

Why a Federal Right of Publicity Statute Is Necessary

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Introduction

The time has come for a federal right of publicity statute. Because of technological advances, expressive works and advertisements are increasingly disseminated on a national, if not international, scale. Right of publicity law, however, remains entirely a creature of state law. Different states have widely divergent right of publicity laws. This divergence results in a multistate patchwork that forces national content producers to engage in self-censorship and tailor their content to the laws of states that provide the least amount of protection to free speech rights.

The outsized role of Indiana's right of publicity law provides a good example. In recent years, numerous lawsuits have been brought against non-Indiana defendants for violations of Indiana right of publicity law by celebrities and heirs of deceased celebrities who have had little or no connection to Indiana. The reason is simple. Indiana's right of publicity statute is the most plaintiff-friendly in the nation, and it contains sweeping jurisdictional and choice of law provisions. This is no accident. The statute's principal author is the CEO of a powerful Indiana-based management company that represents huge numbers of estates and heirs of deceased celebrities, ranging from Marilyn Monroe to Babe Ruth.

National content providers should not be required to navigate a hodge-podge of right of publicity laws. They should not have to tailor their content to laws such as Indiana's that aim to create a de facto national law that inadequately protects other states' interests and their citizens' First Amendment rights. The best solution to this problem is a federal right of publicity

statute that expressly preempts state law and brings uniformity and predictability to right of publicity law.

Need for a Federal Right of Publicity Statute—A Brief History

Much of the lack of uniformity in state right of publicity laws is attributable to the “spasmodic” development of the right of publicity and its divergent and often controversial justifications.¹ The historical origin of the right of publicity lies in the law of privacy.² The right of publicity is linked to the “misappropriation” prong of the four-part invasion of privacy tort analyzed by scholar William Prosser and later adopted by the Restatement (Second) of Torts and numerous states.³

Because of its origins in privacy law, the cause of action for misappropriation of a person's name or likeness “remained deeply rooted for many years in offense to person, to acts that caused ‘pain and mental stress,’” rather than economic injuries caused by a person's lost opportunities to commercially exploit his image for his own financial gain.⁴

However, spurred by the Second Circuit's decision nearly sixty years ago in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, which coined the term *right of publicity*, the right began to be viewed more as economic, based on the commercial value of one's name or likeness, instead of a personal right based on dignity and bruised feelings.⁵ Viewed as property, a right of publicity could be used to recover damages for the economic value of a defendant's unauthorized exploitation of a plaintiff's name or likeness.⁶

Over the ensuing half-century, the recognition of the right of publicity as an expansive economic right has been widespread:

Since *Haelan* was decided, more than half of the states have adopted some form of a right of publicity, either through common law or statute. . . .

The right of publicity has been applied in a wide range of cases: sound-alikes; look-alikes; use of the celebrity's nickname in a fictional work; use of address; statutes; and the use of a robot that barely resembles the celebrity but evokes her image.⁷

Nonetheless, based on its historical origin, some courts have continued to characterize the right of publicity as a personal “right of privacy,” not an economic property right.⁸ This causes confusion and exacerbates the lack of uniformity in right of publicity laws across the country.⁹ For example, a court or legislature viewing the right of publicity as a personal right that protects privacy interests and individual dignity might limit recovery to general damages. If, however, the right of publicity is viewed as a property right protecting commercial interests, then damages should be limited to the commercial value of a misappropriation of a plaintiff's name and likeness.¹⁰ Characterization of the right of publicity as a personal right or a property right could also impact whether a descendible postmortem right of publicity should be recognized. If the right is personal, it should die with the person.

Just as the characterization of the right of publicity has changed over time, so have its proffered justifications. Generally, “[t]he justifications offered for the right of publicity fall into two categories, economic and noneconomic.”¹¹ The economic justifications include “stimulating athletic and artistic achievement, promoting efficient allocation of resources, and protecting consumers.”¹² The noneconomic justifications include “safeguarding natural rights, securing the fruits of celebrity labors, preventing unjust enrichment, and averting emotional harm.”¹³

Critics and courts have questioned the validity and strength of both the economic and noneconomic justifications. The Tenth Circuit has stated

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that “[t]he incentive effect of publicity rights, however, has been overstated” because “most celebrities with valuable commercial identities are already handsomely compensated,” and “[t]he extra income generated by licensing one’s identity does not provide a necessary inducement to enter and achieve in the realm of sports and entertainment.”¹⁴

Moreover, it is far from clear whether, as a normative question, the law should be providing greater incentives for people to pursue celebrity. When the throngs of *American Idol* and reality television hopefuls are considered alongside the United States’ ongoing need to import skilled technical workers from abroad, concerns for economic incentives and efficient allocation of resources may weigh against recognizing a right of publicity at all.

The noneconomic justifications have also been criticized. The Tenth Circuit dismissed the natural rights justification: “blind appeals to first principles carry no weight in our balancing analysis.”¹⁵ The court also criticized the argument that the right of publicity allows celebrities to enjoy the fruits of their labors. The court explained, “Celebrities, however, are often not fully responsible for their fame” as “a celebrity’s fame may largely be the creation of the media or the audience,” although some celebrities such as professional athletes may be more responsible for their fame.¹⁶ The fruit of labor and unjust enrichment justifications for publicity rights were also criticized by Ninth Circuit Judge Alex Kozinski as “beg[ging] the question” of whether celebrities should have the exclusive right to control the use of their “identity” in the first place.¹⁷ Vesting exclusive property rights in celebrities “impoverishes the public domain, to the detriment of future creators and the public at large.”¹⁸

The right of publicity also has been criticized as contravening the First Amendment. One judge opined, “[I]n proclaiming this new ‘right of publicity,’ we have created an open-ended and ill-defined force which jeopardizes a right of unquestioned authenticity—free speech.”¹⁹ Some scholars maintain that the right of publicity is inconsistent with free speech and permits private censorship of popular culture and discourse.²⁰ Professor Eugene Volokh stated that “there is good reason to think . . . that the right of publicity is

unconstitutional as to all noncommercial speech and perhaps even as to commercial advertising as well.”²¹ Although others disagree, the ongoing dispute over the validity of the justifications for a right of publicity fuels the unpredictability and lack of uniformity in right of publicity laws across the country.

Right of Publicity Is a Creature of State Law

There is no federal right of publicity; it is entirely a matter of state law.²² The closest federal analogue to the right of publicity is a Lanham Act claim for false endorsement. However, although the right of publicity and the Lanham Act apply to some of the same situations, they are far from identical. In general, the right of publicity is significantly broader than the Lanham Act and applies to many situations in which the Lanham Act does not. For example, the Lanham Act requires that there be some element of falsity, deception, or confusion as to whether the plaintiff is endorsing or associated with the defendant’s product, but no such requirement exists for the right of publicity.²³

There is a trend toward more states recognizing a right of publicity. Currently, at least thirty-one states recognize a right of publicity by statute and/or common law.²⁴ Only two state courts have rejected a common law right of publicity (New York and Nebraska). However, the Nebraska legislature subsequently overrode the decision, and New York has its own limited statutory right of publicity.²⁵ In the states that have not recognized a right of publicity, it seems likely that if their courts were required to decide, they would recognize a common law right of publicity. Besides looking to all the states that have recognized such a right, the courts might be influenced by the Supreme Court’s largely positive acknowledgement of Ohio’s right of publicity law in *Zacchini v. Scripps-Howard Broadcasting Co.*²⁶

Lack of Uniformity Among State Laws

Although there is a trend toward more states recognizing a right of publicity, there is a dramatic lack of uniformity concerning the scope and substance of the rights of publicity recognized by different states.

At one extreme is Indiana’s incredibly expansive right of publicity law. Indiana’s right of publicity extends to

one’s “personality,” a fluid label defined by statute to encompass pretty much every attribute that any court across the country has ever found to fall within the right of publicity, including a person’s name, likeness, signature, voice, photograph, image, gestures, appearance, and mannerisms.²⁷ Indiana recognizes a 100-year postmortem right of publicity that even retroactively grants a right of publicity to heirs of people who died a century ago.²⁸ Plaintiffs are given a wide range of remedies, such as statutory and punitive damages, attorney fees, and injunctive relief, including confiscation and destruction of infringing goods.²⁹

Indiana law also includes sweeping choice of law and jurisdictional provisions. The Indiana right of publicity statute “applies to an act or event that occurs within Indiana, regardless of a personality’s domicile, residence, or citizenship.”³⁰ Defendants are subject to jurisdiction if they “cause” infringing materials “to be transported” or “published, exhibited, or disseminated within Indiana,” which could encompass virtually anything on the Internet and much of what is on television and in print.³¹ In theory, heirs of a celebrity who dies in a state not recognizing a postmortem right of publicity could sue a non-Indiana defendant in Indiana as long as the allegedly infringing materials were disseminated there.

At the other end of the spectrum, New York has no common law right of publicity and recognizes only a narrow statutory right of publicity limited to unauthorized uses of a person’s “name, portrait, picture or voice . . . for advertising purposes or for the purposes of trade” within New York.³² New York’s statute does not provide for a postmortem right of publicity.³³

In between Indiana and New York are dozens of other states whose laws combine to create a “crazy quilt” of divergent rights of publicity that confound any meaningful classification.³⁴ Right of publicity champion J. Thomas McCarthy states that “[i]t is difficult to group the [state right of publicity] statutes into any sort of coherent ‘types’ or subspecies. . . . Each statute is really ‘one of a kind’ in that it is largely a product of its time and place.”³⁵

Probably the largest piece of the crazy quilt of state right of publicity laws is California, home to celebrities and much of the country’s right of publicity

litigation. California recognizes a common law right of publicity and provides a separate statutory right of publicity.³⁶

California right of publicity law has been substantially broadened by a series of decisions by the Ninth Circuit that are as expansive as plaintiffs' counsel's imaginations. In one case, the Ninth Circuit held that a race car driver had a viable right of publicity claim based solely on the look of his car even though plaintiff was not named and "the 'likeness' of plaintiff is itself unrecognizable."³⁷

In another case, the Ninth Circuit upheld the right of publicity claim of Vanna White, a svelte blonde who turns letters on the game show *Wheel of Fortune*, when she sued an electronics manufacturer that produced an ad-

The state-by-state approach to the right of publicity risks causing a "race to the bottom . . ."

vertisement with a stocky robot (resembling Rosie from *The Jetsons*) sporting a blonde wig and standing near some block letters.³⁸ Then Judge (now Chief Judge) Kozinski wrote a blistering and hilarious dissent from the denial for rehearing en banc deriding "the Court of Appeals for the Hollywood Circuit" for making "dangerous," "insidious," and "bad law" that "raises serious First Amendment problems."³⁹

Different states have been creative in inventing tests to grapple with the right of publicity. The California Supreme Court created a heavily criticized "transformative use" test that asks, among other things, whether a defendant's use of a plaintiff's image adds "significant expression," which is protected, or is merely a "literal depiction or imitation" of plaintiff's image for commercial gain, which is not.⁴⁰

The Supreme Court of Missouri rejected California's transformative use test, creating instead a "predominant use" test in right of publicity cases.⁴¹ Under that test, the use of a person's name in a creative and expressive work

can give rise to a right of publicity claim if it was the author's "intention" to use the name in order to "attract attention" to the expressive work "to obtain a commercial advantage."⁴²

Tennessee, one of the capitals of the music industry, is another important state for right of publicity law. Tennessee establishes a postmortem right of publicity that leaves copyright law in its dust and potentially runs in perpetuity as long as it continues to be exploited commercially—a boon to the estate of Elvis Presley.⁴³ In addition, in contrast to California and some states, Tennessee prohibits the unauthorized use of a person's name or likeness in solicitations for donations and fund-raising, even in connection with political campaigns.⁴⁴

Washington's right of publicity law has been in the news recently based on a new statute and litigation involving heirs of musician Jimi Hendrix. In 2008, Washington amended its right of publicity statute to add expansive choice of law and postmortem provisions similar to those of Indiana.⁴⁵ However, a federal district court recently held that the amended statute violated the Due Process, Full Faith and Credit, and Dormant Commerce Clauses of the U.S. Constitution and invited forum shopping.⁴⁶

Existing Patchwork of State Laws Needs to Be Cleaned Up

The state-by-state approach to right of publicity law risks causing a "race to the bottom," where a handful of states provide ever-expanding rights of publicity that invite forum shopping and give short shrift to First Amendment rights and public domain interests. Indiana is a perfect example. One of the primary reasons why Indiana has the most expansive right of publicity law in the country is the efforts of CMG Worldwide, an Indiana-based company that represents the heirs and estates of large numbers of deceased celebrities, ranging from Babe Ruth to Marilyn Monroe. CMG Worldwide's website states, "Indiana is widely recognized for having the most comprehensive and progressive right of publicity law in the world, and CMG Worldwide Chairman and C.E.O., Mark Roesler, is recognized as the principle author of this legislation."⁴⁷

By contrast, Indiana is not known as a hotbed for the types of entities

that generally push back against expansive rights of publicity that threaten First Amendment rights, e.g., media, entertainment, and advertising companies. Nonetheless, media, entertainment, and advertising defendants risk being haled into Indiana courts because of the state's aggressive choice of law and jurisdictional rules. Although those rules might be successfully challenged as unconstitutional,⁴⁸ there is a risk that Indiana could become a gathering point for right of publicity plaintiffs, similar to what Delaware is to corporate law defendants. The growth in the Internet and other technologies increases that risk.

Nor is Indiana alone in broadening its right of publicity statutes in response to pressure from celebrities and their representatives. In the 1990s, California significantly broadened its postmortem right of publicity after the Screen Actors Guild and prominent celebrities such as Tom Cruise, as well as heirs of deceased celebrities like Fred Astaire, pressed the Legislature.⁴⁹ In 1984, Tennessee enacted the so-called Elvis Law to provide for a postmortem right of publicity after some courts had ruled that Tennessee common law did not provide Presley's heirs with such a right.⁵⁰ As discussed previously, Washington's right of publicity statute was revised in 2008 in response to a ruling against heirs of Jimi Hendrix.⁵¹

The patchwork of right of publicity laws encourages forum shopping by plaintiffs. Again, Indiana is a good example. In 2005, the estate of Marilyn Monroe sued a photography archive and a licensing company in Indiana for allegedly violating the actress's postmortem right of publicity under Indiana law, despite the fact that Monroe had little or no connection with Indiana during her life.⁵² That same year, the heirs of musician Duke Ellington sued a piano company in a federal court in Indiana for alleged violations of Indiana's right of publicity law.⁵³ In 2009, California-based Bruce Lee Enterprises filed suit in Indiana against a clothing company based in New York and New Jersey, alleging violation of Indiana's right of publicity statutes.⁵⁴ In December 2010, a Danish rock singer sued Mattel in Indiana for allegedly violating her right of publicity in connection with a Barbie doll.⁵⁵ Former college athletes from all over the United States

have sued California-based video game maker Electronic Arts in federal court in California for violating Indiana's right of publicity law.⁵⁶

Carson v. Here's Johnny Portable Toilets, Inc. highlights another danger: nationwide injunctions based on one state's right of publicity laws.⁵⁷ There, the Sixth Circuit affirmed an injunction barring defendant from engaging in activities infringing Johnny Carson's right of publicity in any state, not just Michigan where Carson's right of publicity allegedly had been violated.⁵⁸

Finally, a relatively unexplored issue is the potential use of the single publication rule, which courts have held applies to right of publicity claims,⁵⁹ as a springboard to seek damages in a single lawsuit in one state for infringements occurring all over the country.⁶⁰

Although many states have no right of publicity laws (at least not yet), content providers and disseminators based in those states can take little comfort in that fact. Because of the wide distribution of all forms of media, those producing content—whether it be advertising, news, expressive works, etc.—must consider and account for the right of publicity laws of every jurisdiction nationwide. These considerations increase compliance and transaction costs. They lead to uncertain and inconsistent results based on choice of law determinations that are outcome-determinative and possibly result-oriented.⁶¹ They lead to courts in plaintiff-friendly states issuing decisions that may affect parties in other states, e.g., “a national injunction and damages for national injury.”⁶²

What results is a race to the bottom of the free speech ladder, forcing all media to tailor their content to the most plaintiff-friendly or speech-unfriendly jurisdiction around or else (1) face uncertain and potentially daunting liability or (2) selectively avoid particular jurisdictions. The current state of the law results in unacceptable levels of potential liability and self-censorship, and it turns certain jurisdictions into magnets of litigation and pariahs of content—none of which is healthy.

A Proposal—Federal Right of Publicity Statute That Expressly Preempts State Law

The right of publicity is exploited and potentially infringed via channels of interstate commerce such as the Internet,

television, and radio.⁶³ The right of publicity also affects interstate commercial activities such as multistate advertising campaigns and the distribution and sale of products and works that are the subject of right of publicity law and disputes.⁶⁴ Thus, the Commerce Clause provides Congress with authority to enact a federal right of publicity statute.⁶⁵

The right of publicity's connection to interstate commerce is sufficient such that Congress also should have the power to enact a federal right of publicity statute that expressly preempts state right of publicity laws. “[W]hen acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms.”⁶⁶ On that basis, § 301(a) of the Copyright Act expressly preempts state law claims that fall within the general subject matter of copyright law and seek redress of rights equivalent to the exclusive rights in § 106 of the Copyright Act.⁶⁷ A federal right of publicity statute should pre-empt state law in the same way.

A federal right of publicity law is not a new idea. It was championed in the mid-1990s by the International Trademark Association and the ABA's Intellectual Property Section.⁶⁸ It also has been urged in numerous law review articles.⁶⁹ Despite such advocacy, a federal right of publicity statute has not been enacted. To the contrary, there appear to have been no significant efforts in recent years to enact a federal statute.

The following is a nonexhaustive list of some of the attributes that a federal right of publicity should have.

Scope of the Federal Right of Publicity

The proper scope of a federal right of publicity should take into account several considerations. First, several states have yet to recognize a right of publicity at all. Second, some states already recognize an extensive right of publicity. Third, and most important, any federal right of publicity must be limited to avoid constitutional concerns. Those constitutional concerns could be solved by strong defenses. Even better, however, is to work constitutional limitations directly into the definition of the statutory claim.

This article advocates a limited federal right of publicity that would pre-empt more expansive rights recognized in various states while staying true to the First Amendment and not shocking

the system of states with no right of publicity laws at all. In order to be consistent with the First Amendment, a federal right of publicity should, as a definitional matter, apply only to names and likenesses and not apply to news, commentary, expressive works, or advertising attendant to such works.⁷⁰ As one judge put it: “Just as a public figure's ‘right of privacy’ must yield to the public interest so too must the ‘right of publicity’ bow where such conflicts with the free dissemination of thoughts, ideas, newsworthy events and matters of public interest.”⁷¹ By limiting the definition of the federal right of publicity, the burden unquestionably remains at all times on the plaintiff to prove an infringement and potentially spares a court from ruling directly on the application of a constitutional defense, which courts typically are loathe to do.

Limitations on the definition of a federal right of publicity would be well-founded in case law. It is clear that the First Amendment protects the use of names and likenesses in news accounts and reports on matters of public interest.⁷² In a New York case, for example, the court held that a factually based biography of Howard Hughes could not give rise to a publicity rights claim.⁷³ This protection extends to expressive works, including works of entertainment in different media.⁷⁴

In another case, a federal court rejected a misappropriation claim under California law where defendants used images of plaintiff kissing a man in a bathroom stall as part of a documentary television program about music groups and also used plaintiff's image to advertise the same program.⁷⁵ The court explained that the broadcast was “an expressive work protected by the First Amendment,” which precluded plaintiff from stating a misappropriation claim “based on the use of her likeness in the program or the advertisements for the program.”⁷⁶

The First Amendment also protects the depiction of real people in fictional accounts. A California case involved a postmortem publicity rights claim alleging that defendants used deceased actor Rudolph Valentino's “name, likeness and personality in a fictionalized film which did not accurately portray his life.”⁷⁷ In a concurring opinion adopted by a majority of the California Supreme Court, former Chief Justice Rose

Bird explained that “[i]t is clear that works of fiction are constitutionally protected in the same manner as political treatises and topical news stories,” and, as a consequence, “no distinction may be drawn in this context between fictional and factual accounts of Valentino’s life.”⁷⁸

A federal court in New York court came to the same conclusion concerning a fictionalized biography and movie of deceased author Agatha Christie, holding that “the right of publicity does not

[C]ritical portrayals of celebrities can result in lawsuits . . . or at least threats designed to chill expression.

attach here, where a fictionalized account of an event in the life of a public figure is depicted in a novel or a movie.”⁷⁹

The First Amendment also protects the depiction of real people in accounts blending fiction and nonfiction. In a case decided under Pennsylvania’s right of publicity law, a federal court held that a docudrama “combin[ing] fiction with history” did not violate plaintiff’s right of publicity because “the Defendants’ use of the Plaintiff’s name and likeness was for the purpose of First Amendment expression.”⁸⁰ Other courts have come to similar conclusions.⁸¹ As the Fifth Circuit held, “[c]ourts long ago recognized that a celebrity’s right of publicity does not preclude others from incorporating a person’s name, features or biography in a literary work, motion picture, news or entertainment story.”⁸²

There is good reason to prohibit right of publicity claims that target news, commentary, expressive works of fiction, and docudramas. Without such prohibition, the right of publicity could provide celebrities and other powerful individuals with a tool that allows them to effectively censor the public discourse through lawsuits and the threat of litigation. Sycophantic coverage of celebrities does not result in litigation. But critical portrayals of celebrities can result in lawsuits for alleged violations of publicity rights, or at least threats designed to

chill expression. Critical depictions serve as an important antidote to a culture that idolizes and obsesses about celebrities and their carefully manipulated public images. Celebrities also constitute common reference points for wide swaths of the public, and discussions of celebrities’ lives are often vehicles for larger discussions regarding culture, values, national character, and politics.⁸³

Consistent with the foregoing authorities and the First Amendment, no right of publicity claim should lie where a plaintiff’s name or likeness is used in advertising attendant or adjunct to an underlying protected work.⁸⁴

Scienter Requirement

One treatise author asserts that it is the “majority rule” that intent is irrelevant in a right of publicity analysis.⁸⁵ The better rule avoids strict liability for a tort that invariably (even in the commercial speech context) implicates First Amendment rights.⁸⁶ Free speech rights should not be forfeited on a strict liability basis.

Postmortem Rights

Twenty states recognize a postmortem right of publicity, i.e., a right of publicity that survives death that may be exploited by a person’s heirs or assigns.⁸⁷ Some states extend the right for extraordinarily long periods of time, e.g., 100 years in Indiana, 70 years in California, and potentially in perpetuity in Tennessee.⁸⁸ Two states, New York and Wisconsin, have considered and expressly rejected a postmortem right of publicity.⁸⁹

The fact that only twenty states recognize a postmortem right of publicity militates against recognizing such a right as part of a federal statute. However, most courts and legislatures that have actually addressed the issue have recognized a postmortem right of publicity.⁹⁰

If there were to be a federal postmortem right of publicity, it should be strictly circumscribed to avoid indeterminate restrictions on speech interests. The shortest possible duration (for example, five to ten years) would be preferable because it would free uses as soon as possible. Longer durations would be more likely to vest rights in distant heirs or corporate assignees, serving no discernible public purpose and running contrary to basic notions that the right is at least somewhat personal and its postmortem aspect is meant to protect the financial interests of immediate family.⁹¹

Right of Publicity Should Not Be Assignable During a Person’s Lifetime

The right of publicity should not be assignable during a person’s lifetime, although a person should be permitted to license his right of publicity. Although the right of publicity is commonly characterized as a property right, many of its proffered justifications are personal in nature, i.e., “safeguarding natural rights, securing the fruits of celebrity labors, preventing unjust enrichment, and averting emotional harm.”⁹² These noneconomic justifications show that the right of publicity is very different from ordinary property such as a car and weigh against permitting assignment of the right of publicity. With regard to economic justifications, the same desire to protect consumers from confusion and deception that underlies the prohibition against assignments of trademarks in gross also weighs strongly against permitting celebrities to assign their publicity rights.⁹³

Moreover, if the right of publicity were assignable like ordinary property, it would lead to strange results. A person’s right of publicity might be seized by the government to settle tax liabilities and then exploited to serve governmental and political interests. It might be ordered sold and its proceeds split as part of a divorce settlement, with the buyer viewing it as a purely economic property to be exploited without regard to the celebrity’s persona or wishes. These results seem inappropriate because of the unmistakably personal dimension of publicity rights.

Some Key Defenses

Although this article does not intend to provide a comprehensive list of all of the defenses that should apply to a federal right of publicity statute, a couple deserve special mention here.

First, the Communications Decency Act, 47 U.S.C. § 230(c), immunizes Internet service providers (ISPs) from state law claims based on content posted by third parties. If the right of publicity is elevated from a patchwork of state law claims to one federal claim, ISPs arguably would lose that immunity for right of publicity claims simply because they are no longer founded in state law.⁹⁴ A federal right of publicity law should make clear that § 230 immunizes ISPs from right of publicity claims.⁹⁵

Second, the fair use and nominative

fair use defenses set forth in the Copyright Act and the Lanham Act should also apply to the federal right of publicity statute.⁹⁶ Although fair use is sometimes an awkward fit as a defense to right of publicity claims, fair use serves important free speech interests that should be vindicated regardless of whether a plaintiff's claim is based on copyright, the Lanham Act, or the right of publicity.

Statutory Damages, Actual Damages, and Defendants' Profits

The federal right of publicity statute should provide for statutory damages that permit an individual to vindicate his rights and dignity in the absence of demonstrable economic damages. But statutory damages should be modest, for example, \$500, perhaps with the possibility of doubling statutory damages if the infringement is willful.⁹⁷ If a plaintiff seeks greater compensation, he should be required to demonstrate entitlement to general damages.

Although a plaintiff should be permitted to seek a defendant's profits from infringement based on principles of unjust enrichment, the Copyright Act's approach to burden shifting should not apply. The Copyright Act only requires a plaintiff to introduce evidence of an infringing defendant's gross revenues. It is then the defendant's burden to prove deductible costs and to demonstrate that a certain portion of the gross revenues were not due to the infringement. If the defendant fails to meet those burdens, then its entire gross revenues are treated as "profits" to which the plaintiff is entitled.⁹⁸

Such an approach might have its merits in cases of straightforward copyright piracy where a presumption that all profits flow from the infringement is reasonable. But it is a poor fit for publicity rights because it is often difficult, if not impossible, to determine what portion of consumers' purchase decisions can be attributed to some ephemeral connection between a celebrity and the goods and services purchased.⁹⁹ Instead, ordinary rules regarding unjust enrichment should apply, and it should remain the plaintiff's burden to establish entitlement to whatever portion of a defendant's profits are sought.

Attorney Fees and Costs

The federal right of publicity statute should allow the prevailing party in a

lawsuit to recover reasonable attorney fees and costs, regardless of whether the prevailing party is a plaintiff or defendant.¹⁰⁰ This will provide plaintiffs with an incentive not to bring tenuous claims and will provide defendants with an incentive to settle meritorious claims.

Punitive Damages

Punitive damages should not be available for infringement of the right of publicity. The availability of such damages risks overdeterrence of speech and expression and thereby threatens First Amendment interests. The Copyright Act does not permit punitive damages for copyright infringement,¹⁰¹ and neither should a federal right of publicity statute.

Injunctive Relief and Prior Restraints

Although some injunctive relief may be appropriate for publicity rights violations, injunctions that amount to prior restraints of speech should not be permitted.¹⁰² The Supreme Court has rejected the issuance of a temporary injunction to block distribution of leaflets that allegedly violated plaintiff's right of privacy.¹⁰³ Courts routinely reject prior restraints to prevent alleged defamation that plaintiffs claim will destroy their reputations.¹⁰⁴ There is no compelling reason why alleged infringements of the right of publicity should be treated differently.

Conclusion

After several decades of experimentation in statehouses and courts around the country, two things are clear about the right of publicity: (1) there is no uniformity of laws, and (2) that lack of uniformity is a serious threat to the First Amendment. The time has come for a federal right of publicity law that adequately protects free speech and press rights.

Endnotes

1. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 836 (1979) (Bird, C.J., dissenting) (characterizing the development and recognition of a right of publicity as "spasmodic" and opining that "[t]his is in part a consequence of courts adjudicating claims which might be categorized as invasions of plaintiff's right of publicity as privacy claims").

2. The right of privacy often is traced to the famous 1890 law review article *The Right to Privacy* by Samuel D. Warren and Louis D. Brandeis, 4 HARV. L. REV.

193 (1890).

3. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); see also THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:24 (2011).

4. Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1170–71 (2006).

5. 202 F.2d 866, 868 (2d Cir. 1953).

6. See *id.*; see also Dogan & Lemley, *supra* note 4, at 1172–75.

7. Dogan & Lemley, *supra* note 4, at 1174–75; see also MCCARTHY, *supra* note 3, §§ 1:28–1:36.

8. See, e.g., *McBee v. Delica Co., Ltd.*, 2004 WL 2634465, at *3 (D. Me. Aug. 19, 2004) ("the right of publicity flows from the right of privacy").

9. MCCARTHY, *supra* note 3, §§ 1:30, 1:34 (arguing that privacy terminology has led to confusion in right of publicity law).

10. Cf. *id.* § 1:30 (discussing how characterization of a right of publicity as a personal right or property right could impact what types of damages are available).

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

12. *Id.*; see also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

13. *Cardtoons*, 95 F.3d at 973.

14. *Id.* at 973–74; see also Dogan & Lemley, *supra* note 4, at 1184–86 (characterizing the allocative efficiency justification for the right of publicity as antimarket and inimical to ordinary tenets of free and efficient markets); Steven J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y 111, 120 (1980) (arguing that celebrity endorsements of products and services may be a net negative for consumers and society).

15. *Cardtoons*, 95 F.3d at 975; see also JEREMY BENTHAM, *ANARCHICAL FALLACIES* (1843) (criticizing claims of natural rights as "nonsense upon stilts").

16. *Cardtoons*, 95 F.3d at 975; see also Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 184–96 (1993) (questioning justifications for right of publicity).

17. *White v. Samsung Elec. Am.*, 989 F.2d 1512, 1517 (9th Cir. 1992) (Kozinski, J., dissenting from denial of petition for rehearing).

18. *Id.* at 1516.

19. *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697 (1982) (Weltner, J.,

concurring); *see also* *White*, 989 F.2d at 1519–21.

20. *See generally* Madow, *supra* note 16; Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003).

21. Volokh, *supra* note 20, at 930.

22. *See* C.B.C. Distrib. & Mktg., Inc. v. MLB Advanced Media, 505 F.3d 818, 822 (8th Cir. 2007).

23. *See* 15 U.S.C. § 1125(a).

24. *See* MCCARTHY, *supra* note 3, § 6:3. The Media Law Resource Center's *50-State Survey: Media Privacy and Related Law, 2009–2010* indicates that the number of states recognizing a common law and/or statutory right of publicity may be significantly more than thirty-one.

25. *Id.*

26. 433 U.S. 562, 572–77 (1977).

27. IND. CODE §§ 32-36-1-6, 32-36-1-7.

28. IND. CODE § 32-36-1-8.

29. IND. CODE §§ 32-36-1-10, 32-36-1-12, 32-36-1-14, 32-36-1-15.

30. IND. CODE § 32-36-1-1(a). *But see* Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 589 F. Supp. 2d 331, 333 (S.D.N.Y. 2008) (choice of law should depend on where person was domiciled at time of death).

31. IND. CODE § 32-36-1-9.

32. N.Y. CIVIL RIGHTS LAW § 51; *see also* *Stephano v. News Group Publ'ns, Inc.*, 485 N.Y.2d 220 (N.Y. Ct. App. 1984) (no common law right of publicity).

33. N.Y. CIVIL RIGHTS LAW § 51.

34. MCCARTHY, *supra* note 3, § 6:6.

35. *Id.*

36. *See, e.g.*, *No Doubt v. Activision Publ'g, Inc.*, 192 Cal. App. 4th 1018, 1028–29 (Cal. Ct. App. 2011).

37. *Motschenbacher v. R.J. Reynolds, Inc.*, 498 F.2d 821, 827 (9th Cir. 1974).

38. *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1993); *see also* *Waits v. Frito-Lay, Inc.* 978 F.2d 1093 (9th Cir. 1992) (California right of publicity applies to advertisement featuring vocals by performer who sounds like plaintiff Tom Waits).

39. *White v. Samsung*, 989 F.2d 1512, 1513–14, 1518, 1521 (1993).

40. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 405, 407 (2001); *see also* *Winter v. DC Comics*, 30 Cal. 4th 881, 891 (2003) (explaining that in California, liability will not turn on whether defendant's use in an otherwise expressive manner will increase profits because “[t]he question is whether the work is transformative, not how it is marketed; if the work is sufficiently transformative

to receive legal protection, ‘it is of no moment that the advertisements may have increased the profitability of the [work]’”).

41. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 370–72, 373–74 (Mo. 2003).

42. *Id.* at 372, 374–75.

43. TENN. CODE ANN. § 47-25-1104.

44. *Compare* TENN. CODE ANN. § 47-25-1105(a), with CAL. CIV. CODE § 3344(d).

45. WASH. REV. CODE § 63.60.020.

46. *Experience Hendrix LLC v. HendrixLicensing.com, Ltd.*, 2011 WL 564300, at *11–12 (W.D. Wash. Feb. 8, 2011).

47. CMG WORLDWIDE, available at www.cmgworldwide.com/services/legal/ip-strategies.htm (last visited May 31, 2011).

48. *Cf. Experience Hendrix LLC*, 2011 WL 564300, at *11–12.

49. CAL. CIV. CODE § 3344.1; *see also* www.assembly.ca.gov/acs/committee/c15/publications/sb209_99.pdf (describing legislation that created § 3344.1 and listing bill's supporters).

50. *See* *Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89, 95, 99 (Tenn. Ct. App. 1987).

51. WASH. REV. CODE § 63.60.010 et seq. (amended in 2008).

52. Defendants brought a declaratory relief action in New York, and the Indiana action was later transferred to New York and consolidated with the declaratory relief action there. *See* *CMG Worldwide, Inc. v. Bradford Licensing Assocs.*, 2006 WL 3248423, at *6 (S.D. Ind. Mar. 23, 2006).

53. *Ellington v. Gibson Piano Ventures, Inc.*, 2005 WL 1661729 (S.D. Ind. June 24, 2005) (denying summary judgment of Indiana right of publicity claim).

54. *Bruce Lee Enters., LLC v. Ecko Complex, LLC*, Case No. 09-CV-0398 WTL-DML (S.D. Ind. filed Apr. 1, 2009). Although the district court granted defendants' motion to transfer venue to the Southern District of New York based on the convenience of the parties, the court suggested that Indiana law could be applied by the New York court. *See* *Bruce Lee Enters., LLC v. Ecko Complex, LLC*, 2010 WL 989909, at *2 (S.D. Ind. Mar. 16, 2010).

55. *Day v. Wonderama Toys*, Case No. 1:10-cv-01689-RLY-MJD (S.D. Ind. filed Dec. 23, 2010).

56. *In re NCAA Student-Athlete Name & Likeness Litig.*, 2011 WL 1642256, at *3 (N.D. Cal. May 2, 2011).

57. 810 F.2d 104 (6th Cir. 1987).

58. *Id.* at 105. *But see* *Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 326–27 (6th Cir. 2001) (holding that nationwide injunction based on

infringement of Michigan postmortem right of publicity was improper because many states did not recognize postmortem right of publicity, including New York, home of defendant).

59. *See, e.g.*, *Christoff v. Nestle USA, Inc.*, 47 Cal. 4th 468, 476 (Cal. 2009).

60. *See* MCCARTHY, *supra* note 3, § 11:20; *see also* *Zoll v. Jordache Enters., Inc.*, 2001 WL 1550943, at *2 (S.D.N.Y. Dec. 5, 2001).

61. For example, in *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1007 (9th Cir. 2001), the Ninth Circuit applied California's right of publicity law to the claims of Hawaii residents where the allegedly offending publication was distributed in California and Hawaii had no right of publicity law.

62. MCCARTHY, *supra* note 3, § 11.12. McCarthy also states that conflict of law analysis can be “fantastically complicated.” *Id.* § 11.13.

63. *See* *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005) (discussing Congress's power under the Commerce Clause).

64. Besides the Commerce Clause, authority for a federal right of publicity statute might be found in the Dormant Copyright Clause and the First Amendment. *See* *White v. Samsung*, 989 F.2d 1512, 1518–19 (9th Cir. 1993).

65. U.S. CONST. art. 1, § 8, cl. 8.

66. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987).

67. 17 U.S.C. § 301(a); *see also* U.S. CONST. art. 6, cl. 2 (Supremacy Clause); *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1137–38 (9th Cir. 2006) (discussing test for copyright preemption); *Bonito Boats Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151–56 (discussing patent preemption).

68. INT'L TRADEMARK ASS'N, FEDERAL RIGHT OF PUBLICITY: REQUEST FOR ACTION BY THE INTA BOARD OF DIRECTORS (1998), available at www.inta.org/Advocacy/Pages/USFederalRightofPublicity.aspx; *Right of Publicity*, ABA SEC. INTELL. PROP. L. ANN. REP. 202, 250 (1995–1996).

69. *See, e.g.*, Richard S. Robinson, *Preemption, the Right of Publicity, and a New Federal Statute*, 16 CARDOZO ARTS & ENT. L.J. 183 (1998); Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. 227 (1999); Sean D. Whaley, *I'm a Highway Star: An Outline for a Federal Right of Publicity*, 31 HASTINGS COMM. & ENT. L.J. 257 (2009); Brittany A. Adkins, *Crying Out for Uniformity: Eliminating State Inconsistencies*

in Right of Publicity Protection Through a Uniform Right of Publicity Act, 40 CUMB. L. REV. 499 (2009–10) (advocating nonpreemptive federal right of publicity law).

70. Some states have statutes with laundry lists of other realms of protection—nicknames, signatures, voices, etc.—but such expansive protections lead to questionable results, e.g., protecting robots and cars that are not consistent with a limited and constitutionally passable right of publicity. See *White v. Samsung*, 989 F.2d 1512, 1513–14, 1518, 1521 (9th Cir. 1993).

71. *Rosemont Enters., Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122, 129 (Sup. Ct. 1968), *aff'd*, 301 N.Y.S.2d 948 (N.Y. App. Div. 1969).

72. *Id.* (the “right of publicity” must “bow” to “newsworthy events and matters of public interest”).

73. *Id.* at 127–29.

74. Courts have held that the First Amendment bars Lanham Act false endorsement claims targeting expressive works unless the use of the plaintiff’s mark has no artistic relevance to the expressive work or the use “explicitly misleads” consumers to believe that the plaintiff endorses the work. See, e.g., *Mattel, Inc. v. MCA Records*, 296 F.3d 894, 902 (9th Cir. 2002).

75. *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118, 1122–23 (N.D. Cal. 2002).

76. *Id.* at 1123.

77. *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 456 (Cal. 1979) (Bird, C.J., concurring).

78. *Id.* at 459; see also *Polydoros v. Twentieth Century Fox Film Corp.*, 79 Cal. Rptr. 2d 207, 208–09, 212 (1997) (despite similarities between plaintiff and movie’s character, the court held that defendants “were creating a fictionalized artistic work,” that “their endeavor is constitutionally protected,” and that “[t]his right was not diminished when [defendants] advertised and then sold their work as mass public entertainment”).

79. *Hicks v. Casablanca Records*, 464 F. Supp. 426, 428–33 (S.D.N.Y. 1978).

80. *Seale v. Grammercy Pictures*, 949 F. Supp. 331, 334–35 (E.D. Pa. 1996), *aff'd without opinion*, 156 F.3d 1225 (3d Cir. 1998).

81. See, e.g., *Partington v. Bugliosi*, 56 F.3d 1147, 1154 (9th Cir. 1995) (holding that “[d]ocudramas”—i.e., works that mix historical fact and fiction—are entitled to “substantial latitude” under the First Amendment); *Ruffin-Steinback v. de Passe*, 82 F. Supp. 2d 723, 726, 728–31 (E.D. Mich. 2000) (foreclosing publicity

rights liability for docudrama about music group *The Temptations* and holding that “to the extent that courts have been reluctant to extend the right of publicity to depictions of life-stories based on First Amendment considerations, those considerations are no less relevant whether the work in question is fictional, nonfictional or a combination of the two”), *aff'd*, 267 F.3d 457, 461–62 (6th Cir. 2001); *Guglielmi*, 603 P.2d at 461–62 (Bird, C.J., concurring) (“[w]hether the publication involved was factual and biographical or fictional, the right of publicity has not been held to outweigh the value of free expression”); *Donahue v. Warner Bros. Pictures Distrib. Corp.*, 272 P.2d 177, 184 (Utah 1954) (dramatized biographical film not subject to publicity rights law); *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828, 829 (N.Y. App. Div. 1980) (although a book claimed to be a “biography,” the court reasoned that “it [did] not matter whether the book is properly described as a biography” since it was protected free expression whether described as a “biography, fictional biography, or any other kind of literary work”).

82. *Matthews v. Wozencraft*, 15 F.3d 432, 439 (5th Cir. 1994) (affirming the dismissal of a misappropriation claim based on the use of an individual’s persona in a book and subsequent motion picture dramatizing real events); see also *Ruffin-Steinback*, 82 F. Supp. 2d at 726 (“[t]he scope of the right of publicity does not depend . . . on the fictional or nonfictional character of the work”); *Leopold v. Levin*, 259 N.E.2d 250, 254–57 (Ill. 1970) (generally recognizing a misappropriation right but holding that the First Amendment limited such a claim in the context of “knowingly fictionalized accounts”).

83. See *Madow*, *supra* note 16, at 128.

84. *Ruffin-Steinback*, 267 F.3d at 461–62 (affirming finding that a movie about the musical group *The Temptations*, which employed the “fictionalized likenesses” of plaintiffs, was “protected by the First Amendment” and that “the advertising incidental to such uses did not give rise to a claim for relief under the plaintiffs’ rights of publicity”); *Cher v. Forum Int’l, Ltd.*, 692 F.2d 634, 639 (9th Cir. 1982) (“[c]onstitutional protection extends to the truthful use of a public figure’s name and likeness in advertising which is merely an adjunct of the protected publication and promotes only the protected publication”); *Guglielmi*, 603 P.2d at 455–56, 462 (defendants used Rudolph Valentino’s name in the title of a film and in advertising for film; such

uses did not remove constitutional protections because “[i]t would be illogical to allow [defendants] to exhibit the film but effectively preclude any advance discussion or promotion of their lawful enterprise”).

85. *McCARTHY*, *supra* note 3, § 3:32; see, e.g., *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1140 (7th Cir. 1985) (holding that intent is “irrelevant” to a right of publicity claim under Illinois law); *Pooley v. Nat’l Hole-In-One Ass’n*, 89 F. Supp. 2d 1108, 1114–15 (D. Ariz. 2000) (holding that Arizona’s right of publicity “does not include the element of fault”); *Fairfield v. Am. Photocopy Equip. Co.*, 138 Cal. App. 2d 82, 87 (1955) (common law claim in California does not require showing of intent: “[i]nadvertence or mistake is no defense where the publication does in fact refer to the plaintiff in such manner as to violate his right of privacy”).

86. See, e.g., CAL. CIV. CODE § 3344(a) (California statutory right of publicity claim requires showing that defendant “knowingly use[d]” plaintiff’s identity); *Tana v. Dantanna’s*, 611 F.3d 767, 783 (11th Cir. 2010) (Georgia law requires that there must be a taking with “an intent to use the likeness for one’s benefit”); *Kovotovich v. K-Mart Corp.*, 88 F. Supp. 2d 975, 987 (D. Minn. 1999) (inadvertent use of name in promotional mailing would not give rise to misappropriation claim without evidence of intent).

87. *McCARTHY*, *supra* note 3, § 9:18.

88. *Id.*; see also IND. CODE § 32-36-1-8; CAL. CIV. CODE § 3344.1(g); TENN. CODE ANN. § 47-25-1104.

89. *McCARTHY*, *supra* note 3, § 9:19.

90. See *Jim Henson Prods., Inc. v. John T. Brady & Assocs., Inc.*, 867 F. Supp. 175, 190 (S.D.N.Y. 1994) (holding that Connecticut Supreme Court would, “like the vast majority of courts that have considered the issue,” find the goals of a post-mortem right “relevant and persuasive” and “would interpret the right of publicity as descendible”).

91. Although most states tie the post-mortem right to a particular number of years after death, another possibility is to tie it to the life span of specifically identified surviving heirs. See Comment, *The Right of Publicity: “You Can’t Take It with You,”* 12 PEPP. L. REV. 999, 1023 (1985) (suggesting right could extend for lifetime of surviving spouse and children).

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

93. *Dogan & Lemley*, *supra* note 4, at

1215–16; *see also id.* at 1184–88 (criticizing economic justifications for right of publicity); *Cartoons*, 95 F.3d at 973 (criticizing strength of economic justifications for right of publicity). *But see* McCARTHY, *supra* note 3, § 10:13 (right of publicity generally viewed as assignable).

94. *See* Perfect 10, Inc. v. CCBill LLC, 481 F.3d 751, 768 (9th Cir. 2007) (holding that § 230 immunizes ISP from liability for right of publicity claim). *But cf.* Atl. Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009) (holding that right of publicity is “intellectual property” not immunized under § 230).

95. An innocent infringer defense, similar to the one in federal trademark law, should also apply to a federal right of publicity statute. *See* 15 U.S.C. § 1114(2) (limiting remedies available against printers, publishers, and distributors “for others” of “electronic communications” that infringe a party’s trademark rights).

96. 17 U.S.C. § 107; 15 U.S.C. § 1115(b) (4); *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 308 (9th Cir.

1992) (discussing nominative fair use doctrine).

97. As in California, the owner of a dead celebrity’s postmortem right of publicity should only be permitted to recover damages if the owner has registered his interest in such rights with the government. CAL. CIV. CODE § 3344.1(f). A similar registry should be created on the national level.

98. 17 U.S.C. § 504(b).

99. However, California follows the Copyright Act approach to recovery of profits in right of publicity cases. *See* CAL. CIV. CODE § 3344(a).

100. California follows this approach. *See* CAL. CIV. CODE § 3344(a). Perhaps the amount of attorney fees recoverable should be tied to the amount of damages sought and/or obtained to prevent an incentive to spend large sums litigating claims worth relatively little in hopes of securing an attorney fees windfall.

101. *See, e.g., Saregama India Ltd. v. Young*, 2003 WL 25769784, at *1 (C.D. Cal. Mar. 11, 2003). However, some states permit recovery of punitive damages for

right of publicity claims. *See, e.g., CAL. CIV. CODE* § 3344(a).

102. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 726 (1971) (Brennan, J., concurring) (prior restraint justified in only the most extreme circumstances, such as to “suppress[] information that would set in motion a nuclear holocaust”). The rule against prior restraints applies to both political speech and commercial speech. *See* N.Y. Magazine v. Metro. Transp. Auth., 136 F.3d 123, 131 (2d Cir. 1998). *But see* Michaels v. Internet Entm’t Group, Inc., 5 F. Supp. 2d 823, 839 (C.D. Cal. 1998) (granting preliminary injunction against use of plaintiffs’ names and likeness in the promotion, marketing, and advertising of film).

103. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

104. *See, e.g., Metro. Opera Ass’n v. Local 100*, 239 F.3d 172, 177 (2d Cir. 2001) (“equity will not enjoin a libel” because there are adequate legal remedies available).