judiciary is ripe with litigations involving alleged misuse of a celebrity persona. And perpetually growing technological and social platforms that allow for instantaneous sharing populate society with the means by which to

¹ Elvis Presley, *Quotable Quote*, GOODREADS, <http://www.goodreads.com/quotes/215363-the-image-is-one-thing-and-the-human-being-is>.

² OSCAR WILDE, *The Decay of Lying—An Observation*, in INTENTIONS (1891) (“Life imitates Art far more than Art imitates Life.”).

³ See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

⁴ *Id.*

⁵ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) (“[T]he right to life has come to mean . . . the right to be let alone.”).

⁶ *Haelan Labs., Inc.*, 202 F.2d at 868.

⁷ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. LAW INST. 1995).

accelerate these misappropriations.

However, current statutes decline to extend the right of publicity in two different contexts: an actor's rights to the characters that he or she brings to life or one's rights in his or her own life story. The right of publicity is a dually economic and moral right: it both prevents unjust enrichment in the commercial sphere and also allows for someone who is well-known to own and control the portrayal and usage of his or her own identity and persona.⁸ Therefore, limiting publicity rights solely to traditional commercial contexts—advertisements that imply false endorsements—neglects to account for the fact that the right is a moral one as well.⁹ And as a moral right, it grants its holder with the capacity to use or refrain from using it without restrictions or usurpation of ownership.¹⁰ Celebrities can copyright the books that they write or trademark their catchphrases, but cannot universally gain rights of publicity over their identities that they have cultivated, which naturally includes the characters that they have created and the story of their life. The purpose of copyright is to provide an economic incentive for creators.¹¹ The purpose of trademark is to prevent unfair competition or dilution.¹² Should there not be a parallel for celebrity publicity?

This Note will argue for the inclusion of life story and fictional character portrayal rights in right of publicity legislation, while also balancing the various conflicting interests. On the one hand, there is the argument for rewarding sweat equity, allowing ownership in one's own story or work product, and preventing unjust enrichment, and on the other hand, there is the public's right to access information and affording artistic license and creativity. Part II will set out the background on the current state of right of publicity law, including several seminal cases that have shaped the common law interpretation of the right and what areas of celebrity persona are currently protected. Part III analyzes the need for this new addendum to this evolving area of intellectual property law, and how the various competing interests between rights holders and the public would be balanced. Part IV argues for the need for a descendible right of publicity through the creation of future interests that would

⁸ Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L. J. 383, 404 (1999) ("In fact, many jurisdictions acknowledge that even celebrities who have commodified their images may object to the unauthorized use of their images on moral (i.e., personal autonomy) as well as economic grounds.").

⁹ *Natural Right*, THE WOLTERS KLUWER BOUVIER L. DICTIONARY DESK EDITION (2012).

¹⁰ *Id.*

¹¹ See, e.g., Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1348 (1989).

¹² See, e.g., Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1840 (2007).

ensure continued post-mortem protection over one's persona and life story. Part V concludes.

II. THE HISTORY OF THE RIGHT OF PUBLICITY

There are judicial strains on district and circuit courts stemming from the lack of a uniform codification of right of publicity legislation.¹³ Each state that does have a statute that addresses right of publicity has adopted distinctive rules and interprets them in a unique manner.¹⁴

The Supreme Court has only heard a right of publicity case on one occasion. In *Zacchini v. Scripps-Howard Broadcasting Co.*,¹⁵ a television station covertly recorded and broadcast Hugo Zacchini's "human cannonball" performance without obtaining his consent or providing him with any form of compensation. The Court reasoned that there was "not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place."¹⁶ Justice White, writing for the majority, posited that the news company appropriated Zacchini's performance, thereby contravening his future ability to make a living—a fundamental right protected by the Constitution.¹⁷ Since the Court found that Scripps-Howard's usage of the clip was not a situation in which speech could be chilled—as the public would not be "deprived of the benefit of [Zacchini's] performance as long as his commercial stake in his act is appropriately recognized"—the First Amendment protections were not applicable.¹⁸ Additionally, Zacchini did not seek to enjoin his performance from airing, but instead felt that he should be compensated for its broadcast.¹⁹

A celebrity's identity can be valuable in the promotion of products, and the commercial exploitation of that identity is analogous to an invasion of his or her rights regardless of whether a name or likeness is used.²⁰ In *Carson v. Here's Johnny Portable Toilets, Inc.*,²¹ the Sixth Circuit held that the use of the phrase "Here's Johnny" was impermissible and inappropriate, since it was objectively connected to "The Tonight

¹³ See generally Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. 227, 227 (1999).

¹⁴ *Id.*

¹⁵ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 562 (1977).

¹⁶ *Id.* at 576 (citing Harry Kalven Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROB. 326, 331 (1966)).

¹⁷ *Id.*

¹⁸ *Id.* at 578.

¹⁹ *Id.*

²⁰ *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983).

²¹ *Id.* at 837.

Show” host Johnny Carson. There should not be any difference between if the appropriated identity is that of the celebrity’s face, personal or professional name, voice, or character that he or she has become intrinsically affiliated with or the story of his or her life.²² It is not important *how* the plaintiff’s identity has been appropriated, only that it has been appropriated, since celebrities should have the sole right to exploit their identity value for profit.²³

Currently, twenty-two states recognize the statutory right of publicity, and carve out protections for various appropriations including name, likeness, image, and voice, and thirty-eight states have common law precedent-based rights of publicity.²⁴ However, no statutory publicity rights exist to defend life stories or fictional character portrayals.

The right of publicity is not immune to controversy.²⁵ In *Zacchini*, Justice White defended the enforcement of the right of publicity by explaining that its rationale is the “straight-forward one of preventing unjust enrichment by the theft of good will.”²⁶ He went on to explain that “[n]o 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.”²⁷ Copyright scholar Melville B. Nimmer published an Article one year after the pivotal *Haelan* decision, in which he expounded on the concept that “publicity value” is acquired through the expenditure of “considerable time, effort, skill, and even money,” so therefore, “every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations.”²⁸

However, others have argued that the right has “spun out of control” in its application by courts “hand[ing] celebrities a new property right

²² See, e.g., *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (holding that a celebrity’s distinctive and recognizable voice is as much a part of her “likeness”).

²³ *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992) (finding appropriation through impersonation in Samsung’s use of a robot dressed as Vanna White and posed in front of a “Wheel of Fortune” game without her consent in one of its advertisements).

²⁴ Jonathan Faber, *Statutes & Interactive Map*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/statutes> (last visited Dec. 27, 2017).

²⁵ Linda J. Stack, *White v. Samsung Electronics America, Inc.’s Expansion of the Right of Publicity: Enriching Celebrities at the Expense of Free Speech*, 89 NW. U.L. REV. 1189, 1189 (1995) (proposing a judicial approach that would prevent overextending the right of publicity in the future).

²⁶ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (citing Harry Kalven Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROB. 326, 331 (1966)).

²⁷ *Id.*

²⁸ Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 216 (1954).

with greatly expanded boundaries.”²⁹ Many feel that celebrities can turn to traditional modes of intellectual property—copyright and trademark—to ensure protection, yet these mechanisms fail to adequately address otherwise non-protectable identities.

The Lanham Act, the federal statute governing trademarks, service marks, and unfair competition, finds civilly liable any person who uses “any word, term, name, symbol, or device, or any combination thereof” that is “likely to cause confusion . . . or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities.”³⁰ While many plaintiffs have included claims of infringement under the Lanham Act along with right of publicity violations, the trademark act is primarily focused on commerce and trade.³¹ This includes unfair competition, trademark dilution, and false designation of origin, but does *not* focus on artistic or creative forms of expression and, therefore, the Act does not adequately protect a publicity appropriation.³² Nimmer argues that under the current intellectual property law framework, “publicity values are not effectively protected” since “a person’s publicity values may be profitably exploited in non-competitive fields.”³³ He has reservations about the potential success that a plaintiff may find in litigating an appropriation case against a company or brand that is not in direct competition with the plaintiff.³⁴

Statutorily, and through common law, there is a large gap in how the law protects personas and identities of both well-known and non-famous people. Because there is a lack of uniformity, different courts do not possess an adequate roadmap of what rules to apply when answering questions pertaining to the right of publicity. This results in a vast imbalance of justice to potential publicity rights holders who may succeed on a claim of misuse of one aspect of his or her identity but not on another valid aspect that is equally deserving of protection. Part III will make an argument for amending right of publicity legislation to include both life story rights and rights in fictional character portrayals in audiovisual media, and will explain why such legislation is most equitable to the rights holders while still allowing the advancement of creativity without imposing a ban on freedom of expression under the

²⁹ Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity “Wheel” Spun Out of Control*, 45 KAN. L. REV. 329, 330 (1997).

³⁰ 15 U.S.C. § 1125(a)(1)(A) (2017).

³¹ *Id.*

³² *Id.*

³³ Nimmer, *supra* note 28, at 210.

³⁴ Nimmer, *supra* note 28, at 216.

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First Amendment.

III. RIGHT OF PUBLICITY IN THE REAL AND MAKE-BELIEVE

A. *Life Stories are Inseparable from Persona*

It has often been said that “[t]ruth is stranger than fiction.”³⁵ So it is no surprise that moviemakers, television writers, novel authors, and theatrical producers alike have made millions of dollars in the entertainment industry by telling stories that have already been lived.³⁶ Therefore it is only natural that life story rights be added into right of publicity statutes, as one’s life story is as intrinsically connected to one’s persona as his or her likeness and name, and therefore should be granted the same amount of protections.

In balancing the various competing interests to certify a legislation expansion that would not be too restrictive or would not be preempted by the First Amendment, there must be narrow constraints that a potential plaintiff’s claim must fall within in order for it to pass constitutional muster. A heightened evidentiary showing requirement would allow for defendants to continue creatively expressing themselves and introducing new artistic works into the marketplace. In such a case, a plaintiff could only succeed if he or she could show that there are distinct and remarkable connections between the circumstances and characterization presented in the work of fiction or unauthorized biography and the plaintiff’s own life, and that these links would be indistinguishable to a viewer, in the same vein as an unfair competition or false advertising claim would be to a consumer.

Additionally, defendants may utilize “anti-SLAPP” legislation to prevent chilling freedom of speech or expression by attempting to dismiss cases that are violative of issues of actual “public importance.”³⁷ A strategic lawsuit against public participation (“SLAPP”) is a lawsuit that a plaintiff brings about to deliberately stifle or silence a defendant by forcing a defendant to develop a legal defense if he or she refuses to comply with a censor.³⁸ Anti-SLAPP statutes claim that these suits

³⁵ MARK TWAIN, *FOLLOWING THE EQUATOR: A JOURNEY AROUND THE WORLD* 140 (1897).

³⁶ See, e.g., Anjelica Oswald, ‘Hamilton’ Tickets Sell For More Than \$2,000—Here’s How Much Money Broadway’s Hottest Musical Is Raking In, *BUS. INSIDER* (Apr. 13, 2016, 10:56 AM), <http://www.businessinsider.com/hamilton-musical-revenue-facts-2016-4/#created-and-composed-by-lin-manuel-miranda-the-musical-is-based-on-hamilton-a-biography-about-alexander-hamilton-written-by-ron-chernow-1> (detailing how the hit musical *Hamilton*, based upon the life story of America’s Founding Father, makes over \$1.5 million each week).

³⁷ SPEAK FREE Act of 2015, H.R. 2304, 114th Cong. (2015).

³⁸ *What Is a SLAPP?*, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/what-is-a->

encumber freedom of speech and create a chilling effect, and thus such suits are illegal in many jurisdictions.³⁹ In 2015, the House introduced a bipartisan bill entitled “SPEAK FREE Act of 2015,” which was intended to formulate a federal anti-SLAPP ability to dismiss claims that “arise from an oral or written statement or other expression, or conduct in furtherance of such expression, by the defendant in connection with an official proceeding or about a matter of public concern.”⁴⁰ “Public concern” includes an issue related to a “public official or public figure” or a “good, product, or service in the marketplace.”⁴¹ This legislation complicates the conundrum of whether or not right of publicity claims would be, in effect, shut out by any future defendants who would bring about an anti-SLAPP motion to dismiss by claiming that the plaintiff is chilling its freedom of speech and expression.⁴²

i. Why the Right to Privacy Is Not Applicable

Several courts have considered the degree of ownership that one has over his or her own life story that is being portrayed on screen or in literature. These courts have struggled with how to recognize a legal right in these circumstances and under what legal theories they should be acknowledged. While the right to privacy has been applied in some cases, this does not serve an adequate or relevant purpose. Privacy is about protection from publicity, *not* the ability to generate one’s own publicity.⁴³ In cases involving life stories, the individuals claiming misappropriation are seeking to dictate the use of their own personas and selecting who may or may not profit from creating fictional or fact-based expressive works centered around their identities.

slapp/ (last visited Dec. 27, 2017).

³⁹ *Id.*

⁴⁰ H.R. 2304.

⁴¹ *Id.*

⁴² Actress Olivia de Havilland brought a suit against television network FX and “Feud” showrunner Ryan Murphy for infringing upon her publicity rights by inaccurately depicting her in the series “Feud: Bette and Joan.” Libby Hill, *Olivia de Havilland Scores Court Victory; Trial Will Begin Nov. 27*, L.A. TIMES (Sept. 29, 2017, 12:54 PM), <http://www.latimes.com/entertainment/la-et-entertainment-news-updates-olivia-de-havilland-scores-court1506710393-htmllstory.html>. FX and Murphy retaliated with a motion to strike, claiming that under California’s anti-SLAPP statute, the work is protected as “a social commentary on Hollywood’s history of sexism, misogyny, and media manipulation, issues that still plague Hollywood today.” Nardine Saad, *Olivia de Havilland, at 101, Gears Up For a Fight in ‘Feud’ Court Battle*, L.A. TIMES (Aug. 30, 2017, 1:15 PM), <http://www.latimes.com/entertainment/tv/la-et-st-olivia-de-havilland-feud-fx-lawsuit-20170830-story.html>. The court found that while the defendants’ speech was protected under the statute, there was demonstrable evidence that the plaintiff could prevail at trial, thus denying the anti-SLAPP motion, in a major victory for publicity rights holders. *See Hill, supra*.

⁴³ Warren & Brandeis, *supra* note 5, at 215.

The right to privacy is “the claim that a man has the right to pass through this world, if he wills, without having his picture published . . . or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers.”⁴⁴ In his article *Privacy*, William Prosser sets forth four categories of invasion that are recognized in privacy law: (1) intrusion of seclusion or solitude; (2) public disclosure of private facts; (3) false light; and (4) appropriation.⁴⁵ The right to privacy is intended to protect an individual’s mental or emotional well-being.⁴⁶ But as for the final element, appropriation, Prosser explains that this interest is “not so much a mental as a proprietary one.”⁴⁷ The right to one’s own publicity is more than mental or emotional well-being or reputational—it is also economic. This legal right grants an individual the power of control over the commercial use of his or her very identity—it does not just ensure that this identity is protected from being portrayed in a manner that is potentially invasive or that could invoke emotional stress. Because of this nuanced difference, the law of privacy is inadequate to cover the use of real-life identities in either fact or fiction-based media portrayals.

In *Corabi v. Curtis Publishing Company*,⁴⁸ the Pennsylvania Supreme Court held that the plaintiff, entertainer Lillian Reis, had no right over the publication of an article about her in the *Saturday Evening Post*, which detailed how she was charged with having been the mastermind of a large burglary. The court explained that “[t]he flaw in plaintiff’s position is that a public figure has no exclusive rights to his or her own life story, and others need no consent or permission of the subject to write a biography of a celebrity.”⁴⁹ The court analyzed this case through a privacy lens, determining that no privacy rights are owed to publicly known figures whose actions are already on full display in the public eye, and therefore already provided unrestricted knowledge to any person who chooses to integrate these actions or this person into a work.⁵⁰ However, this case is distinguishable from other right of privacy or right of publicity life story cases since this case involves a news report as opposed to a work of fiction or creative expression. News reports should be granted more freedom and protection than creative works because they are relevant to public interest and the need for the successful

⁴⁴ *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 443 (N.Y. 1902).

⁴⁵ William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

⁴⁶ *Id.* at 384.

⁴⁷ *Id.* at 406.

⁴⁸ *Corabi v. Curtis Pub. Co.*, 273 A.2d 899, 912 (Pa. 1971).

⁴⁹ *Id.* at 919.

⁵⁰ *Id.*

dissemination of public knowledge.

False light and defamation are also integral aspects of privacy rights. False light concerns the protection of an interest that is reputational and contains the same “overtones of mental distress” as are required for a successful pleading of defamation.⁵¹ But, whereas public disclosure of private facts involves truthful statements, false light involves either invented or misleading facts that place an individual in a false light and are highly offensive through an objective lens.⁵² A story can be true, thus eliminating the application of a false light or defamation claim, but still violate the right of publicity since it is being appropriated without consent—a key factor of any right of publicity violation.

Likewise, the court in *Spahn v. Julian Messner, Inc.*⁵³ warned of the dangers of confusing “privacy” with “personality,” and explained that the plaintiff, Warren Spahn, a celebrated baseball player, was a “public personality” and that “insofar as his professional career is involved, he is substantially without a right to privacy.” However, Judge Keating went on to explain “[t]hat is not to say . . . that his ‘personality’ may be fictionalized and that . . . it may be exploited for the defendants’ commercial benefit through the medium of an unauthorized biography.”⁵⁴

ii. Why the Right of Publicity is the Best Equipped Legal and Equitable Remedy for Life Story Appropriations

The right of publicity has been analyzed in the context of use of persona in “stories” for several decades; however, no court or legislature has created a uniform method for applying this legal right in these circumstances, which is in dire need of remediation. In his treatise on publicity rights, J. Thomas McCarthy theorized that “perhaps no aspect of the rights of privacy and publicity has been perceived as being as cloudy and muddled as liability for the use of persons’ identities in ‘stories,’ whether denominated as ‘fiction,’ ‘faction,’ or ‘docudrama.’”⁵⁵ The term “docudrama” has been described as “a type of film or novelization in which real-life events are embellished with fictional dramatic events.”⁵⁶ Docudramas, as a form of entertainment, have been in existence since the early twentieth century, with many sources

⁵¹ Prosser, *supra* note 45, at 400.

⁵² Prosser, *supra* note 45, at 400.

⁵³ *Spahn v. Julian Messner, Inc.*, 221 N.E.2d 543, 545 (N.Y. 1966).

⁵⁴ *Id.*

⁵⁵ *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 336 (E.D. Pa. 1996) (citing J. Thomas McCarthy, *The Rights of Publicity and Privacy*, § 8.9[A] (1988)).

⁵⁶ *Ruffin-Steinback v. de Passe*, 82 F. Supp. 2d 723, 726 n.1 (E.D. Mich. 2000) (citing J. Thomas McCarthy, *The Rights of Publicity and Privacy*, § 8.9[A] n.2 (1988)).

crediting this to producer Louis de Rochemont, who created *The March of Time*, a documentary-dramatization film series about World War II, which contributed to the genre's popularity.⁵⁷ Docudramas differ from historical fiction in that they do not simply create fictionalized tales grounded in a realistic era, but instead take advantage of existing people, places, and things that serve as the "characters" in these tales.⁵⁸

Most recently, in a case decided in February 2016, the Ninth Circuit held that there is no right to publicity in life stories as such stories are not a form of purely commercial speech, and the alleged publicity holder did not "make the investment required to produce a performance of interest to the public" or "invest time and money to build up economic value in a marketable performance or identity."⁵⁹ In *Sarver v. Chartier*,⁶⁰ Mark Boal, a journalist for *Playboy* magazine, shadowed the plaintiff, Army Sergeant Jeffrey Sarver, who served as one of approximately 150 Explosive Ordnance Disposal ("EOD") technicians in Iraq. Boal wrote an article about Sarver's life and experiences in Iraq for both *Playboy* and *Reader's Digest*.⁶¹ Prior to the events of this lawsuit, Sarver claimed that he "never consented to the use of his name and likeness" in the article, and that he "objected to it after reviewing an advance copy."⁶² After the article was published, Boal wrote the screenplay for the June 2009 film *The Hurt Locker*.⁶³ Sarver alleges that the film's main character is based on his life and experiences, that "characteristics of [the main character] and events in the movie . . . mirror his life story," that this was done without his consent, and several scenes portray him in a false manner, which has damaged his reputation.⁶⁴ Sarver sued for misappropriation of his likeness and right of publicity along with a number of other privacy and contractual claims.⁶⁵ The case was dismissed under California's anti-SLAPP statute, which allowed the defendants to claim that the film depicted an issue of "public importance" worth broadcasting and defeating Sarver's publicity rights.⁶⁶

In analyzing the anti-SLAPP claims, Judge O'Scannlain sided with

⁵⁷ ALAN ROSENTHAL, WHY DOCUDRAMA?: FACT-FICTION OF FILM AND TV 65 (1999).

⁵⁸ STEVEN N. LIPKIN, REAL EMOTIONAL LOGIC: FILM AND TELEVISION DOCUDRAMA AS PERSUASIVE PRACTICE 64 (2002) ("Docudrama[s] . . . are, of course, offering us some actual person's 'true story.'").

⁵⁹ *Sarver v. Chartier*, 813 F.3d 891, 905 & n.8 (9th Cir. 2016).

⁶⁰ *Id.* at 896.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Sarver*, 813 F.3d at 896.

⁶⁶ *Id.* at 897, 899.

the defendants who contended that the Iraq War was a matter of “significant and sustained public attention,” as was the use of improvised explosive devices during the war and that, therefore, the subject matter of the film was one of public concern.⁶⁷ However, Sarver felt that this application was too broad and, instead, asked the court not to analyze whether the *war* was of public interest, but whether Sarver’s *private persona* was of public interest.⁶⁸ The plaintiff argued that this standard would not satisfy the first step of the anti-SLAPP analysis: a *prima facie* showing that the defendants’ actions are related to a “public issue in furtherance of the defendant’s right to free speech.”⁶⁹

Ultimately, the court concluded that the “nature of Sarver’s occupation and the context in which his alleged portrayal appears” in the film and the “significant attention devoted to the war” contributed to the film being one of public concern.⁷⁰ The court held that while the film “allegedly incorporates personal characteristics of Sarver—for example his appearance, his temperament, and parts of his biography—such characteristics are displayed only in the context of the character’s experiences fighting in Iraq.”⁷¹

However, what the court failed to acknowledge was that this appropriation, whether or not directly relevant to the film’s public interest elements, was still appropriative of Sarver’s identity. A more applicable test is the one that Sarver suggested: inquiring whether the *persona* at issue was of so-called public concern rather than if the subject matter of a given dramatization was of concern.⁷² This would allow for the rise of right of publicity claims to be recognized in the case of life story misappropriation when the issue is the misuse of the persona at the center of the film, rather than the particular era or subject matter of the film. A prime example of this is the difference between historical fiction and docudramas; whereas the former is perfectly acceptable when authors take creative license to write works that are grounded entirely in fiction and merely set in a realistic world, the latter would involve taking an existing subject and fictionalizing his or her life.⁷³ Additionally, this would not stifle a screenwriter’s ability to create a film about a subject matter of public concern; it would only limit the author’s ability to create

⁶⁷ *Id.* at 902.

⁶⁸ *Id.*

⁶⁹ *Id.* at 901-02.

⁷⁰ *Id.* at 902.

⁷¹ *Sarver*, 813 F.3d at 902.

⁷² *Id.*

⁷³ ROSENTHAL, *supra* note 57.

a film that is based upon another's life.⁷⁴

A bedrock copyright case decided by the Supreme Court declared that originality is the "sine qua non" of copyright.⁷⁵ While publicity rights are not a codified element of copyright law, statutory rights of publicity would be more salutary if they adopted a similar approach of analyzing originality when determining whether a docudrama violates a subject's right of publicity. Life stories, by their very nature, are not original. If an expressive work is so closely related to a subject's life, through connections that are distinct and remarkable, then a subject's right of publicity has been violated, even if the character's novel name or the fictionalized dialogue is stripped away. Creating a legislatively proscribed list of factors for a court to weigh in deciding whether or not a work is appropriative would be the most judicious way to ensure that all generators of creative works are put on notice of what is and is not statutorily permissible. This could assist in closing the doors to litigious claims by informing those creating films, television shows, or novels that use real life stories as their basis, of what is infringing and what is allowable. Additionally, if a claim does reach the courts, this checklist would provide judges with an equally streamlined process by which to decide where the case falls on the spectrum of appropriating a persona to providing a story with subject matter that is of public concern. Factors, such as results from a viewer perception survey detailing facts of the individual and showing the artistic work, the number of physical and circumstantial similarities between the character at issue and his real-life counterpart, the existence of a prior relationship between the plaintiff and defendant, or the use of one's own name, would be beneficial to both lawmakers as well as the judiciary.⁷⁶ This would provide the opportunity to certify that the restrictions are neither too strict for potential defendants nor violative of First Amendment rights to freedom of speech and expression, and would carve out exceptions for merely coincidental occurrences.

In copyright law, in order to prove infringement, a plaintiff must

⁷⁴ In 1913, the New York Court of Appeals held that a film based upon plaintiff's heroic actions was a "series of pictures [that] were not true pictures of a current event but mainly a product of the imagination, based, however, largely upon such information relating to an actual occurrence as could readily be obtained." *Binns v. Vitagraph Co. of Am.*, 103 N.E. 1108, 1110 (N.Y. 1913). Here, the New York Court of Appeals drew an early distinction between "news" and "entertainment," finding that there is no cause of action in the former, but that there may be one in the latter. *Id.*

⁷⁵ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

⁷⁶ Courts may also consider weighing whether or not the creative work makes use of an overt and prominent disclaimer—stating that there is no connection to or endorsement by the real-life subjects of the film and that any dialogue, events, or characteristics portrayed are purely fictionalized.

show that the defendant has copied the work in question, and then demonstrate that the defendant's work improperly appropriates the plaintiff's work by substantiating that the "intended audience" will recognize substantial similarities between the two.⁷⁷ Courts have found that the test for determining improper appropriation should be equivalent to that of a "spectator," who would rely upon the "complex of his impressions" in deciding if there is uncanny similarity.⁷⁸ If the audience would perceive that the individual whose life story is the foundation for the creative work must have "endorsed" the film or book, or must have an affiliation with it due to the striking similarities, this should be sufficient to set out the case for a right of publicity violation. While the work may not be a "commercial" one in the traditional sense, if it impinges upon the individual's opportunity to create his *own* work based upon his life story by saturating the market with the same tale, this would create an economic ripple effect that should also serve to allow for a showing of misappropriation.

Other courts have held that copying has occurred if the defendant has sufficient "access" to the plaintiff's work and thus produced a "substantially similar" product by virtue of this access.⁷⁹ Of course, a defendant could not be accused of "copying" a plaintiff's life story if he or she was not familiar with it or did not have access to the story, which would shield mere coincidences.⁸⁰ *De minimis* similarities would also fail to qualify as appropriations in the eyes of the law.⁸¹ Applying these

⁷⁷ See e.g., *Airframe Sys. v. L-3 Communs. Corp.*, 658 F.3d 100, 106 n.7 (1st Cir. 2011) ("Where . . . the copyrighted work involves specialized subject matter, such as a computer program, some courts have held that the 'ordinary observer' is a member of the work's 'intended audience' who possesses 'specialized expertise.'").

⁷⁸ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 123 (2d Cir. 1930).

⁷⁹ *Warner Bros. v. ABC*, 654 F.2d 204, 207 (2d Cir. 1981) ("[I]t is well settled that copying may be inferred where a plaintiff establishes that the defendant had access to the copyrighted work and that the two works are substantially similar.").

⁸⁰ See e.g., *Art Attacks Ink, LLC v. MGA Enter. Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009) ("To prove access, a plaintiff must show a reasonable possibility, not merely a bare possibility, that an alleged infringer had the chance to view the protected work. . . . Where there is no direct evidence of access, circumstantial evidence can be used to prove access either by (1) establishing a chain of events linking the plaintiff's work and the defendant's access, or (2) showing that the plaintiff's work has been widely disseminated."); see also *Gaste v. Kaiserman*, 863 F.2d 1061, 1068-69 (2d Cir. 1988) ("striking similarity . . . must extend beyond themes that could have been derived from a common source or themes that are so trite as to be likely to reappear in many compositions").

⁸¹ Andrew Inesi, *A Theory of De Minimis and A Proposal For Its Application in Copyright*, 21 BERKELEY TECH L.J. 945, 947 (2006) ("*De minimis non curat lex* is commonly translated as 'the law does not concern itself with trifles.'"). New York courts have made use of an "incidental use" exception for life story portrayals, which tests if the plaintiff "was the sole or a primary subject of the allegedly fictitious work" or instead if the portrayal was merely "incidental, momentary, [or] isolated." *Ladany v. William Morrow & Co.*, 465 F. Supp. 870,

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confines in the right of publicity context on a case-by-case basis would assist in ensuring that appropriation is found only in specific circumstances; either when the defendant had “direct” and apparent access to the plaintiff’s life story, or when an intended audience, who observed both the allegedly infringing work and the circumstances of the persona’s life, would find the two to be “substantially similar” and thus probative of impermissible appropriation.

However, there must be affirmative defenses for alleged appropriators, and one such exception must exist for “transformative” uses. The Copyright Clause sets forth four “fair use” limitations on the exclusive rights to a copyrighted work: (1) the purpose and character of the use; (2) the nature of the work; (3) the amount and substantiality of the used portion in relation to the whole work; and (4) the effect of the use in relation to the potential market for or value of the work.⁸² Under the first element, a work is protected as “fair use” if it does not “supersede the objects” of the original creation, but instead is *transformative* by “[adding] something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁸³ A fair use defense would grant privileges to a rights-holder that are not too broad and do not restrict the open marketplace of ideas. This would ensure that aspects that represent only a mere modicum of the individual’s persona are not policed and prevented from use under the First Amendment freedoms.

While parody remains a protected form of free speech under “fair use” doctrines, there is a difference between parody, which is transformative, and life stories, which are either directly taken from someone else’s own life, or greatly lifted with slight fictionalization.⁸⁴ If the work is so transformative as to render the connection between the real-life individual and the character in the artistic piece, then the First Amendment protections would apply and safeguard the work. However, the First Amendment protections are not a shield to defamation claims in biopics and docudramas.⁸⁵

In the past, courts have grappled with the issue of whether or not the

880-82 (S.D.N.Y. 1978).

⁸² 17 U.S.C. § 107 (Westlaw through Pub. L. No. 115-61.).

⁸³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

⁸⁴ § 107 (proscribing protection for the purpose and character of the use under the fair use umbrella).

⁸⁵ See e.g., Eriq Gardner, *Viacom Headed to Trial over TLC Biopic*, THE HOLLYWOOD REP. (Sept. 20, 2016), <http://www.hollywoodreporter.com/thr-esq/viacom-headed-trial-tlc-biopic-931125>; see also Peter Libbey, *Olivia de Havilland Files Lawsuit Over ‘Feud’ Portrayal*, N.Y. TIMES (July 2, 2017), <https://www.nytimes.com/2017/07/02/arts/olivia-de-havilland-files-lawsuit-over-feud-portrayal.html>.

scope of the right of publicity depends upon the “fictional or non-fictional character of the work,” thus providing a useful context of when transformation would be sufficient.⁸⁶ In *Ruffin-Steinback v. de Passe*,⁸⁷ plaintiffs sued for infringement of their right of publicity over a mini-series docudrama depicting the story of the Motown group “The Temptations,” which was based upon a novel written by Otis Williams, one of the founding members of the group. The district court cited the Michigan Supreme Court, which has recognized a tort claim for “appropriation, for the defendant’s advantage, of the plaintiffs name or likeness.”⁸⁸ However, since the court had not yet decided a life story appropriation claim, it chose to adopt the Restatement of Unfair Competition’s view, which provides that “‘for purposes of trade’ does not ordinarily include the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.”⁸⁹ The court went on to cite to the Restatement’s comment (c), which states that “[u]se of another’s identity in a novel, play, or motion picture is also not ordinarily an infringement.”⁹⁰

However, while the Restatements are intended as valuable treatises written by legal scholars and professionals, they are merely persuasive and are not binding authority.⁹¹ And, since the Supreme Court has yet to hear a case on right of publicity in life story claims and Congress has yet to enact a statute that addresses a uniform right of publicity law, the Restatement does not provide a clear-cut answer for judges tackling this issue.

A Fifth Circuit case, *Matthews v. Wozencraft*,⁹² concerned the publication of a novel involving a fictionalized version of the plaintiff. The court held that “the term ‘likeness’ does not include general incidents from a person’s life” and that the “narrative of an individual’s life, standing alone, lacks the value of a name or likeness that the misappropriation tort protects.”⁹³ The court distinguished name and likeness from life story, by explaining that “[u]nlike the goodwill associated with one’s name or likeness, the facts of an individual’s life

⁸⁶ *Ruffin-Steinback v. de Passe*, 82 F. Supp. 2d 723, 730 (E.D. Mich. 2000).

⁸⁷ *Id.* at 726.

⁸⁸ *Id.* at 728.

⁸⁹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (AM. LAW INST. 1995).

⁹⁰ *Id.*

⁹¹ See generally Kristin David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 205 (2007) (describing the role of the legal “Restatement movement”).

⁹² *Matthews v. Wozencraft*, 15 F.3d 432, 436 (5th Cir. 1994).

⁹³ *Id.* at 438.

possess no intrinsic value that will deteriorate with repeated use.”⁹⁴

But the right of publicity is not only an *economic* right, but a *moral* one as well, and therefore a plaintiff should have the ability to control how his or her “likeness” and “persona” is used. An intellectual property owner should be allowed a right that is parallel to the one given to a homeowner in real property who is allowed to grant others permission to come onto his property and restrict others from trespassing.⁹⁵ In the intellectual property realm, the right should exist to allow an owner to dictate the use of his own “persona,” which should encompass events that occurred in his life that were unique to him.⁹⁶ This would not broaden publicity rights too much. The unique facts and circumstances of one’s life are just as integral to one’s persona as one’s name or face. But in order to prevent widespread claims of misuse, a life story rights-holder who is not already in the public eye should be required to show a preexisting and fiduciary relationship between himself and the author of the creative work that was produced using his story. Therefore, purely coincidental incidences will not be penalized; characters that appear in novels or films that experience vaguely similar events or have vaguely similar personality or physical characteristics or traits to real-life counterparts will not be punished as infringing the right of publicity. But, if a relationship already exists between the author and the person whom the character is based upon, such as in the case of *Sarver* or *Matthews*, this is sufficient evidence that the creative works do not merely display coincidental similarities, but rather are intentional, and thus infringing of the individual’s ability to control the use and portrayal of his persona on film or in a novel.⁹⁷

In a case before the D.C. district court, David Whitehead claimed that the movie *Mission: Impossible* was based upon a book that he wrote detailing his time in the Central Intelligence Agency (“CIA”) and that this infringed upon his privacy rights.⁹⁸ The court concurred with the *Matthews* court, and explained that even if the plaintiff “could establish that either of the movies was based on his life story, which he cannot, there is no tort for invasion of privacy for appropriating the story of

⁹⁴ *Id.*

⁹⁵ See e.g., J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 721 (1996); see also Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 377 (2003) (discussing how property law can be interpreted as a bundle of rights, which includes the right to exclude).

⁹⁶ See e.g., Penner, *supra* note 95; see also Mossoff, *supra* note 95.

⁹⁷ See *Sarver v. Chartier*, 813 F.3d 891, 896 (9th Cir. 2016); see also *Matthews*, 15 F.3d at 432.

⁹⁸ *Whitehead v. Paramount Pictures, Corp.*, 53 F. Supp. 2d 38, 40-41 (D.D.C. 1999).

another person's life."⁹⁹ However, the district court here did not extend its analysis to an application of whether there even is an economic value in one's life story that will be impacted by nonconsensual use. This court solely analyzed the case through the lens of the right of privacy, *not* the right of publicity, and thus neglected to address this pivotal issue.

In failing to address economics in life story works, courts have missed the opportunity to determine that the right of publicity extends beyond merely "commercial" uses particularly in the context of advertisements. In 1989, actress and dancer Ginger Rogers sued an Italian filmmaker over a film entitled *Ginger and Fred* that featured a dancing duo as its stars.¹⁰⁰ The Second Circuit held that "the title 'Ginger and Fred' is clearly related to the content of the movie and is not a disguised advertisement for the sale of goods or services or a collateral commercial product" and is therefore permissible.¹⁰¹ A similar case, *Frosch v. Grosset & Dunlap, Inc.*,¹⁰² held that it was irrelevant whether the work in question was "properly described as a biography, a fictional biography, or any other kind of literary work," and that it was not the court's responsibility to "pass on literary categories, or literary judgment," declaring that it was enough "that the book is a literary work and not simply a disguised commercial advertisement for the sale of goods or services." These declarations—that expressive works cannot be commercial—are inherently dangerous and open the door to a potential parade of horrors. By granting any future screenwriter or novelist the ability to literally appropriate the exact circumstances, events, names, or even lines of dialogue that have been spoken by an individual, and to make use of them without that individual's consent, courts allow these authors to monopolize on the lives of others.

Even if creative works are not strictly "commercial" in the advertising sense, the creators of these works still directly profit from them. These circumstances are distinguishable from right-of-publicity cases that involve the use of celebrity names in recorded works or images in social media.¹⁰³ These circumstances, whether appropriative or not,

⁹⁹ *Id.* at 53.

¹⁰⁰ *Rogers v. Grimaldi*, 875 F.2d 994, 996-97 (2d Cir. 1989).

¹⁰¹ *Id.* at 1005.

¹⁰² *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828, 829 (N.Y. App. Div. 1980).

¹⁰³ *See, e.g., Lindsay Lohan Loses Lawsuit Against Pitbull*, ROLLING STONE (Feb. 23, 2013), <http://www.rollingstone.com/music/news/lindsay-lohan-loses-lawsuit-against-pitbull-20130223> (reporting that Lindsay Lohan's claim against Pitbull for the line "got it locked up like Lindsay Lohan" as a violation of her publicity rights was dismissed since it was not used for "advertising" or "trade"); *see also* Eriq Gardner, *Katherine Heigl Ends Lawsuit Over Duane Reade Tweet (Exclusive)*, THE HOLLYWOOD REP. (Aug. 27, 2014, 12:20 PM), <http://www.hollywoodreporter.com/thr-esq/katherine-heigl-ends-lawsuit-duane-728552> (discussing Katherine Heigl's settlement with Duane Reade for tweeting a paparazzi image

do not usurp the entirety of another's personal life and individualized, unique circumstances. This distinction invites the need for legislative action through the amendment of right of publicity statutes to provide for protection for those whose lives are impermissibly portrayed in film, on television, or in text, in order to prevent the unjust enrichment that would undoubtedly occur if lawmakers granted authors permission to profit from writing stories revolving around other peoples' lives.

Life story right of publicity cases are not confined solely to cases involving unknown individuals, and can extend to both living and deceased celebrities. In 1979, Rudolph Valentino's nephew attempted to bar a television broadcast entitled *Legend of Valentino: A Romantic Fiction* for violating his uncle's right of publicity.¹⁰⁴ The Supreme Court of California dismissed the action for failure to state a claim, but Chief Justice Bird explained, on behalf of himself and two concurring justices, that, in resolving the question of right of publicity infringement, the "context and nature of the use is of preeminent concern."¹⁰⁵ The Chief Justice posited that the "range of free expression" would be "meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imaginations of authors of fiction."¹⁰⁶ But "forbidding" the use of an existing persona is not something that should be done wholesale. Instead, it should be done in a selective manner. Namely, authors should not be restricted completely from mentioning or alluding to celebrities in their creative works—but they should also not permit works centered solely around a celebrity's persona without prior consent. Chief Justice Bird noted that the circumstance would be different if respondents had "published Rudolph Valentino's Cookbook and neither the recipes nor the menus described in the book were in any fashion related to Rudolph Valentino," but since the broadcast at issue was not "wholly unrelated," the right of publicity did not apply.¹⁰⁷ This method of analysis is erroneous because it attributes liability to the defendant based upon the manner of use of the individual's name. In works involving a celebrity's life story, the work is infringing of the celebrity's right of publicity if it is about the celebrity in such a manner that makes it indistinguishable in the eyes of the viewer. In amending right of publicity legislation, lawmakers should put to rest this distinction by using express language that clarifies that, if a work is *solely* about an individual, then it violates the right of publicity. But on the other hand,

of Heigl leaving one of its stores with a shopping bag).

¹⁰⁴ *Guglielmi v. Spelling-Goldberg, Prods.*, 603 P.2d 454, 455-56 (Cal. 1979).

¹⁰⁵ *Id.* at 457 (Bird, C.J., concurring).

¹⁰⁶ *Id.* at 460.

¹⁰⁷ *Id.* at 457 n.6.

if a work merely *mentions* a celebrity or has one character who is vaguely similar to a well-known individual, then the First Amendment's freedom of expression, which permits creators to put forth works into the artistic marketplace without infringing upon others' rights, should safeguard it.

In another case involving a noted persona, Agatha Christie's estate sued defendants for making *Agatha*, a movie that told a fictionalized account of a true incident in Christie's life.¹⁰⁸ The court found that the question of infringement hinges upon "the absence or presence of deliberate falsifications" through a defendant's attempt to present the disputed events as true, and that this determines "whether the scales in this balancing process, shall tip in favor of or against protection of the speech at issue."¹⁰⁹ The court found that in this situation "it is evident to the public that the events so depicted are fictitious;" but that assumption was a slippery slope, considering the lack of concrete evidence showing how the public actually perceived the events.¹¹⁰ This is why a heightened evidentiary standard and burden of proof for a potential plaintiff would prevent a guessing game about whether or not the fictionalized elements of a docudrama sufficiently distinguish a work from an already well-known celebrity's life story.

The addition of life story rights under the right of publicity umbrella would not stifle creativity. After receiving contractually granted consent from the subject, one could still create a biopic about a celebrity or write a piece of fiction that is heavily inspired by an actual person, just as brands may use celebrity spokespeople once they obtain consent or provide compensation. This would help close the door to litigation as name and likeness protections for commercial speech helped prevent companies from appropriating celebrity images to sell their products.

Additionally, the ability to control life rights in various media should also depend upon what damages the plaintiff seeks: injunctive relief or monetary relief. In a famous 1994 suit between Elizabeth Taylor and NBC, Taylor sought an injunction to prevent the airing of an unauthorized biopic. In his decision, Judge Wayne called this injunction an "unconstitutional prior restraint" on expression, regardless of the fact that the miniseries could be a commercial success for NBC.¹¹¹ Judge Wayne claimed that Taylor might be able to bring an action for monetary damages after the program aired, but she could not attempt to restrict the

¹⁰⁸ Hicks v. Casablanca Records, 464 F. Supp. 426, 428 (S.D.N.Y. 1978).

¹⁰⁹ *Id.* at 433.

¹¹⁰ *Id.*

¹¹¹ *Judge Refuses to Block Miniseries About Elizabeth Taylor*, REP. COMM. FOR FREEDOM OF THE PRESS (Sept. 20, 1994), <http://www.rcfp.org/browse-media-law-resources/news/judge-refuses-block-miniseries-about-elizabeth-taylor>.

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program from broadcasting in the first place.¹¹² Overall, the focus should not necessarily be about plaintiffs attempting to chill speech and create a restraint on expression, but instead about plaintiffs receiving due credit and compensation for works that are either directly about them or heavily inspired by them.

B. An Actor's Ownership in the Fictional Characters That He or She Brings to Life

Right of publicity statutes should protect fictional characters, since many actors are indivisible from the characters that they play. Again, these statutes would heavily limit protection to characters that the actor solely creates and that are indistinguishable from the actor. Such protections would require a high burden of proof whereby plaintiffs must show that the public intrinsically associates an image of that character with the celebrity. Lawmakers should also limit this right to images of characters where the physical features are strikingly similar to the actor, and not extend the right to mere character name usage alone with no corresponding likeness appropriation. This right would exist mostly in the context of commercial advertising where there is a current trend of brands utilizing fictional characters to advertise products. Recently, the National Association of Realtors aired a series of commercials featuring the character Phil Dunphy from *Modern Family*.¹¹³ This is not a question of copyright or trademark—who owns the character—but rather a publicity question that would require a determination of who is allowed to economize on the use of a character's image.

An important inquiry in fictional character publicity rights is whether or not the actor who would claim possession of the right has been the sole portrayal of the character in an audiovisual medium. In *Lugosi v. Universal Pictures*, Bela Lugosi's heirs brought a suit against Universal Pictures to enjoin the company from using images of Lugosi in character as Count Dracula for the commercial sale of products.¹¹⁴ When the case reached the California Supreme Court, the majority ruled against Lugosi's heirs because too many actors have portrayed the character of Count Dracula over the years.¹¹⁵ In his concurrence, Justice Mosk clarified that the rule should not state that an actor "can never retain a

¹¹² *Id.*

¹¹³ Nathalie Tadena, 'Modern Family' Teams Up with National Association of Realtors in Integration Deal, WALL ST. J. (May 5, 2016), <http://www.wsj.com/articles/modern-family-teams-up-with-national-association-of-realtors-in-integration-deal-1462449601>.

¹¹⁴ *Lugosi v. Universal Pictures*, 603 P.2d 425, 427 (Cal. 1979).

¹¹⁵ *Id.*

proprietary interest in a characterization.”¹¹⁶ Instead, he felt that “[a]n original creation of a fictional figure played exclusively by its creator may well be protectable.”¹¹⁷ Justice Mosk cited Groucho Marx, Red Skelton, and the “unique personal creations” of Abbott and Costello as examples of figures worthy of protection of the law, since these actors have taken sufficient measures to qualify for publicity rights.¹¹⁸ Furthermore, according to Justice Mosk, courts should grant such rights based upon the talent, work, and effort that one puts into cultivating the image of the individual claiming the right.¹¹⁹

The Third Circuit in *McFarland v. Miller*,¹²⁰ extended this ideology further by claiming that originality is not the only piece in the puzzle, but that courts should also consider the “association with the real life actor.” In a suit between the actor who portrayed Spunky McFarland on the television program *Our Gang* and the owner of a restaurant named Spunky McFarland, the court sided with the former, stating “[w]here an actor’s screen persona becomes so associated with him that it becomes inseparable from the actor’s own public image, the actor obtains an interest in the image which gives him standing to prevent mere interlopers from using it without authority.”¹²¹ This prevention of unjust enrichment should extend to actors for the fictional characters that they portray, and further solidifies the right of publicity as both a moral and an economic right that applies whether or not profit is involved.¹²² If an objective third-party could reasonably believe that the actor endorses a product or a restaurant or a brand through the use of a character name or image that he is intrinsically associated with, then the unauthorized use of the character name or image is inappropriate, and the infringing party should be held liable.¹²³

If actors portray themselves or develop their own characters, they should be granted a proprietary right. The court concurred with this ideology in *Price v. Hal Roach Studios, Inc.*,¹²⁴ holding that there were no imitation claims when an actor was responsible for cultivating his or

¹¹⁶ *Id.* at 432 (Mosk, J., concurring).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *McFarland v. Miller*, 14 F.3d 912, 920 (3d Cir. 1994).

¹²¹ *Id.*

¹²² Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 *IND. L.J.* 47, 49 (1994) (discussing both the moral and economic injuries that plaintiffs incur as a result of unauthorized use).

¹²³ *Id.* at 50 (discussing the resulting harm from consumer deception).

¹²⁴ *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 845 (S.D.N.Y. 1975) (holding that publicity rights extended to actors Laurel and Hardy for developing their own characters).

her own character, and therefore the actor deserves protection. Just as it is unjust enrichment for a brand to monopolize on an entertainer's persona, it would be equally unjust to profit off of a fictional character that an actor spent time and talent creating and cultivating, so that it could linger and make an impact in the public's mind, obviously great enough to warrant commercialization. Courts have even gone as far as to enjoin misappropriation of a persona that an actor cultivated through the portrayal of a character.¹²⁵ This paradigm sufficiently demands uniformity through statutory right of publicity laws.

Arguably one of the most famous right of publicity cases involves litigation between *Wheel of Fortune* hostess Vanna White and technology giant Samsung Electronics.¹²⁶ The case involved the distribution of an advertisement campaign for Samsung that featured a series of popular culture phenomena beside Samsung products.¹²⁷ The theme of the campaign was that Samsung would still be a popular brand well into the twenty-first century.¹²⁸ The advertisement in question featured a golden-hued robot donning a pink satin gown, blonde wig, and diamond necklace and bracelet and posed in front of *Wheel of Fortune*'s letter game board set in the middle of turning one of the letters.¹²⁹ The text "Longest-running game show. 2012 A.D." was inscribed underneath the image.¹³⁰ Samsung executives referred to the advertisement as the "Vanna White" ad.¹³¹

The Ninth Circuit majority held that the advertisement in question was appropriate.¹³² The court spent a great portion of its opinion clarifying that "[t]he right of publicity does not require that appropriations of identity be accomplished through particular means to be actionable."¹³³ Judge Goodwin, writing for the majority, seemed concerned with distinguishing between the manner of the appropriation, and if an appropriation had even occurred in the first place.¹³⁴ In a right of publicity case, the mere fact that any appropriation occurred is

¹²⁵ *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360, 362 (S.D.N.Y. 1988) ("[t]he copy evoked the 'schlemiel' persona Allen cultivated up through his appearance in *Amie Hall*").

¹²⁶ *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1395 (9th Cir. 1992).

¹²⁷ *Id.* at 1396.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *White*, 971 F.2d at 1399.

¹³³ *Id.* at 1398.

¹³⁴ *Id.* ("It is not important *how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant has done so.").

sufficient to warrant defendant liability, even if there was no explicit use of the plaintiff's name or direct image.¹³⁵ Judge Goodwin feared that if the court, or legislation, limited the right of publicity to a laundry list of violating usages, then enterprising advertisers would merely think up creative new ways to appropriate a person's identity in a manner that is not on the proscribed list.¹³⁶ This can also be true for character appropriations, which are not "traditional" means of appropriation inscribed in existing statutory provisions.¹³⁷ However, such character appropriations are still deserving of protection from clever advertisers who could find new ways to appropriate well-known celebrity personas by merely creating images that resemble the celebrity's famous character as opposed to the celebrity herself.

It can be argued that in *White*, the use of a robot dressed as Vanna White was an appropriation of a "character" that White played on television, with the placement of that "character" in a place where viewer's would expect to see it—in front of the show's set.¹³⁸ Vanna White, the real-life person, does not, presumably, spend all of her waking time positioned in front of a letter board, draped in a gown and dripping with jewels. But the "character" that White portrays on a televised game show is one that she has been intrinsically associated with since 1982.¹³⁹ It is enough if a brand "directly implicate[s] the commercial interests which the right of publicity is designed to protect."¹⁴⁰ And in appropriating her identity, or her "character's" identity, Samsung has implicated the commercial interest that White has in choosing endorsements for herself and her character.

The Ninth Circuit heard a case brought by two actors from the television show *Cheers* who claimed that animatronic robots modeled to look like their characters and placed in airport bars infringed upon their publicity rights.¹⁴¹ The circuit court found that there were enough

¹³⁵ *Id.* (explaining the impossibility of treating the right of publicity as guarding only against a laundry list of specific means of appropriating identity).

¹³⁶ *Id.*

¹³⁷ See e.g., CAL. CIV. CODE § 3344 (Westlaw current through Ch. 685 of 2017 Reg. Sess.) (California's right of publicity statute).

¹³⁸ *White*, 971 F.2d at 1398.

¹³⁹ See Lily Rothman, *6 Vanna White Facts to Blow Your Mind as Wheel of Fortune Celebrates 6,000 Episodes*, TIME (Apr. 25, 2014), <http://time.com/76710/wheel-of-fortune-vanna-white-6000/>; see also Steve Baron, *Syndicated TV Ratings: 'Wheel of Fortune' Tops Households & Viewers; 'Dr. Phil' Leads Talkers for Week Ending April 26, 2015*, TV BY THE NUMBERS (May 5, 2015), <http://tvbythenumbers.zap2it.com/sdsdskdh279882992z1/syndicated-tv-ratings-wheel-of-fortune-tops-households-dr-phil-leads-talkers-for-week-ending-april-26-2015/>.

¹⁴⁰ *White*, 971 F.2d at 1398.

¹⁴¹ *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 809 (9th Cir. 1997).

similarities between the characters' and the robots' "physical characteristics" for the actors to bring an appropriation claim.¹⁴² It could not, however, be argued that the robots were intended to conjure up images of the *actors* George Wendt and John Ratzenberger, but rather the characters Norm Peterson and Cliff Clavin, respectively.¹⁴³ The court's ruling has created a general understanding that characters can be just as lucrative in marketing as real-life celebrity persona.

Adding right of publicity to a character or an actor's role could also assist in solving the joint authorship problem that arises when actors claim copyright in a role that they inhabited. In a 2015 case involving such a debate, the Ninth Circuit held that an actress's claim to own copyright in her film performance would "splinter a movie into many different 'works,' even in the absence of an independent fixation."¹⁴⁴ Copyright is not sufficient to resolve this conundrum. Instead, right of publicity legislation that acknowledges ownership of character performance—in terms of its potential usage in the commercial context and the evocation of false endorsement—would fulfill the right of publicity's aim of preventing unjust enrichment and granting a proprietary right to individuals for the persona that they have cultivated based upon their talent or notoriety.

C. Competing Equities: Right of Publicity vs. Right of Freedom of Expression

There are inevitably various competing equities in right of publicity legislation and litigation. On the one hand, the publicity holder wants the ability to monopolize his or her persona; and on the other hand, the external agents seek the ability to express their freedom of speech and expression under the First Amendment.¹⁴⁵ Because of this, it is unsurprising that prior cases have called upon the circuit courts to ascertain the line between the right of publicity and the First Amendment.¹⁴⁶ These cases usually involved the debate about whether

¹⁴² *Id.*

¹⁴³ *Cheers* (Paramount Network Television 1982); *see also Wendt*, 125 F.3d at 811.

¹⁴⁴ *Garcia v. Google, Inc.*, 786 F.3d 733, 742 (9th Cir. 2015) ("Simply put, as Google claimed, it 'make[s] Swiss cheese of copyrights.'").

¹⁴⁵ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").

¹⁴⁶ *See e.g.*, *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 918 (6th Cir. 2003) (artist created a painting commemorating Tiger Woods' victory at the Masters Tournament); *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 86-87 (2d Cir. 1989) (magazine published commercial posters of wrestlers without consent); *ABG EPE IP LLC v. Fabbrica d'Armi Pietro Beretta S.p.A.*, No. 2:14-cv-02263 (W.D. Tenn. Apr. 10, 2014) (use of Elvis

or not commercial speech is involved.¹⁴⁷ Additionally, there must be a need for First Amendment protection to apply in a given case, such as creatively “transforming” a given known persona and applying it in a new way.¹⁴⁸ Merely utilizing a well-known celebrity’s likeness or name, for the purposes of trade or commercial exploits, should not be sufficient to claim freedom of speech under constitutional safeguards.

Rogers v. Grimaldi involved a film that Ginger Rogers claimed appropriated her name in its title.¹⁴⁹ The court stated that “movies, plays, books, and songs are all indisputably works of artistic expression and deserve protection.”¹⁵⁰ However, the court clarified that “they are also sold in the commercial marketplace like other more utilitarian products, making the danger of consumer deception a legitimate concern that warrants some government regulation.”¹⁵¹ Other cases have held that First Amendment protections are “not limited to written or spoken words, but include[] other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures.”¹⁵²

Judge Kozinski, writing for the dissent in *White*, posited that “[i]ntellectual property rights aren’t free” but instead are “imposed at the expense of future creators and of the public at large.”¹⁵³ He went on to

impersonators at trade shows).

¹⁴⁷ *Julia Child Found. v. Airbnb, Inc.*, No. 16CV02626 (Cal. Super. Ct. June 21, 2016) (use of Julia Child’s name in Airbnb’s marketing materials for a villa in France); *see also* Keith Harris, *Can Taylor Swift Sue Kanye West Over ‘Famous’ Video?*, ROLLING STONE (June 29, 2016), <http://www.rollingstone.com/music/news/can-taylor-swift-sue-kanye-west-over-famous-video-20160629> (discussing whether rights of publicity can exist over the use of celebrity likeness via wax figures in a music video in which there is no commercial loss); *Faulkner v. Hasbro, Inc.*, No. 15-6518 (KSH)(CLW), 2016 U.S. Dist. LEXIS 95638 (D.N.J. July 21, 2016) (Fox News anchor claimed right of publicity violation in Hasbro “Hamster Toy” for using her full name and alleged “likeness”); *Lindsay Lohan Loses Case Against Makers of Grand Theft Auto*, FORTUNE (Sept. 1, 2016), <http://fortune.com/2016/09/01/lindsay-lohan-grand-theft-auto/> (dismissing Lindsay Lohan’s case against a video game for creating a character with a similar look, voice, clothing, and hair, claiming it was a work of fiction that did not appropriate her likeness, but, instead, portrayed the likeness of the fictional character).

¹⁴⁸ *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001) (formulating a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation).

¹⁴⁹ *Rogers*, 875 F.2d 994, 997 (2d Cir. 1989).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (citing *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (holding that the Constitution looks beyond written or spoken words as mediums of expression)).

¹⁵³ *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1516 (9th Cir. 1993) (Kozinski, J., dissenting).

ask where society would be “if Charles Lindbergh had an exclusive right in the concept of a heroic solo aviator? If Arthur Conan Doyle had gotten a copyright in the idea of the detective story, or Albert Einstein had patented the theory of relativity?”¹⁵⁴ Judge Kozinski feared that “[i]f every author and celebrity had been given the right to keep people from mocking them or their work” they would “have made the world poorer, not richer, culturally as well as economically.”¹⁵⁵

Should every famous person have an exclusive right to anything that reminds a viewer of her? This is risky as it may deny any future Vanna Whites an opportunity to create a persona because brands that may seek to hire an actress for an advertising campaign may now claim that this individual’s look is too similar to one that already exists—Judge Kozinski writes that this is dangerous and creates a deprivation of parody and mockery.¹⁵⁶ But at the same time, should future creators be able to commercialize upon the creations that have come before? While this would not restrict their freedom of speech under the First Amendment, it would severely impact the individual’s ability to commercially take advantage of the dually economic and moral right of publicity through the process of deciding how his or her own persona, including life story and character portrayal is utilized.

There *is* something unsettling about giving someone too much power over his or her life story or past roles.¹⁵⁷ But why are courts and legislatures apt to quickly provide trademark protection for someone who invented a product or copyright protection over the creation of a work involving “sweat of the brow,” but not comparable publicity rights to someone who invested time cultivating his or her talent and career?¹⁵⁸ This imbalance of justice furthers the argument for why there should be statutory safeguards for publicity rights, albeit narrowly defined.

But there exists an idyllic resolution to best balance the competing equities between ownership of one’s self and prevention of silencing free speech. Legislatures must allow for the addition of life story and fictional character rights under the right of publicity umbrella, but create stringent parameters and an exacting evidentiary requirement, thus ensuring that this legislation does not place a chilling effect over freedom of speech or

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1516-17.

¹⁵⁷ Jim Rutenberg, *Spike Lee Is Expected To Settle Suit Over Spike TV*, N.Y. TIMES (July 8, 2003), http://www.nytimes.com/2003/07/08/business/spike-lee-is-expected-to-settle-suit-over-spike-tv.html?_r=0 (stating Spike Lee brought suit against Viacom to enjoin the network from naming one of its networks “Spike” TV).

¹⁵⁸ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352 (1991).

expression or restrict matters of “public importance.”¹⁵⁹ By demanding that the *persona* be appropriated and not merely the *circumstances* or *situation*, the limitations placed upon the right will still serve to ensure that individuals are not granted *too* many rights that would prevent the creation of new works. Legislatures should demand a heightened burden of proof that an author must meet in order to create a work. This ensures that works inspired by events or people are perfectly permissible, but once they cross the line to usurp another’s life or make use of a character that an actor has portrayed and made famous, the use is not done without compensation or contractual permission. Additionally, for either life story rights or fictional character persona rights, these works can still be created with express permission, thereby not restricting them from ever again entering the marketplace. First Amendment freedoms will still exist, and these constitutionally protected rights will guarantee an artist’s ability to continue generating and producing creative works that are inspired by real-life circumstances and based on events that are of public interest and concern.

IV. EXPANDING THE POST-MORTEM RIGHT OF PUBLICITY THROUGH THE CREATION OF A DESCENDIBLE FUTURE INTEREST

The right of publicity should be descendible through the creation of a future interest for rights-holders to control their rights of publicity post-mortem by granting an heir the ability to continue to profit, or on the opposite end, restricting others from unduly profiting, even after the persona in question has died.¹⁶⁰ As the law currently stands, of the varying right of publicity statutes that are in place in each state that does not solely adhere to the common law, each one takes a different stance on whether or not the right of publicity should extend after death.¹⁶¹ The creation of a uniform publicity right that is fully descendible, devisable, and alienable would greatly assist estate planners working with celebrities.¹⁶² As the right presently stands, it is both devisable and

¹⁵⁹ See *Rosa & Raymond Parks Inst. for Self Dev. v. Target Corp.*, 812 F.3d 824, 830-31 (11th Cir. 2016); see also *Martin Luther King, Jr. Ctr. for Soc. Change v. Am. Heritage Prods.*, 694 F.2d 674, 677 (11th Cir. 1983).

¹⁶⁰ See *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 992 (9th Cir. 2012) (holding New York does not recognize post-mortem publicity rights, thereby allowing Monroe’s persona to enter the public domain).

¹⁶¹ See, e.g., N.Y. CIV. RIGHTS LAW § 50 (McKinney, Westlaw through L.2017, chapters 1 to 331) (stating New York does not recognize the descendible right of publicity; it is non-assignable and terminates at death); but see CAL. CIV. CODE § 3344.1 (Westlaw current through Ch. 685 of 2017 Reg. Sess.) (stating California holds liable any person who uses a deceased person’s name, voice, signature, photograph, or likeness).

¹⁶² T.J. Hope, *The Right of Publicity: An Often Overlooked Asset in Estate Planning*, STOUT (Sept. 1, 2011), <http://www.srr.com/article/right-publicity-often-overlooked-asset-esta>

alienable but not uniformly descendible.¹⁶³ So, a publicity rights-holder could sell the right of publicity of his or her name or likeness to another, while maintaining control over its usage.¹⁶⁴ In the estate-planning context, the right of publicity should be viewed as a business value in the decedent's "gross estate."¹⁶⁵ The Internal Revenue Code ("IRC") defines the gross estate as encompassing one's "value at the time of his death of all property, real or personal, tangible or intangible."¹⁶⁶ It seems counterintuitive to permit a rights-holder to sell or transfer his rights to another for use during his lifetime but not for use after his death. In determining the value of federal estate taxes upon death, the right of publicity has been included in the calculation based on certain factors such as contractual value while the decedent was alive.¹⁶⁷

One of the most famous cases involving the debate over the post-mortem right of publicity involved a company that was granted an exclusive license to use Elvis Presley's name and likeness for commercial purposes after his death, and sought an injunction against another company that began selling Presley posters.¹⁶⁸ The court explained that if the publicity right was developed through commercial investment and exploitation during the holder's lifetime, then it should be devisable or descendible at death, like any other intangible property right.¹⁶⁹ Public policy also supports this view: by allowing an individual to "pass the fruits of his labors" along to others after his death, this provides an incentive for both enterprise and capital development and contribution to the public benefit and enjoyment during life.¹⁷⁰ In a previous case involving Presley's estate, the Sixth Circuit felt that "leaving a good name to one's children is sufficient reward in itself for the individual, whether famous or not."¹⁷¹ But in this case, the court disagreed: Judge Newman explained that claiming "good name" as an adequate familial legacy shortchanges individuals who have invested their time and effort in

te-planning.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* ("The right of publicity relates to the business value of the very identity or persona of an individual as a human being, and the commercial damage that may ensue if that identity is used in an unauthorized manner in ways that bring harm to the image and reputation of the individual.")

¹⁶⁶ 26 U.S.C. § 2031 (LEXIS through Pub. L. No. 115-55).

¹⁶⁷ *Estate of Andrews v. U.S.*, 850 F. Supp. 1279, 1281 (E.D. Va. 1994) (explaining that the value of the decedent's name at the time of her death for use on ghostwritten books was based on its fair market value, using her publishing contract as evidence).

¹⁶⁸ *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 279 (2d Cir. 1981).

¹⁶⁹ *Id.* at 287.

¹⁷⁰ *Id.*

¹⁷¹ *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 959 (6th Cir. 1980).

developing the worth of that name, rather than, for example, in the stock market, and feared that this would place too heavy a burden on creativity.¹⁷²

A Second Circuit case, *Groucho Marx Prods. v. Day & Night Co.*,¹⁷³ dealt with the question of the descendible nature of the right of publicity for the heirs of the Marx Brothers in preventing the production of a play featuring the Brothers' likeness and comedic style. While a New York district court found that the play infringed upon the Brothers' right of publicity, the Second Circuit reversed.¹⁷⁴ Since the Marx Brothers were domiciled in California at the times of their deaths and also drew out contracts regarding the status of their rights of publicity as governed under California law, California choice-of-law applied in determining the post-mortem right.¹⁷⁵ This inconsistency makes estate-planning more difficult and forces those who utilize their right of publicity during their lifetime to be more precise in transferring or selling that right to others in terms of determining what state's law shall apply in future litigation.

The Elvis Presley cases also attempted to put to rest the issue of whether the future interest should be put into place regardless of whether or not the owner "exploited" the right during his or her life.¹⁷⁶ Previous cases held that a publicity rights-holder had to have taken advantage of the commercialization of her publicity while she was alive in order to allow for her heirs to do so upon her passing.¹⁷⁷ But this undue burden makes as much sense as a requirement that a former child actor cannot economize from his right of publicity at age fifty if he has not during the previous forty-eight years. If an individual's persona is of such a value that others would appropriate it for its intrinsic value, then that persona should be protected and held in trust by the individual's selected heirs.

Allowing the right of publicity to continue after death benefits both the celebrity's heirs as well as the celebrity's fans who would like to be continually reminded of the celebrity's life story or famous characters into perpetuity.¹⁷⁸

¹⁷² *Factors Etc., Inc.*, 652 F.2d at 287.

¹⁷³ *Groucho Marx Prods. v. Day & Night Co.*, 689 F.2d 317, 318 (2d Cir. 1982).

¹⁷⁴ *Id.* at 318-19 (holding, in the district court, that the play was neither biographical nor an attempt to convey information, and that there was a wholesale appropriation of the Marx Brothers characters.).

¹⁷⁵ *Id.* at 320 (citing *Guglielmi v. Spelling-Goldberg Productions*, 603 P.2d 454 (Cal. 1979); *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979)).

¹⁷⁶ *Factors Etc., Inc.*, 579 F.2d at 222 n.11.

¹⁷⁷ *Lugosi*, 603 P.2d at 431.

¹⁷⁸ William A. Drennan, *Wills, Trusts, Schadenfreude, and the Wild, Wacky Right of Publicity: Exploring the Enforceability of Dead-Hand Restrictions*, 58 ARK. L. REV. 43, 96 (2005) (arguing that the ability to create images featuring deceased celebrities should hinge upon the rights of the fans who enriched the celebrity and want to be reminded of her image

V. CONCLUSION

The right of publicity is a legal framework that has existed since the middle of the twentieth century.¹⁷⁹ It has arisen in the context of unfair trade practices, false endorsements, and general unauthorized misappropriation.¹⁸⁰ Amending right of publicity legislation to address the contexts of life story rights and fictional character portrayal rights will benefit not only the rights-holders themselves but also the general public that enjoys these forms of entertainment. The looming fear of prior restraints or future litigation may prevent artists from even venturing to create these works in the first place.

Therefore, it is vital that the legislation carve out heightened required showings of proof regarding the similarities between the work in question and the real-life persona. Factors set forth in the legislation, such as the results from surveys showing viewers the docudrama and detailing the alleged misappropriated life, a list of physical and circumstantial connections between the fictionalized character and the actual human, and the existence of a preexisting relationship between the artist and the persona, would force artists to take these elements into consideration prior to putting a work into the entertainment marketplace. Doing so would provide additional shields against the restrictions being too chilling or violative of First Amendment rights to freedom of speech and expression. Those exceptions would also protect merely coincidental occurrences. Additionally, “transformative” uses as defined under the Copyright Clause, such as parody or satire, would be exempt from the restricted uses.¹⁸¹ A “public importance” exception would ensure *public issues* are not contested as appropriative, while only *personal personas* are disputed as used in an unauthorized manner.¹⁸²

Broadening this legislation would also create a bright-line, legislatively-mandated rule that would close the door to litigious claims and ease the burden on courts, especially those in jurisdictions that are more inclined to receive right of publicity cases.¹⁸³ Additionally, as a result of the differentiation that exists between different jurisdictions in

and work and the heirs of the estate who have a financial interest in reasonably managing the commercial use of the decedent’s identity).

¹⁷⁹ See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 869 (2d Cir. 1953).

¹⁸⁰ See generally *Sarver v. Chartier*, 813 F.3d 891, 902 (9th Cir. 2016) (misappropriation); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1400 (9th Cir. 1992) (endorsement); *Lugosi*, 603 P.2d at 430 (trade practice).

¹⁸¹ 17 U.S.C. § 107 (LEXIS through Pub. L. No. 115-55).

¹⁸² SPEAK FREE Act of 2015, H.R. 2304, 114th Cong. (2015).

¹⁸³ Toby J. Stern, *Federal Judges and Fearing the “Floodgates of Litigation,”* 6 U. PA. J. CONST. L. 377, 377 (2003) (“For nearly two hundred years, judges in the United States have expressed a desire to avoid opening the ‘floodgates litigation’ upon the court system.”).

their approaches to the right of publicity, a uniform statutory right would act as a safeguard against forum shopping.¹⁸⁴

Most essentially, modifying this legislation would not silence future creators, but would instead enhance their ability to freely create by requiring that life story bundled rights are purchased through contractual agreements or that the individuals who inspired these stories are granted a royalty from the resulting work's profits.¹⁸⁵ In the context of actors' ownership of the fictional characters that they portray, when these images are used for commercial purposes, granting the actor a proprietary right would also give advertisers more creative freedom in their campaigns. In successfully allowing life and art to merge, both artists and publicity-worthy personas can benefit from the ubiquitous generation of creative and artistic works that are protected by the dual-pronged economic and moral right of publicity, thereby ensuring that they are not violative of the First Amendment.

¹⁸⁴ *Forum Shopping*, THE WOLTERS KLUWER BOUVIER L. DICTIONARY DESK EDITION (2012) ("Selection among several jurisdictions of the most favorable to a party. Forum shopping is the practice by both plaintiffs and defendants of seeking to bring a claim or transfer an action to the forum the litigant believes is the most likely to favor its own argument. Such favoritism might be perceived because of objective differences in the law of the forum, such as a longer or shorter period of limitations or more or less favorable rules governing the plaintiff's standing. It might also arise from the attorneys' perception of hostility or favoritism toward a type of claim or party by the bench or the jury pool in a given forum.").

¹⁸⁵ Lisa A. Callif, *To Acquire or Not To Acquire Life Rights For A Movie*, LAW 360 (June 22, 2015, 10:28 AM), <http://www.law360.com/articles/665781/to-acquire-or-not-to-acquire-life-rights-for-a-movie> ("Historically, movies based on true stories were not made unless the rights to the individuals involved in the story were acquired.").