

THE “SAD MICHIGAN FAN”: WHAT ACCIDENTALLY BECOMING AN INTERNET CELEBRITY MEANS IN TERMS OF RIGHT OF PUBLICITY AND COPYRIGHT

Caitlyn Slater*

2017 MICH. ST. L. REV. 865

ABSTRACT

In October 2015, Chris Baldwin was caught on camera after an improbable play had Michigan State University defeating University of Michigan in the final seconds of the rivalry football game. Overnight, Baldwin’s reaction was an internet sensation, and his face was integrated into the word “OHIO” printed on a t-shirt supporting University of Michigan’s rivalry with The Ohio State University. Uncertainty in the “patchwork” of state right of publicity laws makes it unclear whether Baldwin would have had a successful claim to protect his image from being used for profit without his consent—especially when some jurisdictions find the state right of publicity preempted by federal copyright law. The copyrights in this case were owned by both ESPN and University of Michigan, which both could have instituted a copyright infringement claim against the t-shirt company for the unauthorized use of an image from the copyrighted broadcasts.

In today’s technological age, anyone could be caught on camera and face the same situation as Chris Baldwin. The person who faces this should have a cause of action that is not preempted by federal law and is uniform regardless of where the event occurs—

* Senior Managing Editor, *Michigan State Law Review*; J.D. 2018, Michigan State University College of Law; B.S. 2015, Northeastern University. The author would like to thank Professor Nancy Costello for her invaluable insight, advice, and time throughout the research, writing, and publication process. The author would also like to thank the members of the *Michigan State Law Review* for the time and effort they put into reviewing and editing this Comment. The author would like to thank her parents, Chris and Trisha Slater; her fiancé, Josh Silverblatt; and her sisters, Jessica and Ciera Slater, for their love and support throughout this process and throughout law school. She would also like to thank them for helping her acquire most of the tickets cited in this Comment by going to the specified games with her. Finally, the author would like to thank Anne Miller and Marissa Kreuzfeld for acquiring the University of Michigan tickets cited in this Comment.

meaning there needs to be a federal right of publicity statute that can coexist with federal copyright law. In addition to the federal right of publicity and copyright regime, each ticketed event should sell tickets that include express language that the sponsor of the event can use the ticket holder's image and likeness without restriction when it is captured by the sponsor's photographers and videographers. While alleged infringers can rely on First Amendment defenses, such as transformativeness for the right of publicity claim and fair use for the copyright infringement claim, this scheme of dual federal rights and a contractual obligation will protect all parties involved and still allow the dissemination of information under the First Amendment.

TABLE OF CONTENTS

INTRODUCTION	867
I. HISTORY OF THE RIGHT OF PUBLICITY	872
A. The Development of the Right of Publicity	873
B. State Right of Publicity Protections Range from Statutes, to Common Law, to Nothing	877
1. <i>Twenty-Two States Have Codified the Right of Publicity into a Statute</i>	877
2. <i>Nineteen States Use a Common Law Right of Publicity</i>	879
C. First Amendment Limitation to Right of Publicity	882
1. <i>"Transformativeness" as a Defense to Right of Publicity Violations</i>	883
2. <i>Other Tests Available to the Courts: Newsworthiness, Profits, and Core Speech</i>	885
II. COPYRIGHT LAW AND ITS (SOMETIMES) PREEMPTION OF THE RIGHT OF PUBLICITY	888
A. History of Federal Copyright Law	889
B. Copyright's Preemption of State Law	892
1. <i>Cases in Which Courts Found that Right of Publicity Was Preempted</i>	894
2. <i>Cases in Which Courts Found that Right of Publicity Was Not Preempted</i>	897
C. Fair Use Defense to the Use of Copyrighted Material	900
D. The Contractual Relationship Between Right of Publicity and Copyright in Sports	901
III. A BRIEF INTERLUDE INTO THE LANHAM ACT	904

IV. MAKING ROOM FOR BOTH THE RIGHT OF PUBLICITY AND COPYRIGHT PROTECTION 906

 A. The Effect on the Ordinary Person’s Right of Publicity .. 907

 1. *The “Bad Luck Brian” Meme*..... 908

 2. *The “Ain’t Nobody Got Time for That” Meme* 909

 3. *The “Scumbag Steve” Meme*..... 909

 4. *“Bye Ayesha” T-Shirt*..... 910

 B. The Effect on the Owner of the Copyrighted Image and Broadcast..... 912

 C. Solution: A Federal Right of Publicity Statute that Coexists with Copyright Protections..... 913

 D. Counterarguments: Protecting Monopolies on the Ordinary Person’s Image and Overprotecting Copyrights Hinders Free Speech..... 916

 1. *The Ordinary Person Caught on Camera Is Not Famous and Should Not Have a Right of Publicity*..... 916

 2. *Protecting Images Through Right of Publicity Laws Hinders Free Speech Under the First Amendment* 918

 3. *The Protection of Images Through Copyright Law Hinders Free Speech Under the First Amendment* 921

CONCLUSION..... 925

INTRODUCTION

On October 17, 2015, the Michigan State University football team traveled to Ann Arbor for the 108th battle for the Paul Bunyan trophy, the mascot of the annual Michigan State versus University of Michigan football game.¹ With ten seconds left in the game, University of Michigan was ahead 23 – 21² and was set to punt the

1. *No. 7 Spartans, No. 12 Wolverines Battle for the Paul Bunyan Trophy in Big East Division Showdown*, MSU SPARTANS (Oct. 15, 2015), <http://www.msuspartans.com/sports/m-footbl/spec-rel/101515aab.html> [https://perma.cc/8V4X-7U2A]. See also CFB Fans, *Michigan State vs Michigan Full Game 17/10/2015 NCAA Football Week 7*, YOUTUBE (Oct. 18, 2015), <https://www.youtube.com/watch?v=Fa60YNgAG-Q> [https://perma.cc/AY4P-Y6TQ] (showing the entire football game).

2. Dan Murphy, *Michigan State Stuns Michigan with Final-Play Fumble Return*, ESPN (Oct. 18, 2015), <http://www.espn.com/college-football/recap?gameId=400763542> [https://perma.cc/P3UM-J8J6].

ball away on fourth down on its own forty yard line.³ Dejected, with only a 0.2% chance to win,⁴ Michigan State resigned itself to the loss and delivered the Paul Bunyan trophy to the Wolverines.⁵ But University of Michigan punter Blake O'Neill bobbled the snap, and his off balance kick landed the ball straight into the hands of Michigan State's Jalen Watts-Jackson.⁶ Watts-Jackson ran the ball thirty-eight yards into the end zone for an improbable, and almost impossible, game-winning play.⁷ After the touchdown, in the stunned silence of the stadium, television cameras rested on the face of stricken University of Michigan fan Chris Baldwin, who stood with his hands pressed to his head and mouth draped open in shocked disbelief.⁸

Within hours, Baldwin's face was splashed across the Internet, making him an instant overnight celebrity, an icon in the college football world⁹—dubbing him the “Sad Michigan Fan.”¹⁰ Cincy Shirts, an Ohio-based T-shirt company that supported University of Michigan's archrival Ohio State University, saw an opportunity.¹¹ It seized the frozen image of Baldwin in the now nicknamed “surrender

3. See CFB Fans, *supra* note 1. The specific play referenced can be found beginning at time 2:41:40. *Id.*

4. Kevin Trahan, *Michigan State Was So Sure It Had Lost to Michigan, It Had Already Given Away the Trophy*, SB NATION (Oct. 18, 2015, 8:39 AM), <http://www.sbnation.com/college-football/2015/10/17/9562197/michigan-state-michigan-paul-bunyan-trophy> [<https://perma.cc/JN86-ATEB>].

5. See *id.*

6. See Murphy, *supra* note 2.

7. See *id.*; see also *Michigan v. Michigan State - Play-by-Play*, ESPN, <http://www.espn.com/college-football/playbyplay?gameId=400763542> [<https://perma.cc/M8K4-WKLB>] (last visited Nov. 6, 2017); CFB Fans, *supra* note 1 (showing the specific bobbled punt returned for a touchdown at 2:41:48).

8. See CFB Fans, *supra* note 1. The specific reaction referenced can be found beginning at time 2:41:59. *Id.*

9. See *Shocked in the Stands: U of M Fan Identified*, FOX 17 NEWS (Oct. 19, 2015, 8:08 PM), <http://fox17online.com/2015/10/19/shocked-in-the-stands-u-of-m-fan-identified/> [<https://perma.cc/QB5Z-TS9N>].

10. See *Michigan State and Ohio State Fans Get Creative, Immortalize “Sad Michigan Fan” in Merch*, HERO SPORTS (Oct. 27, 2015, 3:30 AM), <http://herosports.com/collegefootball/michigan-state-ohio-state-fans-sad-michigan-fan-shirt-pumpkin> [<https://perma.cc/R6AS-AJMN>] (describing Baldwin's image as the “Sad Michigan Fan”).

11. See Ben Goldschmidt, *Did Michigan Fan Ever Get Any Money from Cincy Shirts?*, CINCINNATI.COM (Jan. 5, 2016, 3:14 PM), <http://www.cincinnati.com/story/entertainment/2016/01/05/did-michigan-fan-ever-get-money-cincy-shirts/78135800/> [<https://perma.cc/U5JB-RUHC>].

cobra” pose¹² and made Baldwin’s round face the first “O” in “OHIO” on T-shirts for sale.¹³ However, Cincy Shirts did not obtain Baldwin’s consent prior to using his image on its T-shirts, and the shirts turned a handsome profit.¹⁴ After Baldwin announced in media interviews that the company was profiting off his image and not paying him, the T-shirt company paid him an undisclosed amount of money.¹⁵



16



17

12. See *id.*

13. See Luke Kerr-Dineen, *Ohio State T-shirt Mocks Michigan Fans After Devastating Loss*, USA TODAY (Oct. 20, 2015, 8:21 AM), <http://ftw.usatoday.com/2015/10/ohio-state-t-shirt-mocks-michigan-fans-after-devastating-loss> [https://perma.cc/MP8A-ZCE5].

14. See Goldschmidt, *supra* note 11.

15. See *id.*

16. See Mark Tower, *Meme-Spawning Michigan Fan Presents ESPN ‘Best Play’ Award to MSU*, MLIVE (Dec. 14, 2015, 10:22 AM), http://www.mlive.com/news/saginaw/index.ssf/2015/12/stunned_michigan_fan_presents.html [https://

Baldwin's case is not new—there have been numerous cases that result from a company using the likeness of a celebrity without his or her consent.¹⁸ One of the most famous is *White v. Samsung Electronics America, Inc.*, where the defendant used a robot in a mock *Wheel of Fortune* set to portray Vanna White in a commercial, and the court held that the defendant misappropriated Ms. White's identity.¹⁹ Throughout the last half century, the right of publicity, a new legal doctrine arising out of a mixture of state statutes and common law, was developed to allow people to protect their name and likeness from being used without their consent.²⁰ However, in the case of Chris Baldwin, an unknown college student attending a football game, the issue of whether he has a right to protect his name and likeness from being exploited commercially is not as clear cut as a celebrity protecting his or her image.²¹

Not only is there an issue of Baldwin enforcing his right of publicity, but it is unclear whether that right could be preempted by a copyright claim of the broadcaster that first fixed Baldwin's pose in a tangible medium.²² Where the right of publicity laws and copyright laws protect "equivalent rights," the right of publicity is preempted.²³ In Baldwin's case, ESPN, the sports broadcaster, and the University of Michigan would own the copyright of Baldwin's image for that particular clip of game footage.²⁴ If the right of publicity claim is

perma.cc/7HSB-T2XJ].

17. See Goldschmidt, *supra* note 11.

18. See, e.g., Michael J. Hoisington, *Celebrities Sue over Unauthorized Use of Identity*, HIGGS, FLETCHER, & MACK LLP, <http://higgslaw.com/celebrities-sue-over-unauthorized-use-of-identity/> [<https://perma.cc/GK3K-8T2X>] (last visited Nov. 6, 2017).

19. No. 90-55840, 1992 U.S. App. LEXIS 19253, at *2-3, *13 (9th Cir. Aug. 19, 1992).

20. See Jeremy T. Marr, Note, *Constitutional Restraints on State Right of Publicity Laws*, 44 B.C. L. REV. 863, 863 (2003).

21. See Charlise Dewey, *Copyright Infringement Cases Take a Personal Turn*, GRAND RAPIDS BUS. J. (Nov. 27, 2015), <http://www.grbj.com/articles/83887-copyright-infringement-cases-take-a-personal-turn> [<https://perma.cc/6ETU-PTAZ>]. In Michigan, cases have come out both ways on whether or not one has to be famous to have a right of publicity claim. *Id.* Some cases suggest that having some level of celebrity status is important, but other cases indicate that is not necessary. *Id.*

22. See *id.*; see also *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 675 (7th Cir. 1986) (discussing preemption of a right of publicity claim by professional baseball players).

23. *Balt. Orioles*, 805 F.2d at 675.

24. See Dewey, *supra* note 21 (discussing the second legal issue of copyright infringement to using Chris Baldwin's image); see also Kyle Austin,

preempted by the copyright owner’s claim, Chris Baldwin and any other fan that may be caught on camera are left with few to no rights to protect their names and likenesses from being commercially exploited.²⁵

The rights of the average fan caught on video whose likeness may be commercially exploited must be explored and solidified.²⁶ Due to technology, anyone’s image may become an Internet sensation, and companies can use that image to make a profit without obtaining consent from that person.²⁷ There should be a uniform federal right of publicity statute²⁸ that can apply to any person, which would establish a cause of action for both the person, through a right of publicity claim, and the owner of the copyright, through a copyright infringement claim.²⁹ In conjunction with this statute, every major event with masses of people that requires tickets for entry should have tickets that contain terms and conditions that allow the organization behind the event to utilize the person’s image freely, so there would not be an unnecessary amount of litigation against the owner of the copyright.³⁰ However, the right of publicity statute and

Michigan vs. Michigan State 2015: What Channel, Live Stream, How to Watch Online, MLIVE (Oct. 17, 2015 2:55PM), http://www.mlive.com/sports/2015/10/michigan_vs_michigan_state_201.html [<https://perma.cc/DJ49-Q5H2>].

25. See *Balt. Orioles*, 805 F.2d at 679.

26. See Dewey, *supra* note 21.

27. See *id.*

28. See Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 249 (2002) (explaining how some scholars recommend a federal right of publicity to balance federal and state interests while allowing for uniform protection of performers).

29. See Marr, *supra* note 20, at 869; see also Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMM. LAW. 14, 14-15 (2011). The closest analogous law to a federal right of publicity law is the Lanham Act, which applies to many similar situations, but requires falsity, deception, and confusion as to whether the person whose image is being used is actually endorsing the defendant’s product. *Id.* at 15.

30. See *Michigan State University v. University of Michigan*, University of Michigan Football Ticket (Oct. 17, 2015) (on file with author) [hereinafter *Michigan State v. Michigan Football Ticket*]. The ticket states:

The Holder of this ticket grants Michigan and its respective licensees and agents an unrestricted right and license to utilize Holder’s image, likeness, actions, and statements in any live or recorded audio, video, or photographic display or other transmission, broadcast, exhibition or reproduction made of, or at the event without further authorization or compensation.

Id. The University of Michigan ticket is the same or substantially the same for each ticket during a single season; this specific clause has not changed in recent years. Compare *Bowling Green v. University of Michigan*, University of Michigan Football

the copyright infringement claim should still be subject to First Amendment defenses, as this ensures that there is protection for the person whose image is exploited and the copyright holder while not hindering free speech.³¹

Part I discusses the history of the right of publicity law from its emergence, including an overview of states that have codified the right of publicity and the common law rules in states that have not. Part II discusses the right of publicity in relation to copyright law, discussing the court splits on preemption. Part III discusses a brief history of the Lanham Act. Part IV analyzes the problem of using a fan's image for profit and the proposed solution to prevent the many lawsuits that could be filed over the same image.

I. HISTORY OF THE RIGHT OF PUBLICITY

The right of publicity originally derived from the misappropriation prong included in the invasion of privacy tort.³² However, discrepancy in right of publicity laws remains as it is entirely a matter of state law.³³ Due to the fact there is no federal guidance, states are free to adopt statutes, follow common law, or reject the right of publicity entirely.³⁴ However, these rights must all be balanced with the First Amendment.³⁵

Ticket (Sept. 25, 2010) (on file with author), with *Indiana v. University of Michigan*, University of Michigan Football Ticket (Nov. 19, 2016) (on file with author).

31. See Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831, 852 (2010) (“The fair use doctrine is the second major mechanism internal to the copyright regime which is proffered as a supposed cushion against abridgement of First Amendment rights.”).

32. See Vick & Jassy, *supra* note 29, at 14; see also RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW. INST. 1977) (“One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”).

33. See Vick & Jassy, *supra* note 29, at 14.

34. See *id.* at 15. However, states are not likely to reject the right of publicity outright as a result of the Supreme Court of the United States' recognition of Ohio's right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 572-77 (1977). *Id.* Thus, because of this recognition by the Supreme Court and because there will not be a recovery for the use of one's image without permission without a right of publicity law, the states that do not have a statutory or common law right of publicity will not be focused on in this Comment. See *id.*

35. See Reid Kress Weisbord, *A Copyright Right of Publicity*, 84 FORDHAM L. REV. 2803, 2812 (2016) (“[P]ublicity rights operate by granting the owner exclusionary rights, thus allowing the personality to enjoin or charge for use of her persona. Exclusionary rights may be waived or not asserted, so the right of publicity

A. The Development of the Right of Publicity

Rooted in privacy law, the right of publicity claim originally recognized that use of a person’s name and likeness without his or her consent can cause pain and mental stress.³⁶ Over time this changed.³⁷ Key court decisions expanded the right of publicity laws to allow a person to recover both noneconomic damages and economic damages from lost opportunities to commercially exploit one’s own image.³⁸

The right of publicity is a modern protection that began with the invention of photography and printing.³⁹ Prior to these inventions and as early as the founding of this country, celebrity status and fame were considered common property of the people, despite the increasing amount of commercial exploitation of celebrities.⁴⁰ With the invention of photography and printing, pictorial advertisements became more common, and those in the advertisements attempted to control the commercial use of their likeness.⁴¹ In 1890, Samuel Warren and Louis Brandeis published an article in which they

operates by allowing the right holder to decide whether to permit the use of her persona. The very existence of publicity rights, therefore, tends to chill speech about the personality because the right creates at least the threat of possible liability for use of the persona.”).

36. See Vick & Jassy, *supra* note 29, at 14. The offense was related to the misappropriation of the person’s name and likeness as an offense to the person rather than an economic injury for lost opportunity of commercial exploitation of that name and likeness. *Id.*

37. See *id.* at 14-15. This has not changed in all courts, though, as some courts continue to view the right of publicity as a personal right of privacy rather than economic gain. *Id.* at 14.

38. See *id.* at 14-15.

39. See Mark Joseph Stern & Nat Stern, *A New Test to Reconcile the Right of Publicity with Core First Amendment Values*, 23 J. INTELL. PROP. L. 93, 95-96 (2015) (explaining the invention of photography and printing led to the shift from a common ownership of fame to an individual ownership).

40. See *id.* (noting that this derived from the celebrity status of a person as a “species of common property” rather than personal property); see also NEIL HARRIS, *CULTURAL EXCURSIONS: MARKETING APPETITES AND CULTURAL TASTES IN MODERN AMERICA* 239 (1990) (“Yet all this stimulated little litigation. Some unspoken assumption made famous people . . . a species of common property whose commodity exploitation required little control.”).

41. See, e.g., Stern & Stern, *supra* note 39, at 96 (“As photography and printing technology grew more sophisticated, pictorial advertisements exploded, and famous people began to attempt to assert commercial control over their likenesses. Predictably, most courts rejected these early suits; still, a few prescient courts recognized an individual’s proprietary interest in his own identity.”).

proposed a right to privacy to protect one's identity from "journalistic intrusiveness,"⁴² suggesting that a person has a proprietary interest in his or her identity.⁴³ The rationale underlying a right of publicity was that if court decisions could indicate a general right to privacy for emotions, thoughts, and sensations, these should receive the same protection whether expressed in writing, conduct, or facial expression.⁴⁴ For Warren and Brandeis, "the right of privacy was the vehicle for the protection of an internal interest, the feelings of one who involuntarily had been publicly used."⁴⁵

The early application in legislature and court decisions of the right to privacy required that plaintiffs allege embarrassment or emotional distress.⁴⁶ However, the legal landscape for right to privacy and right of publicity changed with *Haelan Laboratory, Inc. v. Topps Chewing Gum, Inc.*⁴⁷ Here, the Second Circuit held that the

42. See *id.*; accord Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 206 (1890) ("The circumstance that a thought or emotion has been recorded in a permanent form renders its identification easier[.]. . . If, then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.").

43. See, e.g., Yvette Joy Liebesman, *When Selling Your Personal Name Mark Extends to Selling Your Soul*, 83 TEMP. L. REV. 1, 10-12 (2010) ("Warren and Brandeis argued that it was necessary and desirable that our courts recognize and protect, at least to some extent, the right to privacy. After discussing several theories under which courts had granted relief for a wrongful publication, the authors concluded that there was, in case law, 'a principle which may be invoked to protect the privacy of the individual.' This common law right to privacy was predicated upon the interest of an individual in the exclusive nature of his personality. Whether phrased in terms of the right 'to be let alone' or freedom from exposure, the right of privacy was the vehicle for the protection of an internal interest, the feelings of one who involuntarily has been publicly 'used.'").

44. See Warren & Brandeis, *supra* note 42 and accompanying text.

45. Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1204 (1986) (internal quotations omitted).

46. See Stern & Stern, *supra* note 39, at 97. This theory of the right of publicity resulted from the right of privacy that Samuel Warren and Louis Brandeis proposed in their 1890 article, leading to the direct link between the right of privacy and the right of publicity. *Id.* at 96.

47. 202 F.2d 866 (2d Cir. 1953). In *Haelan*, the Court was confronted with a situation in which a baseball player had contracted with a single chewing gum company for exclusive rights to the ballplayer's photograph. *Id.* at 867. A rival chewing-gum company then deliberately induced the player to allow the company to use his photograph. *Id.* The Court recognized the player's right of publicity explaining that a prominent person would be deprived of the monetary benefit of his or her image if he or she was no longer receiving money from the use of their

right of publicity was in addition to and independent of the right to privacy.⁴⁸ The following year, Melville Nimmer released an article in response to Warren and Brandeis’s article, further developing the idea that the right to privacy is an inadequate means for allowing persons to control the use of their likeness without outright prohibiting its use.⁴⁹ In 1960, William Prosser became the Chief Reporter of the Second Restatement of Torts and codified misappropriation.⁵⁰ The same year, the United States Supreme Court held that the general principle of publicity rights passed First Amendment scrutiny.⁵¹

The right of publicity, beginning with the *Haelan* decision, was used to protect celebrities.⁵² To date, the most well-known cases for right of publicity laws are derived from the use of celebrity likeness.⁵³ The most recognizable case in the last twenty-five years is *White v. Samsung Electronics*, where the defendant aired a commercial that used a robot in front of a *Wheel of Fortune* board dressed similarly to Vanna White.⁵⁴ The Ninth Circuit explained that

likeness in advertising. *Id.* at 868. *See also* Stern & Stern, *supra* note 39, at 98 (discussing the *Haelan* decision).

48. *Haelan Labs., Inc.*, 202 F.2d at 868. *Haelan* argued that the right of publicity was a separate right that was based in property and thus could be transferred, which differentiated it from the right of privacy. *Id.* at 867.

49. *See* Stern & Stern, *supra* note 39, at 99; Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 204 (1953).

50. *See supra* notes 32 and 39 and accompanying text.

51. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977) (holding that one trying to protect his or her right of publicity does not seek to enjoin the broadcast of the performance, but merely wants to be paid for it, which passes First Amendment scrutiny); *see also* Stern & Stern, *supra* note 39, at 100.

52. *See* Stern & Stern, *supra* note 39, at 99; Kelli L. Sager, *Summary of Right of Publicity Issues*, DAVIS WRIGHT TREMAINE LLP 1 (Sept. 2012), https://law.ku.edu/sites/law.ku.edu/files/docs/media_law/Summary_of_Right_of_Publicity_Issues.pdf [<https://perma.cc/N9BK-SP7C>] (discussing right of publicity laws in terms of celebrities and their personas).

53. *See generally* *White v. Samsung Elecs. Am., Inc.*, No. 90-55840, 1992 U.S. App. LEXIS 19253, at *13 (9th Cir. Aug. 19, 1992) (finding that defendants using Vanna White’s identity violated her common law right of publicity); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (finding a singer’s right of publicity was violated when the defendant used a sound-alike because it was an appropriation of the singer’s identity); *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 694 F.2d 674, 676 (11th Cir. 1983) (defining right of publicity as a celebrity’s exclusive right to his or her name and likeness); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1353 (D.N.J. 1981) (defining the right of publicity as the right of an individual, especially a celebrity, to control the commercial value of his or her image and likeness).

54. *White*, 1992 U.S. App. LEXIS 19253, at *1-3.

a celebrity identity has marketable value and celebrities should be able to decide when and how to exploit that value under California law.⁵⁵ As judicial acceptance of the right of publicity grew, uncertainty remained as to what the limits of the rights were.⁵⁶ The right of publicity is analogous to state law protections for misappropriation, and policy considerations are equivalent to those that underlie federal copyright law.⁵⁷ As of 2014, forty-one states recognize a statutory or common law right of publicity protection.⁵⁸

55. *Id.* at *12-13 (“Television and other media create marketable celebrity identity value. Considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit. The law protects the celebrity’s sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof.”). This case involving Vanna White has been cited by numerous articles in the past several years. See Katherine Boyle, *Vanna White: Let the Great Wheel Spin*, WASH. POST (Sept. 11, 2013), https://www.washingtonpost.com/entertainment/tv/vanna-white-let-the-great-wheel-spin/2013/09/11/f89dbabc-198a-11e3-82ef-a059e54c49d0_story.html [<https://perma.cc/RY64-5N58>] (discussing who Vanna White is in relation to the show *Wheel of Fortune* and her lawsuit against Samsung as an example of how she takes her image seriously); Sunny Hostin, *The Naked Truth About the Naked Cowboy Case*, CNN (Apr. 11, 2008, 4:13 PM) <http://www.cnn.com/2008/CRIME/02/14/naked.cowboy/> [<https://perma.cc/Y57M-TH97>] (using *White* as an example of a time when a celebrity sued to enforce her right to publicity); Matt Novak, *Robot Vanna, Trashy Presidents and Steak as Health Food: Samsung Sells Tomorrow*, SMITHSONIAN MAG. (Feb. 20, 2013), <http://www.smithsonianmag.com/history/robot-vanna-trashy-presidents-and-steak-as-health-food-samsung-sells-tomorrow-22348926/> [<https://perma.cc/V2YQ-V8KU>] (using Samsung’s advertisement featuring the Vanna White robot at the center of the *White* case to show how advertisers use futurism to sell their products).

56. See, e.g., David E. Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673, 675 (1981). (“Despite such judicial recognition, the definition of the right of publicity remains unclear; its theory is still evolving and its limits are uncertain.”).

57. See *id.* (explaining the right of publicity is analogous to misappropriation in rationale, purpose, and scope, and the interests of right of publicity laws parallel those of copyright law).

58. See William K. Smith, Comment, *Saving Face: Adopting a Right of Publicity to Protect North Carolinians in an Increasingly Digital World*, 92 N.C. L. REV. 2065, 2116 (2014). Table 1 discusses whether each state has common law right of publicity protection, statutory right or publicity protection, whether the right continues postmortem, and what the nature of the right is. *Id.* at 2108-16.

B. State Right of Publicity Protections Range from Statutes, to Common Law, to Nothing

Despite the developments in the last half century, the right of publicity is established only through state laws.⁵⁹ A vast majority of states recognize the right of publicity through statutes or common law; however, the elements that encompass the right vary from state to state.⁶⁰ The differences in state laws have created a “quilt” of divergent rights of publicity throughout the country.⁶¹

1. *Twenty-Two States Have Codified the Right of Publicity into a Statute*⁶²

New York has one of the most limited right of publicity statutes within its privacy laws.⁶³ This statutory right protects any living person from having his or her name, portrait, or picture used in advertising without the person’s consent.⁶⁴ The New York statute specifies a protection for unauthorized use for advertising purposes only, but also allows the protection to be for any person, celebrity or not.⁶⁵ New York has also codified the right of a person whose image or likeness was used for advertising without consent to recover punitive damages for intentional violations.⁶⁶ New York limits its

59. See Vick & Jassy, *supra* note 29, at 15 (explaining that right of publicity laws are left for the states to develop).

60. See Sager, *supra* note 52, at 1 (noting the most common elements in a right of publicity include: (1) the use of someone’s name, identity, likeness, or persona; (2) the defendant receives a commercial advantage from the use; (3) the use was made without consent; and (4) the plaintiff is injured).

61. See Vick & Jassy, *supra* note 29, at 15 (“It 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.”) (alterations in original).

62. See Smith, *supra* note 58, at 2116.

63. See N.Y. CIV. RIGHTS LAW § 50 (McKinney 1909); see also Vick & Jassy, *supra* note 29, at 15 (discussing the limitations of the New York right of privacy statute).

64. See CIV. RIGHTS LAW § 50.

65. Compare CAL. CIV. CODE § 3344(a) (West 1984) (including protection from use “on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases”), with CIV. RIGHTS LAW § 50.

66. See CIV. RIGHTS LAW § 51; Sager, *supra* note 52, at 1 n.4 (“Punitive damages are available for ‘knowing’ violations.”).

protection of a right of publicity to commercial purposes and does not allow for the protection of postmortem rights.⁶⁷

The New York statute is extremely limited in what it protects, especially compared to Indiana's statute.⁶⁸ Indiana has one of the most expansive right of publicity laws, which covers a person's personality, defined as including a person's name, likeness, signature, voice, photograph, image, gesture, appearance, or mannerism.⁶⁹ This protection also extends to any event that occurs in Indiana and allows for a 100-year postmortem right of publicity.⁷⁰

California recognizes both a common law and statutory right of publicity.⁷¹ The different protections are important because California, the home of Hollywood and major motion picture studios, and New York are the most common places for celebrities to bring right of publicity claims.⁷² Consequently, California and New York are the jurisdictions with the most established right of publicity laws.⁷³ The common law right of publicity was established in California in 1983 by *Eastwood v. Superior Court of Los Angeles County*.⁷⁴ The common law right established three elements, including: (1) the appropriation of plaintiff's name or likeness by

67. See Vick & Jassy, *supra* note 29, at 15 (explaining this right allows the heir of the celebrity to bring a lawsuit for infringing the celebrity's right of publicity after the celebrity has died).

68. See *id.* at 16.

69. See IND. CODE §§ 32-36-1-6, -7 (2002); see also Vick & Jassy, *supra* note 29, at 15. ("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.'") (citing IND. CODE § 32-36-1-1(a) (2012)). The language of the statute is broad and "could encompass virtually anything on the Internet and much of what is on television and in print." *Id.* The primary reason Indiana has such extensive right of publicity laws without being media or entertainment focused is due to the lobbying for such a law from CMG Worldwide, which is an Indiana based company that represents the heirs of many deceased celebrities. *Id.* at 16.

70. See §§ 32-36-1-1(a), -8; see also Vick & Jassy, *supra* note 29, at 15.

71. See Vick & Jassy, *supra* note 29, at 16 (noting California's right of publicity laws were expanded through several Ninth Circuit cases, including one that expanded the right to include a racecar driver's car).

72. See Sager, *supra* note 52, at 1 (explaining that celebrities historically have brought most right of publicity claims in California and New York, although other jurisdictions are deciding more cases recently).

73. See *id.*

74. 149 Cal. App. 3d 409, 418 (Cal. Ct. App. 1983), *superseded by statute*, CAL. CIV. CODE § 3344, Amended Stats. 1984 ch. 1704 § 2. *Eastwood* involved a situation in which an actor was published in an offending news magazine article. *Id.* at 414. See also Sager, *supra* note 52, at 1 n.4.

defendant; (2) lack of plaintiff’s consent; and (3) injury to plaintiff.⁷⁵ California has also codified the right of publicity to protect against a person who knowingly uses another’s likeness in any manner.⁷⁶ This statutory right adds two additional elements to the common law right, including (4) a knowing use and (5) a direct connection between the use and a commercial purpose.⁷⁷

Another example of a well-established right of publicity law is Illinois, which codified the right in 1998 under the Right of Publicity Act.⁷⁸ This Act allows any person to control the use of his or her individual identity for commercial purposes.⁷⁹ This Act is distinguishable from both the California and New York laws in that it exempts some commercial purposes, including portraying that person’s identity where the work is not considered a commercial advertisement, the use of images by a professional photographer, and the use of the individual’s name as identifying the person as an author or performer.⁸⁰ The New York, Indiana, Illinois, and California statutes exemplify how significantly the right of publicity can vary in who is protected, what unauthorized uses are protected against, and how long the protection lasts.⁸¹

2. Nineteen States Use a Common Law Right of Publicity⁸²

Since the right of publicity is exclusively the domain of state law, there are numerous states that follow only a common law right of publicity.⁸³ The District of Columbia established a common law

75. See *Eastwood*, 149 Cal. App. 3d at 417; Sager, *supra* note 52, at 1 n.4.

76. See CAL. CIV. CODE § 3344(a) (West 1984).

77. See Sager, *supra* note 52, at 1 n.4 (explaining the two rights were intended to complement each other rather than have one that replaced the other). Compare *Eastwood*, 149 Cal. App. 3d at 417, with CIV. CODE § 3344(a).

78. See 1997 ILL. LAWS 747.

79. See *id.* § 10 (“Recognition of right of publicity. The right to control and to choose whether and how to use an individual’s identity for commercial purposes is recognized as each individual’s right of publicity.”).

80. See *id.* § 35 (discussing the applicability of this Act).

81. See CAL. CIV. CODE § 3344(a); 1997 ILL. LAWS 747; IND. CODE § 32-36-1-1 (2012); N.Y. CIV. RIGHTS LAW § 50 (McKinney 1909); see also ARIZ. REV. STAT. ANN. § 12-761 (2007); FLA. STAT. ANN. § 540.08 (West 2007); MASS. GEN. LAWS ch. 214, § 3A (1973); NEV. REV. STAT. ANN. § 597.800 (West 1989); OHIO REV. CODE ANN. §2741.04 (West 1999); OKLA. STAT. tit. 12, § 1449 (2014); 42 PA. CONS. STAT. § 8316 (2002); S.D. CODIFIED LAWS §21-64-10 (2015); TEX. PROP. CODE §§ 26.001-.015 (1987).

82. See Smith, *supra* note 58, at 2108-17.

83. See Vick & Jassy, *supra* note 29, at 15-16.

right of publicity through its courts' adoption of the Restatement (Second) of Torts § 625.⁸⁴ Later decisions have further clarified that the right of privacy under the rule of appropriation is not limited to commercial purposes, but also includes use of the plaintiff's name and likeness by a third party for the third party's own purpose and benefit.⁸⁵ Some courts have also held that the plaintiff must allege the commercial benefit gained by the defendant was derived from the reputation the public associated with the plaintiff.⁸⁶

In comparison, Georgia first recognized a common law right of publicity in *Cabaniss v. Hipsley*.⁸⁷ Not only did the Georgia Court of Appeals recognize a right of publicity, but it also recognized four related torts, including: (1) intrusion into plaintiff's private affairs; (2) public disclosure of embarrassing private facts; (3) publicity which places the plaintiff in a false light; and (4) appropriation of the plaintiff's name or likeness from which the defendant benefitted.⁸⁸ Through these four torts, the Georgia courts have separated right of publicity and misappropriation.⁸⁹ In deciding a case interpreting

84. See *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 587 (D.C. 1985) ("The District of Columbia has long recognized the common law tort of invasion of privacy. In so doing, the courts have adopted the RESTATEMENT formulation."). *Vassiliades* involved a claim for invasion of privacy for use of before and after images from the plaintiff's cosmetic surgery in various presentations. *Id.* at 580.

85. See *Tripp v. United States*, 257 F. Supp. 2d 37, 41 (D.D.C. 2003). The *Tripp* case involved information regarding the plaintiff's criminal history on a security clearance application being given to a *New Yorker* reporter and subsequently published in the *New Yorker*. *Id.* at 39. Due to the plaintiff's notoriety at the time, the Court found that the plaintiff stated enough to establish a misappropriation claim under District of Columbia laws. *Id.* at 43.

86. See *id.* at 43 (citing *Barnako v. Foto Kirsch, Ltd.*, No. 87-1700, 1987 WL 10230 (D.D.C. Apr. 16, 1987)) (discussing the "value" associated with the plaintiff's likeness to establish a cause of action). For example, in *Barnako*, the District Court relied heavily on the fact that no one but the plaintiff would recognize that it was the plaintiff in the photograph and held that this failed to show value garnered by the defendant's use. 1987 WL 10230, at *2. Thus, the defendant needed to obtain some value through the public's knowledge of the plaintiff. *Id.*

87. 114 Ga. App. 367, 370 (1966). In *Cabaniss*, the plaintiff brought claims relating to the defendant's unauthorized use of images of the plaintiff in her exotic dancer profession in magazines that were distributed throughout Atlanta. *Id.* at 368-69.

88. See *id.* at 370 ("Dean Prosser has analyzed the many privacy cases in an article entitled 'Privacy,' published in 48 Calif. L. Rev. 383 in 1960 . . . We consider this analysis well-founded and take it as a starting point for our deliberations here.").

89. See *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 694 F.2d 674, 680 (11th Cir. 1983) ("Recognizing, as we do, the fundamental distinction between causes of action involving injury to feelings,

Georgia law, the Eleventh Circuit defined a right of publicity as a celebrity’s right to control the use of his or her name and likeness.⁹⁰ The court went on to hold that there was a tort cause of action for misappropriation of one’s name and likeness for private citizens, as distinguished from public figures and celebrities.⁹¹

In 1982, the Michigan Supreme Court defined four types of common law invasion of privacy, including: (1) intrusion into plaintiff’s personal affairs; (2) public disclosure of embarrassing facts; (3) publicity which places plaintiff in a false light; and (4) appropriation for defendant’s advantage of the plaintiff’s name or likeness.⁹² Interpreting Michigan law, the Sixth Circuit, in *Carson v. Here’s Johnny Portable Toilets, Inc.*, defined a right of publicity as a celebrity’s right to protect his or her identity from commercial exploitation.⁹³ More recently, the Sixth Circuit reaffirmed and expanded the protection of a celebrity’s right of publicity, holding that plaintiffs only had to prove they have a pecuniary interest in their identity and that the defendant commercially exploited that

sensibilities or reputation and those involving an appropriation of rights in the nature of property rights for commercial exploitation.”) (citing *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 217-18 (1905)).

90. See *id.* at 676-78 (“[I]t is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.”). It should be noted that this right of publicity specifically pertains to well-known persons who could claim an injury for loss of profits for unauthorized uses of his or her image. *Id.*

91. See *id.* at 680 (“We conclude that while private citizens have the right of privacy, public figures have a similar right of publicity, and that the measure of damages to a public figure for violation of his or her right of publicity is the value of the appropriation to the user.”).

92. See *Tobin v. Mich. Civil Serv. Comm’n*, 331 N.W.2d 184, 189 (Mich. 1982). In *Tobin*, employees brought a cause of action under Michigan’s Freedom of Information Act for public disclosure of personal information. *Id.* at 185.

93. 698 F.2d 831, 835, 837 (6th Cir. 1983) (“[A] celebrity’s legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes.”). *Carson* involved a portable toilets company using the host of “The Tonight Show” John W. Carson’s catchphrase “Here’s Johnny” to promote its product. *Id.* at 832-33. In *Carson*, the Court found it was enough that the plaintiff’s identity was appropriated, despite not using the plaintiff’s “name.” *Id.* at 837. See also *Parks v. LaFace Records*, 329 F.3d 437, 459-60 (6th Cir. 2003) (indicating Michigan recognizes a right of publicity). In *Parks*, the plaintiff sued a band for using her name as the title of a song. *Id.* at 442-43.

identity.⁹⁴ It is unclear, based on these Sixth Circuit decisions, whether a private citizen, rather than a celebrity, has a right of publicity in Michigan.⁹⁵ Regardless of the type of right granted, it could be limited by other doctrines.⁹⁶

C. First Amendment Limitation to Right of Publicity

There has long been tension between free speech and the protection of one's image and likeness.⁹⁷ In general, the right of publicity does not prohibit the use of someone's identity for news reporting, commentary, entertainment, works of fiction or nonfiction, or advertising for these works.⁹⁸ That is, these types of uses are protected by the First Amendment.⁹⁹

Since the individual may choose when to permit his or her likeness to be used, the right of publicity can chill speech.¹⁰⁰ Courts have attempted to balance the right of publicity and the First Amendment, including using various defenses such as adopting the copyright fair use "transformative [] test"¹⁰¹ or using the

94. See *Parks*, 329 F.3d at 459-60 (indicating Michigan recognizes a right of publicity).

95. See *Dewey*, *supra*, note 21 (indicating that, in Michigan, the general rule appears to be that you only have to have a pecuniary interest in your name or likeness and do not have to be a celebrity, but decisions have gone both ways).

96. See *Weisbord*, *supra* note 35, at 2812-13 (explaining the tension between free speech and the right of publicity).

97. See *id.* at 2811 ("On the one hand, the value of publicity rights is almost always enhanced by the public's use of and speech about the persona because the commercial value of and demand for a persona is often a direct function of the overall volume of speech in the public discourse about the personality.").

98. See, e.g., *Rothman*, *supra* note 28, at 206-07 (explaining the right of publicity was expanded to include works of entertainment, including movies, songs, and books, but does not extend to one's identity in advertising for these works of entertainment).

99. See *id.* at 207.

100. See *Weisbord*, *supra* note 35, at 2812-13 ("The right of publicity inhibits the freedom of expression when it prevents or constrains speech concerning a person's identity."); see also Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 685 (1978) (explaining that the "chilling effect doctrine" is often used in free speech adjudication where there is a state statute or other rule that "might inhibit the exercise of First Amendment freedoms").

101. See *Weisbord*, *supra* note 35, at 2813 (discussing the origin, nature, and application of the transformative test in the right of publicity).

“newsworthiness test.”¹⁰² However, in attempting to strike this balance, courts have often favored speech over the right of publicity.¹⁰³ This is most likely due to the fact that the freedom of speech arises under the First Amendment—constitutional law—while right of publicity is state law, which is often preempted and often ends when another’s free speech begins.¹⁰⁴ However, the use of balancing tests results in courts, even within the same state, finding on both sides.¹⁰⁵ A sampling of California cases demonstrates the use of multiple tests, resulting in different outcomes in determining First Amendment protection.¹⁰⁶

1. “Transformativeness” as a Defense to Right of Publicity Violations

California is an ideal example of courts using the “transformative tests” and those courts coming to different decisions within the same jurisdiction.¹⁰⁷ The transformativeness inquiry determines whether the likeness is based on the raw materials that contribute to the end product or is essentially the substance of the end product itself.¹⁰⁸ In *Comedy III Productions, Inc. v. Gary*

102. See Mark Bartholomew, *Intellectual Property’s Lessons for Information Privacy*, 92 NEB. L. REV. 746, 789-91 (2014) (discussing the application of the newsworthiness test).

103. See Weisbord, *supra* note 35, at 2812 (“Unlike publicity rights, which arise under preemptable state law, the freedom of speech is expressly and supremely protected under the First Amendment. Thus, an individual’s publicity rights generally end—full stop—when another individual’s free speech begins.”).

104. See *id.* (noting federal law, under the Supremacy Clause, preempts the state laws when publicity protections hinder freedom of speech).

105. Compare *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001), and *Keller v. Elec. Arts Inc.*, 724 F.3d 1268, 1271 (9th Cir. 2013), with *Winter v. DC Comics*, 30 Cal. 4th 881, 890 (2003). See also *infra* Section I.B (regarding the relevance of California right of publicity laws).

106. See Bartholomew, *supra* note 102, at 786-91 n.234-59 (discussing various cases, many within California courts or the Ninth Circuit, that utilize the transformative and newsworthiness balancing tests, suggesting that California is an ideal example jurisdiction to discuss differing outcomes under these balancing tests).

107. See *id.*; Weisbord, *supra* note 35, at 2811-14.

108. See, e.g., Bartholomew, *supra* note 102, at 787. This definition of the transformativeness test is derived from the California Supreme Court in *Comedy III Prods. Inc. Id.* The *Comedy III* Court noted that the transformation could take many forms and was not to be limited to the known types, such as parodies. *Id.* at 809. When a work is transformed to make an expressive point, the unauthorized use is then allowed as protected speech under the First Amendment. See Stern & Stern, *supra* note 39, at 102. The transformative test can sometimes be broken into two

Saderup, Inc., the Supreme Court of California found that an artist's work depicting The Three Stooges with only trivial variation from the original portrayal showed no significant transformation or creative contribution, and so the First Amendment did not protect the work; the right of publicity prevailed.¹⁰⁹ The court explained that depictions of celebrities that were little more than a rendition of what made the celebrity's likeness economically valuable were not protected under the First Amendment, but that expressive uses of the likeness, such as a parody, were protected.¹¹⁰ The court further explained that when a work is transformative it no longer risks impeding the economic value derived from the person's likeness that the right of publicity aims to protect.¹¹¹ Similarly, in *Keller v. Electronic Arts Inc.*, the Ninth Circuit held that the literal depiction of a college athlete in a video game was not afforded First Amendment protection because the player was shown in the setting in which he was made famous, so there was no transformative aspect of the work.¹¹²

subcategories: transformative work and transformative use. *Id.* The transformative work test "asks whether a work uses the plaintiff's likeness as merely one piece of a much broader work; if it does, the right of publicity claim must fail." *Id.* The transformative use test "asks whether the celebrity's likeness *itself* has been distorted or altered; if it has not, the right of publicity claim may proceed." *Id.*

109. 21 P.3d at 800, 811. *See also* Bartholomew, *supra* note 102, at 788 ("In assessing transformativeness, a court analyzes the defendant's expressive project, not the type of expression first created by the plaintiff."). Notably, intent is not a factor that is considered. *Id.*

110. *Comedy III*, 21 P.3d at 805-07 ("Once the celebrity thrusts himself or herself forward into the limelight, the First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope. . . . What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity's fame.").

111. *Id.* at 808 (explaining when a work is transformative it brings to life the new expression by the defendant and thus fosters the free expression and speech that the First Amendment does protect).

112. 724 F.3d 1268, 1271 (9th Cir. 2013). The *Keller* court looked to the five factors set forth in *Comedy III* to determine if a work is transformative. *Id.* at 1274. The first factor is whether the defendant used the raw material of the final work or imitated the final work itself. *Id.* The second factor is to determine if the defendant added his or her own expression that is protected. *Id.* The third factor is whether the literal or the creative elements predominate the defendant's work. *Id.* The fourth factor is the economic and market impact the defendant's work has on the original work. *Id.* And the fifth factor is whether the work is merely a conventional portrait of the celebrity to exploit that celebrity's fame. *Compare id.*, with 17 U.S.C. § 107 (1992) (listing the four factors of the copyright fair use test). *See also* Hart v. Elec. Arts, Inc., 717 F.3d 141, 160 (3d Cir. 2013) (following the California Supreme

In contrast, in *Winter v. DC Comics*, the Supreme Court of California held that the characterized depiction of musicians Johnny and Edgar Winter into comic books were transformative and creative enough to allow the work to be protected under the First Amendment.¹¹³ Though it was obvious that the comic books were illustrating the plaintiffs, the plaintiffs were not depicted literally.¹¹⁴ The brothers were depicted as cartoons with worm-like bodies, which made this work transformative, and thus it was afforded First Amendment protection.¹¹⁵ Whether a work transforms the person’s image could determine whether the work is afforded First Amendment protection or if it could be blocked by the person’s right of publicity claim—for example, Chris Baldwin stopping Cincy Shirts from using his image or not.¹¹⁶ While some courts in California use the transformative test, other courts within California rely on alternate tests, such as newsworthiness, use for profit, and the core speech test.¹¹⁷

2. Other Tests Available to the Courts: Newsworthiness, Profits, and Core Speech

There are several other tests that are used to determine if a defendant has First Amendment protection in right of publicity

Court’s application of the transformative test). In *Hart*, like *Keller*, the defendant created a video game of collegiate athletes. *Id.* at 146. The court held that creating a player into a video game avatar was not transformative enough to escape the right of publicity meaning there was no First Amendment protection. *Id.* at 166-69. In looking to make realistic portrayals of the college athletes, the avatars of the athletes were not transformed. *Id.* at 168.

113. 69 P.3d 473, 480 (Cal. 2003) (“Here, by contrast, defendants essentially sold, and the buyers purchased, DC Comics depicting fanciful, creative characters, not pictures of the Winter brothers. This makes all the difference. The comic books here are entitled to First Amendment protection.”).

114. *See id.* at 479.

115. *See id.* at 476, 479 (“We can readily ascertain that they are not just conventional depictions of plaintiffs but contain significant expressive content other than plaintiffs’ mere likenesses. Although the fictional characters Johnny and Edgar Autumn are less-than-subtle evocations of Johnny and Edgar Winter, the books do not depict plaintiffs literally.”). The *Winter* Court held that the defendants only used the raw materials and created an expressive work that was protected. *Id.* at 479.

116. *See, e.g., Bartholomew, supra* note 102, at 789 (explaining that the transformative test is similar to the fair use prong in copyright law regarding the purpose and character of the second work and thus is part of the determination of whether unauthorized use is permissible).

117. *See id.* at 789-90 (explaining that, unlike the transformativeness test, the newsworthiness test does not have any consideration under copyright fair use).

lawsuits, but these tests are not as popular as the transformative test.¹¹⁸ One of the more prominent tests aside from transformativeness is the “newsworthiness” defense.¹¹⁹ This analysis is determined by “whether the defendant’s work concerns [some] matter of public interest.”¹²⁰ However, courts have not been consistent on what matters are defined as concerning the public interest.¹²¹ In many contexts, courts apply a broad meaning to what is considered news; for example, one case suggested “liking” information on Facebook makes that information newsworthy.¹²² By taking this approach, courts look to the defendant’s actions to determine what is newsworthy and in the public interest instead of considering and relying on the right the plaintiff is trying to protect.¹²³

Another defense is the *CBC* test, which asks the court whether the likeness of the person has been used solely for profit.¹²⁴ If the purpose was to sell the product, then the publicity claim can prevail.¹²⁵ In *C.B.C. Distributing and Manufacturing, Inc. v. Major*

118. See Stern & Stern, *supra* note 39, at 101, 103 (“Recognizing the dangers that an overly broad right of publicity could pose to the First Amendment, various courts have struggled to create a test that balances publicity interests with free speech rights.”).

119. See Bartholomew, *supra* note 102, at 789-90 (“A newsworthiness defense exempts journalistic uses of celebrity, even when the journalism at issue consists of only mundane celebrity gossip.”).

120. *Id.* at 790 (internal quotation omitted) (“As with the transformativeness defense, the newsworthiness defense focuses on the nature of the defendant’s work, not the character of the interest held by the plaintiff.”).

121. See *id.* (“Although one court has attempted to limit the definition of public interest, others hold that even works of entertainment receive constitutional protection under the newsworthiness exception if they fulfill an ‘informative role.’”).

122. See *id.* The case in which the court suggested liking information on Facebook is deemed newsworthy is *Fralely v. Facebook*, 830 F. Supp. 2d 785, 804-05 (N.D. Cal. 2011). *Id.* at 790-91. See also Hoisington, *supra* note 18 (“‘Newsworthy’ generally means news and factual information relating to public issues and entertaining information about a person.”).

123. See Bartholomew, *supra* note 102, at 791 (“This can hold true even if the defendant obviously employed the plaintiff’s persona for a commercial purpose. For example, when the *San Jose Mercury News* took quarterback Joe Montana’s likeness not only for its front page, but also to sell commemorative posters, the court immunized the use under the newsworthiness exceptions.”) (citing *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639, 642, 643 n.2 (Cal. Ct. App. 1995)).

124. See Stern & Stern, *supra* note 39, at 102.

125. See *id.* (explaining that the test “asks whether the defendant’s likeness has been used explicitly to sell a product; if it has, the right of publicity claim may proceed”).

League Baseball Advanced Media, the Eighth Circuit held that an online fantasy baseball company’s right in offering baseball statistics superseded the players’ right of publicity because the statistics were not distributed for profit and it was in the public interest to disseminate the information.¹²⁶ Another test is known as the core speech test, which asks whether the person’s likeness is used for “news, entertainment, creative works, or political contexts,” and if so, the “publicity claim must fail.”¹²⁷ A final test that has been used by courts is the predominant use test, which asks whether the person’s likeness has been used by the defendant in a predominantly expressive way.¹²⁸ If the use is expressive, the publicity claim fails, and conversely, if the use is predominantly commercial, the publicity claim can proceed.¹²⁹

With no federal guidance, states are left to determine if there should be a right of publicity law and, if so, what the scope of it should be.¹³⁰ Many states have codified the right into statute, but many have decided to let the courts establish a common law right instead.¹³¹ This then creates a problem of significant differences in right of publicity protection amongst the states that could lead to varying decisions where there are similar facts.¹³² Or in some states, an aggrieved plaintiff does not have the right to bring a right of publicity at all—this is true in nine states.¹³³ There is also the balance that must be struck between the right of publicity and the First

126. 505 F.3d 818, 823-24 (8th Cir. 2007).

127. Stern & Stern, *supra* note 39, at 102 (explaining that both the *CBC* test and the core speech test protect speech but have not been used much in recent history).

128. *See id.*

129. *See id.* at 102-03 (“This test allows strikingly little breathing room for freedom of expression and has been rejected by most courts that have had occasion to consider it.”).

130. *See, e.g.,* Vick & Jassy, *supra* note 29, at 14-15 (describing how privacy laws have been left to the states to develop, and thus the right of publicity, stemming from privacy laws, has also developed through state laws, leading to a “spasmodic” development of publicity laws with divergent and controversial justifications).

131. *See* Sager, *supra* note 52, at 1-2 (discussing various state statutes, such as New York and California, and common law standards for what right of publicity laws protect in different jurisdictions).

132. *See* Vick & Jassy, *supra* note 29, at 15 (“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.”).

133. *See* Smith, *supra* note 58, at 2108-16.

Amendment, which can be difficult to determine.¹³⁴ Not only is there a difficulty determining what the right of publicity protects from state to state and the balance with the First Amendment, there is also the issue of the right of publicity often being preempted by federal copyright law.¹³⁵

II. COPYRIGHT LAW AND ITS (SOMETIMES) PREEMPTION OF THE RIGHT OF PUBLICITY

Copyright law is designed to protect the property rights of the author of the creative work.¹³⁶ However, with the expansion of the Copyright Act, there has been conflict between federal copyright law and the state right of publicity laws.¹³⁷ On one hand, some courts have held that, based on the language of the Copyright Act, the state law is preempted by the federal law because both protect the same rights.¹³⁸ On the other hand, some courts have held that the right of publicity law protects different rights than the Copyright Act, and so

134. Weisbord, *supra* note 35, at 2812; *see also* Stern & Stern, *supra* note 39, at 103 (“In recent years, courts have generally relied upon the third or fourth tests—transformative work or transformative use—when dealing with right of publicity in video game lawsuits. The transformative use test in particular has risen to prominence in a number of jurisdictions, though this test significantly cramps expression and has led to some questionable results.”).

135. *See* Shipley, *supra* note 56, at 702 (“Section 301(a) provides that any state law, whether based on common law or statute, is subject to federal preemption if: (1) it creates ‘legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106’; and (2) such rights under state law may be claimed in ‘works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright.’”).

136. *See* Eric E. Johnson, *The NFL, Intellectual Property, and the Conquest of Sports Media*, 86 N.D. L. REV. 759, 767 (2010) (“[T]he general rule in U.S. copyright law is that the person who operates the camera is the author of the footage, and that the author of the footage is the owner of the copyright in it.”). The author of the copyrighted work is often the person who is the “owner” of that creative work. *Id.* It should be noted that there are some exceptions that can change the ownership of the work to someone else, so this is merely a general rule, not an absolute rule. *Id.*

137. *See* Shipley, *supra* note 56, at 705-06 (explaining that the legislative history of § 301 of the Copyright Act makes the status of misappropriation unclear in terms of preemption, leading to an issue among publicity laws, as many of them stem from the misappropriation prong of privacy laws).

138. *See* James M. Chadwick & Roxana Vatanparast, *The Copyright Act’s Preemption of Right of Publicity Claims*, 25 COMM. LAW. 3, 3-4 (2008) (noting § 301 does not define what is equivalent under the statute).

the state law is not preempted.¹³⁹ For example, Chris Baldwin, the “Sad Michigan Fan,” may or may not have a successful right of publicity claim, depending on if the jurisdiction where the lawsuit is brought determines the right is preempted by the rights of the University of Michigan and ESPN, the copyright holders.¹⁴⁰ The difficulty is that there is no obvious pattern to the decisions, as courts in the same jurisdiction or even the same court have decided cases both ways.¹⁴¹ The protection of copyrighted material must also be balanced with the fair use doctrine and contracted licenses of the copyrighted work.¹⁴²

A. History of Federal Copyright Law

Federal copyright protection became firmly established in the United States in 1787, when the Constitution granted authors and inventors exclusive rights to their writings and discoveries to promote progress in the arts and sciences.¹⁴³ As derived from the language of the Constitution, the authors and inventors could obtain this exclusive right for “limited times.”¹⁴⁴ In 1790, the first copyright

139. See *id.* at 4-5 (“Courts have reached differing conclusions with respect to whether right of publicity claims are preempted by copyright law.”).

140. See *id.* at 4.

141. See *id.* at 4-5. There are, however, a few trends that emerge. *Id.* at 4. First, preemption is determined based on the individual claim. *Id.* Second, in cases involving a right of publicity claim with an otherwise authorized use of a copyrighted image, courts have often found that the claim was preempted. *Id.* Third, courts have often found no preemption when the celebrity’s name, likeness, or image is used independent of an authorized copyrighted work. *Id.*

142. See Abraham Bell & Gideon Parchomovsky, *The Dual-Grant Theory of Fair Use*, 83 U. CHI. L. REV. 1051, 1053 (2016) (“Fair use is a keystone of the law of copyright; the Supreme Court has repeatedly stated that fair use is a constitutionally mandated limitation on copyright in order to avoid conflicts between the First Amendment’s free speech protections and the monopoly rights copyright owners receive over expressions.”); see also Johnson, *supra* note 136, at 763 (“In the 1970s, assignments of copyright by telecasters to sports organizers were unheard of. Yet today, such assignments are routine—virtually all organizers obtain a copyright assignment as part of their deal to have a game televised.”).

143. U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”). This was modeled after the more restrictive copyright statutes used for government censorship and press control in England and its subsequent Statute of Anne. See JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 23-25 (4th ed. 2015).

144. See U.S. CONST. art. I, § 8, cl. 8; see also Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV. 613, 623 (2014) (explaining

law established the owner of a copyright could have exclusive rights to his or her work for fourteen years.¹⁴⁵

As copyright law developed, it was expanded to protect more creative works.¹⁴⁶ For example, in 1802, the 1790 Act was amended to include historical and other prints.¹⁴⁷ In 1831, a general revision of the copyright law added musical compositions to the list of protectable works and increased the term of protection for all works to twenty-eight years with a renewal for another fourteen years.¹⁴⁸ Three years later, in 1834, the United States Supreme Court ruled in its first copyright law case, holding that authors of unpublished works had perpetual rights to their unpublished work, but as soon as it was published, statutory provisions limited the protection.¹⁴⁹

the limitation on time comes directly from the Constitution and is a central feature to federal copyright law).

145. See, e.g., Raymond Shih Ray Ku, Jiayang Sun & Yiyang Fan, *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669, 1670 (2009). While the duration of a copyright began at fourteen years, the duration has steadily increased with an expansion of copyright law. *Id.* This is due to the fact that copyright laws allow for the exclusive right of the work to the copyright owner, which acts as a reward system to assist in fostering more creativity. *Id.* at 1671.

[I]n 1790, copyright originally provided authors the exclusive right to vend books and maps for fourteen years with an additional fourteen years of protection available through renewal. Currently, copyright protects all original expression fixed in a tangible medium of expression, which includes books, motion pictures, sound recordings, broadcasts of sporting events, and video games. It provides authors the exclusive right to control almost all uses of their writings—even the ability to create new works based upon the original. Moreover, this protection generally lasts for the life of the author plus an additional seventy years.

Id. at 1670-71. See also COHEN ET AL., *supra* note 143, at 25-26 (noting that in the beginning, copyright owners had to comply with various formalities, including registering the title, publishing the registration in a newspaper, and depositing a copy with the secretary of state within six months).

146. See *The 18th Century*, U.S. COPYRIGHT OFF., http://www.copyright.gov/timeline/timeline_18th_century.html [<http://perma.cc/9Q7J-NZMY>] (last visited Nov. 6, 2017) (noting that the original law from 1790 only protected books, maps, and charts).

147. See *id.* This was the first expansion of copyrightable works. *Id.*

148. See *id.* The original length of time of fourteen years was copied from the English Statute of Anne. *Id.* This was the first time that the United States expanded its copyright protections in regards to length of time of protection. *Id.*

149. See *The 19th Century*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_19th_century.html [perma.cc/W557-98A6] (last visited Nov. 6, 2017); see also *Wheaton v. Peters*, 33 U.S. 591, 591-92 (1834). The Court held in *Wheaton* that court opinions could not have copyrights as

Continuing through the 1800s, other works of art were included under copyright law, including dramatic works and photographs.¹⁵⁰ The Supreme Court, in 1880, acted to limit what works were protected under copyright laws.¹⁵¹ The Court held that general ideas or common knowledge could not be copyrighted, despite the fact the knowledge was fixed in a tangible medium.¹⁵²

The 1909 Copyright Act created a dual system of state and federal copyright laws, distinguishing between published and unpublished works.¹⁵³ In 1947, copyright law was officially codified into Title Seventeen of the United States Code.¹⁵⁴ With many new forms of creative work added to copyright protection as new technology was introduced, the Supreme Court once again limited the subject matter of copyrights.¹⁵⁵ In *Mazer v. Stein*, the Court held that only artistic works, not any utilitarian aspect of that work, could be copyrighted.¹⁵⁶

unpublished documents, but the written opinion summaries could. *Id.* at 622, 668. This case also abolished any idea of common law copyright protection. *Id.* at 663.

150. See *The 19th Century*, *supra* note 149. Following this, the Act was expanded to include protection for visual art (1870), right of public performance for dramatic works (1856), musical compositions (1897), and the right to create derivative works (1870). See *The 18th Century*, *supra* note 146.

151. See *The 19th Century*, *supra* note 149; see also *Baker v. Seldon*, 101 U.S. 99, 100-01 (1880), *overruled by Mazer v. Stein* 347 U.S. 201, 218 (1954).

152. *Baker*, 101 U.S. at 100-01. *Baker* involved copyright infringement of a bookkeeping ledger. *Id.* at 100. The Court held that the author’s original writing of the ideas expressed within the book was copyrightable subject matter, but the property common to the public was not. *Id.* at 100-01.

153. See, e.g., Joseph P. Bauer, *Addressing the Incoherency of the Preemption Provision of the Copyright Act of 1976*, 10 VAND. J. ENT. & TECH. L. 1, 6-7 (2007) (“As a practical matter, this meant that state protection extended only to works that the author was not (yet) exploiting commercially. No affirmative steps were needed to secure common law copyright. After ‘publication,’ i.e., after the author undertook some form of commercial distribution of his or her work, protection under state law was no longer available. At that point, the copyright owner was required to take several steps to obtain federal protection.”).

154. See *1900-1950*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1900-1950.html [perma.cc/EA92-XYGU] (last visited Nov. 6, 2017).

155. See *1950-1997*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1950-1997.html [perma.cc/CPR8-BASK] (last visited Nov. 6, 2017).

156. 347 U.S. 201, 218 (1954) (“[A]rtistic articles are protected ‘in form but not their mechanical or utilitarian aspects.’ The dichotomy of protection for the aesthetic is not beauty and utility but art for the copyright and the invention of original and ornamental design for design patents.”) (citation omitted).

The Copyright Act of 1976 was the next significant change to copyright law.¹⁵⁷ This created a single federal system for original works of art, whether published or unpublished.¹⁵⁸ While the 1976 Act was the most recent fundamental change, there have been other changes in copyright law since, including the addition of more works protected under the copyright law and the extension of copyright protection term.¹⁵⁹ Today, copyright allows protection of all original expressions fixed in a tangible medium for the life of the author plus an additional seventy years.¹⁶⁰ In regards to images, videos, and any other pictures, the owner of the copyrighted image is the person who operates the camera, not the people actually in the image.¹⁶¹ Federal copyright law continues to grow as technological advances are introduced and the world becomes more integrated with globalization, which can affect the force of other laws.¹⁶²

B. Copyright's Preemption of State Law

The Copyright Act of 1976 had the effect of further expanding federal preemption of state law.¹⁶³ Section 301(a)¹⁶⁴ contains a two-

157. See Shipley, *supra* note 56, at 701 (explaining that this Act and its adoption of § 301 was the most fundamental change in federal copyright law since its inception).

158. See *id.* (“It create[d] a single system of federal protection for all ‘original works of authorship,’ published or unpublished, from the moment they are fixed in a tangible medium of expression.”).

159. See 1950-1997, *supra* note 155; see also 1998-2012, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1998-2012.html [perma.cc/H4Y4-2ENL] (last visited Nov. 6, 2017). Some of these expansions include computer programs becoming copyrightable (1980), the United States joining the Berne Convention (1989), copyright term extension to author’s life plus seventy years (1998), and the Digital Millennium Copyright Act (1998). Additionally, the United States has become signatories to the Beijing Treaty on Audiovisual Performances (2012) and the Marrakesh Treaty (2013).

160. See *supra* note 145 and accompanying text.

161. See *supra* note 136 and accompanying text.

162. See 2013 and Beyond, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_2013-beyond.html [perma.cc/GHF7-G8FV] (last visited Nov. 6, 2017). The Digital Millennium Copyright Act also “limit[s] online infringement liability for Internet service providers, create[s] a form of protection for vessel hulls, and clarifie[s] the role of the Copyright Office.” See 1998-2012, *supra* note 159. In 1998, the Digital Millennium Copyright Act was passed, which provided for the implementation of the World Intellectual Property Organization Copyright Treaty and the Performances and Phonograms Treaty and further clarified the role of the Copyright Office. See *id.*

163. See Shipley, *supra* note 56, at 702 (discussing 17 U.S.C. § 301(a)-(b) (1998)).

prong test to determine whether federal copyright law preempts state law.¹⁶⁵ The state law is preempted if: (1) it creates a legal right that is equivalent to any of the exclusive rights¹⁶⁶ under the scope of copyright law;¹⁶⁷ and (2) the state right may be claimed in works of authorship fixed in a tangible medium of expression within the subject matter of copyright law.¹⁶⁸ Based on the wording of this statute, states may not protect interests that are equivalent to those covered by copyright law, but they may protect nonequivalent rights.¹⁶⁹

164. 17 U.S.C. § 301(a) (1998) (“On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 [17 U.S.C. § 106] in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 [17 U.S.C. §§ 102 and 103], whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.”).

165. *See id.*; *see also Shipley, supra* note 56, at 702 (explaining state law is preempted whether the state law is based in common law or in statute).

166. *See* § 106. The six exclusive rights of copyright law are: (1) the right to reproduce the work; (2) the right to prepare derivative works; (3) the right to distribute copies; (4) the right to perform works publicly; (5) the right to display copyrighted work publicly; and (6) the right to perform work publicly by digital audio transmission. *Id.*

167. *See* §§ 102-104 (discussing the subject matter and protections under federal copyright law).

168. *See Shipley, supra* note 56, at 702. However, § 301(b) preserves state rights for when the work of authorship is not fixed in a tangible medium. *Id.* *See also* § 301(b); *supra* note 164 and accompanying text. Section 301(b) states: Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103 [17 U.S.C. §§ 102 and 103], including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978;

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 [17 U.S.C. § 106]; or

(4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8) [17 U.S.C. § 102(a)(8)].

§ 301(b).

169. *See, e.g., Shipley, supra* note 56, at 702-03 (“Thus, states may protect interests that are not equivalent to those protected by copyright as well as noncopyrightable subject matter. All rights equivalent to copyright in works within

Although the language of § 301(a) may appear clear on its face, its effects when applied are uncertain.¹⁷⁰ There is no consensus between courts, both within the same state and between states, on what exactly an “equivalent right” is.¹⁷¹ The test adopted by many courts decides (1) whether the subject matter protected under state law is also protected under § 102 of the Copyright Act and (2) whether the state law rights are equivalent to rights under § 301 of the Copyright Act.¹⁷² Despite using this test, courts in all jurisdictions have come to differing conclusions on whether the right of publicity is or is not preempted.¹⁷³

1. *Cases in Which Courts Found that Right of Publicity Was Preempted*

Various courts have held that the “exclusive rights” protected by the Copyright Act encompass the rights protected under right of

the subject matter of copyright are now governed exclusively by federal law.”). For example, protecting one’s image and use of that image could be considered a different right than protecting a photograph of that image and the use of that specific photograph. *See Toney v. L’Oreal U.S.A., Inc.*, 406 F.3d 905, 910 (7th Cir. 2005) (explaining that a person’s image is different than a photograph of that person). Applied to Chris Baldwin, a nonequivalent right would be exemplified by the difference in Baldwin protecting the use of his image in any context compared to the University of Michigan protecting the one still image of the broadcast of Baldwin at the football game. *See id.* On the other hand, both of the rights are centered on the protection of Baldwin’s image, and thus a court could consider the rights to be equivalent. *See Balt. Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 677 (7th Cir. 1986) (explaining the right of publicity is equivalent to copyright if infringing on the right of publicity also infringes the copyright).

170. *See Shipley, supra* note 56, at 703 (“Determining the scope of the preemption under the 1976 Act involves two inquiries: (1) what constitutes noncopyrightable subject matter; and (2) what rights are not equivalent to those granted under the copyright law?”). Additionally, the language of § 301 is especially uncertain where it is not clear if federal copyright law applies directly. *Id.*

171. *See id.* at 703, 697-98.

172. *See Chadwick & Vatanparast, supra* note 138, at 3-4 (“Courts have reached differing conclusions with respect to whether right of publicity claims are preempted by copyright law. . . . A comparison of pairs of cases, often from the same jurisdictions, that reach different conclusions illustrates where most courts will draw the line.”).

173. *See id.* at 6 (“The Copyright Act preempts inconsistent state law claims. However, right of publicity claims are neither uniformly preempted nor uniformly exempt from preemption. The nominal test for preemption of right of publicity claims has produced a confusing and inconsistent body of law. At present, it is difficult to predict whether a right of publicity claim will be preempted by the Copyright Act.”).

publicity laws, and therefore the state law is preempted.¹⁷⁴ For example, in *Laws v. Sony Music Entertainment, Inc.*, the Ninth Circuit held that the misappropriation claim was within the subject matter of copyright law and that the rights under California Law were equivalent to those protected under the Copyright Act.¹⁷⁵ The plaintiff was a vocalist who gave a copy of her recording to a recording company that subsequently used her voice in another artist’s song.¹⁷⁶ The court found that the right of publicity and copyright are both mechanisms for an individual to protect his or her artistic works and thus copyright preempts the right of publicity.¹⁷⁷

The Seventh Circuit reached a similar outcome in *Baltimore Orioles, Inc. v. Major League Baseball Players Association*.¹⁷⁸ The Seventh Circuit found that a telecast of a baseball game fell within the scope of the subject matter of copyright law.¹⁷⁹ In balancing copyrights and right of publicity, the court defined an equivalent right as a right that is infringed by the mere act of reproductions, performance, distractions, or display, and thus the broadcast fell within an equivalent right.¹⁸⁰ The baseball players claimed a right of publicity in their televised performance, but the court found this was preempted as both the right of publicity and copyright protect the promotion of performances to the public.¹⁸¹

174. See *id.* at 3-6. Chadwick and Vatanparast examine cases within the same jurisdiction that have been decided for and against preemption. *Id.* The common theme found in determining if preemption should occur was based on the specific use of the copyrighted work. *Id.* at 6.

175. 448 F.3d 1134, 1139, 1143, 1145 (9th Cir. 2006) (“Both copyright and the right of publicity are means of protecting an individual’s investment in his or her artistic labors.”).

176. *Id.* at 1136.

177. *Id.* at 1145 (noting that if the elements of the publicity claim differed from the elements and evidence of the copyright infringement claim, then there would likely not be preemption as different rights would be involved).

178. 805 F.2d 663 (7th Cir. 1986).

179. *Id.* at 674-77 (“[A] right is equivalent to one of the rights comprised by a copyright if it is infringed by the mere act of reproduction, performance, distribution or display.”).

180. *Id.* at 676-77.

181. *Id.* at 677-78 (“The purpose of federal copyright protection is to benefit the public by encouraging works in which it is interested. To induce individuals to undertake the personal sacrifices necessary to create such works, federal copyright law extends to the authors of such works a limited monopoly to reap the rewards of their endeavors. . . . The reason that state law protects individual pecuniary interests is to provide an incentive to performers to invest the time and resources required to develop such performances.”). The court specifically noted, however, that the

In *Daboub v. Gibbons*, the Fifth Circuit held that a singer's claim that the defendant improperly copied his song, though brought under right of publicity, was an interest protected by the Copyright Act.¹⁸² The court found that there was no "disharmony" between the state law claims and federal claims, and thus the federal copyright claim preempted the state right of publicity claim.¹⁸³ Therefore the Fifth Circuit found that there was equivalency of rights pursuant to § 301(a) of the Copyright Act, and the plaintiff could not bring a right of publicity claim.¹⁸⁴

The Eastern District of Michigan, in *Armstrong v. Eagle Rock Entertainment, Inc.*, held that the plaintiff's recorded performance of playing the bass was preempted by federal copyright law.¹⁸⁵ The court found that the motion picture fell within the subject matter of the Copyright Act, and the right to reproduce one's work was an exclusive right under the Copyright Act.¹⁸⁶ With both prongs of the preemption test satisfied, the right of publicity claim could not be successful as the proper cause of action was for the copyright holder to sue for copyright infringement.¹⁸⁷ Circuit courts, district courts,

players' right of publicity would not be preempted under certain circumstances. *Id.* at 676 n.24. In doing so, the court stated:

The Players' rights of publicity in their performances are preempted only if they would be violated by the exercise of the Clubs' copyright in the telecasts. A player's right of publicity in his name or likeness would not be preempted if a company, without the consent of the player, used the player's name to advertise its product.

Id.

182. 42 F.3d 285, 289 (5th Cir. 1995) (determining that the plaintiff "failed to allege or produce any evidence of 'any element, such as an invasion of personal rights or a breach of fiduciary duty, which render [their claims] different in kind from copyright infringement'").

183. *Id.* at 290 ("Finding no disharmony between the elements of the state law claims and the federal law in this case, we have no hesitancy in pronouncing enough equivalency to satisfy [27 U.S.C.] § 301(a).").

184. *Id.*

185. 655 F. Supp. 2d 779, 789 (E.D. Mich. 2009). The court found that the motion picture was subject matter covered by §§ 102-103 of the Copyright Act and as such met the first requirement of the § 301 preemption test. *Id.* The court then found that the right that was being asserted by the plaintiff was found in § 106 of the Copyright Act, and thus there was preemption. *Id.*

186. *Id.* at 789-90.

187. *Id.* at 790 ("Thus, even though Plaintiff's claim is couched as an appropriation of likeness claim, it is really a copyright violation claim. If Plaintiff believes he has a right in the recording and a right to receive a share of the profits from its reproduction, the appropriate target of such a claim is the copyright holder.").

and state courts have all heard similar matters and have decided that the state right of publicity laws are preempted by federal copyright law.¹⁸⁸

2. Cases in Which Courts Found that Right of Publicity Was Not Preempted

However, the same courts have also held that the “exclusive rights” protected by the Copyright Act do not encompass the rights protected under right of publicity laws, and therefore the state law is not preempted.¹⁸⁹ In *Downing v. Abercrombie & Fitch*, the Ninth Circuit held that the protection of publicity claims was of an individual’s name and likeness, which is not a work of authorship within the meaning of the Copyright Act.¹⁹⁰ The defendant had obtained the right to images from a surfing competition to use in promoting its new surfing themed clothing line.¹⁹¹ The Ninth Circuit differentiated the picture from the image within the photograph.¹⁹² The court held that the photograph itself was protected by copyright, but the defendant had gone beyond simply reprinting the photograph by using the surfers’ images and names in a way that suggested the surfers in the photograph were promoting the clothing brand.¹⁹³ This use of the surfers’ names and likenesses was held to be different than

188. See generally *Jules Jordan Video, Inc. v. 144942 Can. Inc.*, 617 F.3d 1146, 1153-55 (9th Cir. 2010); *Romantics v. Activision Publ’g, Inc.*, 532 F. Supp. 2d 884, 888-89 (E.D. Mich. 2008); *Stanford v. Caesars Entm’t, Inc.*, 430 F. Supp. 2d 749, 759 (W.D. Tenn. 2006); *Rainey v. Wayne State Univ.*, 26 F. Supp. 2d 963, 973 (E.D. Mich. 1998); *Brown v. ACMI Pop Div.*, 873 N.E.2d 954, 960-61 (Ill. App. Ct. 2007).

189. See *Chadwick & Vatanparast*, *supra* note 138, at 4-5 (discussing various cases within the same jurisdiction that found for and against preemption).

190. 265 F.3d 994, 1005 (9th Cir. 2001) (“[T]he subject matter of the Appellants’ statutory and common law right of publicity claims is their names and likenesses, which are not copyrightable, the claims are not equivalent to the exclusive rights contained in § 106.”).

191. *Id.* at 1002.

192. *Id.* at 1003 (“The photograph itself, as a pictorial work of authorship, is subject matter protected by the Copyright Act. . . . [I]t is not the publication of the photograph itself, as a creative work of authorship, that is the basis for Appellants’ claims, but rather, it is the use of the Appellants’ likenesses and their names pictured in the published photograph.”).

193. See *id.*

the use of the photograph and was not protected under the Copyright Act, and thus the surfers' right of publicity claim could prevail.¹⁹⁴

In *Toney v. L'Oreal U.S.A., Inc.*, the Seventh Circuit held that the plaintiff's right of publicity claim was not preempted under Illinois law, even while recognizing its previous decision in *Baltimore Orioles*.¹⁹⁵ The model whose image was used to endorse a product without her consent wished to protect the commercial aspect of her image as allowed under Illinois law.¹⁹⁶ The court held that this right was not protected by copyright law, so the Copyright Act did not preempt, despite the fact that the image in question was copyrighted by the defendant.¹⁹⁷

The Fifth Circuit has also been split as seen in *Brown v. Ames*, where the court held that the tort of misappropriation was intended to protect a person's persona, which did not fall within the subject matter of the Copyright Act.¹⁹⁸ The court further held that misappropriation does not fit within the Copyright Act even if the name or likeness used is in a copyrighted work.¹⁹⁹ The court

194. See *id.* at 1004-05 (finding the names and likeness of the appellants were separated from the copyrightable image as noncopyrightable subject matter that could be protected by the right of publicity without being preempted).

195. 406 F.3d 905, 911 (7th Cir. 2005). The Seventh Circuit clarified that *Baltimore Orioles*, 805 F.2d 663 (7th Cir. 1986), had been widely criticized as holding that any right of publicity claim was preempted by copyright. *Id.* Here, the court chose to clarify that this was only true when the state law claim intruded on the domain of copyright law, as "[s]uch a result is essential in order to preserve the extent of the public domain established by copyright law." *Id.* See also *supra* Subsection II.B.1.

196. *Toney*, 406 F.3d at 910 ("One can imagine many scenarios where the use of a photograph without consent, in apparent endorsement of any number of products, could cause great harm to the person photographed. . . . The defendants did not have [the plaintiff's] consent to continue to use the photograph, and therefore, they stripped [the plaintiff] of her right to control the commercial value of her identity.").

197. See *id.* ("A person's likeness—her persona—is not authored and it is not fixed. The fact that an image of the person might be fixed in a copyrightable photograph does not change this.").

198. 201 F.3d 654, 661 (5th Cir. 2000) ("Supreme Court precedent suggesting that courts should steer a middle ground in considering Copyright Act preemption cases supports our conclusion that appellees' misappropriation claims are not preempted."). In *Brown*, musicians, songwriters, and music producers sued a record label and its producer, Ames, for the use of the plaintiffs' songs, names, and likenesses in cassettes and compact discs and in music catalogs, posters, and videotapes without permission. *Id.* at 656-67.

199. See *id.* at 661 ("Since appellees' misappropriation claims neither fall within the subject matter of copyright nor conflict with the purposes and objectives of the Copyright Act, the claims were not preempted.").

distinguished its prior decision in *Daboub* because *Daboub* involved a controversy concerning a song that was the source of both the copyright infringement and misappropriation claim, whereas the present case only involved the misappropriation claim, and so it was not preempted.²⁰⁰

In *Shamsky v. Garan, Inc.*, the New York Supreme Court decided that the right of publicity of New York Mets players was not preempted when images of their faces were placed on shirts and sold without their consent.²⁰¹ The shirt was licensed by Major League Baseball to be sold.²⁰² Despite this license, the court determined that the New York laws included an extra element of “use for advertising purposes” that was not protected under copyright law, and thus the publicity rights were not preempted.²⁰³ The players were entitled to exploit the marketability of their names and images that came from winning a World Series that was different than the protection of images owned by the copyright holders.²⁰⁴ Circuit courts, district courts, and state courts have all heard similar matters and decided that the right of publicity is not preempted.²⁰⁵

Whether someone like Chris Baldwin, the “Sad Michigan Fan,” could bring a right of publicity claim in conjunction with a copyright holder’s copyright infringement claim depends on whether a court deems the rights under each cause of action to be equivalent or not.²⁰⁶

200. See *id.* at 658. The court distinguished *Daboub*, 42 F.3d 285 (5th Cir. 1995), because in *Daboub* the plaintiff claimed both copyright infringement and misappropriation of the same song. *Id.* The difference was that both claims were to the same song itself and the misappropriation was not based on use of the plaintiff’s name or likeness. *Id.* See also *supra* Subsection II.B.1.

201. 632 N.Y.S.2d 930, 935 (N.Y. Sup. Ct. 1995) (“[A] right to publicity—to the commercial exploitation of one’s identity—appears qualitatively different from copyright.”).

202. See *id.* at 931-32.

203. *Id.* at 935-36 (“In this court’s view, the extra element here is the ‘us[e] for advertising purposes, or for the purposes of trade, [of] the name, portrait or picture of any living person without [consent].’”) (alteration in original).

204. *Id.* at 937 (“Protection of a personality with ‘marketable status,’ established by legislation and guarded by our courts, is the right we uphold today.”).

205. See generally *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 853 (2d Cir. 1997); *Bruce Lee Enters., L.L.C. v. A.V.E.L.A., Inc.*, No. 10-cv-2333, 2013 U.S. Dist. LEXIS 31155, at *44 (S.D.N.Y. Mar. 6, 2013); *Apigram Pub’g. Co. v. Factors Etc., Inc.*, No. C78-525, 1980 U.S. Dist. LEXIS 9738, at *4-5 (N.D. Ohio July 30, 1980); *Brown v. A.M.C.I. Pop Div.*, 873 N.E.2d 954, 963 (Ill. App. Ct. 2007).

206. See Shipley, *supra* note 56, at 702-03, 735-36 (explaining that if the rights are deemed equivalent, the right of publicity claim will be preempted by the

It could also depend on how a state defines its right of publicity.²⁰⁷ A separate question that could affect whether the copyright infringement cause of action will be successful is whether the third party's unauthorized use is allowed under the fair use doctrine.²⁰⁸

C. Fair Use Defense to the Use of Copyrighted Material

A separate issue in regards to copyrights is the fair use doctrine, which is the most prominent defense in a copyright infringement lawsuit.²⁰⁹ The fair use doctrine is codified as a four-prong test²¹⁰ that decides unauthorized, yet still permissible, uses of copyrighted material.²¹¹ The factors that courts consider and balance are: (1) purpose and character of the use; (2) nature of the original work; (3) the amount of the original work used; and (4) the potential harm to the original work's market.²¹² The fair use test assumes some level of unauthorized use of copyrighted works in order to promote the goals of copyright law, and thus a third party can use a

federal copyright law regardless of whether a copyright infringement suit is brought).

207. See *supra* Subsections I.B.1-2.

208. See, e.g., Niva Elkin-Koren & Orit Fischman-Afori, *Taking Users' Rights to the Next Level: A Pragmatist Approach to Fair Use*, 33 *CARDOZO ARTS & ENT. L.J.* 1, 3 (2015). The fair use doctrine is a test that determines if an unauthorized use of a copyrighted work is permissible based on the four-factor test. *Id.* at 7.

209. See Bell & Parchomovsky, *supra* note 142, at 1053 ("The fair use defense to copyright infringement is perhaps the most frequently raised and litigated defense in the law of intellectual property. . . . [T]he Supreme Court has repeatedly stated that fair use is a constitutionally mandated limitation on copyright in order to avoid conflicts between the First Amendment's free speech protections and the monopoly rights copyright owners receive over expressions.").

210. See 17 U.S.C. § 107 (2012) ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.").

211. See Elkin-Koren & Fischman-Afori, *supra* note 208, at 3 ("Fair use is a double-edged sword. It defines an open-norm for deciding permissible uses of copyrighted material based on a fairly ambiguous set of standards.").

212. See § 107; see also Elkin-Koren & Fischman-Afori, *supra* note 208, at 7.

copyrighted image without permission of the copyright holder under this doctrine.²¹³

However, since courts have discretion to balance these factors, there is often a discrepancy as to which factors are more important.²¹⁴ In March 2015, the United States Supreme Court declined a petition to review *Kienitz v. Sconnie Nation L.L.C.*,²¹⁵ which may have clarified how to balance the factors in the fair use test.²¹⁶ Despite the discrepancies across jurisdictions, the fair use doctrine authorizes courts to apply the four factors to determine if a second work permissibly uses the original work.²¹⁷ However, the jurisdiction may not be a factor if the parties have a contractual agreement about the use of likeness or copyrighted materials.²¹⁸

D. The Contractual Relationship Between Right of Publicity and Copyright in Sports

In some circumstances, like a sporting event, there is also the issue of a contractual agreement between the event sponsor and the person attending the event through the terms and conditions the ticket purchaser must agree to.²¹⁹ Protecting the sounds and images of sporting events became a significant aspect of sports with the

213. See Elkin-Koren & Fischman-Afori, *supra* note 208, at 7 (“Fair use assumes that some level of unlicensed use is permissible under copyright law and necessary in order to promote copyright goals.”).

214. See Andrea Weiss Jeffries & Kevin Goldman, *High Court Will Need to Resolve Circuit Split in Fair Use*, LAW 360 (Apr. 30, 2015, 10:54 AM), <http://www.law360.com/articles/645919/high-court-will-need-to-resolve-circuit-split-in-fair-use> [perma.cc/P3EF-MXGL] (explaining how the Supreme Court touched on the fair use doctrine over the years but has not squarely addressed it since its decision in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)).

215. 135 S. Ct. 1555 (2015). See also *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 760 (7th Cir. 2014) (holding defendant’s use was fair use, as almost none of the original image remained).

216. Compare *Kienitz*, 766 F.3d at 758 (explaining that the fourth prong, market effect, is the most important), with *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013) (explaining the importance of the first prong and how transformative the second work was).

217. See, e.g., Elkin-Koren & Fischman-Afori, *supra* note 208, at 13 (“Fair use doctrine authorizes the courts to apply the four-factor analysis to particular cases, thereby constructing more concrete guidelines on permissible uses over time.”).

218. See *Michigan State v. Michigan Football Ticket*, *supra* note 30; see also Johnson, *supra* note 136, at 764 (explaining that the National Football League (NFL) has contractual agreements to own copyrights in every broadcasted game).

219. See *Michigan State v. Michigan Football Ticket*, *supra* note 30.

invention of the radio and television because broadcasts of events meant spectators of a sport could grow from an arena of thousands of live fans to a broadcast audience of hundreds of thousands—even millions.²²⁰ Prior to these technological advances, the main source of revenue for sports teams was selling tickets to live games.²²¹ An example of the sports world acting to own its intellectual property—the broadcast images of games—can be seen through the National Football League (NFL), which began producing and owning copyrighted works of on-field products in 1962.²²² The NFL grants telecast rights to broadcast its games and takes the assignment of the copyright in its own name.²²³ Currently, the NFL registers every telecast professional football game with the Copyright Office.²²⁴

The NFL claims a copyright to all game action and ancillary actions regardless of the source of such footage.²²⁵ This broad claim

220. See Johnson, *supra* note 136, at 762-63 (“Beginning in the 1930s, however, organizers—leagues or home teams—began demanding payments from radio networks for the privilege of broadcasting games. The promotional benefit was no longer considered requisite compensation; fees had to be paid to the organizer. . . . The NFL first got into the business of owning intellectual property rights in moving images in the 1960s.”). Johnson also notes this trend continued with the NFL making movies out of its football games and eventually developed a film company, NFL Films. *Id.*

221. See *id.* at 762. “The National Football League (NFL) has been called ‘the most successful sports league in history.’ It controls America’s ‘favorite’ sport with a business model that is ‘the envy of all other professional sports leagues.’” *Id.* at 760.

222. See *id.* at 763 (explaining that the NFL’s successful business model makes it an ideal example to discuss the nature of intellectual property in sports).

223. See *id.* at 764. Johnson explains that the NFL as a league negotiates its intellectual property. *Id.* He compares this to Major League Baseball, where it is not the league that negotiates, but each individual home team in Major League Baseball that grants the right to televise the event and take assignment of the televised footage. *Id.* Despite the difference in approach, the outcome is still the same in regards to the team or league owning the copyrighted televised event. *Id.*

224. See *id.* at 764-66 (“Through its business arrangements, the NFL has secured copyright ownership over the main coverage of every game. But the NFL’s ownership of telecast game coverage does not mean that it owns the copyright over all footage of every game. That is because the telecasters are not the only persons with cameras inside a stadium. Members of the local news media have long been allowed into stadiums to shoot video for their own news programs. And fans have long been able to shoot video with their camcorders. Yet sometime within the past 10 years or so, the NFL has begun attempting to gain the copyright to this non-telecaster footage as well.”).

225. See *id.* at 766 (“NFL game film or tape includes all footage of NFL game action, including footage of ancillary activities inside the stadium (e.g., cheerleaders, pre-game activities) regardless of the source of such footage.”). The

of protection and ownership can also be seen through the licensing page for NFL Films, a subsidiary of the NFL, which claims exclusive ownership of all footage from three hours before the game to one hour after the game at any NFL-controlled event.²²⁶ This language expressly includes footage of the crowds as part of its copyrighted material, which could effectively eliminate any crowd member’s right of publicity claim against the NFL because the NFL owns that image.²²⁷

This practice of protecting each possible copyright is also applicable for some football teams at the collegiate level.²²⁸ The University of Michigan is one of the schools that protects the images and footage of its games.²²⁹ In the case of Chris Baldwin becoming the “Sad Michigan Fan” for his shocked reaction that was caught on camera, the University of Michigan included terms and conditions on the back of its football tickets, including an express claim to the ownership of the ticket holder’s image, likeness, and statements, which allows the University of Michigan to own and use any image of Baldwin from the game.²³⁰ Thus, the ticket language eliminates any right of publicity claim of any fan or person against the University of Michigan as the copyright owner.²³¹ In fact, this language more explicitly stops any right of publicity claim than the language used by the NFL as it directly mentions using the ticket holder’s image.²³² Although the ticket language stops litigation

NFL attempts to expand ownership from its own work and work of its licensed partners to other people or entities capturing these events. *Id.*

226. *See id.* at 767; *see also Football Licensing*, NFL FILMS, <http://www.nflfilms.com/FootageRequest/Default.aspx> [https://perma.cc/5N8K-NUG7 (last visited Nov. 6, 2017) (“NFL Films, on behalf of the NFL, is the exclusive holder of all rights, including copyright rights, in and to all NFL footage, regardless of the source of such footage (this includes, but is not limited to, television coverage of games/events, footage shot on NFL sidelines with proper credentials, and NFL Films’ coverage). NFL copyrighted footage includes: (1) all footage of NFL game action, including footage of ancillary activities inside the stadium (e.g., cheerleaders, pre-game activities, crowd, sidelines, etc.) from the period three hours prior to kickoff of an NFL game to one hour after the NFL game has ended, and (2) NFL controlled events (i.e., Combine, NFL Draft, etc.).”).

227. *See supra* note 226 and accompanying text.

228. *See Michigan State v. Michigan Football Ticket*, *supra* note 30.

229. *See id.*

230. *See id.* (“The Holder of this ticket grants Michigan and its representative licenses and agents an unrestricted right and license to utilize Holder’s image, likeness, actions, and statements.”).

231. *See id.*

232. *See id.* Compare *supra* note 30 and accompanying text, with *supra* note 226 and accompanying text.

between the image owner and the person in the image, there should still be causes of action for both the image owner and person in the image against a third party who uses the image without authorization.²³³

The right to protect one's image and likeness can depend on a jurisdiction's interpretation of equivalent rights, which determines whether a person, like Chris Baldwin, can protect his or her image under right of publicity laws or if the only proper cause of action is a copyright infringement action brought by the copyright holder.²³⁴ If the person could not bring a right of publicity claim, he or she may not have any remedy if there is a contractual relationship between the person and the copyright owner, who can use the image at his or her discretion.²³⁵ With the conflict between federal copyright law and state right of publicity laws, looking to the Lanham Act could help guide the move toward a federal right of publicity statute.²³⁶

III. A BRIEF INTERLUDE INTO THE LANHAM ACT

The closest federal law analogous to state right of publicity laws is the Lanham Act.²³⁷ The right of publicity laws and Lanham Act cover similar scenarios in protecting against the unauthorized use of someone's likeness; however, the Lanham Act is much narrower in scope.²³⁸ The Lanham Act is implicated when a celebrity's personality is used specifically for false advertisement.²³⁹

233. See Dewey, *supra* note 21 (discussing both right of publicity and copyright claims over the same image); Weisbord, *supra* note 35, at 2811 (discussing the Lanham Act, which is a federal law that complements state right of publicity laws).

234. See Shipley, *supra* note 56, at 702-03 (explaining that if the rights are deemed equivalent, the only proper cause of action would be copyright infringement under federal copyright law brought by the copyright holder).

235. See *supra* note 30 and accompanying text.

236. See Weisbord, *supra* note 35, at 2811 (explaining the Lanham Act is supplemental to the state right of publicity laws).

237. See Vick & Jassy, *supra* note 29, at 15 ("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.").

238. See *id.* (noting the Lanham Act is for false endorsement claims).

239. See Weisbord, *supra* note 35, at 2811 ("A complementary area of federal law, section 43(a) of the Lanham Act, supplements state-law publicity rights by providing a civil action for false affiliation, designation of origin, or endorsement in connection with goods or services used in interstate commerce. Under the Lanham Act, a personality whose depiction has been used without permission may

For example, in *White*, Vanna White brought both a right of publicity claim and a claim under the Lanham Act for false endorsement of the defendant’s product when the defendant used a robot dressed as Ms. White in front of a mock *Wheel of Fortune* set.²⁴⁰

Section 43(a) of the Lanham Act²⁴¹ is especially relevant to right of publicity claims as celebrities often bring claims under this section as well as right of publicity claims.²⁴² This section protects against false or misleading advertisements, which can occur when a celebrity’s likeness is used without authorization in conjunction with advertising the defendant’s product.²⁴³ Right of publicity laws and the Lanham Act share a common goal designed to protect the public from confusing similar trademarks and preventing dilution of celebrity brands.²⁴⁴ While the Lanham Act protects against unfair competition based on false advertising or misappropriation, many right of publicity laws seek to protect from the same type of harm.²⁴⁵

recover damages where the contested depiction falsely implies an affiliation or endorsement by the personality of the goods or services promoted in connection with the misappropriated persona.”).

240. See *White v. Samsung Elecs. Am., Inc.*, No. 90-55840, 1992 U.S. App. LEXIS 19253, at *3 (9th Cir. Aug. 19, 1992).

241. Also known as the Trademark Act of 1946, codified as 15 U.S.C. §§ 1051-1127 (2006).

242. See Weisbord, *supra* note 35, at 2811; *accord White*, 1992 U.S. App. 19253, at *3 (bringing both a right of publicity cause of action and a cause of action under the Lanham Act).

243. 15 U.S.C. § 1125 (2012). In relevant part, this section states:

(a) Civil action.

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, 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 by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Id.

244. See Lynne M. J. Boisineau, *Intellectual Property Law: The Right of Publicity and Social Media Revolution*, 30 GPSOLO 66, 66 (2013).

245. See *id.* (“The Lanham Act also contains provisions for redressing unfair competition based on false advertising, misappropriation, or passing off.”).

A celebrity's name or likeness can be considered his or her "brand" or trademark that can be diluted or misappropriated if used without that celebrity's consent.²⁴⁶ Both sets of laws are designed to allow celebrities to control the use of their image in a commercial way.²⁴⁷ The Lanham Act, however, only addresses false endorsements of celebrity personas, not general unauthorized uses of likenesses, and it does not face the preemption challenges the right of publicity faces.²⁴⁸

IV. MAKING ROOM FOR BOTH THE RIGHT OF PUBLICITY AND COPYRIGHT PROTECTION

The issue of a person or company using one's image can have lasting effects on the person whose image was used and the holder of the copyrighted image.²⁴⁹ Both parties should be allowed to enforce their right to protect either themselves or their creative property.²⁵⁰ This person whose name or likeness was used without consent should have a mechanism for protecting the pecuniary interest that he or she has already developed, is developing, or generally protect his or her name or likeness if he or she does not want to develop a pecuniary interest.²⁵¹ Since the image is being used for profit, as

246. *See id.* (explaining a name, likeness, or voice of a celebrity may become so well-known as to become a "brand" that he or she can commercially exploit and would therefore want to control).

247. *See id.* ("Notwithstanding these similarities, right-of-publicity law also remains the most fluid and erratic area of protection, in part because not all states have enacted laws specifically protecting the right of publicity. To complicate matters further, the right of publicity has been evolving as technology does.").

248. *See id.* at 67 ("The state-to-state differences in the treatment of right-of-publicity claims may lead to different outcomes."). Because the right of publicity is state law, compared to the Lanham Act, which is federal law, there are also unique issues of preemption by federal law. *See* Weisbord, *supra* note 35, at 2812 (explaining that right of publicity causes of action arise under "preemptable state law").

249. *See* Dewey, *supra* note 21 (discussing both the issues of right of publicity and copyright infringement issues stemming from the Chris Baldwin "Sad Michigan Fan" situation).

250. *See id.* (explaining that the person who has his or her image used for profit without consent should be able to protect the image from being used, and the party that uses the image also faces potential copyright infringement liability from the broadcaster or owner of the image).

251. *See id.* ("Just the fact that somebody thinks they can make money on your likeness is enough to establish that you probably have a pecuniary interest in your name or likeness, because if someone else can make money on it then, in theory, you could, too."). Dewey specifically discusses the case of Chris Baldwin

compared to news or commentary, the unauthorized commercial use is not protected under the First Amendment if it is not transformative.²⁵² At the same time, the owner of the copyrighted work should be allowed to protect its creative work from copyright infringement but may face the challenge of overcoming the fair use defense.²⁵³

A. The Effect on the Ordinary Person’s Right of Publicity

At their current stage and with their lack of uniformity, it is unclear whether the right of publicity laws protect the ordinary person or only celebrities.²⁵⁴ The right of the person attempting to protect his or her likeness will depend on the jurisdiction in which that person is trying to bring a cause of action.²⁵⁵ Chris Baldwin, the “Sad Michigan Fan,” would likely have a cause of action in Michigan because a company was using his likeness for a commercial purpose.²⁵⁶ Though the case of the “Sad Michigan Fan”

and his image as it was used by an Ohio T-shirt company, which is the main topic of this Comment. *Id.*; see also *supra* INTRODUCTION.

252. See Dewey, *supra* note 21 (“[H]e [wa]s just a college kid who did not have a pecuniary right in his name or likeness, but now his likeness is being used for a commercial purpose. Somebody is profiting off of that, so . . . there would be some right to publicity concerns there for him.”).

253. See Bell & Parchomovsky, *supra* note 142, at 1053 (“The fair use defense to copyright infringement is perhaps the most frequently raised and litigated defense in the law of intellectual property.”).

254. See Dewey, *supra* note 21. In Michigan, it is unclear based on the case law whether one has to be a celebrity to have a right of publicity cause of action or simply have a pecuniary interest in your name or likeness. *Id.* See also *supra* Section I.B (discussing various right of publicity laws in other jurisdictions). Because right of publicity is governed by state law, whether someone has a cause of action depends on the jurisdiction. *Id.* But see Hoisington, *supra* note 18 (“Technically, everyone enjoys a right of publicity. . . . If you are famous—even if it’s just for 15 minutes—you definitely do.”).

255. See Vick & Jassy, *supra* note 29, at 15 (discussing differing state right of publicity laws); see also *supra* Section I.B (discussing details of right of publicity statutes and common law in various jurisdictions).

256. See Dewey, *supra* note 21 (“That’s because in Michigan there is a body of law related to publicity that indicates an individual who has some pecuniary right in his or her name or likeness, whose name or likeness has been used for the commercial benefit of someone else without his or her permission, would have cause of action for right to publicity. . . . ‘Some cases have indicated that having some name recognition or some level of celebrity is important to making that claim, but other cases have indicated that you don’t necessarily have to be a celebrity.’”).

occurred at a sporting event, the age of the Internet and instant communication could mean others could face a similar problem.²⁵⁷

1. The “Bad Luck Brian” Meme

Kyle Craven, the person in the “Bad Luck Brian” memes, took a bad school picture his junior year of high school.²⁵⁸ The first meme was posted online by Craven’s friend as a joke, and for reasons unknown, the image became viral.²⁵⁹ In his case, companies followed what should be the required procedure and approached Craven for licensing and T-shirt deals.²⁶⁰ While not every situation would end this way, Craven earned approximately \$15,000–\$20,000 within three years by giving companies permission to use his image in relation to their products.²⁶¹

257. See David Franklyn & Adam Kuhn, *Owning Oneself in a World of Others: Towards a Paid-For First Amendment*, 49 WAKE FOREST L. REV. 977, 994–95 (2014) (“The Internet breaks down borders and allows participation and interaction (and infringement) on a massive scale. YouTube users watch over six billion hours of footage each month. Beyond that, high-traffic social websites such as Facebook, Twitter, reddit, imgur, and tumblr allow users to post, discuss, and create content individually or collaboratively. Modern participatory culture is anchored on the Internet where content can be created, uploaded, shared, and remixed at the push of a button. Many content trends involve ‘memes,’ which pose innovative intellectual property problems. Generally, memes are messages conveyed in the form of a picture transposed with captions. A type of visual communication, the image as a whole oftentimes has a satirical meaning that its component parts lack.”).

258. See Jessica Contrera, *Being Bad Luck Brian: When the Meme that Made You Famous Starts to Fade Away*, WASH. POST, Jan. 5, 2015, https://www.washingtonpost.com/lifestyle/style/being-bad-luck-brian-when-the-meme-that-made-you-famous-starts-to-fade-away/2015/01/05/07cbf6ac-907c-11e4-a412-4b735edc7175_story.html [https://perma.cc/68SH-WSBR] The image is described as:

[A] blond kid wearing a light blue polo shirt under a hideous red sweater vest, giving off the goofiest, braces-laced smile. Above and below his head are the large white block letters that turn the silly photo into a meme—a sort of one panel cartoon in which the caption is rewritten over and over.

Id.

259. See *id.* (noting that Craven’s friend who posted the picture on Reddit informed Craven he was now “Internet-famous”).

260. See *id.* (“He has been asked to let people use his picture for advertisements in Germany, Chile, Poland and Puerto Rico. Here, he has been part of ad campaigns for Volkswagen and RealPlayer. He negotiates all the deals himself.”).

261. See *id.*

2. The “Ain’t Nobody Got Time for That” Meme

In a situation more similar to Chris Baldwin, Kimberly Wilkins was interviewed for the local news station and informed the news that she fled from a burning building because she had bronchitis and “ain’t nobody got time for that.”²⁶² The video went viral.²⁶³ As a result, Wilkins filed a lawsuit against Apple after it began selling the song “I Got Bronchitis,” which was produced on the *Bob Rivers Show* and subsequently sold on iTunes, using samples from Wilkins’s interview without permission.²⁶⁴ Apple has since removed the song from iTunes.²⁶⁵

3. The “Scumbag Steve” Meme

The danger of unlimited use of someone’s image is not only about monetary damages; it can have negative effects on the person’s reputation.²⁶⁶ The image of Blake Boston, taken by his mom and posted to MySpace, was copied and used exclusively for negative

262. See Megan Rose Dickey, ‘Ain’t Nobody Got Time for That’ Viral-Video Star Does Have Time to Sue Apple, *BUS. INSIDER*, Mar. 12, 2013, <http://www.businessinsider.com/sweet-brown-apple-lawsuit-2013-3> [<https://perma.cc/RJ2M-LUGX>].

263. See *id.* (noting the video became a viral sensation, gaining one million views on YouTube within the first forty-eight hours).

264. See *id.* (“The Bob Rivers Show, according to Sweet Brown’s complaint, produced the song with samples from Wilkins’ interview with the local TV-news station. The song sampled phrases like, ‘Ain’t nobody got time for that,’ ‘Ran for my life,’ and ‘Oh, Lord Jesus it’s a fire.’ The suit claims that in April 2012, the defendants started selling the song on iTunes for profit. It also claims the radio program and its owner falsely advertised that Sweet Brown had given her consent for the radio station to use her voice and likeness in the song.”).

265. See *id.* (“The Digital Millennium Copyright Act provides protection for companies if they promptly take action to remove material whose copyright is disputed. Apple has since removed the song from iTunes.”). However, the claim may not actually hold up in court because Apple removed the song from iTunes. *Id.*

266. See Adonis Jones, *Non-Celebrities and Non-Athletes in Meme Culture*, *MEMES IN MEDIA, CULTURE, & SOC’Y*, <http://scalar.usc.edu/works/memes-1/non-celebrities-and-common-people-in-meme-culture.meta> [<https://perma.cc/YUZ7-G75C>] (last visited Nov. 6, 2017) (“That context is removed when dealing with non-celebrity memes, and all that remains is the image for the meme creator and the reader to creator [sic] their own context. . . . However, when a meme is created, all that the writer of the meme has to work with is the image and the text they choose to add.”). Along with the power to create what the meme represents, the creator can create a positive or negative message, which can severely affect the person who is the subject of the meme. *Id.*

memes.²⁶⁷ The creation of this meme led to the family being harassed, and despite efforts to contact Google to have the image removed, there was no remedy to protect Boston's image.²⁶⁸ Not only did Boston and his family fail to receive compensation for the use of his image, he and his family were subject to harassment on the Internet with no way to stop the use of the image.²⁶⁹

4. "Bye Ayesha" T-Shirt

A scenario involving another Ohio T-shirt company that may bring to light a potential lawsuit in the future is the creation of a "Bye Ayesha" T-shirt, referencing Ayesha Curry's tweets about the National Basketball Association (NBA) finals.²⁷⁰ The T-shirt references the movie *Friday*²⁷¹ as well as Curry's Twitter rant regarding the NBA finals being rigged against her husband.²⁷² While

267. See *id.* ("Unlike many other memes where the subject is seen as positive or neutral, Scumbag Steve is the punching bag of the meme world, being used as the subject of all meme creators' hatred and loathing.").

268. See *id.* (explaining that the harassment included death threats to Blake Boston's unborn child as people could not separate him from "Scumbag Steve").

269. See *id.* (describing how the image, which started as something Blake Boston's mother posted to her own MySpace account, the family members now felt like they could not control the image of their family).

270. See Ryan Glasspiegel, *Cavs Fans Apparently Purchasing "Bye Ayesha" Shirts in Droves*, BIG LEAD (June 20, 2016, 1:15 PM), <http://thebiglead.com/2016/06/20/cavs-fans-apparently-purchasing-bye-ayesha-shirts-in-droves> [<https://perma.cc/6MB7-XJK8>]. There were two instances within the same NBA series in which Ayesha Curry's tweets garnered significant attention. *Id.* Having been put in the spotlight as the wife of one of the most prominent players on one of the teams in the series, Stephen Curry of the Golden State Warriors, and her negative tweets about the series, her social media presence captured attention that led to the creation of this shirt. *Id.*

271. *Id.* (including the clip from *Friday* which the phrase "Bye Ayesha" references).

272. See Bay Area News Group, *"Bye Ayesha" T-shirts Are Hot Sellers in Cleveland*, EAST BAY TIMES (June 20, 2016), <http://www.eastbaytimes.com/2016/06/20/bye-ayesha-T-shirts-are-hot-sellers-in-cleveland/> [<https://perma.cc/6A39-FSXF>] ("The line [on the shirt] is co-inspired by a line from the movie 'Friday' starring Ice Cube and the fact that Ayesha Curry had used it with a hashtag in a Twitter post during a series of tweets regarding the Warriors in the NBA Finals against the Cleveland Cavaliers. In one tweet, which was later deleted, Ayesha Curry wondered [sic] finals had been 'rigged' after her husband fouled out and then was ejected from a Game 6 loss in Cleveland for throwing his mouthpiece."); see also Frank Isola, *Ayesha Curry Goes Off on Twitter, Says NBA Is Rigged*, N.Y. DAILY NEWS (June 17, 2016, 9:51 AM), <http://www.nydailynews.com/sports/>

this T-shirt does not utilize Curry’s image the way an Internet meme would, it does use her name for a commercial purpose.²⁷³ The Cleveland based T-shirt company sold approximately 1,000 shirts the night of the final game of the series.²⁷⁴ It is highly unlikely that this company asked permission to use Curry’s name, as the owner of the company admits that the idea came to him and within thirty minutes the shirts were made.²⁷⁵

The ability of people today to have instant communication at their fingertips has led to the problem of overnight Internet celebrities for both good and bad reasons.²⁷⁶ Currently, some of these “celebrities” may have a cause of action to protect the use of their image for commercial purposes, but others do not due to the patchwork of state laws.²⁷⁷ This situation is not only confined to copyright and right of publicity, but similar situations have been seen in the commercial use of trademarks without permission.²⁷⁸

basketball/ayesha-curry-complains-cavs-wouldn-warriors-family-arena-article-1.2677030 [<https://perma.cc/75UZ-UBVR>] (showing several of Ayesha Curry’s tweets regarding the NBA).

273. See Glasspiegel, *supra* note 270 (including an image of the “Bye Ayesha” T-shirt).

274. See Bay Area News Group, *supra* note 272 (explaining that the number of shirts sold is likely due to the fact that the Cleveland Cavaliers had defeated the Golden State Warriors, the team Ayesha Curry’s husband played for).

275. See Glasspiegel, *supra* note 270 (explaining the first company to sell these shirts, Lamp Apparel, is a local company, and so it is highly unlikely that it could have contacted someone like Ayesha Curry and gotten permission so quickly); see also Bay Area News Group, *supra* note 272 (“[‘The idea] came out of nowhere and we whipped them up in 30 minutes,’ owner Brandon Lamp told TMZ. ‘Once Cleveland won, it went crazy. The orders have been non-stop.’”).

276. See *supra* note 257 and accompanying text.

277. See Vick & Jassy, *supra* note 29, at 15 (“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.”).

278. See Daily Mail Reporter, *Fear the Brow! Top NBA Prospect Copyrights His UNIBROW Just Days Before the Draft*, DAILY MAIL (June 26, 2012, 4:24 PM), <http://www.dailymail.co.uk/news/article-2165129/Top-NBA-prospect-Anthony-Davis-copyrights-unibrows-just-days-draft.html> [<https://perma.cc/J9R9-ZJEJ>]. Anthony Davis, a top NBA prospect, was well-known for his prominent unibrow. *Id.* He explained that he did not “want anyone to try to grow a unibrow because of [him] and then try to make money off it.” *Id.* See also Hostin, *supra* note 55. Robert Burck, also known as the Naked Cowboy, plays his guitar in Time Square, New York City in cowboy boots and underwear. *Id.* Burck sued Mars for \$6 million for violation of his trademark and right of publicity when Mars created an ad

B. The Effect on the Owner of the Copyrighted Image and Broadcast

While the person in the copyrighted work may or may not have a cause of action to protect his or her image, the owner of the copyright will have a cause of action to protect the creative property.²⁷⁹ Copyrights have long been held to belong to the author of a creative work, such as the author of a book or the person taking a photograph.²⁸⁰ In the case of Chris Baldwin and his “Sad Michigan Fan” facial expression, the copyright belongs to the company that broadcasts the game, which was ESPN.²⁸¹ In this instance, pursuant to the terms and conditions on the back of its football ticket, the University of Michigan owned a copyright of the ticket buyer’s image, likeness, actions, or statement through its own recordings.²⁸² The T-shirt company in this case, Cincy Shirts, could have been liable to both ESPN and the University of Michigan for using the copyrighted image without permission.²⁸³ Chris Baldwin should be allowed to bring a right of publicity claim to protect his image in conjunction with the University of Michigan and ESPN bringing copyright infringement cases to protect the copyrights in the broadcast and images of the game.²⁸⁴

Similar to the University of Michigan, many sporting event locations have policies that the team or overarching organization holds the copyright to any footage or images taken from within the

with M&M characters walking around what appears to be Time Square in what appears to be the Naked Cowboy’s outfit. *Id.*

279. See Dewey, *supra* note 21. For example, this has been an issue previously with the NFL and the sports commentary company SB Nation. *Id.* SB Nation was using Twitter for circulating GIFs that were the sole copyright of the NFL. *Id.* The NFL sent Twitter Digital Millennium Copyright Act (DMCA) take down notices. *Id.* This, however, caused negative backlash, as SB Nation is typically considered a news outlet, and news generally qualifies for fair use protection under the Copyright Act. *Id.*

280. See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884) (“An author in that sense is ‘he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.’”).

281. See Austin, *supra* note 24 (showing that the University of Michigan versus Michigan State football game was broadcast on ESPN and its online mobile application, WatchESPN).

282. See *supra* note 30 and accompanying text.

283. See Dewey, *supra* note 21 (explaining the alleged infringer could be liable to the copyright owner and the broadcaster). In the case of Chris Baldwin, the owners of the image were the University of Michigan and ESPN. See Austin, *supra* note 24; *Michigan State v. Michigan Football Ticket*, *supra* note 30.

284. See Dewey, *supra* note 21 (discussing both Chris Baldwin’s cause of action and possible copyright infringement).

stadium.²⁸⁵ The University of Michigan contains a clause within the terms and conditions on the back of its football tickets stating that it owns an unrestricted right to the ticket holder’s image, likeness, actions, and statements.²⁸⁶ In comparison, Michigan State University football tickets contain no such language in the terms and conditions.²⁸⁷ This means that Chris Baldwin would not be able to sue the University of Michigan for using his image, but he could have sued Michigan State if this game had been played at Michigan State and the cameraman caught his reaction.²⁸⁸ Comparing the University of Michigan and Michigan State tickets to other sports teams within Michigan, the Detroit Tigers and Lansing Lugnuts, both professional baseball teams, sell tickets with terms and conditions on the back that allow the team to use the image of the ticket holder with no restrictions.²⁸⁹ The right of someone like Chris Baldwin being caught on camera should be the same no matter what jurisdiction the event occurs in or what event the person is attending, leading to the need for uniform protection that is not preempted.

C. Solution: A Federal Right of Publicity Statute that Coexists with Copyright Protections

Both the person who has his or her image used without his or her permission and the owner of the copyright should be able to

285. See Johnson, *supra* note 136, at 765-66. (noting this is especially true for the NFL to own the copyrights from its games and events). For example, the NFL claims it owns the copyright to any footage shot within the stadium no matter who shoots this footage, including fans and media members. *Id.* at 766. See also *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 845-47 (2d Cir. 1997) (holding that NBA games are not copyrightable, but the broadcasts are since they are the games fixed in a tangible medium).

286. See *supra* note 30 and accompanying text.

287. See *Purdue v. Michigan State University*, Michigan State University Football Ticket (Oct. 3, 2015) (on file with author).

288. Compare *supra* note 30 and accompanying text, with source cited *supra* note 287.

289. See *Red Sox v. Tigers*, Detroit Tigers Baseball Ticket (Aug. 20, 2016) (on file with author) (“By use of this ticket, the ticketholder agrees . . . (c) the Club, Major League Baseball Properties, Inc. and Major League Baseball Enterprises, Inc. shall have the unrestricted right and license to use his or her likeness as included in any broadcast, telecast or photograph taken in connection with the game.”); *Lake County Captains v. Lansing Lugnuts*, Lansing Lugnuts Baseball Ticket (Apr. 24, 2016) (on file with author) (“Holder allows participating clubs and their designees to use holder’s image or likeness in connection with any broadcast or reproduction of this game.”).

protect their interests against impermissible commercial use.²⁹⁰ There should be a federal right of publicity statute that allows for uniformity in who and what is protected that is not preempted by copyright law.²⁹¹ Similar to the *Shamsky* decision, the marketability and protection of one's name and likeness, especially from a specific event or occurrence, should be differentiated from the marketability and protection of the copyrighted image.²⁹² Under that legal scheme, anyone whose image or likeness is used, whether taken from a broadcast, uploaded Internet picture, or social media, would have a cause of action against any company that used the image or likeness for profit without obtaining permission.²⁹³ However, this right should not be extended to allow causes of action against the owner of the copyrighted image.²⁹⁴ The federal right of publicity statute should mirror that of the Lanham Act, which is the most analogous federal law.²⁹⁵ The Lanham Act currently supplements state right of publicity laws and allows a celebrity whose depiction has been used without consent to endorse a product to collect damages.²⁹⁶ A statute should be enacted to replace state right of publicity laws with a federal

290. See Dewey, *supra* note 21 (explaining both the right of publicity and copyright infringement causes of action).

291. See Vick & Jassy, *supra* note 29, at 17 (“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. A federal right of publicity statute should preempt state law in the same way.”).

292. See 632 N.Y.S.2d 930, 937 (1995) (distinguishing between marketable status of the personality and the image).

293. See Vick & Jassy, *supra* note 29, at 17 (suggesting a federal right of publicity statute that covers “names and likenesses and not apply to news, commentary, expressive works, or advertising attendant to such works”).

294. See *Michigan State v. Michigan Football Ticket*, *supra* note 30.

295. See Vick & Jassy, *supra* note 29, at 15 (“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.”).

296. See Weisbord, *supra* note 35, at 2811 (“Under the Lanham Act, a personality whose depiction has been used without permission may recover damages where the contested depiction falsely implies an affiliation or endorsement by the personality of the goods or services promoted in connection with the misappropriated persona.”).

statute that works with the Lanham Act to protect anyone’s image from being misappropriated for profit.²⁹⁷ Thus, instead of the Lanham Act supplementing state right of publicity laws, the new federal statute and Lanham Act would work together to protect a broader scope of issues.²⁹⁸

This new federal right of publicity statute would not affect the copyright protections on the image or the ability for copyright holders to sue for infringement.²⁹⁹ Additionally, for ticketed events, the tickets should contain language that allows the organization sponsoring the event to have the unconditional right to use the ticket holder’s image from that event taken by the organization’s own photographers, videographers, and reporters.³⁰⁰ This prevents unnecessary litigation when the owner of the copyrighted image has lawfully used its own image without obtaining permission from the person within the image.³⁰¹ There should be a federal right of publicity statute that allows for a person to protect his or her likeness that can coexist with federal copyright laws to protect both the person’s interest and the copyright holder’s interest.³⁰²

297. See *id.*; see also Boisineau, *supra* note 244, at 66 (explaining that the right of publicity and the Lanham Act have the same goal).

298. See Weisbord, *supra* note 35, at 2811 (“A complementary area of federal law, section 43(a) of the Lanham Act, supplements state-law publicity rights.”); see also Vick & Jassy, *supra* note 29, at 15 (“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.”).

299. See *Toney v. L’Oreal U.S.A., Inc.*, 406 F.3d 905, 910 (7th Cir. 2005) (explaining that a person’s likeness does not meet the criteria to be copyrighted and that does not change simply because that likeness is captured in a copyrightable photograph); *Brown v. Ames*, 201 F.3d 654, 658 (5th Cir. 2000) (explaining that misappropriation claims do not fall within the subject matter of copyright nor conflict with the purposes of the Copyright Act).

300. See *supra* note 30 and accompanying text. This language applies to stills, broadcasts, and audio that would come out of the event taken by employees or contractors of the organization. See *id.* This right would not extend to images taken by fans themselves, as the University of Michigan would no longer be the author of those photographs. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884) (explaining who the author of a creative work is).

301. See *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1004-05 (9th Cir. 2001) (holding that right of publicity is not preempted because a person’s name and likeness is separate and different than the copyrighted image). It is notable that if the person in the image gives permission, either through express consent or through a clause on a purchased ticket, then there could then be a cause of action for both right of publicity and copyright infringement, but the person in the image could not sue the copyright owner. See *id.*; see also *supra* note 30 and accompanying text.

302. See *Dewey*, *supra* note 21 (noting that in the case of Chris Baldwin, the owner of the copyright may have a cause of action in copyright infringement).

D. Counterarguments: Protecting Monopolies on the Ordinary Person's Image and Overprotecting Copyrights Hinders Free Speech

The expansion of the right of publicity and copyright protection will be faced with resistance due to First Amendment limitations and general opposition to expanding these protections.³⁰³ One argument against a federal right of publicity is that an ordinary person does not have the right to protect the use of his or her image because he or she cannot allege any monetary harm.³⁰⁴ Aside from allegations of damages, there is the argument that this protection of one's likeness chills speech, but uses protected by the First Amendment can be differentiated using the transformativeness test.³⁰⁵ Similarly, there is the concern that protecting copyrights too heavily hinders the dissemination of information, but this too can be countered through the fair use doctrine.³⁰⁶

1. *The Ordinary Person Caught on Camera Is Not Famous and Should Not Have a Right of Publicity*

Perhaps the ordinary person should not be allowed to have a cause of action to protect his or her right of publicity because the ordinary person has no pecuniary interest in his or her name or

303. See *supra* note 31 and accompanying text; see also Dewey, *supra* note 21 (explaining that, at least in Michigan, the right of publicity protection may only extend to certain people).

304. See Dewey, *supra* note 21 (explaining that most people do not have a pecuniary interest in their name; however, there may be pecuniary interests that start because some other person or entity is now making a profit off the person's name and likeness).

305. See Stern & Stern, *supra* note 39, at 103 ("The transformative use test in particular has risen to prominence in a number of jurisdictions."). The transformative tests are the ones the courts have been relying on most recently and are the ones considered in this Comment. See *id.* The transformative use test is distinguishable from the transformative prong of the copyright fair use test because it is the alteration of the likeness of the person in the image, and not the transformativeness of the broadcast as a whole, which falls more under the transformative work test. *Id.*

306. See, e.g., Bell & Parchomovsky, *supra* note 142, at 1053 ("While fair use appears as the first in a series of defenses and mandatory licenses in the Copyright Act of 1976, it is seen as much more than that. Fair use is a keystone of the law of copyright; the Supreme Court has repeatedly stated that fair use is a constitutionally mandated limitation on copyright in order to avoid conflicts between the First Amendment's free speech protections and the monopoly rights copyright owners receive over expressions.").

likeness and therefore cannot claim any damage or harm done.³⁰⁷ For example, in California, the statutory right of publicity contains a specific element in which a plaintiff needs to establish an injury.³⁰⁸ To recover monetary damages, a plaintiff would need to allege some sort of economic damage, such as the amount that would have needed to be paid to the plaintiff for him or her to agree to the picture or loss of value in the plaintiff’s identity.³⁰⁹ The issue with this is that it may be difficult for an ordinary person, such as a college student, to allege any pecuniary interest in his image that would result in damages the court could award.³¹⁰

This outcome may not be the result in Michigan, though, as the common law rule does not include a similar damages requirement.³¹¹ It can also be argued that Chris Baldwin, the “Sad Michigan Fan,” does have a pecuniary interest in his name, at least to the point of preventing others from profiting from it.³¹² In fact, based on his image circulating on the Internet, Chris Baldwin is still treated like a local celebrity around the University of Michigan campus.³¹³ He was also asked to attend ESPN’s *College Football Awards Show* to

307. See Dewey, *supra* note 21 (noting that most ordinary people do not have any sort of economic interest in their name or likeness).

308. See Sager, *supra* note 52, at 1 n.4 (listing “(3) resulting injury” as an element of a right of publicity claim).

309. See, e.g., Marr, *supra* note 20, at 873 (“To recover monetary damages, however, a plaintiff must establish and quantify the economic damage from the use. If, for example, the defendant used the plaintiff’s image without permission in an advertisement, one measure of damages would be what the defendant would likely have had to pay to entice the plaintiff (or someone whose identity had similar commercial value) to appear in the advertisement. Another possible measure of damages is the resultant loss of economic value of the plaintiff’s identity. This could occur, for example, if the complained-of use resulted in a reduced demand for plaintiff’s services.”).

310. See *supra* note 304 and accompanying text.

311. See *supra* note 255 and accompanying text.

312. See *supra* note 256 (suggesting that due to the fact that some person or company is now profiting off the image of Chris Baldwin, there is an argument that he has the pecuniary interest in his image because he could have made a shirt and profited off his image).

313. See Zac Al-Khateeb, *Stunned Michigan Fan Chris Baldwin Can’t Get Away from His Moment of Fame*, SPORTING NEWS, Aug. 31, 2016, <http://www.sportingnews.com/ncaa-football/news/stunned-michigan-fan-chris-baldwin-michigan-state-game-finish-fumbled-punt-wolverines-spartans/u3dd3o1gt5eb1fhur75a4pfzw> [<https://perma.cc/2UUV-87YD>] (describing how in August of the year following the game, Chris Baldwin was still being stopped by people on the street who recognize him and has become an on-campus celebrity).

present the award for “best play of the season” to Michigan State University’s football coach, Mark Dantonio.³¹⁴ Ultimately, the T-shirt company sent Chris Baldwin a check, Ohio food favorites, and donated to the ChadTough Foundation in Baldwin’s name, all of which suggest that there was a pecuniary interest in Baldwin’s image that could be protected.³¹⁵ There should still be a requirement for the person to show that he or she has a pecuniary interest in his or her likeness, but this will likely always be met by virtue of a company using the likeness for profit or another commercial purpose.³¹⁶ If this person does have protection, there is then the issue of balancing that protection with the First Amendment.³¹⁷

2. *Protecting Images Through Right of Publicity Laws Hinders Free Speech Under the First Amendment*

In general, the right of publicity does not extend to using someone’s identity for news reporting or commentary, which are protected uses under the First Amendment.³¹⁸ By allowing Chris Baldwin to prevent his image from being used, it could be considered chilling speech in regards to the specific football game.³¹⁹ Currently, the most prominent test that courts use to determine if the

314. See Tower, *supra* note 16 (“[W]ho better to present the award to MSU Coach Mark Dantonio than the student who became the face of the Wolverines’ loss. Then became a local celebrity. And then became an internet meme.”).

315. See Goldschmidt, *supra* note 11 (noting Chris Baldwin was sent a check of an undisclosed amount of money; sent local food favorites such as Skyline Chili, Montgomery Inn ribs, and Graters ice cream; and a \$500 donation was made in his name to the foundation established in honor of Chad Carr, the grandson of former Michigan coach Lloyd Carr).

316. See Dewey, *supra* note 21 (“Just the fact that somebody thinks they can make money on your likeness is enough to establish that you probably have a pecuniary interest in your name or likeness, because if someone else can make money on it then, in theory, you could, too.”).

317. See *supra* note 35 and accompanying text.

318. See, e.g., Rothman, *supra* note 28, at 206-07 (“In theory, at least, the right of publicity does not extend to the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or advertising for these works.”).

319. See Weisbord, *supra* note 35, at 2812 (“On the other hand, publicity rights operate by granting the owner exclusionary rights, thus allowing the personality to enjoin or charge for use of her persona. Exclusionary rights may be waived or not asserted, so the right of publicity operates by allowing the right holder to decide whether to permit the use of her persona. The very existence of publicity rights, therefore, tends to chill speech about the personality because the right creates at least the threat of possible liability for use of the persona.”).

use of a person’s name or likeness is protected under the First Amendment is the “transformative use” test.³²⁰ The transformative use test³²¹ focuses on whether the image of the person itself has been transformed rather than focusing on the work as a whole.³²² Thus, the original image of Chris Baldwin would need to be compared to the image of him on the T-shirt sold by Cincy Shirts.³²³ Both the original picture and the image on the T-shirt portray a young man with short hair and glasses wearing a hooded “Michigan” sweatshirt with pull strings in the front.³²⁴ The young man in both pictures looks shocked and has his hands on his head at relatively the same angle, covering the same portions of his hair and face.³²⁵ The only difference is the man on the T-shirt is slightly less realistic looking and is solely colored in white and red.³²⁶

This situation is distinguishable from *Winter*, where the depictions of Johnny and Edgar Winter were creative because they were not literal depictions of the brothers, but creative expressions of the brothers with worm bodies.³²⁷ Though it was obvious the drawings were of the Winter brothers, the rendition was creative

320. See Stern & Stern, *supra* note 39, at 103 (“The transformative use test in particular has risen to prominence in a number of jurisdictions, though this test significantly cramps expression and has led to some questionable results.”).

321. This test was chosen for this Comment over the other tests explored in Subsections I.C.1-2, *supra*, because of its prominence. See *id.* Additionally, the newsworthiness test is difficult to apply based on its wide array of definitions, and the other tests (the *CBC* test, core speech test, and predominant use test) are almost never used. See *supra* Subsection I.C.2.

322. See Stern & Stern, *supra* note 39, at 102 (explaining “the ‘transformative use’ test, asks whether the celebrity’s likeness *itself* has been distorted or altered; if it has not, the right of publicity claim may proceed”). This is differentiated from the copyright transformative fair use analysis used in Subsection IV.D.3, *infra*, which focuses on the transformation of the entire work through a new meaning or message in a parody and not the person’s image within the work. See Bartholomew, *supra* note 102, at 789 (explaining copyright’s transformative analysis is used for works when “those uses [in the second work] serve an entirely new purpose from the original”).

323. See Stern & Stern, *supra* note 39, at 103 (focusing on the distortion and alteration of the likeness itself).

324. Compare Tower, *supra* note 16 (image of Chris Baldwin), with Goldschmidt, *supra* note 11 (image of the shirt with Chris Baldwin’s image). See also *supra* INTRODUCTION.

325. Compare Tower, *supra* note 16, with Goldschmidt, *supra* note 11.

326. See Goldschmidt, *supra* note 11 (image of the shirt with Chris Baldwin’s image).

327. 69 P.3d 473, 478-79 (Cal. 2003) (holding that creative expression was protected under the First Amendment).

enough to be transformative.³²⁸ In fact, this case more similarly aligns with *Comedy III*, where The Three Stooges were portrayed in a way that was not creative and was essentially a depiction of what brought economic value to the characters.³²⁹ In the case of Chris Baldwin, Cincy Shirts merely created a more cartoon-like version of Baldwin by depicting him in Ohio State University colors, but it did little else to transform Baldwin's image.³³⁰ Without any significant alteration or distinction to Chris Baldwin's image, his right of publicity claim would likely be able to proceed past the First Amendment defense.³³¹

Even if a court were to use the transformative work test instead, Chris Baldwin's right of publicity claim would survive the defense.³³² Baldwin's image is not part of a much broader work as required by this test to defeat a right of publicity cause of action.³³³ His image is the focal point on the shirt that merely says "OHIO," in which his image is the first "O."³³⁴ The makers of this shirt did not use Baldwin's image to create a much larger work, thus transforming the use of his likeness, but instead made his shocked reaction the reason to purchase the shirt, thus overcoming the transformative work defense.³³⁵ Under both the transformative work and transformative

328. *Id.* (determining that the defendants only used the plaintiffs' likenesses as raw materials for a creative work).

329. 21 P.3d 797, 811 (Cal. 2001) (holding that the work was not protected under the First Amendment because it was not transformative).

330. *Compare* Tower, *supra* note 16 (image of Chris Baldwin), with Goldschmidt, *supra* note 11 (image of the shirt with Chris Baldwin's image). See also *supra* INTRODUCTION.

331. See Stern & Stern, *supra* note 39, at 102-03 (explaining that under the transformative use test, the question is whether "the celebrity's likeness *itself* has been distorted or altered; if it has not, the right of publicity claim may proceed").

332. See *id.* (explaining the transformative work test asks, "[W]hether a work uses the plaintiff's likeness as merely one piece of a much broader work; if it does, the right of publicity claim must fail").

333. See Goldschmidt, *supra* note 11 (image of the shirt with Chris Baldwin's image).

334. See *id.*

335. See *id.*; see also Stern & Stern, *supra* note 39, at 102 (explaining the requirements under the transformative work test). There could be an argument that Cincy Shirts transformed Baldwin's image by depicting him in Ohio State colors and as part of the word "OHIO" to turn his reaction from an improbable play by Michigan State into always being shocked and embarrassed by Ohio State University. *Compare* Tower, *supra* note 16 (image of Chris Baldwin), with Goldschmidt, *supra* note 11 (image of the shirt with Chris Baldwin's image). This argument is likely to be overcome, however, because there is insufficient transformation of the portrayal of Baldwin to meet the transformativeness test in right of publicity law. See *id.*

use tests, Chris Baldwin would be able to overcome the First Amendment defenses to bring a right of publicity cause of action to protect the unauthorized use of his likeness for profit.³³⁶ This protection, however, does not affect the copyright holder’s infringement claim—that would have its own First Amendment defense to overcome.³³⁷

3. *The Protection of Images Through Copyright Law Hinders Free Speech Under the First Amendment*

There has also been tension between the protection of copyrighted works and free speech under the First Amendment.³³⁸ However, a company such as Cincy Shirts that uses a copyrighted image without permission will be allowed to use the image if it amounts to fair use.³³⁹ The fair use test assumes some level of unauthorized use of copyrighted work in order to promote the goals of copyright law.³⁴⁰ Courts differ on which of the four prongs are most important in determining if there is fair use; however, it is likely that the transformative element would be a leading factor in

336. See Stern & Stern, *supra* note 39, at 102-03 (explaining the transformative use and transformative work tests).

337. See Dewey, *supra* note 21 (discussing both the issues of right of publicity and copyright infringement issues stemming from the Chris Baldwin “Sad Michigan Fan” situation).

338. See Bauer, *supra* note 31, at 852. For example:

[T]he Supreme Court [in *Campbell*, 510 U.S. at 594] contrasted “mere duplication” of a work from a “transformative” use. Because duplication is far more likely to act as a substitute for the underlying work, thus diminishing the copyright owner’s monetary rewards, the defendant’s burden of prevailing on the [this] is much higher. . . . From a First Amendment perspective, however, the distinction often will point in the opposite direction. On occasion, a speaker or writer may find it necessary to use precisely the same expression as the copyrighted work; indeed, the value and strength of the communication would be undermined if she were required to make some transformation to invoke the benefits of the fair use doctrine. While the creation of derivative uses should be promoted, the fact that the activity is not transformative should not be a barrier to appropriate invocation of the First Amendment.

Id. at 857. See also *supra* note 142 and accompanying text.

339. See Bartholomew, *supra* note 102, at 789 (“Copyright’s transformation analysis [under fair use] has been used to immunize a broad array of unauthorized uses of copyrighted materials, particularly when those uses serve an entirely new purpose from the original.”).

340. See Elkin-Koren & Fischman-Afori, *supra* note 208, at 7 (“Fair use assumes that some level of unlicensed use is permissible under copyright law and necessary in order to promote copyright goals.”).

the case of the “Sad Michigan Fan.”³⁴¹ Specifically, a parody may be fair use as it transforms the original image by commenting back on it.³⁴² The leading definition of parody comes from the Supreme Court’s *Campbell v. Acuff-Rose Music, Inc.* decision, which suggests that the parody needs to critically comment on the original work.³⁴³ In the case of the “Sad Michigan Fan” T-shirt, the print on the shirt comments on the long and bitter rivalry between the University of Michigan and Ohio State University.³⁴⁴ Thus, the comment that the University of Michigan will always be shocked and embarrassed by Ohio State University portrayed by Cincy Shirts using this image was to mock the rival, and this message would likely fall under the category of parody.³⁴⁵ The shirt, named “The Disappointment Up North,” also specifically references former Ohio State University

341. See Jeffries & Goldman, *supra* note 214 (noting the Supreme Court has yet to determine which of the four factors of the fair use test is most important, despite lower courts producing inconsistent results by weighing the factors differently). This transformative analysis under copyright law differs from the transformative use analysis utilized in Subsection IV.D.2, *supra*, for right of publicity as the transformative use test focuses on the transformation of the person’s image and not the transformation of the overall work. See Stern & Stern, *supra* note 39, at 102-03.

342. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579-81 (1994) (“For the purposes of copyright law, the nub of the definitions, and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works. If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger. Parody needs to mimic an original to make its point.”).

343. See *id.*

344. See David Fitzgerald II, *Why Ohio State vs. Michigan Is the Best Rivalry in College Football*, BLEACHER REP. (Nov. 30, 2013), <http://bleacherreport.com/articles/1869320-why-ohio-state-vs-michigan-is-the-best-rivalry-in-college-football> [<https://perma.cc/SMT3-RKCL>]. The close geographic locations of the schools, the traditions for both the fans and football programs, and the big stakes that are usually on the line for both teams have led to a rivalry that has occurred 109 times. *Id.* The governor of Ohio even went as far to ban the letter “M” during the week of the game. *Id.*

345. See Kyle Newport, *Ohio Shirt Company Creates Hilarious T-shirt Mocking Stunned Michigan Fan*, BLEACHER REP. (Oct. 19, 2015) <http://bleacherreport.com/articles/2580643-ohio-shirt-company-creates-hilarious-T-shirt-mocking-stunned-michigan-fan> [<https://perma.cc/ABX3-LALT>].

Coach Woody Hayes, who only referred to the University of Michigan as “That School Up North.”³⁴⁶

The second fair use factor, nature of the copyrighted work, is rarely a significant factor in a finding for fair use.³⁴⁷ This is because copyright does not protect facts, but only the manner of expressing these facts.³⁴⁸ However, because there is less creativity in a factual work, such as the image of a fan at a football game, the work is afforded less protection, though it is still protected.³⁴⁹

The third factor in the fair use doctrine is the consideration of the amount of the original work used.³⁵⁰ The implication is that the less of the original work that is used, the more likely a court will find for fair use.³⁵¹ In the case of Chris Baldwin, the broadcast of the football game is approximately three and a half to four hours long.³⁵² The image of Baldwin that was taken from this broadcast was a

346. See Fitzgerald, *supra* note 344 (“One of the most storied coaches in college football, Woody Hayes, refused to refer to Michigan by name, preferring the moniker ‘That School Up North.’”). The nickname Hayes gave to the University of Michigan is important because the shirt with Chris Baldwin’s image on it was called “The Disappointment Up North.” See Goldschmidt, *supra* note 11.

347. See Authors Guild v. Google, Inc., 804 F.3d 202, 220 (2d Cir. 2015) (“The second factor has rarely played a significant role in the determination of a fair use dispute. The Supreme Court in *Harper & Row* made a passing observation in dictum that, ‘[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.’”) (citing WILLIAM F. PARTY, PARTY ON FAIR USE § 4.1 (2015); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985)).

348. See *id.* (“[W]hile the copyright does not protect facts or ideas set forth in a work, it does protect that author’s manner of expressing those facts and ideas.”).

349. See *id.* (“The mere fact that the original is a factual work therefore should not imply that others may freely copy it. Those who report the news undoubtedly create factual works. It cannot seriously be argued that, for that reason, others may freely copy and re-disseminate news reports.”).

350. See *id.* at 221 (“The clear implication of the third factor is that a finding of fair use is more likely when small amounts, or less important passages, are copied than when the copying is extensive, or encompasses the most important parts of the original.”).

351. See *id.*; see also L.A. News Serv. v. Reuters Television Int’l, Ltd., 149 F.3d 987, 993 (9th Cir. 1998) (explaining that a small portion of the work can constitute “the ‘heart’ of the work,” which favors finding against fair use).

352. See Jon Solomon, *How Long Is Too Long a College Football Game?*, CBS SPORTS, Feb. 9, 2015, <http://www.cbssports.com/college-football/news/how-long-is-too-long-a-college-football-game/> [https://perma.cc/NB54-5GPP]. In 2014, the average college football game time was three hours and twenty-three minutes. *Id.* The time has increased over recent years due to scoring drives and increased commercial length. *Id.* On YouTube, the length of the game is two hours and forty-five minutes without any commercials. See CFB Fans, *supra* note 1.

handful of seconds and likely does not constitute a substantial portion or “the heart of the work.”³⁵³ The heart of the work was the play that drew this reaction, when the University of Michigan punter bobbled the ball and Michigan State ran it in for a touchdown as time expired to win with its first lead of the game.³⁵⁴

The fourth factor is the effect on the original work’s market.³⁵⁵ This factor, along with transformativeness, has also been described as the most important factor of fair use because copyright is a commercial doctrine designed to stimulate creativity.³⁵⁶ This factor is less applicable for the case of Chris Baldwin, however, because his image was not already in a commercial market.³⁵⁷ On the other hand, the University of Michigan invests a substantial amount of money in protecting its copyrights and trademarks, and any other use of Baldwin’s image could have an effect on any market the university intended to enter.³⁵⁸

The allowance of the fair use defense ensures that freedom of speech is not hindered by the protection of the copyrighted image.³⁵⁹ Since fair use is a mixture of law and fact,³⁶⁰ once a court determines

353. See CFB Fans, *supra* note 1 (showing the entirety of the game and what left the crowd the most shocked).

354. See Trahan, *supra* note 4 (describing the importance of the punt play at the end of the game).

355. See *Authors Guild*, 804 F.3d at 223 (explaining that the fourth fair use factor “focuses on whether the copy brings to the marketplace a competing substitute for the original”).

356. See *id.* (“Because copyright is a commercial doctrine whose objective is to stimulate creativity among potential authors by enabling them to earn money from their creations, the fourth factor is of great importance in making a fair use assessment.”); see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (describing the fourth factor as “undoubtedly the single most important element of fair use”).

357. See *Man Becomes Face of Michigan’s Loss to Michigan State*, WNEM.COM (Oct. 20, 2015, 5:34 PM), <http://www.wnem.com/story/30309953/man-becomes-face-of-michigans-loss-to-michigan-state> [<https://perma.cc/WJ58-B5CZ>] (noting Chris Baldwin was not a celebrity, whose face was already well known, but he was merely caught on camera during a football game and his image then became well known).

358. See *University Seal, Trademarks and Copyright Permission*, BOARD REGENTS, <http://www.regents.umich.edu/trademarks.html> [<https://perma.cc/S9WS-CB27>] (last visited Nov. 6, 2017) (“To obtain permission [for use of material copyrighted by the Regents of the University of Michigan] . . . find and contact someone who is authorized to grant permission on behalf of that unit.”).

359. See Bauer, *supra* note 31, at 852-53 (“This doctrine permits persons to make certain uses of a work protected by copyright without obtaining permission from the copyright owner.”).

360. See *Harper & Row*, 471 U.S. at 560.

sufficient facts regarding each of the statutory fair use factors, the court may decide as a matter of law whether or not the fair use defense applies.³⁶¹ The fair use defense is designed to allow the dissemination of information and copyrightable material and to prevent a monopoly on creative works that would chill speech and stunt the progress of arts and sciences.³⁶² Therefore, the owner of the copyrighted image should be allowed a copyright infringement cause of action even if only to determine whether fair use existed to ensure the utmost protection to its creative property.³⁶³

Chris Baldwin should be able to protect his image and likeness from being used for a profit, especially when the commercial product with his image does not transform his image in any significant or meaningful way.³⁶⁴ While allowing Baldwin’s right of publicity claim under a new federal statute, the copyright holders, University of Michigan and ESPN, should be allowed to bring separate claims for copyright infringement—ones that would not preempt Baldwin’s claim.³⁶⁵ Any alleged infringer could still use common defenses, such as ones arising under the First Amendment, to prove that his or her actions are permissible.³⁶⁶

CONCLUSION

In today’s world, where everyone is connected to technology at all times, it is extremely easy to become an instant Internet celebrity.³⁶⁷ It could be as simple as going to a school football

361. See *id.* (explaining appellate review of fair use factor determinations).

362. See U.S. CONST. art. I, § 8, cl. 8. The goal of copyright is to promote the progress of the arts, and allowing a monopoly to occur, when most creativity is cumulative, would severely hinder this congressional objective. See *id.*

363. See Dewey, *supra* note 21 (discussing the copyright owner’s cause of action in regards to the Chris Baldwin case).

364. See *id.*

365. See *id.* (discussing that the broadcaster and other copyright owners would likely have a cause of action in Baldwin’s case).

366. See Bauer, *supra* note 31, at 852-53 (discussing doctrines that allow unauthorized use of creative works to be permissible).

367. See Terrence McCoy, *How to Become Internet-Famous in Under a Year*, WASH. POST (Jan. 12, 2016), https://www.washingtonpost.com/local/social-issues/how-to-become-Internet-famous-in-under-a-year/2016/01/12/09280804-b873-11e5-b682-4bb4dd403c7d_story.html [<https://perma.cc/A285-AVVQ>] (“The first step to becoming Internet-famous, according to people who know about such things, is recognizing what makes you extraordinary. One guy earned 1.7 million Instagram followers on the strength of his ‘man-bun.’ Another person pulled in 4 million YouTube fans after perfecting the histrionics of the ‘fangirl.’ One man soared into

game³⁶⁸ or getting interviewed on the news.³⁶⁹ If someone has his or her image used without consent by another person or company for profit, he or she should be allowed to protect the use of that likeness no matter where the incident took place.³⁷⁰ The owner of the image should also be allowed to protect his or her creative property against unpermitted commercial use.³⁷¹ Whether the commercial use by this third party was benign or not, no one should be allowed to profit by using someone's image and someone else's property without permission.³⁷² This proposed regime of a federal right of publicity statute in conjunction with existing federal copyright law and a contractual agreement would allow those unexpectedly caught on camera, the Chris Baldwins of the world, to protect their image and likeness from being exploited.³⁷³

stardom because he likes shooting big guns on camera and his 15 million followers like watching it.”)

368. See *Man Becomes Face of Michigan's Loss to Michigan State*, *supra* note 357 (explaining Chris Baldwin's shocked reaction became a symbol of the University of Michigan losing).

369. See *Dickey*, *supra* note 262 (explaining how Sweet Brown became an Internet sensation after being interviewed on a local media television channel).

370. See *Dewey*, *supra* note 21.

371. See *id.*

372. See *id.* (noting that with the Internet, everyone can have access to images whenever they want, and the people in the images and the owners of the images should be able to control and protect the use of that image).

373. See *Goldschmidt*, *supra* note 11 (discussing Baldwin not getting money for the use of his image at first).