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## The First Amendment and the Right(s) of Publicity

**ABSTRACT.** The right of publicity protects persons against unauthorized uses of their identity, most typically their names, images, or voices. The right is in obvious tension with freedom of speech. Yet courts seeking to reconcile the right with the First Amendment have to date produced only a notoriously confused muddle of inconsistent constitutional doctrine. In this Article, we suggest a way out of the maze. We propose a relatively straightforward framework for analyzing how the right of publicity should be squared with First Amendment principles.

At the root of contemporary constitutional confusion lies a failure to articulate the precise state interests advanced by the right of publicity. We seek to remedy this deficiency by disaggregating four distinct state interests that the right of publicity is typically invoked to protect. We argue that in any given case the right of publicity is characteristically invoked to protect (one or more) of these four interests: the value of a plaintiff's performance, the commercial value of a plaintiff's identity, the dignity of a plaintiff, or the autonomous personality of a plaintiff.

Plaintiffs' interests in their identity must always be weighed against defendants' constitutional interests in their speech. We therefore isolate three constitutional kinds of communication, each with a distinct form of First Amendment protection. A defendant's misappropriation of a plaintiff's identity can occur in public discourse, in commercial speech, or in what we call "commodities." We then discuss how constitutional protections for these three kinds of speech should intersect with the four different interests that right of publicity claims are typically invoked to protect.

The upshot is not a mechanical algorithm for producing correct constitutional outcomes, but an illumination of the constitutional stakes at issue in any given right of publicity action. We hope that by carefully surfacing the constitutional and policy stakes that beset the conflict between right(s) of publicity and the First Amendment, we have sketched a map that might substantially assist those who must navigate this tumultuous terrain.



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## INTRODUCTION

The right of publicity is broadly defined as a state-law tort designed to prevent unauthorized uses of a person's identity that typically involve appropriations of a person's name, likeness, or voice.<sup>1</sup> Because the right of publicity restricts what can be said, shown, or heard, it potentially conflicts with freedom of speech. Judicial analysis of this conflict is notoriously incoherent and inconsistent.

The essence of the problem is that unauthorized uses of identity are regulated for many different reasons that are frequently jumbled together in vague state proscriptions enforced either through common-law torts or legislation. Cogent First Amendment analysis requires careful specification of the precise state interests that justify government restrictions of speech. It should come as no surprise then that courts have failed to articulate any single First Amendment test adequate to encompass the many distinct legal interests that the contemporary right of publicity jams together.

In most of its formulations, the right of publicity refers to a distinct tortious *act*, which is broadly defined as the appropriation of a plaintiff's identity for a defendant's "use or benefit."<sup>2</sup> But a single tortious act can impair multiple distinct legal *interests*. Consider an example drawn from *Hustler Magazine, Inc. v. Falwell*: if I accuse you of having sex with your mother, I can damage the esteem in which you are held in your community, and so commit the tort of defamation. Or I can specifically intend to cause you emotional harm, and so commit the tort of intentional infliction of emotional distress. Or I can assault your dignity by revealing deeply held secrets, and so commit the tort of public disclosure of private facts.<sup>3</sup> Although these different torts arise out of the same

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1. Although initially limited to the use of a person's name and likeness, the law now allows liability for uses of other indicia of "identity." See, e.g., *White v. Samsung Elecs. Am.*, 971 F.2d 1395, 1399 (9th Cir. 1992) (holding that a right of publicity claim could lie for the use of a robot that merely brought the plaintiff to mind); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463-64 (9th Cir. 1988) (allowing a publicity claim based on the use of a vocal performance that sounded similar to the plaintiff's voice); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974) (allowing a publicity claim on the basis of the use of a red car associated with the plaintiff); see also JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR THE PUBLIC WORLD* 88-96 (2018) (tracing the expansion of the right of publicity beyond name and likeness).
  2. See RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977).
  3. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56-57 (1988) (holding that such an accusation asserted as parody in a magazine was protected by the First Amendment from an intentional infliction of emotional distress claim; the plaintiff had also brought false light and defamation claims).

act, they each possess different elements that track the specific harm the tort is designed to redress.

The underlying difficulty with the right of publicity is that it prohibits conduct without specifying the particular harm the tort seeks to address.<sup>4</sup> The resulting imprecision has encouraged the tort to expand uncontrollably, becoming, in the words of one commentator, like the “Wild West.”<sup>5</sup> Not only has litigation involving the right of publicity greatly increased,<sup>6</sup> but disparities in defining the right across different jurisdictions have also grown.<sup>7</sup> In some states, the right is confined to commercial contexts, and in others it is not.<sup>8</sup> In some states, plaintiffs asserting the right must establish that they have commercially valuable identities, and in others they do not.<sup>9</sup> In some states, the right is oriented toward economic injury, and in others it encompasses injuries that are both economic and personal.<sup>10</sup> Because the harms redressed by the tort are uncertain and ill-defined, so too is First Amendment treatment of the tort.

This has real and important consequences. Those who wish to create expressive works that incorporate the identities of actual people, or who wish to post images and comments about actual people online, are bereft of reliable and foreseeable protections for the exercise of essential First Amendment

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4. See, e.g., CAL. CIV. CODE §§ 3344, 3344.1 (West 2019); NEV. REV. STAT. § 597.770 (2019); N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2019); *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 349-52 (Ct. App. 1983); *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 705-06 (Ga. 1982).
  5. Brian D. Wassom, *Identity and Its Consequences: The Importance of Self-Image, Social Media, and the Right of Publicity to IP Litigators*, in *LITIGATION STRATEGIES FOR INTELLECTUAL PROPERTY CASES: LEADING LAWYERS ON ANALYZING KEY DECISIONS AND EFFECTIVELY LITIGATING IP CASES* 37, 43 (Aspatore Books ed. 2012); see ROTHMAN, *supra* note 1, at 61-62, 87-97.
  6. In 1977, 9 states had some version of a statutory right of publicity or appropriation tort. Today, that number has swelled to 25. The vast majority of states without a statutory right recognize some version of a common-law right. See ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY, <https://www.rightofpublicityroadmap.com> [<https://perma.cc/78DR-NBFA>] (providing analysis of different state publicity laws). To get a rough perspective on the growth in decisions involving the right of publicity over the last forty years, there were approximately 18 published right of publicity decisions in the 1970s, 53 in the 1980s, 63 in the 1990s, 105 in the 2000s, and 112 in the 2010s. These numbers likely underestimate the number of opinions because they are based on our survey of published decisions on Westlaw only locating cases using the search term “right of publicity” in the synopsis/digest for the cases. The uptick in right of publicity filings has been far greater.
  7. On state-to-state variations in the right, see ROTHMAN, *supra* note 1, at 96-98; and ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY, *supra* note 6.
  8. See *infra* notes 23-24, 29-32 and accompanying text.
  9. See *id.*
  10. See *id.* As we will discuss, in most states the right of publicity addresses both market-based and personality interests.

rights. Courts have disagreed about the circumstances under which the First Amendment protects the use of well-known persons' identities in video games,<sup>11</sup> news reporting,<sup>12</sup> posters,<sup>13</sup> board and card games,<sup>14</sup> prints,<sup>15</sup> comic books,<sup>16</sup> merchandise,<sup>17</sup> and movies.<sup>18</sup> The tort's jagged and unpredictable reach chills speech in extensive and immeasurable ways.

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11. Compare *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1284 (9th Cir. 2013) (rejecting a First Amendment defense in the context of alleged uses of athletes' likenesses in a video game), with *Noriega v. Activision/Blizzard, Inc.*, 42 Media L. Rep. 2740 (Cal. Sup. Ct. 2014) (holding that the First Amendment insulated a video game maker from liability for using the former dictator's likeness in a video game).
  12. Compare *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (rejecting a First Amendment defense in the context of a nightly news broadcast that showed plaintiff's performance), with *Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995, 997 (Colo. 2001) (rejecting a right of publicity claim when the use of a person's identity was in a newsletter, and the use was deemed "newsworthy").
  13. Compare *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639, 643 (Ct. App. 1995) (concluding that a right of publicity claim in the context of a poster of a famous quarterback was barred by the First Amendment), and *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 509 (Sup. Ct. 1968) (denying a right of publicity claim when the defendant sold a poster with the comedian's likeness), with *Factors, Etc., Inc. v. Pro Arts, Inc.*, 496 F. Supp. 1090, 1104 (S.D.N.Y. 1980) (allowing a right of publicity claim and rejecting a First Amendment defense to the use of Elvis Presley's name and image in memorial posters), *rev'd on other grounds*, 652 F.2d 278 (2d Cir. 1981), and *Brinkley v. Casablancas*, 438 N.Y.S.2d. 1004, 1014-15 (App. Div. 1981) (allowing a right of publicity claim in the context of a poster displaying an image of the plaintiff-model).
  14. Compare *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144, 147 (Sup. Ct. 1973) (allowing a right of publicity claim in the context of a board game about Howard Hughes), with *Aldrin v. Topps Co.*, No. CV-10-09939, 2011 WL 4500013, at \*3 (C.D. Cal. Sept. 27, 2011) (allowing a First Amendment defense in the context of a trading-card game).
  15. Compare *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810-11 (Cal. 2001) (rejecting a First Amendment defense in the context of a drawing of comedians sold in multiple lithographed copies and on t-shirts), with *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 936-38 (6th Cir. 2003) (allowing a First Amendment defense in the context of prints of a painting of a famous golfer sold in multiple copies).
  16. Compare *Doe v. TCI Cablevision*, 110 S.W.3d 363, 376 (Mo. 2003) (rejecting a First Amendment defense to the use of a variation on a hockey player's name in a comic book), with *Winter v. DC Comics*, 69 P.3d 473, 480 (Cal. 2003) (concluding that the First Amendment protects an author from liability for using a variation on plaintiffs' names and likenesses in a comic book).
  17. Compare *Rosa & Raymond Parks Inst. for Self Dev. v. Target Corp.*, 90 F. Supp. 3d 1256, 1263-65 (M.D. Ala. 2015) (allowing a First Amendment defense to the use of the civil-rights hero's name and image on a mass-produced plaque), *aff'd on other grounds*, 812 F.3d 824 (11th Cir. 2016), with *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods.*, 296 S.E.2d 697, 706 (Ga. 1982) (rejecting a First Amendment defense in the context of the sale of mass-produced busts of the civil-rights leader).
  18. Compare *Porco v. Lifetime Entm't. Servs., LLC*, 47 N.Y.S.3d 769, 772 (App. Div. 2017) (allowing a right of publicity claim to proceed in the context of a docudrama), with *De Havil-*

Our hope is to ameliorate these deficiencies in right of publicity law much as William Prosser did sixty years ago for the right of privacy. He looked at the “haystack in a hurricane” of privacy law and sought to make sense of it by distinguishing four distinct kinds of privacy torts.<sup>19</sup> In this Article, we seek to perform an analogous service for the right of publicity and, in the process, to clarify constitutional analysis of the tort.

We identify four distinct interests that the right of publicity typically seeks to vindicate. The disaggregation of these interests is an essential first step in addressing the current confusion because each of these four interests requires its own specific First Amendment analysis. As a helpful heuristic, one might even go so far as to imagine each of these interests as embodied in its own distinct tort, with its own set of *prima facie* elements.

For purposes of clarity, we denominate these four ideal torts as the *right of performance*, the *right of commercial value*, the *right of control*, and the *right of dignity*. These torts protect, respectively, plaintiffs’ interests in controlling the use of their performances, in preserving the commercial value of their identity, in protecting the autonomy of their personality, and in maintaining the dignity of their person. In any given right of publicity action, one or more of these four distinct interests may be at stake.<sup>20</sup> When taken together, we believe that these four interests encompass the vast majority of cases presently brought to remedy unauthorized uses of identity under state right of publicity laws.

In Part I, we define these four different rights of publicity. In Part II, we describe the present sorry state of First Amendment analysis with respect to right of publicity claims. In Part III, we demonstrate that the clarity of First Amendment analysis will be much improved if publicity claims are disaggregated into the four interests that we identify. Though difficult constitutional judgments will of course remain, our hope is that our proposed framework will produce more reliable, predictable, and sound constitutional outcomes than the bedlam that presently prevails. We hope also to offer a useful vantage for further critique and reform of the underlying substantive tort.

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land v. FX Networks, LLC, 230 Cal. Rptr. 3d 625, 647 (Ct. App. 2018) (rejecting a right of publicity claim on First Amendment grounds in the context of a docudrama television series).

19. William L. Prosser, *The Right to Privacy*, 48 CALIF. L. REV. 383, 407 (1960).

20. Unauthorized uses of a person’s identity sometimes also implicate interests that are protected by other torts. Plaintiffs may sometimes allege, for example, that the unauthorized use of their identity has placed them in a false light, defamed them, or infringed a trademark. See, e.g., *ETW Corp.*, 332 F.3d at 915 (bringing trademark, unfair competition, and right of publicity claims against an artist who made prints from his painting of the plaintiff winning the Master’s Tournament); *De Havilland*, 230 Cal. Rptr. 3d at 625 (bringing both false light and right of publicity claims in a lawsuit arising out of a miniseries character based on the plaintiff that used her name and personality).

## I. THE FOUR RIGHTS OF PUBLICITY

In this Part, we identify four different kinds of right of publicity claims. Each concerns a distinct interest that a plaintiff might seek to vindicate in a right of publicity action. Each of these four interests is visible in contemporary right of publicity litigation. In an ideal world, the protection of each interest would require its own set of prima facie elements and First Amendment analysis. But regardless of whether the protection of these interests is formally separated into distinct torts, cogent jurisprudential and constitutional scrutiny is not possible until these interests have been disaggregated and separately evaluated.<sup>21</sup>

American law has protected plaintiffs' commercial and personality interests in their identity for more than a century. As one of us has documented, this body of law long predates Jerome Frank's and Melville Nimmer's consideration of the "right of publicity" in the 1950s.<sup>22</sup> Justifications for barring the unauthorized use of identity presently encompass the protection of both market-based and personality-based interests.<sup>23</sup> Although some courts (and scholars)

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21. See Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891, 894, 928-32 (2017) (observing that one of the foundational problems for the right of publicity is that it is treated as a unitary right, when it "is really multiple rights"). Dividing the right of publicity into four distinct torts would be especially useful in guiding decisions about the adjectival aspects of the tort, like inheritability and transferability, which to date have been particularly controversial.
  22. ROTHMAN, *supra* note 1, at 11-29 ("Concerns over the misappropriation of identity and unwanted publicity were not novel when the right of publicity purportedly emerged in the 1950s. To the contrary, they were long-standing and in large part the inciting incident for the development of the right of privacy itself."). What Frank and Nimmer added to the picture was the possibility that rights over one's own identity could be transferable. See *id.* at 45-64, 68-71; see also *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (Frank, J.) (suggesting the existence of a transferable "right of publicity"); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 221-23 (1954) (advocating for the adoption of a broad and alienable "right of publicity" in the wake of the *Haelan* decision). It took decades after the decision in *Haelan* for courts even to consider the possibility that a right of publicity might be something distinct from the right of privacy's appropriation tort. ROTHMAN, *supra* note 1, at 67-86.
  23. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1102-04 (9th Cir. 1992) (recognizing a singer's economic and personal injuries stemming from the use of a similar-sounding voice under California's common-law right of publicity); *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 753 (N.D. Cal. 1993) (suggesting that claims under section 3344 of the California Civil Code "may present [as] one of two theories" — one based on commercial exploitation, and the other on the basis of "injury to the feelings" (citing *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 792 (Ct. App. 1993))); *Bullard v. MRA Holding, LLC*, 740 S.E.2d 622, 625 (Ga. 2013) (recognizing that Georgia's right of publicity protects against both dignitary and monetary injuries); see also RESTATEMENT (SECOND) OF TORTS § 652C & cmt. a (AM. LAW INST. 1977) (treating the right of publicity and appropriation as a single tort and noting that this



distinguish the privacy tort of appropriation (which they define as protecting personality interests in identity) from the tort of right of publicity (which they define as protecting the market value of identity),<sup>24</sup> many states treat the two torts interchangeably.<sup>25</sup> And even in states that claim to distinguish between the appropriation and right of publicity torts, the elements of the two causes of action are frequently identical. As the Supreme Court of Missouri candidly observed about that state's purportedly distinct causes of action, "the elements of the two torts are essentially the same."<sup>26</sup> Because both torts are in fact directed

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tort protects against both "mental distress" and economic injuries). We note that although the *Restatement (Third) of Unfair Competition* takes a narrower view of the right of publicity as primarily a tort of unfair competition, it too describes the tort as protecting both market-based and personality-based interests. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (AM. LAW INST. 1995) (noting that "the right of publicity protects an individual's interest in personal dignity and autonomy" and the person's "commercial value").

24. See *Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995, 1000 (Colo. 2001) (noting that while some courts "follow Prosser's formulation of the tort and provide relief for both personal and commercial harm," others "partially reject[] the Prosser formulation, choosing to distinguish claims for injury to personal feelings caused by an unauthorized use of a plaintiff's identity ('right of privacy') from claims seeking redress for pecuniary damages caused by an appropriation of the commercial value of the identity ('right of publicity')"); *Crump v. Beckley Newspapers, Inc.*, 320 S.E. 2d 70, 85 n.6 (W. Va. 1983) ("The right of privacy protects individual personality and feelings, the right of publicity protects the commercial value of a name or likeness.").
25. See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454, 458-60 (Ohio 1976) (explaining that Ohio's right of privacy encompasses a claim for the "appropriation of a plaintiff's name and likeness" and that "this aspect of privacy" is termed "the right of publicity"), *rev'd on other grounds*, 433 U.S. 562, 565-66 (1977) (understanding the plaintiff's state right of privacy claim as one for the violation of the right of publicity); see also *Prima v. Darden Rests., Inc.*, 78 F. Supp. 2d 337, 346 (D.N.J. 2000) ("Louisiana law . . . does not expressly provide for a right of publicity. Rather, courts in Louisiana have interpreted Louisiana's right of privacy to protect a person's name or likeness from commercial exploitation." (citing *Prudhomme v. Procter & Gamble Co.*, 800 F. Supp. 390, 396 (E.D. La. 1992))); *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004, 1012 (App. Div. 1981). California law provides a telling example of this. California's statutory right of publicity for the living, which is now frequently used to protect the commercial value of identity, was originally passed under the moniker of "privacy" and created to provide ordinary citizens whose identity lacked commercial value the opportunity to obtain statutory damages. Act of Nov. 22, 1971, ch. 1595, 1971 Cal. Stat. 3426 (codified at CAL. CIV. CODE § 3344); ROTHMAN, *supra* note 1, at 208 n.40; Letter from Assemb. John Vasconcellos to Governor Ronald Reagan (Nov. 10, 1971) (on file with the Governor's Chaptered Bill File, California State Archives). Accordingly, the statutory codification of the privacy-based appropriation tort and the right of publicity in California are identical, as are the common-law versions of the torts, and both allow recovery of personal and market-based injuries. See *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 346-48 (Ct. App. 1983); see also RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977) (treating the privacy-based appropriation tort and the right of publicity as identical).
26. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003).

at preventing unauthorized uses of identity, we shall in this Article treat both as variants of a single overarching right of publicity.

The vagueness that envelops the right of publicity is exemplified by the *Restatement (Second) of Torts*, which defines the tort of “Appropriation of Name or Likeness” as follows: “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 privacy.”<sup>27</sup> This definition focuses the tort of appropriation on the actions of a defendant. It is silent about the nature of the plaintiff’s interests it seeks to protect.<sup>28</sup>

The tort of appropriation is one of four privacy torts delineated in the *Restatement (Second)*. In contrast to the other three privacy torts, appropriation does not require a plaintiff to demonstrate that a defendant has acted in a “highly offensive” way.<sup>29</sup> This omission is not accidental. “Highly offensive” behavior violates basic community norms and is thus experienced as an assault on dignity that is mortifying and degrading.<sup>30</sup> But the *Restatement (Second)* did not intend the appropriation tort merely to vindicate a plaintiff’s dignity. Instead it formulated the tort to encompass *all* appropriations that can be said in some sense to “benefit” a defendant, which literally include uses by biographers, historians, newspapers, credit-reporting agencies, publishers of directories, and so on.

In an effort to cabin this intolerable overbreadth, many states have imposed additional affirmative elements on the tort. Several states, for example, require that a plaintiff have a commercially valuable identity or that a defendant’s use be for commercial purposes, for advertising purposes, or for the purposes of trade.<sup>31</sup> Yet these requirements usually neither require a showing of market damages nor exclude showings of injuries to dignity.<sup>32</sup>

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27. RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977); see Prosser, *supra* note 19, at 401-07. Many states have adopted the formulation of section 652C. California’s common-law right of publicity, for example, requires a showing that (1) the defendant used the plaintiff’s identity; (2) the appropriation of plaintiff’s identity be for the defendant’s advantage, commercially or otherwise; (3) the plaintiff did not consent to the use; and (4) an injury resulted. See *Eastwood*, 198 Cal. Rptr. at 346; see also *Dittmar*, 34 P.3d at 1002 (adopting a similar formulation in Colorado law).

28. RESTATEMENT (SECOND) OF TORTS § 652C cmts. a & d (AM. LAW INST. 1977).

29. Compare *id.* §§ 652B, 652D, 652E, with *id.* § 652C.

30. Robert C. Post, *The Social Foundations of Privacy*, 77 CALIF. L. REV. 957, 961 (1989) [hereinafter Post, *Social Foundations*]; see also Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 616-26 (1990) [hereinafter Post, *The Constitutional Concept of Public Discourse*].

31. See, e.g., 765 ILL. COMP. STAT. ANN. 1075/1 (West 2020); N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2019); 42 PA. STAT. AND CONS. STAT. ANN. § 8316 (West 2020); see also Jennifer

The tort's failure to focus on the vindication of precise interests makes it quite difficult to reconcile right of publicity claims with First Amendment protections. Consider, for example, that in 2001 the Supreme Court of Colorado was certain that the tort of appropriation could not overcome "a First Amendment privilege that permits the use of a plaintiff's name or likeness when that use is made in the context of, and reasonably relates to, a publication concerning a matter that is newsworthy or of legitimate public concern."<sup>33</sup> Yet in 1977 the Supreme Court of the United States allowed a right of publicity claim to proceed in the context of a presumptively newsworthy nightly news broadcast.<sup>34</sup> The two cases can be reconciled only if the two courts were adjudicating assertions of the right of publicity vindicating entirely distinct state interests, as indeed they were.<sup>35</sup>

In this Part, we identify four different interests that right of publicity claims typically seek to vindicate. These four interests concern the protection, respectively, of performances, of the commercial value of identity, of the autonomy of personality, and of the dignity of personality. In practice, plaintiffs may allege harm on the basis of more than one of these interests in any given lawsuit. But because each of these interests requires a distinct constitutional analysis, we think it most helpful to imagine four ideal torts, each precisely oriented toward the protection of a specific and singular interest.

### A. *The Right of Performance*

We consider, first, what we call the *right of performance*, which we define as a claim designed to authorize persons who create performances to protect those performances from misappropriation. Broadly speaking, the right of performance is violated when a defendant uses the performance of another without consent.

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E. Rothman, *Commercial Speech, Commercial Use, and the Intellectual Property Quagmire*, 101 VA. L. REV. 1929, 1950-55, 1959-64 (2015) (noting the variety and variability of right of publicity provisions around commerciality).

32. See, e.g., CAL. CIV. CODE § 3344 (West 2020); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001); *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004, 1012-13 (App. Div. 1981).

33. *Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995, 1003 (Colo. 2001).

34. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 564, 566 (1977).

35. The Colorado Supreme Court was addressing a form of the right of publicity that sought to prevent the "mental anguish" caused by the misappropriation of a plaintiff's identity, *Dittmar*, 34 P.3d at 1002-03, whereas the United States Supreme Court in 1977 was discussing a form of the right of publicity designed to prevent misappropriations of a plaintiff's performance, *Zacchini*, 433 U.S. at 564, 566, 569, 572-79.

The right of performance is commonly asserted. Athletes sue to prevent the broadcast of their matches;<sup>36</sup> entertainers sue to prevent the broadcast of their acts;<sup>37</sup> announcers sue to prevent the reproduction of their commentary;<sup>38</sup> actors sue to prevent unauthorized distribution of films in which they have appeared;<sup>39</sup> singers sue to prevent the recycling of their tracks.<sup>40</sup>

The only right of publicity claim ever explicitly considered by the Supreme Court of the United States was a right of performance case—*Zacchini v. Scripps-Howard Broadcasting Co.*<sup>41</sup> The plaintiff was Hugo Zacchini, who performed “the feat of being shot from a cannon into a net some 200 feet away. The entire performance last[ed] about 15 seconds.”<sup>42</sup> Zacchini objected when a news station sought to film his act at an Ohio fair. Ignoring his objections, the news station recorded his performance and subsequently broadcast the footage on the nightly news. Zacchini complained that “the defendant showed and commercialized the film of . . . [his] act without his consent and such conduct by the defendant was unlawful appropriation of plaintiff’s professional property.”<sup>43</sup>

The Supreme Court of Ohio conceptualized Zacchini’s claim as “one for invasion of the right of privacy by appropriation,” which was synonymous under

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36. See, e.g., *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 490 (3d Cir. 1956); *id.* at 497 (Hastie, J., dissenting). Ettore was a boxer who attempted to block the rebroadcast of his bout with Joe Louis. Ettore had agreed to the filming of his performance but had not agreed to the use of his performance on television—a technology not contemplated when he agreed to the filming and use of his performance. In his complaint, Ettore also claimed that the rebroadcast had impaired his dignity by omitting his best round and thus painting him in a negative light that reflected poorly on his boxing skills. See *id.* at 484 (majority opinion).
37. See, e.g., *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354 (1952).
38. See, e.g., *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007 (3d Cir. 2008); *Ventura v. Titan Sports, Inc.*, 65 F.3d 725 (8th Cir. 1995).
39. See, e.g., *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146 (9th Cir. 2010); *Fleet v. CBS, Inc.*, 58 Cal. Rptr. 2d 645 (Ct. App. 1996).
40. See, e.g., *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134 (9th Cir. 2006); *Armstrong v. Eagle Rock Entm’t, Inc.*, 655 F. Supp. 2d 779 (E.D. Mich. 2009).
41. 433 U.S. 562 (1977). We note that, arguably, the first right of publicity case heard by the Supreme Court was much earlier, in *Sperry & Hutchinson Co. v. Rhodes*, 220 U.S. 502 (1911). In that case, the Court upheld the constitutionality of New York’s right of privacy statute, which is the same statute that established its right of publicity, in the context of a plaintiff’s objection to the use of a photograph of her on trading stamps without her consent. *Id.* at 505.
42. *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454, 455 (Ohio 1976), *rev’d on other grounds*, 433 U.S. 562 (1977).
43. *Id.* at 456. Zacchini’s complaint was broadly pled and did not specifically mention the right of publicity, the right of privacy, or common-law copyright. Petition for Writ of Certiorari app. at A49-A50, *Zacchini*, 433 U.S. 562 (No. 76-577).

Ohio state law with its right of publicity.<sup>44</sup> The court observed that “the fundamental wrong” addressed by the tort “is the appropriation for one’s self of the benefits of another’s name, likeness, or identity, and the wrong is the same whether or not that benefit is pecuniary.”<sup>45</sup> The court observed that “[t]he determinative question is . . . whether the *defendant’s taking and use of the films of plaintiff’s act* . . . constituted the appropriation of the defendant’s *exclusive rights to his own likeness and identity*.”<sup>46</sup>

Although the rhetoric of the Ohio court seemed to conflate Zacchini’s right to protect the value of his *performance* with a broader right to protect his *identity*, the decision specifically focused its analysis on the use of Zacchini’s performance:

It is this right, a right of exclusive control over the publicity given to his *performances*, which the plaintiff seeks to protect. For a performer, this right is a valuable part of the benefit which may be attained by his talents and efforts, and we think that this right is entitled to legal protection, contrary to the holding of some earlier cases.<sup>47</sup>

Zacchini’s act was not in a fixed form and thus was not copyrightable under federal or state copyright laws.<sup>48</sup> But the Ohio court concluded that even unfixed performances deserve legal protection. It sought to close this perceived gap in copyright law’s coverage by recognizing Zacchini’s claim under the state’s right of publicity.<sup>49</sup>

The Ohio court ultimately held that Zacchini’s legal rights were overridden by the nightly news program’s First Amendment “privilege” to broadcast a film of his act.<sup>50</sup> The films shown by the program were presumptively newsworthy.<sup>51</sup> “[T]he press has a privilege to report matters of legitimate public interest

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44. *Zacchini*, 351 N.E.2d at 456, 460.

45. *Id.* at 458 (citing RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977)).

46. *Id.* at 459 (emphasis added).

47. *Id.* at 460 (emphasis added).

48. 17 U.S.C. § 102 (2018); *Zacchini*, 351 N.E.2d at 457 (concluding that the unfixed performance was not copyrightable under state law, and that even if it had been, such protection would have terminated upon the public performance). Copyright protection at the state level for unpublished works was abolished with the effective date of the Copyright Act of 1976, January 1, 1978. See Pub. L. No. 94-553, § 301, 90 Stat. 2541, 2572 (1976) (codified as amended at § 101).

49. See *SK&F, Co. v. Premo Pharm. Labs., Inc.*, 625 F.2d 1055, 1065 (3d Cir. 1980) (citing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576-77 (1977)) (noting that under *Zacchini*, “state law can protect [a] right of publicity in uncopyrighted performance”).

50. *Zacchini*, 351 N.E.2d at 461.

51. *Id.* at 460-62.

even though such reports might intrude on matters otherwise private. . . . The same privilege exists in cases where appropriation of a right of publicity is claimed.”<sup>52</sup>

The Supreme Court granted certiorari to review this constitutional holding. It accepted, as it was required to do, the Ohio court’s conclusion that under state law Zacchini possessed a “right to the publicity value of his performance,”<sup>53</sup> which had been compromised by the television station’s broadcast of “his entire act and [display of] that film on television for the public to see and enjoy.”<sup>54</sup> But the Supreme Court differed with the Ohio court’s interpretation of the First Amendment.

The Ohio court had applied constitutional precedents from cases involving defamation and false light privacy-based claims, which the Supreme Court understood to be about protecting plaintiffs from dignitary harms.<sup>55</sup> But dignitary harms were irrelevant to Zacchini’s claim. Instead the Court conceived of Zacchini’s interest in his performance as a “proprietary” interest, the protection of which was “closely analogous to the goals of patent and copyright law.”<sup>56</sup> Ohio law protected “the right of the individual to reap the reward of his endeavors and [had] little to do with protecting feelings or reputation.”<sup>57</sup>

The Supreme Court observed:

The broadcast of a film of petitioner’s entire act poses a substantial threat to the economic value of that performance. . . . Much of its economic value lies in the “right of exclusive control over the publicity given to his performance”; if the public can see the act free on television, it will be less willing to pay to see it at the fair. . . . [I]n this case, Ohio has recognized what may be the strongest case for a “right of publicity”—involving, not the appropriation of an entertainer’s reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.<sup>58</sup>

Stressing the close analogy to copyright, the Supreme Court concluded that “[t]he Constitution no more prevents a State from requiring respondent to

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52. *Id.* at 461.

53. *Zacchini*, 433 U.S. at 565.

54. *Id.* at 569.

55. *Id.* at 573.

56. *Id.*

57. *Id.*

58. *Id.* at 575-76 (footnote omitted) (citations omitted).

compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner.”<sup>59</sup>

The Supreme Court properly based its First Amendment analysis on the exact purpose of Ohio’s common-law tort. It extended legal protection specifically to reproductions of Zacchini’s “performance” of his cannonball act.<sup>60</sup> Precisely put, the quarrel between Zacchini and the news station concerned control over the distribution of Zacchini’s *performance*, not the use of his name or likeness. Zacchini may have used his identity to create the performance, but his performance is conceptually distinct from his likeness and identity.

Zacchini’s performance is a discrete set of acts in space and time. Copyright creates an analogous right to control a discrete, fixed expression that may convey the personality of an author but that is distinct from the personality of that author.<sup>61</sup> Just as society desires to encourage the production and distribution of works protected by copyright, so it may wish to encourage the creation of performances, including those that may not be copyrightable because they are unfixable.<sup>62</sup> “[T]he economic rationale for copyright law—that market failure

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59. *Zacchini*, 433 U.S. at 575. The Justices in the majority were particularly concerned that allowing a First Amendment defense in the case would give broadcasters the ability to broadcast uncopyrighted works, such as some symphonies and sporting events, under the guise of being news. See ROTHMAN, *supra* note 1, at 141-42, 220 n.5 (describing Justice Blackmun’s oral argument questioning, notes, and visit to the symphony two nights before the oral arguments in *Zacchini*).

60. *Zacchini*, 433 U.S. at 575-76; see also *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 464 (Cal. 1979) (Bird, C.J., concurring) (interpreting *Zacchini* as concerned with the plaintiff’s “right to the publicity value of his performance”); Carissa Byrne Hessick, *The Right of Publicity in Digitally Produced Images: How the First Amendment Is Being Used to Pick Celebrities’ Pockets*, 10 UCLA ENT. L. REV. 1, 12 (2002) (“The right of performance is a corollary to the right of publicity. This right was recognized by the Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.* . . .”).

61. See Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 662-70 (1991); see also Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 204-33 & n.205 (2012) (“[I]n the right of publicity context . . . a person’s identity is not external in the same way that a completed creative work becomes external. The identity-holder remains tied to and integrated with the publicity rights in a much more significant and ongoing way than an author remains tied to a copyrighted work.”).

62. See *Zacchini*, 433 U.S. at 573; see also *id.* at 576 (“Ohio’s decision to protect petitioner’s right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court.”).

would occur in the absence of the legal right”<sup>63</sup> – applies with equal force in the context of performances.<sup>64</sup>

Courts and commentators do not typically distinguish the protection of a performance from the protection of a plaintiff’s identity. Indeed, the standard account of the right of publicity is that it focuses on “identity and ‘persona’” rather than on performances.<sup>65</sup> Yet just as the point of copyright is to safeguard the value of a work that is separate from the personality of the author of that work, so the right of performance safeguards the value of a performance that is separate from the identity of the performer who creates that work. The Supreme Court invoked this difference when it stressed that the news station had

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63. Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1187 (2006) (describing the dominant justification for copyright).

64. See *id.* at 1187-88 (critiquing the analogy of the right of publicity to copyright law but noting that in performance cases like *Zacchini* the analogy to copyright is “closest”); see also Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 COLUM.-VLA J.L. & ARTS 123, 126-27 (1996) (noting that protection in cases like *Zacchini* is “easy to understand” because “[r]educing economic benefits” by failing to protect such performances would “dilute[] the financial incentive to produce, with the arguable result that the public will, in the future, have fewer performances to enjoy. In such instances the right of publicity serves as a useful adjunct to the Copyright Clause”); K.J. Greene, *Right of Publicity, Identity, and Performance*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 865, 880-84 (2012) (noting “[g]aps in IP [p]rotection for [p]erformances” and suggesting that “the Supreme Court was on to something” in *Zacchini* by protecting uncopyrighted performances). A number of scholars have challenged copyright’s incentive rationale. See, e.g., Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 321-22 (1970); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1717-18 (2006). Insofar as these critiques are valid, they would seem to hold equal weight in the context of the right of performance.

To the extent copyright is supported by rationales other than the creation of incentives, such justifications would also apply to the right of performance. Cf. 17 U.S.C. § 106A (2018) (granting artists moral rights to prevent “distortion, mutilation, or other modification” of their work irrespective of physical ownership or copyright ownership); Shyamkrishna Balganes, *Privative Copyright*, 73 VAND. L. REV. 1, 3-5 (2020) (chronicling authorial rights-based aspects of copyright law); Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1759-64 (2012) (observing that even under a purely incentive-based approach to copyright law, rewarding authors in ways that further their personality-based interests has an incentivizing effect); *Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, U.S. COPYRIGHT OFF. 3-6 (Apr. 2019), <https://www.copyright.gov/policy/moralrights/full-report.pdf> [<https://perma.cc/8VJ4-F5MR>] (noting the ways that the United States protects authors’ moral rights, including the right of publicity).

65. 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 5.45 (2d ed. 2020).



appropriated Zacchini's "entire act."<sup>66</sup> Such a criterion would be meaningless if applied to Zacchini's likeness, name, or voice.

Once we focus on the protection of a performance, instead of on the protection of identity, it becomes clear that a plaintiff need not demonstrate the actual or potential commercial success of her performance to bring a claim, nor must she establish any preexisting value in her identity. YouTube sensations who teach people how to do particular hairstyles or master a complex video game, for example, should be entitled to bring right of performance claims for the wrongful misappropriation of their performances, even if they have not otherwise profited from their identity.<sup>67</sup> Nor need plaintiffs show a commercial use by defendants. Defendants can wrongfully appropriate performances by using them in contexts not designed to produce a profit, as for example in fundraising for a nonprofit organization or during a political-campaign rally.<sup>68</sup>

The right of performance does not protect the ordinary experience of living a life, even if that life happens to be captured on video or livestreamed, and even if in some sense we are all "performing" in public.<sup>69</sup> To claim protection under a right of performance, a plaintiff must intentionally have created a *per-*

66. *Zacchini*, 433 U.S. at 564, 569-70, 574-75 (emphasis added) (highlighting that the unauthorized use of Zacchini's performance was of his "entire act," a term used seven times in the opinion); see also *id.* at 579-80 (Powell, J., dissenting) (criticizing the "entire act" standard and "doubt[ing] that this formula provides a standard clear enough even for resolution of this case"). There was a dispute about whether Zacchini's "entire act" was actually broadcast. As Justice Powell noted in his dissent,

[a]lthough the record is not explicit, it is unlikely that the "act" commenced abruptly with the explosion that launched petitioner on his way, ending with the landing in the net a few seconds later. One may assume that the actual firing was preceded by some fanfare, possibly stretching over several minutes, to heighten the audience's anticipation: introduction of the performer, description of the uniqueness and danger, last-minute checking of the apparatus, and entry into the cannon, all accompanied by suitably ominous commentary from the master of ceremonies.

*Id.* at 579 n.1.

67. We note that in these contexts YouTube performances are also likely protected by copyright.

68. Although we do not intend in this Article to argue for or against postmortem rights, we acknowledge that to the extent the justifications supporting the right of performance are analogous to those that support copyright laws, it may make sense to extend a limited postmortem period for performances, just as copyrights survive an author's death. A postmortem right of performance, however, need not (and likely should not) track the copyright term, which many have criticized as far too lengthy. Cf. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 213-22 (2003) (suggesting that copyright terms of longer than twenty-five years are not well justified but noting that indefinite renewals of commercially successful works might make sense).

69. To the extent that livestreaming is captured in a fixed form, copyright protection may apply to that fixation.

*formance*. There will undoubtedly be ambiguous circumstances, especially in a world of “reality” television and unscripted programming. States will have to determine the legal boundaries between life and performance. But the bar for having a protectable right of performance should be higher than the mere recording or dissemination of one’s life. A plaintiff must take affirmative steps to enact the discrete kind of behavior that would justify legal protection as an independent “performance” that exists apart from a plaintiff’s ordinary lived identity.

The right of performance protects not only against the unauthorized fixation and distribution of a plaintiff’s performance, as occurred in *Zacchini*, but also against the unauthorized creation of new performances using previously captured footage of a plaintiff’s performance. The case of *No Doubt v. Activision Publishing, Inc.* offers an example.<sup>70</sup> In *No Doubt*, a video game company violated the plaintiff band members’ rights of performance by creating and employing digital avatars of the punk rock group in its game *Band Hero*. Even though the band, including its lead singer Gwen Stefani, had authorized Activision to scan their performances digitally and to use motion-capture data to populate the game with the digital avatars, Activision’s uses exceeded the terms of the contract between the parties. The distribution of these recreated performances was therefore without authorization and violated the band members’ rights of performance.<sup>71</sup>

If Activision had instead used different performers to create “new” *No Doubt* performances, or created these performances without using previously captured data, the appropriate action would not be for the right of performance, but instead a claim for the *right of commercial value*. Although the newly fashioned digital performances would exploit the market value of plaintiffs’ identities, they would not violate their right of performance. This distinction is important because, as we shall see in Part III, First Amendment doctrine restricts the right of commercial value quite differently than it restricts claims asserting a right of performance.<sup>72</sup>

The right of performance must be carefully limited so as not to restrict the creation of new performances. The right of performance should impose liability only when a performance is truly derived—digitally or otherwise—from a plaintiff’s actual performance. Using Tom Cruise’s original performance to digitally recreate or edit a new performance by “Tom Cruise” in a sequel to *Top*

70. 122 Cal. Rptr. 3d 397 (Ct. App. 2011).

71. See *id.* at 405-12. The California appellate court’s analysis in the case focused broadly on the misappropriation of the identities of the band members, but the circumstances also implicate the entirely distinct interest that we identify as the right of performance.

72. See *infra* Sections III.B.1, III.B.2.

*Gun* (without his participation) could violate Cruise's right of performance, but hiring a new actor to imitate Tom Cruise would not.<sup>73</sup>

Understood in this way, the right of performance should protect against digital reanimation when done by using previously captured performances, which is becoming increasingly common as avatars of living and dead actors are now presented as performing in motion pictures,<sup>74</sup> and holograms of de-

73. This example is based on a question posed by Judge Bybee of the Ninth Circuit Court of Appeals during the oral argument in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268 (9th Cir. 2013). Judge Bybee asked whether movie studios would be free to recreate actors' performances digitally based on their original performances, such as that of Tom Cruise in *Top Gun*, if the Ninth Circuit were to hold that the First Amendment insulated a video game maker from liability for using avatars of student athletes in its games. Oral Argument at 9:26, in *In re NCAA*, 724 F.3d 1268 (No. 10-15387), [https://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=000006196](https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=000006196) [<https://perma.cc/2RX9-6MAM>]. Were a studio to recreate Cruise's performance in a *Top Gun* sequel by digitally altering his performance from the original film, Cruise could potentially bring claims for both a right of performance and a right of commercial value. As we discuss *infra* in Sections I.B and III.B.2, however, the right of commercial value claim would likely fail unless there was confusion about whether Cruise was actually performing in the role or about whether he had sponsored or endorsed the recreated performance. The reuse of the copyrighted footage by the studio might also raise copyright preemption issues. See *infra* notes 76-79 and accompanying text.

74. See, e.g., Ashley Cullins, *Carrie Fisher, "Star Wars" and the Legal Issues of Dead but In-Demand Actors*, HOLLYWOOD REP. (May 1, 2017, 6:45 AM PDT), <https://www.hollywoodreporter.com/news/carrie-fisher-star-wars-legal-issues-dead-but-demand-actors-997335> [<https://perma.cc/M26R-GNTY>]; Carolyn Giardina, *How "Furious 7" Brought the Late Paul Walker Back to Life*, HOLLYWOOD REP. (Dec. 11, 2015, 5:00 AM PST), <https://www.hollywoodreporter.com/behind-screen/how-furious-7-brought-late-845763> [<https://perma.cc/6TPG-YEQJ>]; Benjamin Lee, *Discretion, Not CGI: How Philip Seymour Hoffman Was Kept in the Hunger Games*, GUARDIAN (Nov. 17, 2015, 7:35 AM EST), <https://www.theguardian.com/film/2015/nov/17/philip-seymour-hoffman-hunger-games-mockingjay-2-paul-walker> [<https://perma.cc/3G4P-P8HC>]; Alex Lee, *The Messy Legal Scrap to Bring Celebrities Back from the Dead*, WIRED (Nov. 17, 2019), <https://www.wired.co.uk/article/james-dean-dead-actors-rights> [<https://perma.cc/CKZ2-U7B7>] (discussing plans to produce a film starring a reanimated James Dean).

We note that these issues were present even before modern computer-generated imagery technology. See Eriq Gardner, *"Back to the Future II" from a Legal Perspective: Unintentionally Visionary*, HOLLYWOOD REP. (Oct. 21, 2015, 3:51 PM PDT), <https://www.hollywoodreporter.com/thr-esq/back-future-ii-a-legal-833705> [<https://perma.cc/5VSS-Y39P>].

It is not surprising that the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), the main actors' union, has expressed concern over such possible reanimation of performances. See *Who Owns You: SAG-AFTRA Steps Up the Fight to Ensure Members Have Control of Their Own Likenesses*, SAG-AFTRA MAG., Summer 2018, at 30, 31 <http://digital.copcomm.com/i/1012073-summer-2018/37?m4> [<https://perma.cc/KZP3-EHUV>]; see also Brief for Screen Actors Guild, Inc. et al. as Amici Curiae Supporting Appellee at 2, in *In re NCAA*, 724 F.3d 1268 (No. 10-15387) (considering the allowance of digital avatars in video games potentially "ruinous to a performers' career and financial interests");

ceased performers are going on tour.<sup>75</sup> If these recreated performances are produced without using captured footage of previous performances, however, plaintiffs should be barred from bringing right of performance claims, even though they may well be able to bring right of commercial value claims.

Insofar as a performance is captured in a fixed form, the question arises whether state protections for a right of performance are preempted by the Copyright Act.<sup>76</sup> This is the one context in which courts have distinguished between the invocation of state law to protect an “image or likeness” and its use to protect a “copyrightable dramatic or musical performance.”<sup>77</sup> To the extent that any claimed right of performance extends no further than the very “performance” that constitutes “copyrighted material,” such a claim by a performer is likely to be preempted, at least with respect to a performance that has been

Jennifer E. Rothman, *The Right of Publicity: Privacy Reimagined for New York?*, 36 CARDOZO ARTS & ENT. L.J. 573, 575-76, 598 (2018) (discussing SAG-AFTRA’s role in expanding and advocating for broader rights of publicity).

75. See, e.g., Andrew Dalton, *In the Spirit of Whitney: Houston Hologram Tour Set to Begin*, SEATTLE TIMES (Feb. 19, 2020, 12:20 AM), <https://www.seattletimes.com/nation-world/in-the-spirit-of-whitney-houston-hologram-tour-set-to-begin> [<https://perma.cc/S2A5-U7KF>]; Eriq Gardner, *Hollywood Hologram Wars: Vicious Legal Feud Behind Virtual Mariah, Marilyn and Mick*, HOLLYWOOD REP. (May 28, 2015, 9:00 AM PDT), <https://www.hollywoodreporter.com/thr-esq/hollywood-hologram-wars-vicious-legal-798401> [<https://perma.cc/ER4E-LU9B>]; Stephen Humphries, *Buddy Holly’s Back . . . as a Touring Hologram. But Is It ‘Live’ Music?*, CHRISTIAN SCI. MONITOR (Dec. 4, 2019), <https://www.csmonitor.com/The-Culture/Music/2019/1204/Buddy-Holly-s-back-as-a-touring-hologram.-But-is-it-live-music> [<https://perma.cc/9NL9-YSVE>]; Gregory Zinman, *Going ‘Full Tupac’*, ATLANTIC (Aug. 26, 2016), <https://www.theatlantic.com/science/archive/2016/08/help-us-tupac-youre-our-only-hope/497435> [<https://perma.cc/RZV2-HG9W>].
76. The lack of clarity about what is meant by the Copyright Act’s explicit preemption provision, 17 U.S.C. § 301 (2018), has led to conflicts in evaluating copyright-preemption defenses, particularly in the context of right of publicity cases. See ROTHMAN, *supra* note 1, at 160-64, 168-75; Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 208, 225-36 (2002) [hereinafter Rothman, *Copyright Preemption*] (advocating for a Supremacy Clause-based implied preemption analysis to address the confusion); Jennifer E. Rothman, *The Other Side of Garcia: The Right of Publicity and Copyright Preemption*, 39 COLUM. J.L. & ARTS 441, 445-47 (2016).
77. *Fleet v. CBS, Inc.*, 58 Cal. Rptr. 2d 645, 651 (Ct. App. 1996) (emphasis added); see also *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003-05 (9th Cir. 2001) (holding that federal copyright preemption did not apply to a right of publicity claim arising out of the use of a photograph); *No Doubt v. Activision Publ’g, Inc.*, 702 F. Supp. 2d 1139, 1143 (C.D. Cal. 2010) (contrasting plaintiff’s claim “based on her voice alone” with her preempted claim based “on the sampling of her performance”).

Seen through the lens of copyright, it is clear that a “person’s likeness—her persona—is not authored and it is not fixed.” *Toney v. L’Oreal USA, Inc.*, 406 F.3d 905, 910 (7th Cir. 2005). It is also clear that a “voice is not copyrightable. The sounds are not ‘fixed.’” *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) (quoting 17 U.S.C. § 102(a) (1984)); see ROTHMAN, *supra* note 1, at 163-64. Fixed performances, by contrast, are copyrightable.

lawfully captured and then is used or licensed by the copyright holder.<sup>78</sup> But if a performance is fixed *without* permission (as it was in *Zacchini*), the copyright preemption defense should fail when asserted by the maker of the recording.<sup>79</sup>

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78. See *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1143 (9th Cir. 2006); see also *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 677 n.26 (7th Cir. 1986) (distinguishing “performance” cases in which the “performance . . . has been reduced to tangible form” from those involving a “public figure’s persona” for purposes of preemption analysis). One “who does not hold the copyright in a performance captured on film cannot prevent the one who does from exploiting it by resort to state law.” *Fleet*, 58 Cal. Rptr. 2d at 652-53. In a recent decision, the Second Circuit held that a right of publicity action that in effect asserted only a right of performance was subject to implied preemption under the Copyright Act. The court suggested that right of publicity actions which asserted other interests, like those protected by the right of commercial value or the right of dignity, might, in contrast, *not* be preempted. See *Jackson v. Roberts (In re Jackson)*, No. 19-480, 2020 WL 4810706 (2d Cir. Aug. 19, 2020).

We note that the issue of copyright preemption usually arises when plaintiffs try to enforce their rights of performance against a lawful copyright holder or licensee. But some cases have also considered the question in a different context, one in which the plaintiff holds both the copyright in the performance and the relevant right of performance. Such a situation arose in the Ninth Circuit case *Jules Jordan Video, Inc. v. 144942 Canada, Inc.*, 617 F.3d 1146 (9th Cir. 2010). The plaintiffs were an adult entertainer and the company he owned which held the copyrights to the entertainer’s performances. *Id.* at 1149. His company sued for both copyright infringement and a violation of his right of publicity when the defendant copied and distributed the entertainer’s videos. *Id.* at 1149-50. Although the Ninth Circuit held that the right of publicity claim was preempted by the Copyright Act, *id.* at 1152-55, we see no reason why the performance claim should be preempted when it is not in conflict with the Copyright Act and works toward protecting related or harmonious interests, as in *Jules Jordan Video*. See Rothman, *Copyright Preemption*, *supra* note 76, at 241-43; see also *Michaels v. Internet Entm't Grp.*, 5 F. Supp. 2d 823, 836-37 (C.D. Cal. 1998) (holding that plaintiffs’ allegations that defendants used “their names, likenesses and identities on radio, television and the Internet” to advertise the release of a tape were “unrelated to the elements of copyright infringement” in plaintiffs’ allegations).

79. Copyright law requires any fixation to be “by or under the authority of the author” before copyright attaches. 17 U.S.C. § 101 (2018); see also 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03[B][3] (Matthew Bender, rev. ed. 2020) (expressing skepticism that performances “*per se*” are works “subject to copyright protection”).

Difficult questions can arise if a copyright holder exercises its right under copyright law to prepare a derivative work by using copyrighted digital material to create a new performance, and the recreated performance then exceeds the uses agreed to by the person whose initial performance was captured with consent. See, e.g., ROTHMAN, *supra* note 1, at 170-78 (diagnosing the differential treatment of copyright preemption in the context of derivative works). The Tom Cruise hypothetical in which his copyrighted performance is reused in a sequel, see *supra* note 73 and accompanying text, would raise such an issue because the movie studio likely holds the copyright to the original material. Cf. *Lewis v. Activision Blizzard, Inc.*, No. C 12-1096 CW, 2012 WL 5199505, at \*2-4 (N.D. Cal. Oct. 25, 2012), *aff'd*, 634 F. App'x 182 (9th Cir. 2015) (dismissing a publicity claim on the basis of preemption when an employee’s voice performance was reused in a video game without additional compensation or permission); *Ahn v. Midway Mfg. Co.*, 965 F. Supp. 1134, 1137 (N.D. Ill. 1997) (holding

### B. *The Right of Commercial Value*

A second interest frequently asserted in the context of right of publicity claims is that of protecting the market value of a person's identity. We postulate the *right of commercial value* as an ideal tort oriented toward this interest. In contrast to the right of performance, the right of commercial value is designed to protect the market value of a person's *identity* separate and apart from any particular *performance* produced by that person.<sup>80</sup>

The protection of the commercial value of a person's identity is what some commentators regard as the essential purpose of the right of publicity.<sup>81</sup> The *Restatement (Third) of Unfair Competition* defines the right of publicity as preventing the appropriation of the "*commercial value* of a person's identity," and it describes the right as "secur[ing] for plaintiffs the *commercial value* of their fame."<sup>82</sup> Many scholars have highlighted this commercial aspect of the right of

that martial artists' right of publicity claims are preempted when their performances were reused in new video games).

In addition to preempting some right of performance claims brought against the copyright holders and licensees of consensually recorded performances, copyright might also preempt claims that obstruct copyright's "negative spaces—the places copyright law expressly leaves free from ownership or enforcement." ROTHMAN, *supra* note 1, at 177; *see also id.* at 178 (further elaborating on these "negative spaces").

80. Although the term "commercial" means many different things across state publicity laws, *see* Rothman, *supra* note 31, at 1950-55, 1959-65, we use the term here to indicate the monetary value that the use of a person's identity can command in the marketplace.
81. Such commercial value claims were present from the inception of the appropriation tort. ROTHMAN, *supra* note 1, at 30-35 & nn.1, 8-10 (using archival research to document that "[w]hen the right of privacy was adopted, it protected both private and public figures alike, including those with commercially valuable identities who actively sought out publicity and promoted themselves"); *see, e.g.*, Complaint, Case on Appeal at 5-9, *Loftus v. Greenwich Lithographing*, 182 N.Y.S. 428 (1920); Complaint, Case on Appeal at 4-9, *Redmond v. Columbia Pictures*, 1 N.Y.S. 2d 643 (App. Div. 1938) (No.859).
82. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (AM. LAW INST. 1995) (emphasis added). Although the *Restatement (Third)* observes that the right of publicity encompasses both personality-based and market-based interests, it concludes that the right has an "emphasis on commercial interests." *Id.* Some states require plaintiffs to demonstrate that a defendant's unauthorized use be for a "commercial or advertising purpose," FLA. STAT. § 540.08 (2019), for "commercial advantage," *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003), "for advertising purposes, or for the purposes of trade," N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2019), or in "products, merchandise, or goods, or for the purpose of advertising or selling, or soliciting," CAL. CIV. CODE § 3344 (West 2020). Notably, section 652C of the *Restatement (Second) of Torts* does not limit appropriation claims to those involving the appropriation of a person's commercial value. RESTATEMENT (SECOND) OF TORTS § 652C cmt. c (AM. LAW INST. 1977). Many state laws also do not require such a showing. *See, e.g.*, *Stewart v. Rolling Stone LLC*, 105 Cal. Rptr. 3d 98, 111 (Ct. App. 2010) (noting that California's common-law right of publicity tort allows liability when the use is

publicity. Richard Posner and William Landes describe the right of publicity as a right “valuable mainly to celebrities” and focus solely on market-based justifications for the tort’s existence.<sup>83</sup> J.T. McCarthy, the author of the authoritative treatise on the right of publicity, has defined the right as an “intellectual property right whose infringement is a commercial tort of unfair competition” that provides a right to “control the commercial use of identity . . . and recover in court damages and the *commercial value* of an unpermitted taking.”<sup>84</sup>

Right of commercial value claims are often brought by celebrities because the misappropriation of their identities is more likely to produce measurable market harms. Well-known individuals can suffer injuries that range from lost job opportunities and endorsement deals to reduced salaries, loss of revenue from licensing and merchandising contracts, and overall diminishment of goodwill (understood as the public’s positive associations with that individual).<sup>85</sup> As we shall see, however, ordinary persons who are entirely unknown to the general public can sometimes also bring right of commercial value claims.

While the right of performance is intended to encourage the creation of *performances*, incentivizing persons to invest their *identity* with commercial value is a fundamentally different and less attractive justification for a tort. Performances possess intrinsic value; they add to our culture. They are potentially edifying events in the world that might not exist without the protections of copyright and the right of performance. In contrast, a commercially valuable identity is not a distinct event. It is a form of life, most commonly designated by the idea of celebrity. There is no convincing reason for the law to attribute intrinsic value to the creation of celebrity personalities.<sup>86</sup> Society has no reason to treasure people being famous for the sake of being famous. And even if society were de-

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“to defendant’s advantage, commercially or otherwise” (quoting *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 349 (Ct. App. 1983)); see also Rothman, *supra* note 31, at 1950-55, 1959-64 (discussing the differing treatment of commerciality in state right of publicity laws).

83. LANDES & POSNER, *supra* note 68, at 64, 222-28; see Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 634 (2003).
84. J. THOMAS MCCARTHY, 1 THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2018 ed.) (emphasis added). Roger Schechter recently joined McCarthy as an author of the treatise, but this phrase from the treatise long predates the 2019 edition that Schechter joined.
85. See LANDES & POSNER, *supra* note 68, at 222-28; ROTHMAN, *supra* note 1, at 110-11; Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 103-04 (1994).
86. In fact, incentivizing fame might skew behavior toward notoriety and away from more meaningful contributions to society. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 215-19 (1993).

terminated to encourage such stardom, it is doubtful that a right of commercial value would significantly incentivize people to become celebrities.<sup>87</sup>

It has sometimes been said, therefore, that the right of commercial value rests instead on the jurisprudential premise that persons simply *own* the commercial value of their identity. The Missouri Court of Appeals, for example, observed in 1911:

One may have peculiarity of appearance, and if it is to be made a matter of merchandise, why should it not be for his benefit? It is a right which he may wish to exercise for his own profit, and why may he not restrain another who is using it for gain? If there is value in it, sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?<sup>88</sup>

This justification, which sounds in intellectual property, is extraordinarily far-reaching. It is quite common for persons to profit commercially from the identity of celebrities. Authors of biographies, gossip magazines, movie databases, and even some creators of fan pages on social media, all derive profit from the identity of celebrities. It would be overreaching to interpret a property right so broadly as to prevent these ordinary and legitimate uses of celebrity identities.

87. As Judge Tacha once wrote for the Tenth Circuit,

[t]he [Supreme] Court's incentive rationale is obviously more compelling in a right of performance case than in a more typical right of publicity case involving the appropriation of a celebrity's identity. . . .

. . . [T]he additional inducement for achievement produced by publicity rights are often inconsequential because most celebrities with valuable commercial identities are already handsomely compensated.

Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 973-74 (10th Cir. 1996); see also C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1098 (E.D. Mo. 2006), *aff'd*, 505 F.3d 818 (8th Cir. 2007) (noting its skepticism of the incentive-rationale justification for publicity rights in instances that do not involve "actual performances"); LANDES & POSNER, *supra* note 68, at 223 (describing any incentive effect as likely "minimal" or "incremental"). As Richard Posner has observed,

[a] person is unlikely to invest less than he would otherwise do in becoming a movie star or other type of celebrity merely because he'll be unable to appropriate the entire income from the franchising of his name and likeness; there is free riding but not the type that threatens to kill the goose that lays the golden eggs.

Posner, *supra* note 83, at 634. For further discussion and challenges to the incentive-rationale rubric for right of publicity laws, see ROTHMAN, *supra* note 1, at 99-102; Madow, *supra* note 86, at 215-19; and Jennifer E. Rothman, *The Right of Publicity's Intellectual Property Turn*, 42 COLUM. J.L. & ARTS 277, 313 (2019) (questioning the applicability of the incentive rationale outside of performance-based cases like *Zacchini*).

88. *Munden v. Harris*, 134 S.W. 1076, 1078 (Mo. Ct. App. 1911).



In practice, courts recognize the right of commercial value in far more discrete and nuanced ways than simply by postulating an abstract property right in identity. We discern three distinct contexts in which courts are likely to protect a right of commercial value. Each ultimately depends upon an account of what it means to act fairly in the commercial marketplace.<sup>89</sup>

### 1. Confusion

The first concerns uses of a plaintiff's identity that create *confusion* about the plaintiff's participation or sponsorship. An example of such a claim is *Abdul-Jabbar v. General Motors Corp.*,<sup>90</sup> in which the famous basketball star Kareem Abdul-Jabbar brought a right of publicity claim against General Motors for using his name in an advertisement for Oldsmobile cars. Abdul-Jabbar's primary complaint was that viewers of the commercial would think that he had agreed to have his name used in the advertisement and endorsed Oldsmobile cars. It is easy to see how such confusion might damage the potential commercial value of a plaintiff's identity and interfere with a plaintiff's own endorsement or career opportunities.

One need not be a celebrity like Abdul-Jabbar to have such confusing uses interfere with one's commercial pursuits. For example, Christine Dancel and others brought a recent class-action lawsuit against Groupon for scraping their Instagram accounts and using their likenesses and names without permission.<sup>91</sup> The complaint alleges that Groupon did this to "intentionally create[] the false impression that the consumers appearing in the photos are endorsing, or have at least purchased, the [Groupon] Deal itself."<sup>92</sup> The complaint contended that Groupon did this intentionally to profit from the specific Instagram users' "social influence."<sup>93</sup> In effect, the allegation was that Groupon was

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89. Cf. Dogan & Lemley, *supra* note 63, at 1190-1208 (suggesting that trademark law provides a useful analogy for understanding—and limiting—the right of publicity, and analyzing the right of publicity using the trademark frameworks of confusion, dilution, cybersquatting, and merchandising).

90. 85 F.3d 407, 412, 415-16 (9th Cir. 1996) (concluding that although General Motors Corporation used Abdul-Jabbar's previous name, Lew Alcindor, consumers would recognize that name as pointing to Abdul-Jabbar).

91. *Dancel v. Groupon, Inc.*, 940 F.3d 381 (7th Cir. 2019). The Seventh Circuit recently affirmed the district court's order denying class certification to Dancel and others. *Dancel v. Groupon, Inc.*, 949 F.3d 999, 1010 (7th Cir. 2019).

92. Class Action Complaint & Demand for Jury Trial at 7, *Dancel v. Groupon, Inc.*, No. 2016CH01716 (Ill. Cir. Ct. Feb. 5, 2016) [hereinafter *Dancel Complaint*].

93. *Id.* at 6; *see id.* at 6-7.

interfering with the opportunities of Dancel or other members of the class to monetize their status as potential social media influencers.

The aspect of the right of commercial value that is based on confusion is analogous to trademark infringement and false endorsement laws that protect against confusion as to the source or sponsorship of products and services.<sup>94</sup> The right of commercial value fills potential gaps in these laws. Most ordinary people will not be able to establish trademark rights in their names and likenesses, and they may be disqualified from bringing false endorsement claims because they lack established commercial identities. Even some public figures who have not commercialized their identities may struggle to establish sufficient commercial interests to meet the standing requirements of a false endorsement claim.<sup>95</sup>

## 2. *Diminishment*

A second basis for liability is the improper use of a plaintiff's identity that threatens to dilute or lessen its existing market value. We use the label *diminishment* to signify this variation of the right of commercial value. An example of such a claim can be seen in late-night talk show host Johnny Carson's lawsuit against "Here's Johnny Portable Toilets," a portable toilet company that used the cheeky slogan "The World's Foremost Comedian."<sup>96</sup> The Sixth Circuit

94. See 15 U.S.C. §§ 1114, 1125(a) (2018); see also *Parks v. LaFace Records*, 329 F.3d 437, 442 (6th Cir. 2003) (allowing a false advertising claim to proceed against a record label for the use of Rosa Parks's name as a song title); *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 632-33 (S.D.N.Y. 1985) (finding a Lanham Act violation and granting injunctive relief in the context of an advertisement that used a Woody Allen look-alike).

95. False endorsement claims brought under the Federal Lanham Act do not require the establishment of trademark rights, but they do require a demonstration of an economic interest sufficient to establish standing under the statute. See, e.g., *Parks*, 329 F.3d at 446-47 (concluding that Rosa Parks could bring a Lanham Act claim because she had established a "property interest in her name" as a result of her commercial activities and particularly because of her involvement in a tribute album); *Stayart v. Yahoo! Inc.*, 651 F. Supp. 2d 873, 881 (E.D. Wis. 2009) (rejecting a false endorsement claim on the basis of lack of standing because the plaintiff—an allegedly well-known animal rights advocate and business person—had "not engaged in the commercial marketing of her identity," and did "not allege an intent to commercialize" her identity); cf. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131-32 (2014) (holding that to bring a suit for false advertising under the Lanham Act, a plaintiff must establish "a commercial interest in reputation or sales"). But see *Hauf v. Life Extension Found.*, 547 F. Supp. 2d 771, 776-77 (W.D. Mich. 2008) (concluding that one need not be a "celebrity" to bring a false endorsement claim, and allowing a cancer patient's false endorsement claim to proceed if his identity was "distinctiv[e]" and he had a "degree of recognition" or "notoriety among cancer patients or advocates of alternative medicine that is strong enough to have commercial value within the identifiable group").

96. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 833 (6th Cir. 1983).

held that even though consumers were not likely to be confused as to Carson's sponsorship of the business, Carson's "protected pecuniary interest in the commercial exploitation of his identity" was nevertheless violated.<sup>97</sup> The court was concerned that the defendant's offending use could potentially tarnish the value of Carson's brand by associating him with porta potties, and that the proliferation of unauthorized uses might diminish the value of Carson's brand when it came to obtaining compensation for sanctioned endorsements.<sup>98</sup>

Diminishment serves an analogous function to trademark dilution law. As the Supreme Court has observed, liability for dilution does not turn on likely confusion.<sup>99</sup> Instead, dilution laws seek to "preserv[e] . . . the uniqueness of a trademark."<sup>100</sup> They are "intended 'to protect famous trademarks from subsequent uses that blur the distinctiveness of the mark or tarnish or disparage it.'"<sup>101</sup> We recognize that some scholars have expressed concern about both the legitimacy of dilution law's goals and its effectiveness at achieving those goals.<sup>102</sup> Our point, however, is that the same impulses that have led courts and legislatures to recognize dilution claims in the context of trademark law operate with equal force in the context of the right of publicity.<sup>103</sup>

97. *Id.* at 835.

98. *Id.*

99. *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 429 (2003), *superseded in part by statute*, Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730 (replacing the Court's "actual dilution" requirement with a "likely dilution" requirement).

100. Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 831 (1927).

101. *Moseley*, 537 U.S. at 431 (quoting 141 CONG. REC. 38,559-61 (1995) (statement of Sen. Hatch)); see also 15 U.S.C. § 1125(c) (2018) (providing statutory definitions of "blurring" and "tarnishment"); *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 736 F.3d 198, 205-07 (2d Cir. 2013) (providing an overview of federal trademark dilution law leading up to the passage of the Federal Trademark Dilution Revision Act).

102. See, e.g., Barton Beebe, *The Continuing Debacle of U.S. Antidilution Law: Evidence from the First Year of Trademark Dilution Revision Act Case Law*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 449, 449 (2007); Barton Beebe, Roy Germano, Christopher Jon Sprigman & Joel H. Steckel, *Testing for Trademark Dilution in Court and the Lab*, 86 U. CHI. L. REV. 611, 612 (2019); Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789, 795 (1997); Clarisa Long, *Dilution*, 106 COLUM. L. REV. 1029, 1029 (2006); Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 507 (2008).

103. Cf. Barton Beebe, *What Trademark Law Is Learning from the Right of Publicity*, 42 COLUM. J.L. & ARTS 389, 394-95 (2019) (drawing parallels between antidilution and anti-tarnishment protections and the right of publicity). *But see* Dogan & Lemley, *supra* note 63, at 1198-1200 (questioning whether blurring and tarnishment of "personal names" is likely "to be a common occurrence"). To the extent that empirical challenges to trademark dilution are merited, they likely have equal force in the context of diminishment-based right of publicity claims. See *supra* note 102 and accompanying text.

Diminishment claims also serve a gap-filling function. They can be pressed without requiring a plaintiff to possess her own established trademark and without requiring that the defendant's use be as a designation for products or services, as is now required under federal trademark dilution law.<sup>104</sup> In the context of the right of commercial value, diminishment can occur in two ways that are analogous to trademark dilution law. The first is by "overexpos[ing]" a celebrity in a way that likely diminishes the market value of her identity, and the second is by negatively depicting a celebrity in a way that tarnishes her identity and thereby diminishes its commercial value.<sup>105</sup>

We must be careful in our formulation of diminishment actions, however, because many perfectly ordinary uses of a famous plaintiff's identity will dilute or lessen its market value. Every tabloid exposé threatens to diminish the commercial value of a celebrity's identity, as does every negative review. We think it plain that the right of commercial value does not and should not reach harms of this kind. It makes the most sense to confine diminishment claims to those that occur in a purely commercial context involving the sale, marketing, or advertising of nonexpressive products or services.

This is exactly what Congress has done in trademark dilution law. Federal dilution claims cannot be brought for "noncommercial uses" of a mark, which is commonly interpreted as limiting dilution claims to those that occur in commercial speech.<sup>106</sup> Diminishment is accordingly best understood as redressing commercial harms caused by unfair competition, rather than as endowing persons with an unqualified property right in their identity.

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104. See 15 U.S.C. § 1125(c) (2018). We note that prior to the Trademark Dilution Revision Act of 2006 it was not clear that federal dilution claims required use by the defendant as a mark. Several state laws have recognized dilution claims even when the use is not as a mark. See, e.g., *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 41 (2d Cir. 1994); *Pillsbury Co. v. Milky Way Prods., Inc.*, No. C78-679A, 1981 WL 1402, at \*14 (N.D. Ga. Dec. 24, 1981); *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1191, 1193 (E.D.N.Y. 1972).

105. See LANDES & POSNER, *supra* note 68, at 223-27. Some have challenged the likelihood that such overexposure or tarnishment will actually occur and damage a celebrity's market value. See, e.g., Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 142-48 & nn.67-71 (2004) (questioning the "overuse" justifications, among others, for the right of publicity).

106. 15 U.S.C. § 1125(c) (2018); *Radiance Found. v. NAACP*, 786 F.3d 316, 331-32 (4th Cir. 2015); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002); H.R. REP. NO. 104-374, at 8 (1995), as reprinted in 1996 U.S.C.C.A.N. 1029, 1035 (indicating that the dilution provision only applies to "commercial speech" and that it is not intended to limit "consumer product reviews," news, movies, or television); 141 CONG. REC. H14,317-18 (daily ed. Dec. 12, 1995) (statement of Rep. Moorhead). *But see* *Dall. Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 202-03 (2d Cir. 1979) (applying dilution law to noncommercial speech); *Pillsbury Co.*, 1981 WL 1402, at \*14 (same); *Coca-Cola Co.*, 346 F. Supp. at 1188, 1193 (same). For a more detailed discussion of this conflict, see Rothman, *supra* note 31, at 1942-44.

In contrast to *confusion*, which can injure the commercial value of a person's identity whether or not they are famous, the harm of *diminishment* applies primarily (perhaps exclusively) to those plaintiffs whose identities already possess goodwill in the market. The commercial value of such identities may be distinctly vulnerable to damage through overexposure and tarnishment. We accordingly hypothesize that a plaintiff must establish that her identity is widely recognized and invested with significant market value before being authorized to bring a claim for diminishment. This would be analogous to dilution law's requirement that a mark be "famous" before a plaintiff can bring a claim.<sup>107</sup> To prove a diminishment claim, plaintiffs would also need to show that the defendant's use of their identity is likely to (or actually did) cause diminishment to that value.<sup>108</sup>

### 3. *Unjust Enrichment*

In addition to confusion and diminishment, right of commercial value claims also invoke a third theory of liability. Courts frequently say that a defendant was unjustly enriched by "unfairly" appropriating the economic value of a plaintiff's identity.<sup>109</sup> They mean by this that a defendant has commercially employed a plaintiff's identity without having paid the market rate to do so. We call this prong of the right of commercial value *unjust enrichment*.

This branch of the right of commercial value requires neither a showing of confusion nor diminishment. A defendant who without consent or compensation uses the identity of another in the context of advertising or marketing

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107. See 15 U.S.C. § 1125(c) (2018); Dogan & Lemley, *supra* note 63, at 1199.

108. We note that the federal dilution provision of the Lanham Act initially was held to require a plaintiff to demonstrate that a defendant's use *actually* diluted the plaintiff's mark, but the statute has now been amended to allow for liability on the basis of a lesser showing that the use is "likely to cause dilution." 15 U.S.C. § 1125(c)(1) (2018) (emphasis added); *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003), *superseded in part by statute*, Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730. We think that the standards of either likely or actual diminishment are equally likely to pass constitutional muster in the context of commercial speech. See *infra* Section III.B.2. We take no position on which standard states should adopt as a matter of substantive law.

109. *McFarland v. Miller*, 14 F.3d 912, 918 (3d Cir. 1994) ("The 'right of publicity' 'signif[ies] the right of an individual, especially a public figure or a celebrity, to control the commercial value and exploitation of his name and picture or likeness and to prevent others from unfairly appropriating this value for commercial benefit.'" (quoting *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1353 (D.N.J. 1981))); see also *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728-29 (S.D.N.Y. 1978) ("[T]he interest which underlies protecting the right of publicity 'is the straightforword one of preventing unjust enrichment by the theft of good will.'" (quoting Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966))).

goods and services effectively appropriates whatever economic value he would otherwise have had to pay for the use of that identity. The defendant accordingly owes the plaintiff a remedy sounding in restitution.<sup>110</sup> Unjust enrichment does not apply outside of commercial contexts because we do not generally regard it as “unfair” for persons to refer to matters of common knowledge, which includes the identity of persons.

*Fraleigh v. Facebook, Inc.*<sup>111</sup> is a good example of an action for unjust enrichment. The plaintiffs in *Fraleigh* were all ordinary folk without otherwise commercially valuable identities. Facebook facilitated the use of plaintiffs’ identities to advertise products without their consent. The plaintiffs successfully alleged “that their individual, personalized endorsement of products, services, and brands to their friends and acquaintances has concrete, provable value in the economy at large, which can be measured by the additional profit Facebook earns from selling Sponsored Stories compared to its sale of regular advertisements.”<sup>112</sup> The plaintiffs claimed that Facebook had unfairly appropriated that value.

Unjust enrichment claims provide a remedy to ordinary people whose identities have been unfairly appropriated in the marketplace. Just as diminishment claims prevent commercial advertisers from unfairly appropriating the identities of those whose names and images possess market value, so unjust enrichment claims offer legal redress to persons who are otherwise unknown but whose identities have been unfairly appropriated by commercial advertisers. In today’s social media age, “anonymous” individuals can sometimes have great value to advertisers when used to appeal to an online circle of “friends.”<sup>113</sup>

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110. See, e.g., *Dancel v. Groupon, Inc.*, 940 F.3d 381 (7th Cir. 2019); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013); *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010); see also Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD. 449, 467 (1992) (suggesting that restitution is an appropriate remedy for unauthorized uses of a person’s identity). Some of the most controversial right of publicity cases have rested solely on unjust enrichment. See ROTHMAN, *supra* note 1, at 156-57; Stacey L. Dogan, *Haelan Laboratories v. Topps Chewing Gum: Publicity as a Legal Right*, in *INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP* 17, 17-18 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., 2014) (observing that right of publicity claims went off the rails when courts “abandoned a harms-based approach to celebrity publicity rights in favor of an approach centered on unjust enrichment”).

111. 830 F. Supp. 2d 785 (N.D. Cal. 2011).

112. *Id.* at 799.

113. See *id.*; *Hauf v. Life Extension Found.*, 547 F. Supp. 2d 771, 776-77 (W.D. Mich. 2008); *Dancel Complaint*, *supra* note 92, at 6-7; see also JULIE E. COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* 48, 71 (2019) (observing that “[t]he data flows extracted from people play an increasingly important role as raw material in the political economy of informational capitalism” and these “data flows extracted from

The right of commercial value has caused endless confusion because it is so easily conflated with a generalized property right in the commercial value of identity. But any such account of the right would immediately produce intolerable results, sweeping into its ambit uncontroversially legitimate uses of others' identities. We therefore propose to facilitate more precise jurisprudential and constitutional analysis by conceiving the tort as instead addressed to market-based damages caused by the three specific variants we identify—*confusion*, *diminishment*, and *unjust enrichment*.

### C. *The Right of Control*

We have resisted grounding the *right of commercial value* on a general property right to one's identity because it would be incompatible with the ways that information is actually used in our society. The right of commercial value is too prevalent in litigation and legislation to risk such obvious conceptual chaos. A fair reading of the law, however, suggests that there are nevertheless variants of the right of publicity that do in fact ultimately seek to invest persons with a general right to control how others use their identities. We therefore isolate this interest in an ideal tort, which we call the *right of control*.

The right of control is frequently expressed through the metaphor of property. Persons are said to own their own identity and accordingly are authorized to control its use by others. If we press exactly why persons should be endowed with this property right, the answer, most especially in modern times, is that persons should be able to control their identity to the extent necessary for the full development of their own personhood. We therefore theorize the right of control as oriented toward the protection of the autonomy of personality rather than market damages.

One can discern assertions of the right of control in the origins of privacy and publicity law in the United States. Starting in the late 1800s, the development of easy-to-use portable cameras made it possible to capture the images of persons as they appeared in public. Technological improvements enabled these images to be used in advertisements, on products, and in magazines and newspapers. These changes inspired calls for a right of control that would empower persons to govern the use of their images by others.<sup>114</sup>

In 1894, for example, a district court in Massachusetts concluded that a private individual has “the *right to control* the reproduction of his picture or photo-

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people—and, by extension, people themselves” are being commodified and monetized to produce wealth for third parties, including for various social media platforms).

114. ROTHMAN, *supra* note 1, at 11–29; *The Right of Privacy*, N.Y. TIMES, Aug. 23, 1902, at 8.

graph.”<sup>115</sup> A bill was introduced into the New York legislature in 1897 making it a crime to “print, publish, or circulate in any newspaper, paper, periodical, magazine, pamphlet, or book any portrait or alleged portrait of any person or individual living in this State . . . without having first obtained his or her written consent.”<sup>116</sup> Two years later, California passed such a portraiture ban.<sup>117</sup> Articles and essays of this era sometimes justified the right by theorizing that persons possessed a “natural copyright” in their own features.<sup>118</sup>

Concern over the reproduction of photographic imagery in part reflected contemporary sentiments that it was a “humiliation and mortification” to have “one’s picture . . . used by another,” “reproduced and exhibited anywhere.”<sup>119</sup> That these uses of photographs were experienced as “offensive[.]” is a sign that they were also understood as disrespectful and inconsistent with individual

115. *Corliss v. E.W. Walker Co.*, 64 F. 280, 281 (D. Mass. 1894) (emphasis added). Although the court recognized such a right, at least as to private individuals, it rejected the plaintiff’s claim because he was a deceased public figure with respect to whom the use of a photograph in a “biographical sketch” was permissible. *Id.* at 283.

116. *New York Legislature*, N.Y. TIMES, Mar. 26, 1897, at 4; see also ROTHMAN, *supra* note 1, at 16-20 (documenting the widespread “[c]alls for [r]edress” in light of the “technological and cultural developments” of the late nineteenth century).

117. Act of Feb. 23, 1899, ch. 29, 1899 Cal. Stat. 28 (codified at CAL. PENAL CODE § 258 (Deering 1915)) (repealed 1991); see ROTHMAN, *supra* note 1, at 19, 191 n.17.

118. J.A.J., *The Legal Relations of Photographs*, 17 AM. L. REG. 1, 8 (1869); see also *Portrait Right*, 12 WASH. L. REP. 353, 353 (1884) (considering possible solutions to unauthorized uses of a person’s photograph, including use of analogies to “literary property”); *The Right to Privacy*, 6 GREEN BAG 498, 499 (1894) (considering whether there is “a right of property in one’s personal appearance that entitles the person to prevent the publication of a photograph”); cf. *Current Topics*, 24 SOLIC. J. 1, 1-2 (1879) (suggesting that as a matter of copyright law the sitter (or other patron) should own the photograph if it was “made or executed for or on behalf” of them for “good and valuable consideration”). In such contexts, the analogy to copyright cannot be to a property right designed to create incentives to produce independent works or to reward an author’s efforts, as the Court theorized in *Zacchini*, because persons do not produce their distinctive “features” in response to incentives or through labor. Instead, a person’s features evolve naturally as an inescapable dimension of their identity. The analogy to copyright thus is likely based on what Margaret Jane Radin once described as “property for personhood.” Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 961 (1982). For a discussion of personality-based theories of copyright law, see Balganesch, *supra* note 64 *passim*, and Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330-65 (1988). See also MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993) (documenting the longstanding role of author- and “personality”-based justifications for copyright law); Seana Valentine Shiffrin, *Intellectual Property*, in 1 A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 653, 660 (Robert Goodin, Philip Pettit & Thomas Pogge eds., 2d ed. 2007) (describing personality-based theories of intellectual property).

119. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 80 (Ga. 1905).



dignity.<sup>120</sup> We shall discuss this discrete interest in the next Section, in which we examine the *right of dignity*. For the moment, however, we stress that initial concerns over photographic imagery also contained an analytically distinct strain of reasoning, which was well articulated by the New Jersey Court of Chancery in 1907: “[I]t is difficult to understand why the peculiar cast of one’s features is not . . . one’s property.”<sup>121</sup>

In the influential words of Judge John Clinton Gray, dissenting in *Roberson v. Rochester Folding Box Co.*,<sup>122</sup> a “plaintiff has the same property in the right to be protected against the use of her face for defendant’s commercial purposes, as she would have, if they were publishing her literary compositions.”<sup>123</sup> A person’s natural copyright in their image was legally cognizable because an “individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate . . . .”<sup>124</sup>

Why might it be said that law should endow persons with “a property right” in the “exclusive use”<sup>125</sup> of their names and likenesses? Early decisions protecting identity lamented that the misappropriation of names or likenesses impaired personal autonomy. The influential 1905 opinion in *Pavesich v. New England Life Insurance Co.*, for example, forcefully asserted:

The knowledge that one’s features and form are being used [for another’s advertising] . . . brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him; and, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master; and if a man of true instincts, or even of ordinary sensibilities, no one can be more conscious of his enthrallment than he is.<sup>126</sup>

Modern commentators have continued to suggest that “[a]ll individuals have a legitimate interest in autonomous self-definition,” and that “[i]f the overall picture of an individual’s character is made up of the messages conveyed

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120. *The Protection of Privacy*, N.Y. TIMES, Mar. 14, 1897, at 16.

121. *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Eq. 136, 141 (N.J. Ch. 1907).

122. 64 N.E. 442 (N.Y. 1902).

123. *Id.* at 450 (Gray, J., dissenting).

124. *Id.* at 449.

125. RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (AM. LAW INST. 1977).

126. 50 S.E. 68, 80 (Ga. 1905).

by her associational decisions, then unauthorized use of her identity interferes with her autonomy because the third party takes at least partial control over the meaning associated with her.”<sup>127</sup> The underlying thought is that if persons cannot control the use of their identities by others, they will become heteronomous—controlled by others—and lose the freedom necessary to develop fully their own personality.

Comments in the *Restatement (Second) of Torts* can be read to support such a right of control. So, for example, the *Restatement (Second)* asserts that “the right created” is “in the nature of a property right.”<sup>128</sup> The literal words of many state statutes, as well as common-law actions, seem to endow persons with an absolute right to control the use of their names or images by others (sometimes limited to uses in advertising or for purposes of trade), regardless of whether they have suffered any specific cognizable injury. In many states, plaintiffs need neither plead nor prove loss of commercial value, nor restitution of unjust enrichment, nor the impairment of dignity, to obtain both damages and an injunction for unauthorized uses of their identities.<sup>129</sup>

Just as copyright holders can control their works at their pleasure (barring various limitations and defenses), so a right of control would endow plaintiffs with a right to prohibit uses of their identities by others (barring various limitations and defenses). The right of control is therefore powerful and far-reaching. Many cases filed under today’s right of publicity may, if pressed, reveal claims for a variant of this right. Consider the precise interest at stake when lawyers object to being listed in online directories without permission, when Twitter users object to being portrayed in online trading games akin to

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127. Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 231, 282 (2005); see also ROTHMAN, *supra* note 1, at 111 (discussing the right of publicity’s role in protecting individual liberty and dignitary interests); Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 385, 411-30 (1999) (contending that the right of publicity is best understood as a “property right grounded in human autonomy”); Rothman, *supra* note 61, at 219 (concluding that the right of publicity is fundamentally intertwined with one’s personality such that its alienability should be barred or severely limited during one’s lifetime).

128. RESTATEMENT (SECOND) OF TORTS § 652C cmt. a. The *Restatement (Second)* affirms “the interest of the individual in the exclusive use of his own identity.” *Id.*

129. See, e.g., ALA. CODE §§ 6-5-772, 6-5-774 (2020); 765 ILL. COMP. STAT. ANN. 1075/40 (West 2020); N.Y. CIV. RIGHTS LAW § 51 (McKinney 2019); *Ainsworth v. Century Supply Co.*, 693 N.E.2d 510, 512-15 (1998). The inclusion of statutory damages in right of publicity statutes lends itself to the same interpretation. The California right of publicity statute, for example, authorizes statutory damages of \$750 for each violation in the absence of any “actual damages.” CAL. CIV. CODE § 3344(a) (West 2020).

baseball cards, or when historical figures object to being included in video games or movies.<sup>130</sup>

Something like a right of control seems also to underlie the burgeoning worldwide movement to protect data privacy on the basis that there should be a right of “individual control over personal data.”<sup>131</sup> Data privacy is most prominently enshrined in the European Union’s General Data Protection Regulation, which affirms that “[n]atural persons should have control of their own personal data.”<sup>132</sup> Ultimately this concept of control over personal data stems from the influential Census Act Case of the German Federal Constitutional Court, which created “a general right of informational self-determination” protecting “the authority of the individual to decide fundamentally for herself, when and within what limits personal data may be disclosed.”<sup>133</sup> As one commentator has observed, such “informational self-determination follows from human autonomy,” because “in the modern information age, control of information is power.

130. See, e.g., *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016); *Vrdolyak v. Avvo, Inc.*, 206 F. Supp. 3d 1384 (N.D. Ill. 2016); *De Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625 (Ct. App. 2018); *Noriega v. Activision/Blizzard, Inc.*, 42 Media L. Rep. 2740 (Cal. 2014); *Complaint, Parker v. Hey, Inc.*, No. CGC-17-556257 (Cal. Jan. 4, 2017).
131. Orla Lynskey, *Control over Personal Data in a Digital Age: Google Spain v AEPD and Mario Costeja Gonzalez*, 78 MOD. L. REV. 522, 529 (2015) (citations omitted); see also Avner Levin & Patricia Sánchez Abril, *Two Notions of Privacy Online*, 11 VAND. J. ENT. & TECH. L. 1001, 1009 (2009) (discussing the Western emphasis on control as underpinning developments in privacy); Robert C. Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right to Be Forgotten, and the Construction of the Public Sphere*, 67 DUKE L.J. 981, 993–94 (2018) (comparing the respective roles of “control” and “dignity” in the right to be forgotten in data privacy and social life).
132. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 1, 2. Personal data, which include names and likenesses, is a broad concept that encompasses any information “relating to an identified or identifiable natural person.” *Id.* at 33; see also *The OECD Privacy Framework*, ORG. FOR ECON. CO-OPERATION & DEV. 41 (2013), [https://www.oecd.org/sti/ieconomy/oecd\\_privacy\\_framework.pdf](https://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf) [<https://perma.cc/UN8Y-RVNU>] (“Of the OECD [Organisation for Economic Co-operation and Development] Member countries more than one-third have so far enacted one or several laws . . . intended to protect individuals against abuse of data relating to them and to give them the right access to data with a view to checking their accuracy and appropriateness.”); Joel R. Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 STAN. L. REV. 1315, 1326 (2000) (“The most common definition of information privacy is the right of the individual to ‘information self-determination.’” (citations omitted)).
133. Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 1001–02 (quoting Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Dec. 15, 1983, 65 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (42) (Ger.) (guaranteeing individuals the fundamental right to decide for themselves on the disclosure and use of their personal data)).

Thus, control over personal information is the power to control a measure of one's fate. This is indispensable to the free unfolding of personality."<sup>134</sup>

Contemporary efforts to protect data privacy are in part motivated by the oppressive imbalances of power that occur when large organizations, with the capacity to process immense quantities of data, are given unrestricted access to personal information.<sup>135</sup> It is believed that these imbalances "threaten human liberty [because] [t]he more that is known about a person, the easier the person is to control."<sup>136</sup>

Some of these concerns might meaningfully be addressed by endowing persons with a right of control over their own personal information, including their identities. But, of course, such a right of control could also vastly constrict the free circulation of information. Some variant of a right of control, for example, underlies Europe's adoption of a "right to be forgotten," which threatens to remove large stretches of public information from internet searches.<sup>137</sup>

#### D. *The Right of Dignity*

If the *right of control* advances the goal of informational self-determination, the *right of dignity* focuses instead on the integrity of personality. It imagines that identities are formed through processes of socialization, in which existing social attitudes are incorporated into the very structure of the self.<sup>138</sup> Persons who are formed through socialization cannot be characterized as simply autonomous because the very maintenance of their personalities depends upon the attitudes of others.<sup>139</sup> If the value of autonomy strives to promote the *independence* of persons, the value of dignity presupposes and protects their *interdependence*.

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134. Eberle, *supra* note 133, at 1002; *see also* J.C. Buitelaar, *Privacy: Back to the Roots*, 13 GER. L.J. 171, 185 (2012) ("Informational privacy as conceptualized here concerns breaches of the self which take away the key element of self-determination."); Edward J. Eberle, *The Right to Information Self-Determination*, 2001 UTAH L. REV. 965, 974 ("Possession of personal information is the power to influence, if not manipulate, human behavior.").

135. *See* Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1398 (2001). *See generally* COHEN, *supra* note 113 (discussing the "personal data economy"); SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019) (discussing the development of surveillance capitalism and its ability to manipulate human behavior).

136. Eberle, *supra* note 133, at 1001.

137. Post, *supra* note 131 *passim*.

138. *See* Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 475-76 (1997).

139. GEORGE H. MEAD, *MIND, SELF & SOCIETY* 162 (Charles W. Morris ed., 1962) ("A person is a personality because he belongs to a community . . . [O]ne has to be a member of a community to be a self.").

In the world as we experience it, persons are sometimes and in some respects self-fashioning, but they are at other times and in other respects reliant on ongoing intersubjective processes of recognition and validation.<sup>140</sup> The so-called dignitary torts, of which privacy is a prime example, protect persons insofar as we regard them as vulnerable, intersubjective beings who depend upon the respect of others to sustain the integrity of their own personalities. “Our ‘dignity,’” writes Charles Taylor, “is our sense of ourselves as commanding (attitudinal) respect.”<sup>141</sup>

The dignitary torts protect dignity by enforcing “civility rules” that convey the respect we deem necessary for the maintenance of our personality.<sup>142</sup> The dignitary torts imagine individuals as dependent upon a complex web of social norms that sustain their identities as persons worthy of respect. Well-socialized persons experience the violation of civility rules as offensive, demeaning, and humiliating.<sup>143</sup> We postulate the right of dignity as an ideal tort designed to protect the integrity of personality from such mental anguish.

Many contemporary right of publicity lawsuits invoke the right of dignity. The allegations in musician Tom Waits’s lawsuit arising out of the use, in a Doritos commercial, of music and a voice that sounded like his focused in part on the public shame and emotional distress he experienced due to the violation of his strict policy against appearing or singing in advertisements.<sup>144</sup> People who have been arrested have objected to the public posting of their arrest photos on mugshots.com—a website that until recently offered to remove those photos for a fee.<sup>145</sup> Models have objected to being featured in advertisements for strip clubs, claiming that such uses cause them shame and embarrass-

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140. See ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995) (imagining three social domains of constitutional law, one of which—community—is based in shared norms and mores); Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in DEMOCRATIC COMMUNITY: NOMOS XXXV 163 (John W. Chapman & Ian Shapiro eds., 1993) (contrasting community, in which persons are vulnerable, with responsive democracy, in which persons are autonomous).

141. CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY 15 (1989).

142. See Post, *Social Foundations*, *supra* note 30, at 959-68.

143. *Id.*

144. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1103 (9th Cir. 1992) (describing the Doritos commercial as causing Waits “shock, anger, . . . embarrassment,” and “humiliat[ion]”).

145. See, e.g., *Gabiola v. Sarid*, No. 16-cv-02076, 2017 WL 4264000, at \*3 (N.D. Ill. Sept. 26, 2017); Second Amended Complaint at 2-3, 38-40, *Gabiola v. Mugshots.com, LLC*, No. 14-cv-09351 (N.D. Ill. Nov. 20, 2015) (complaining of public shame and embarrassment and loss of employment). Objections to being placed in the equivalent of a “rogues’ gallery” are longstanding. See *Itzkovitch v. Whitaker*, 39 So. 499, 500 (La. 1905) (“Where a person is not guilty, [and] is honest . . . he may obtain an injunction to prevent his photograph from being sent to the rogues’ gallery.”).

ment.<sup>146</sup> Right of publicity lawsuits also have involved objections to the dissemination of intimate photographs and videos of sex acts that have caused plaintiffs embarrassment, shame, and humiliation.<sup>147</sup>

The right of dignity was asserted at the beginning of the twentieth century, when many considered it a “humiliation and mortification” to have one’s image “displayed in places where he would never go to be gazed upon, at times when and under circumstances where if he were personally present the sensibilities of his nature would be severely shocked.”<sup>148</sup> One of the most famous right of publicity cases from the early 1900s involved the use of young Abigail Roberson’s photograph in advertisements for flour.<sup>149</sup> Roberson alleged that these advertisements had “greatly humiliated” her due to “the scoffs and jeers of persons who [had] recognized her face and picture on this advertisement,” and that she had experienced “great distress and suffering, both in body and mind; that she was made sick, and suffered a severe nervous shock, was confined to her bed, and compelled to employ a physician.”<sup>150</sup> In the uproar that followed the denial of Roberson’s claim by the New York Court of Appeals, unauthorized publica-

146. *See, e.g.*, Complaint at 4–8, *Timed Out LLC v. Pajounia*, No. BC599207 (Cal. Super. Ct. Oct. 27, 2015).

147. *See, e.g.*, *Bosley v. WildWetT.com*, 310 F. Supp. 2d 914, 917–18, 933–34 (N.D. Ohio 2004); *Michaels v. Internet Entm’t Grp.*, 5 F. Supp. 2d 823, 828, 838–40 (C.D. Cal. 1998); *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1198–99 (Fla. Dist. Ct. App. 2014); *Bullard v. MRA Holding, LLC*, 740 S.E.2d 622, 624 (Ga. 2013); *see also Doe v. Backpage.com, LLC*, 817 F.3d 12, 22, 24–25 (1st Cir. 2016) (rejecting right of publicity claims by sex-trafficking victims against online classified advertising because the content was posted by third parties). We note that a number of states have begun to pass targeted intimate-image or “revenge porn” laws; these wrongs may fall within the right of publicity’s protections and specifically within what we call the right of dignity. *See, e.g.*, CAL. CIV. CODE § 1708.86 (West 2020); CAL. PENAL CODE § 647(j)(4) (West 2020); 720 ILL. COMP. STAT. ANN. 5/11-23.5 (West 2020); VT. STAT. ANN. tit. 13, § 2606 (2019); WIS. STAT. ANN. § 942.09 (2020). Several of these provisions have been held constitutional. *See People v. Austin*, No. 123910, 2019 WL 5287962, \*5–22 (Ill. Oct. 18, 2019); *State v. VanBuren*, 214 A.3d 791, 798–814 (Vt. 2019); *State v. Culver*, 918 N.W.2d 103, 107–114 (Wis. Ct. App. 2018).

148. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 80 (Ga. 1905).

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

150. *Id.* at 442. The Appellate Division, which upheld Roberson’s claim, explicitly did so on the ground that the unauthorized use of her photograph caused a harm that was analogous to that caused by the dignitary tort of libel:

I can see no distinction in principle between an act which, without threatening physical harm, injures the plaintiff’s reputation by words spoken in respect of it and the like act, which injures her feelings and diminishes the respect with which she is held in the community by saying or doing something in regard to her which tends to bring her into unnecessary and unwarrantable notice.

*Roberson v. Rochester Folding Box Co.*, 71 N.Y.S. 876, 879 (App. Div. 1901).

tions of photographs were denounced as “outrages,” as “savage and horrible practices, practices incompatible with the claims of the community in which they are allowed to be committed with impunity to be called a civilized community.”<sup>151</sup>

In retrospect, it is difficult to pinpoint the exact source of this outrage. It might have been the mere publication of an unauthorized image of Roberson. It might have been the use of that image to advertise the defendant’s flour products.<sup>152</sup> It might have been that the defendant’s advertisements were “conspicuously posted and displayed in stores, warehouses, saloons, and other public places.”<sup>153</sup> Or it might have been particular sensitivity to commandeering the photograph of a teenage girl.<sup>154</sup> The unauthorized appropriation of identity can be experienced as mortifying for all kinds of reasons and in all kinds of circumstances.

To track the interests protected by the right of dignity, however, plaintiffs should have to show that defendants’ misappropriation of their identities would be “highly offensive” to a reasonable person. Three of the four privacy torts defined in the *Restatement (Second)*—public disclosure of private facts, intrusion, and false light—are explicitly formulated to penalize only “highly offensive” conduct, which is to say conduct that can be presumed to cause emotional damage because it is inconsistent with accepted norms of respect. The right of dignity should also contain this requirement.

So understood, a right of dignity would fill a gap in the existing dignitary torts. A defendant’s use of a plaintiff’s identity may not be defamatory; it may not reveal private facts; it may not be intended to produce intense emotional distress; it may not place a plaintiff in a false light; and yet it may still be highly

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151. *The Right of Privacy*, *supra* note 114, at 8. Two years after the decision in *Roberson*, when Alton Parker, who had written the majority opinion for the Court of Appeals, ran for President of the United States as the Democratic Party nominee, he declared “that he did not propose to be photographed by camera men.” *Parker Taken to Task by an Indignant Woman*, N.Y. TIMES, July 27, 1904, at 1. Parker announced: “I reserve the right to put my hands in my pockets and assume comfortable attitudes without being everlastingly afraid that I shall be snapped by some fellow with a camera.” *Id.* Roberson wrote him a long, sophisticated, and indignant letter, citing back to him his own opinion. “Naturally,” Roberson concluded, “the camera fiend feels licensed to annoy you and your family in the manner in which you yourself suggested, at least within the borders of this state.” *Judge Parker and the Right to Privacy*, ARIZ. REPUBLICAN, Aug. 1, 1904, at 2. The contretemps received nationwide publicity.

152. See *Flake v. Greensboro News Co.*, 195 S.E. 55, 63 (N.C. 1938).

153. *Roberson*, 64 N.E. at 442.

154. Roberson was seventeen years of age at the time the lawsuit was filed. See *Her Beauty a Possession: A New York Court Declares a Woman’s Face Property*, EVENING TIMES (D.C.), July 24, 1901, at 5 (describing Roberson as eighteen years old in 1901); see also ROTHMAN, *supra* note 1, at 17–18, 190 n.12 (discussing the role of gender in privacy claims of the late 1800s).

offensive.<sup>155</sup> As with the other privacy torts, the question of what ought to count as a “highly offensive” use will be highly contextual and historically variable.<sup>156</sup>

## II. THE CURRENT FIRST AMENDMENT CHAOS

The right of publicity tort may be unique in American law in the startlingly disparate array of interests that it can protect. In any given case, the right of publicity can be invoked to vindicate one or more of the four interests we have described. The failure to distinguish these interests manifestly contributes to the chaos surrounding efforts to engage in consistent and clear-eyed First Amendment analysis of right of publicity claims.

Modern constitutional analysis of the right of publicity can be traced back to *Zacchini*, in which the Supreme Court considered “whether the First and Fourteenth Amendments immunized” a defendant news station “from damages for its alleged infringement of petitioner’s state-law ‘right of publicity.’”<sup>157</sup> After distinguishing false light privacy-based claims, which the Court believed involved “an entirely different tort from the ‘right of publicity,’” the Court held that the First Amendment did not offer constitutional immunity.<sup>158</sup>

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155. See Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 213 (1999); Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1346 (2009).

156. See Post, *Social Foundations*, *supra* note 30, at 963-64.

157. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 565 (1977).

158. *Id.* at 571. The main precedent distinguished by the Supreme Court in *Zacchini* was *Time, Inc. v. Hill*, 385 U.S. 374 (1967), which was brought under New York’s right of privacy statute, sections 50 and 51 of the New York Civil Rights Law. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2019). That statute provides New York’s only basis for both right of publicity and right of privacy claims, creating liability if a plaintiff’s “name, portrait or picture” is used without consent “for advertising purposes, or for the purposes of trade.” CIV. RIGHTS § 50. Thus, if *Zacchini* had sued under New York law, his claim would perforce have been brought under the very same statute as in *Hill*. See, e.g., *Welch v. Mr. Christmas, Inc.*, 447 N.Y.S.2d 252 (App. Div.) (action brought under section 51 of the New York Civil Rights Law), *aff’d*, 440 N.E.2d 1317 (N.Y. 1982); *Gautier v. Pro-Football, Inc.*, 106 N.Y.S.2d 553 (App. Div. 1951) (same), *aff’d*, 107 N.E.2d 485 (N.Y. 1952). Yet in *Zacchini* the Supreme Court was clear that the tort at issue in *Hill* was fundamentally different from the tort at issue in *Zacchini*, which illustrates how important it is to distinguish the particular interests that any given right of publicity claim is brought to vindicate. We note that by the time of publication New York may have added an additional basis for a right of publicity claim. In the summer of 2020, the New York legislature passed a bill that would add a postmortem right of publicity. It is currently awaiting the Governor’s signature. See S.5959D, 2019-2020 Leg., 238th Sess. (N.Y. 2020).



By rejecting a First Amendment defense in the context of news—a medium typically accorded the highest constitutional protection—*Zacchini* sparked a virtual explosion of right of publicity claims and statutes across the nation.<sup>159</sup> Although the right of performance at issue in *Zacchini* is frequently not involved in right of publicity claims, *Zacchini* was nevertheless cited for the broad proposition that “[t]here is no First Amendment privilege with respect to the appropriation of another’s name or likeness for commercial purposes.”<sup>160</sup>

As right of publicity claims proliferated, it quickly became apparent that such a broad reading of *Zacchini* was untenable. *Zacchini* was distinguished by some courts as “not an ordinary right of publicity case: the defendant television station had appropriated the plaintiff’s *entire act*.”<sup>161</sup> Although the criterion of an “entire act” makes sense in the context of a right of performance, it is virtually incomprehensible in the context of the right of commercial value, the right of control, or the right of dignity. Yet it was only the rare court that could precisely articulate *Zacchini*’s intrinsic limitations: “[T]he distinction between the value of a person’s identity and the value of his performance explains why *Zacchini v. Scripps-Howard Broadcasting Co.*, the Supreme Court’s sole case involving a right of publicity claim, is a red herring.”<sup>162</sup>

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159. See ROTHMAN, *supra* note 1, at 145-53.

160. *Fitzgerald v. Penthouse Int’l, Ltd.*, 525 F. Supp. 585, 601-02 n.79 (D. Md. 1981), *aff’d in part, rev’d in part*, 691 F.2d 666 (4th Cir. 1982). For the persistent influence of *Zacchini*’s holding, see, for example, *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983); *National Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533, 540 (W.D. Tex. 1980); and *Doe v. TCI Cablevision*, 110 S.W.3d 363, 372-74 (Mo. 2003). See also ROTHMAN, *supra* note 1, at 143-54 (discussing the expansion and proliferation of the right of publicity in the wake of *Zacchini*); Rothman, *supra* note 87, at 302-15 (considering the significant influence of *Zacchini* on the development of right of publicity law).

161. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 806 (Cal. 2001) (emphasis added); see also *Wis. Interscholastic Athletic Ass’n v. Gannett Co.*, 658 F.3d 614, 624 (7th Cir. 2011) (“The distinction between coverage or reporting on one hand, and broadcast of an ‘entire act’ on the other, was central to *Zacchini*.”); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 956 (6th Cir. 2003) (Clay, J., dissenting) (“*Zacchini* has been criticized as being very ‘narrowly drawn’ in that it involved the wholesale reproduction of a live ‘entire act’ . . .”); Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1591 (1979) (observing that *Zacchini* did not provide a “particularly clear standard, and it is unlikely to be available in the majority of cases,” leaving courts without sufficient guidance to make First Amendment determinations in right of publicity cases and making “inconsistent holdings . . . virtually inevitable”).

162. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 973 (10th Cir. 1996) (citation omitted). The court also pointed out that “*Zacchini* . . . complained of the appropriation of the economic value of his *performance*, not the economic value of his *identity*.” *Id.*

Many courts nevertheless continue to invoke *Zacchini* in contexts that do not involve performances.<sup>163</sup> This common error suggests the need rigorously to separate the four distinct interests we identified in Part I. Because the “entire act” standard of *Zacchini* does not easily translate into other contexts, courts have found themselves struggling to craft supplementary doctrines to define appropriate constitutional defenses in right of publicity cases.

The upshot can only be described as pandemonium, which one commentator has even compared to a “dumpster fire.”<sup>164</sup> “[T]he point of confusion most associated with the right of publicity law is its interplay with the First Amendment.”<sup>165</sup> “Courts, in struggling to accommodate” the “competing interests” between “a celebrity’s right of publicity and the public’s right to free expression embodied in the First Amendment,” have “failed to articulate a clear standard to resolve the conflict, resulting in a confusing morass of inconsistent, incomplete, or mutually exclusive approaches, tests, and standards.”<sup>166</sup>

The situation goes far beyond a mere circuit split. Courts across the country apply multiple different approaches to constitutional analysis.<sup>167</sup> Speakers are left with little guidance as to basic questions, such as when they may legally use the names or likenesses of real people in video games, comic books, board games, works of art, song titles, congratulatory messages, retweets, celebrity-oriented blogs, and even in news reporting. The unpredictability caused by the “courts’ sloppy and often inconsistent tests for weighing the right of publicity

163. See, e.g., *Toffoloni v. LFP Publ’g Grp.*, 572 F.3d 1201, 1207 (11th Cir. 2009) (arguing that *Zacchini* establishes that “when a media outlet appropriates ‘some aspect’ of an individual ‘that would have market value and for which he would normally pay,’ without that individual’s permission, the media outlet is subject to damages in a tort suit for violation of the right of publicity”); *Bosley v. WildWetT.com*, 310 F. Supp. 2d 914, 927 (N.D. Ohio 2004) (“The Supreme Court [in *Zacchini*] indicated that the right to publicity was constitutional and did comport with the First Amendment.”); *Comedy III Prods.*, 21 P.3d at 805 (citing to *Zacchini* in rejecting a First Amendment defense in the context of a lithograph sold in multiple copies and on t-shirts); *TCI Cablevision*, 110 S.W.3d at 372-74 (same in the context of comic books).

164. William McGeeveran, *Selfmarks*, 56 HOUS. L. REV. 333, 362 (2018).

165. *ETW Corp.*, 332 F.3d at 954 (Clay, J., dissenting).

166. Gloria Franke, Note, *The Right of Publicity vs. the First Amendment: Will One Test Ever Capture the Starring Role?*, 79 S. CAL. L. REV. 945, 946 (2006); see also Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 48 (1995) (observing “the massive confusion surrounding the conflict between the right of publicity and the First Amendment”). Kwall recognized that the “lack” of “a principled and consistent method of resolving the conflict between the right of publicity and the First Amendment . . . stems from the vast array of potential types of appropriations.” *Id.* at 47.

167. ROTHMAN, *supra* note 1, at 145-48; Kwall, *supra* note 155, at 1356-57 (identifying five different “balancing tests for determining how the right of publicity should be applied in cases presenting First Amendment challenges”).

and First Amendment rights”<sup>168</sup> chills speech and incentivizes jurisdictional gamesmanship.<sup>169</sup>

It suffices for present purposes merely to sketch the chaos that currently envelops the field.<sup>170</sup> One approach that courts have taken to reconcile rights of publicity with freedom of speech is bluntly to weigh the value of the use against the likely injury to the plaintiff. The Eighth Circuit took this approach in *C.B.C. Distribution & Marketing v. Major League Baseball Advanced Media*.<sup>171</sup> Balancing the constitutional value of the use against the likely injury to the plaintiffs, the court held that the First Amendment insulated the defendant’s online fantasy-baseball games from liability under Missouri’s right of publicity law. The defendant could use players’ names and statistics because the information was in the public domain, and the use did not materially undermine the baseball players’ incentives to engage in “productive activities.”<sup>172</sup>

By contrast, the Supreme Court of Missouri applied a different First Amendment analysis to a claim asserted under the very same state right of publicity law. Using what is now called the *predominant-purpose* test, the court held that the First Amendment did not insulate a comic-book author from liability for naming a character “Tony Twistelli” after a professional hockey player, Tony Twist.<sup>173</sup> The court decided that the author did not make “an expressive comment” about Twist, but instead “predominantly exploit[ed] the commercial value” of Twist’s identity.<sup>174</sup> The court concluded that naming a character after

168. Martin H. Redish & Kelsey B. Shust, *The Right of Publicity and the First Amendment in the Modern Age of Commercial Speech*, 56 WM. & MARY L. REV. 1443, 1472 (2015).

169. Cf. *Experience Hendrix LLC v. Hendrixlicensing.com LTD*, 762 F.3d 829 (9th Cir. 2004) (enforcing Jimi Hendrix’s postmortem right of publicity under Washington law because that state allows the estates of those who died domiciled elsewhere to bring claims in that state even if the deceased’s domicile denies such rights); Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 *passim* (2016) (discussing strategic filing of patent claims in particular jurisdictions).

170. For a detailed analysis of the various First Amendment tests currently employed and some critiques of them, see ROTHMAN, *supra* note 1, at 145-53. There is a large scholarly literature critiquing these tests. See, e.g., F. Jay Dougherty, *All the World’s Not a Stooge: The “Transformativeness” Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J.L. & ARTS 1 (2003); Kwall, *supra* note 166; Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471 (2003); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003).

171. 505 F.3d 818 (8th Cir. 2007).

172. *Id.* at 824.

173. *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003).

174. *Id.* at 374 (quoting Lee, *supra* note 170, at 500).

Twist was “predominantly a ploy to sell comic books and related products rather than an artistic or literary expression.”<sup>175</sup>

In a seemingly similar case, the Supreme Court of California took a different approach and applied what has become known as the *transformative-work* test. Two well-known rock-star brothers, Johnny and Edgar Winter, objected to the invocation of their names and likenesses in a comic-book series. In contrast to the Supreme Court of Missouri, the Supreme Court of California held that the use was protected by the First Amendment. The California court applied the transformative-work test to conclude that the comic book transformed the Winter brothers’ identities by placing them in a new context, changing their names (to the Autumn brothers) and altering their physical appearance.<sup>176</sup>

California’s transformative-work test derives from one consideration used in copyright law’s multifactor fair use doctrine. The test considers “whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.”<sup>177</sup> This approach was first adopted by the California Supreme Court in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, in which the court held that a realistic portrait of the Three Stooges infringed the deceased comedians’ rights of publicity. The court used the test to reject a First Amendment defense because the portrait at issue (which was also printed on multiple t-shirts) was realistic and did not add significant additional material or commentary, a feature that presumably would have turned the work into a transformative one.<sup>178</sup>

The exact meaning and method of applying the transformative-work test remains disputed. Courts that claim to apply this analysis do so in different ways. The Sixth Circuit said it was applying this test (along with several others) to justify its conclusion that a realistic print of Tiger Woods winning the Masters Tournament was transformative and therefore protected by the First Amendment.<sup>179</sup> But it is hard to square this conclusion with the California Supreme Court’s analysis in *Comedy III*. Although Rick Rush, the artist who produced the portrait of Woods, included in his painting the figures of other golfers looking down at Woods, the style and portrait of Woods himself was just as realistic as the portrait of the Three Stooges.

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175. *Id.*

176. *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003).

177. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001).

178. *Id.* at 811.

179. *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 934-36, 938 (6th Cir. 2003). To compare the images of these two works, see ROTHMAN, *supra* note 1, at 149-50.

Some courts, notably the Third and Ninth Circuits, have developed what appears to be an unacknowledged variation on this transformative-work test.<sup>180</sup> These courts do not focus on whether an *overall work* is transformative, but instead on whether a plaintiff's *specific identity* has been transformed. This narrower approach requires that a defendant "distort[]" or "transmogrif[y]" a person's identity "for purposes of lampoon, parody, or caricature."<sup>181</sup> The use must be "more of a 'fanciful, creative character' than an 'imitative character.'"<sup>182</sup> This narrower version of the test appears on its face to disfavor more realistic portrayals of people.

A more speech-protective doctrine that has been adopted by some jurisdictions is sometimes called the *relatedness* test. This approach constitutionally protects the use of individuals' identities in expressive works unless the underlying work is "wholly unrelated" to the individual" or the use is a "disguised advertisement for the sale of goods or services or a collateral commercial product."<sup>183</sup> Some courts also allow liability under this approach if the use is "solely to attract attention to a work."<sup>184</sup> Some version of this approach has been adopted by the Second, Fifth, and, at times, Sixth Circuit Courts of Appeals, as well as by Kentucky and New York courts, sometimes as an internal limit on right of publicity claims under state law, and sometimes as an independent First Amendment test.<sup>185</sup>

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180. ROTHMAN, *supra* note 1, at 146. Although federal courts are not bound by a state court's interpretation of the First Amendment, the Ninth Circuit Court of Appeals has claimed to be relying on the California Supreme Court's approach in cases involving California's right of publicity laws.

181. *Hilton v. Hallmark Cards*, 599 F.3d 894, 910-11 (9th Cir. 2009).

182. *Id.* at 911 (quoting *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 616, 618 (Ct. App. 2006)). Compare *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 165-70 (3d Cir. 2013) (interpreting transformative-work analysis as about transforming the identity of the individual depicted), and *In re Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1276-79 (9th Cir. 2013) (same), with *Hart*, 717 F.3d at 171 (Ambro, J., dissenting) (interpreting the transformative-work test to refer to transforming the identity of the individual depicted), and in *In re NCAA*, 724 F.3d at 1284-87 (Thomas, J., dissenting) (same).

183. *Rogers v. Grimaldi*, 875 F.2d 994, 1004-05 (2d Cir. 1989).

184. *Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (AM. LAW INST. 1995)).

185. See *id.* at 460-61; *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994); *Rogers*, 875 F.2d at 1004-05; *Romantics v. Activision Publ'g, Inc.*, 574 F. Supp. 2d 758, 765-66 (E.D. Mich. 2008); *Montgomery v. Montgomery*, 60 S.W.3d 524, 528-30 (Ky. 2001); *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828, 829 (App. Div. 1980). The *Restatement (Third) of Unfair Competition* has adopted this approach as a limit on the scope of the right of publicity tort, rather than as an independent defense. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (AM. LAW INST. 1995).

The relatedness test is often also referred to as the *Rogers* test because of its adoption in the Second Circuit case *Rogers v. Grimaldi*.<sup>186</sup> In that case, Ginger Rogers sued over the use of her name in the title of the film *Ginger and Fred*, directed by the famous Italian director Federico Fellini. The movie told the story of two Italian entertainers known as the Italian version of the famous American dancing pair of Fred Astaire and Ginger Rogers. The court held that the use of Rogers's name in the movie title was relevant to the content of the movie and was not a disguised advertisement for something other than the film itself. Strictly construing Oregon's right of publicity law to avoid a conflict with the First Amendment, the court concluded that no right of publicity claim could proceed.<sup>187</sup>

Yet another approach has been to apply *strict scrutiny*. In *Sarver v. Chartier*, a Ninth Circuit panel held that in the context of a movie the right of publicity constituted a content-based restriction, and that it should therefore be subject to strict scrutiny.<sup>188</sup> The case involved a lawsuit brought by an army sergeant who claimed that a character in a movie was based on his identity and life story.<sup>189</sup> The court concluded that a right of publicity claim in such an instance was patently unconstitutional. *Sarver*, however, limited the application of strict scrutiny to cases in which the plaintiff was not a celebrity.<sup>190</sup>

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186. The relatedness test in *Rogers* used in right of publicity cases is different from a distinct and widely-adopted "*Rogers* test" that applies to First Amendment defenses to false endorsement and trademark-based claims brought under the Lanham Act in the context of "artistic expression." The two tests were developed in the same case. See *Rogers*, 875 F.2d at 999 (concluding that there can be no liability under the Lanham Act "if [the allegedly infringing use] has some artistic relevance unless [it] explicitly misleads as to the source or the content of the work"). We note that although the Lanham Act *Rogers* test is widely applied in trademark cases involving expressive works, it is less frequently adopted by courts analyzing First Amendment defenses to right of publicity claims. Compare *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1245 (9th Cir. 2013) (applying *Rogers* test as a basis to reject a false endorsement claim under the Lanham Act), with *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172, 1179 (9th Cir. 2015) (rejecting a First Amendment defense to a right of publicity claim and the application of the *Rogers* analysis in the context of the same video game at issue in *Brown*).

187. *Rogers*, 875 F.2d at 1004-05.

188. 813 F.3d 891, 905-06 (9th Cir. 2016) (identifying California's right of publicity law as a "content-based speech restriction" which "cannot stand unless Sarver can show a compelling state interest in preventing the defendants' speech"); cf. *Pooley v. Nat'l Hole-In-One Ass'n*, 89 F. Supp. 2d 1108, 1113 (D. Ariz. 2000) (distinguishing between "communicative" speech, which "wins over the right of publicity" and "is entitled to the highest level of First Amendment protection," and "commercial" speech, against which "the right of publicity generally wins").

189. Sarver also objected to reporting on his experiences as a bomb-disposal expert using his actual name in *Playboy* and *Reader's Digest*. *Sarver*, 813 F.3d at 896.

190. *Id.* at 904-06. Previous Ninth Circuit decisions had applied the transformative-use test in right of publicity cases in which First Amendment defenses had been asserted, including in

As is apparent from this brief survey, courts are flailing about in a sea of inconsistent, vague, and unhelpful First Amendment tests.<sup>191</sup> This is unsurprising given that careful First Amendment doctrine requires “[p]recision of regulation.”<sup>192</sup> Constitutional scrutiny must always be addressed to the exact state interest at stake in the regulation of speech. Each of the four distinct state interests that we set forth in Part I requires its own unique form of First Amendment review. One size will not fit all. As can readily be deduced from the contemporary disarray, the effort to fashion a single all-purpose First Amendment test to analyze all the various interests that sail under the flag of the “right of publicity” will produce nothing but chaos.

### III. RECONSIDERING THE FIRST AMENDMENT AND THE RIGHT OF PUBLICITY

In this Part, we analyze how First Amendment considerations ought to be matched with the distinct interests protected by state right of publicity laws as separately identified in Part I. We do not expect that isolating and addressing plaintiffs’ particular interests will remove all constitutional ambiguity; hard cases will undoubtedly remain. But we hope that our approach will greatly clarify constitutional analysis and facilitate the orderly and rational development of the law.

Before proceeding to this work, however, we must introduce another important dimension to First Amendment analysis of right of publicity claims.

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the context of video games. *Davis*, 775 F.3d at 1177-78 (rejecting a First Amendment defense in the context of alleged uses of professional football players’ likenesses in video games); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1276 (9th Cir. 2013) (same in the context of student-athletes). The *Sarver* court tried to avoid these precedents by limiting the application of strict scrutiny to cases in which a plaintiff did not possess an identity that had previously established commercial value. For a critique of this aspect of *Sarver*, see ROTHMAN, *supra* note 1, at 151-53. At least one Ninth Circuit panel has also used the actual malice test to construct a First Amendment defense in a right of publicity case. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001).

191. For critiques of the transformativeness test, see ROTHMAN, *supra* note 1, at 146-51; Dougherty, *supra* note 170, at 28-35, 69-77; Rebecca Tushnet, *A Mask that Eats into the Face: Images and the Right of Publicity*, 38 COLUM. J.L. & ARTS 157, 169-88 (2015); and Volokh, *supra* note 170, at 913-25. For critiques of the predominant-purpose test, see *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 154 (3d Cir. 2013), which describes the “Predominant Use Test” as “subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning art critics”; and ROTHMAN, *supra* note 1, at 147-51. For critiques of the relatedness test, see *Hart*, 717 F.3d at 157-58; *Montgomery v. Montgomery*, 60 S.W.3d 524, 535 (Ky. 2001) (Keller, J., dissenting); *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003); and ROTHMAN, *supra* note 1, at 146-51.

192. *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Just as any given right of publicity claim may involve distinct state interests, so too may it involve distinct First Amendment interests, depending on the precise kind of communication a state seeks to regulate. The resolution of any given claim will therefore require assessing the state interests asserted by a plaintiff in light of the relevant constitutional interests asserted by a defendant.<sup>193</sup>

In Section III.A, we describe three distinct types of communication that receive three different forms of constitutional scrutiny under the First Amendment. In Section III.B, we match these three constitutional interests with the four right of publicity interests identified in Part I.

### A. *Tiers of First Amendment Review*

To evaluate properly First Amendment defenses in the context of right of publicity claims, courts must articulate the distinct constitutional values at stake when a defendant uses a person's name, likeness, voice, or other indicia of identity. Plaintiffs assert right of publicity claims for all sorts of uses of their persona—in films, in newspapers, in advertisements, in photographs, in video games, in posters, on t-shirts, on coffee mugs, on pencil erasers, and so on ad infinitum. Not all of these communicative acts will be treated the same for purposes of the First Amendment.

Many years ago, Harry Kalven, Jr., suggested that the Supreme Court had adopted what he called a “two-level free-speech theory.”<sup>194</sup> The Court spoke as if all speech was protected by the full force of First Amendment doctrine except for certain “historic and traditional categories long familiar to the bar”—categories like fighting words or obscenity—to which the Court would extend no constitutional protection at all.<sup>195</sup> Although the Court has recently reiterated the two-level theory,<sup>196</sup> it has been plain for a long time that the theory is a poor and inaccurate description of actual First Amendment jurisprudence.

There are many forms of communication that lie “outside the core or cores of the freedom of speech protected by the [F]irst [A]mendment” that receive

193. See ROTHMAN, *supra* note 1, at 155, 157 (contending that “[c]ourts must evaluate and scrutinize the interests purportedly served by the right of publicity,” as well as “the competing speech interests jeopardized by enforcing a right of publicity”).

194. Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10.

195. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring) (citing *N.Y. Times Co. v. United States*, 403 U.S. 747 (1971)); *Roth v. United States*, 354 U.S. 476, 482-83 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). As the Court famously put it in *Chaplinsky*, these categories constitute “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” 315 U.S. at 571-72.

196. See *United States v. Stevens*, 559 U.S. 460, 468-69 (2010).



distinctive (and diminished) kinds of constitutional review.<sup>197</sup> Most notably, “commercial speech” has explicitly been regulated in ways that core First Amendment protections forbid.<sup>198</sup> Speech that embodies intellectual property also receives diminished First Amendment scrutiny.<sup>199</sup> There are yet other forms of communication outside the “historic and traditional categories” that do not seem to trigger any First Amendment protection at all,<sup>200</sup> like warnings in product liability cases<sup>201</sup> or lawyers’ advice in actions for professional malpractice.<sup>202</sup>

It is impossible to negotiate the complex geography of the right of publicity without recognizing these distinctions. One must appreciate the distinct First Amendment values at play when the state seeks to regulate a portrait hanging in a museum as distinguished from a portrait imprinted on a cereal box. A large part of the difficulty is that official First Amendment jurisprudence is quite crude when it comes to making such distinctions. The Supreme Court has a penchant for abstract, categorical, and overbroad doctrinal pronouncements that do not seem to correspond at all to our existing legal landscape.

So, for example, in *Reed v. Town of Gilbert*, the Court recently opined:

Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified

197. Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1185 (1988).

198. *Id.*; see, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562-63 (1980).

199. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 218-19 (2003) (concluding that speech can be restricted in the context of copyright laws in part because such laws produce more speech); *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 535-41 (1987) (rejecting a First Amendment defense even to nonconfusing speech in the face of a quasi-trademark claim); see ROTHMAN, *supra* note 1, at 143-45, 220-21 nn.11-13; Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 165-69 (1998); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and the Press?*, 17 UCLA L. REV. 1180, 1192, 1203-04 (1970); Rothman, *supra* note 87, at 312.

200. See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (“Numerous examples could be cited of communications that are regulated without offending the First Amendment . . .”); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1765 (2004) (“Although the First Amendment refers to freedom of ‘speech,’ much speech remains totally untouched by it.”); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 269-72 (1981); Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV. F. 346 (2015); Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 320-21 (2018).

201. See, e.g., *Moore v. Ford Motor Co.*, 332 S.W.3d 749 (Mo. 2011) (en banc).

202. See, e.g., *Estate of Spencer v. Gavin*, 946 A.2d 1051 (N.J. Super. Ct. App. Div. 2008).

only if the government proves that they are narrowly tailored to serve compelling state interests.

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.<sup>203</sup>

If the doctrine propounded in *Reed* is taken at face value, the right of publicity is in deep constitutional trouble. The right is unquestionably a content-based regulation that “target[s] speech based on its communicative content.”<sup>204</sup> It imposes liability if the name, likeness, or voice of a plaintiff is identified, but not otherwise. Because few speech regulations survive strict scrutiny, the crude doctrinal structure proposed by *Reed* would radically restrict the right of publicity, perhaps eradicating it entirely except possibly for claims rooted in confusion. We hardly think that outcome likely, however, because the tort is so deeply entrenched in our legal system. It is more plausible to regard the language in *Reed* as imprecise overstatement.

Courts have not developed very useful doctrine to clarify when the robust protections of *Reed* apply and when they do not. In the context of the right of publicity, we propose a rough tripartite division of communicative acts, which, if taken together, will encompass the vast majority of right of publicity actions, and which, if taken separately, will facilitate clearer and more appropriate constitutional review. A defendant’s misappropriation of a plaintiff’s identity can occur in *public discourse*,<sup>205</sup> in *commercial speech*,<sup>206</sup> or in (or on) *commodities*.<sup>207</sup>

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203. 576 U.S. 155, 163-64 (2015) (citations omitted); see also *Barr v. Am. Ass’n of Political Consultants*, 140 S. Ct. 2335, 2346 (2020) (plurality opinion) (affirming the holding of *Reed* that content discrimination should be determined by whether a statute on its face treats speech differently based upon its content and that statutes that discriminate on the basis of content should be subject to strict scrutiny); *Reed*, 576 U.S. at 169 (“[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.” (citation omitted)).

204. *Reed*, 576 U.S. at 163.

205. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 460-61 (2011); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 515 (1981); ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC*

The nature of constitutional scrutiny that a right of publicity claim should receive will depend upon the category to which a court assigns the potentially infringing use.

### 1. *Public Discourse*

Adopting the language of the Supreme Court, we designate as “public discourse”<sup>208</sup> the core forms of speech that receive the full array of essential First Amendment protections. Content and viewpoint discrimination are presumptively forbidden within public discourse because, as Chief Justice Roberts has proclaimed, a “vibrant public discourse . . . is at the foundation of our democracy.”<sup>209</sup>

Public discourse is not defined by its content but by its function. Because democracy is essentially “government by public opinion,”<sup>210</sup> public discourse is composed of the communicative acts deemed necessary for the formation of public opinion. The basic thought is that our government will remain democratically legitimate so long as government is responsive to public opinion and

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FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2012); Post, *The Constitutional Concept of Public Discourse*, *supra* note 30, at 626-84.

206. See, e.g., *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 622-24 (1995); *Bd. of Trs. v. Fox*, 492 U.S. 469, 473-81 (1989); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561-66 (1980).
207. Apart from these three distinct categories, there is also a unique class of communicative acts that are published in outlets or formats that are ordinarily classified as public discourse, but that are nevertheless denominated as speech about matters of purely private concern. This class of communicative acts does not fit cleanly into any of the three categories of speech we discuss, is not well integrated into First Amendment doctrine, is only rarely invoked, and tends to arise uniquely in the context of the right of dignity. We shall discuss it in Section III.B.4. See *infra* notes 351-368 and accompanying text.
208. See *Nat’l Review, Inc. v. Mann*, 140 S. Ct. 344 (mem.) (2019) (Alito, J., dissenting from the denial of certiorari); *Snyder*, 562 U.S. at 460-61; *Metromedia*, 453 U.S. at 515; *Cohen v. California*, 403 U.S. 15, 22-23 (1971).
209. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 373 (2010) (Roberts, C.J., concurring). One need not adopt a democratic theory of the First Amendment to believe that some forms of speech are properly given more constitutional protection than others or to support the rough tripartite division of communicative acts that we propose. On the relationship between democracy, public discourse, and content discrimination, see Robert C. Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*, in *THE FREE SPEECH CENTURY* 106 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).
210. CARL SCHMITT, *CONSTITUTIONAL THEORY* 275 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928).

so long as individuals are free to participate in the formation of public opinion.<sup>211</sup>

In modern states, public opinion is underwritten by a public sphere that is sustained by a “structural skeleton” of “media for the communication of ideas,”<sup>212</sup> like books, films, magazines, art, music, or newspapers.<sup>213</sup> Public opinion is often formed in the communicative exchanges that occur through these and similar media. Speech within such media is presumptively public discourse.<sup>214</sup> This is true regardless of whether the speech appears in low-brow media, like gossipy articles in the *National Enquirer*,<sup>215</sup> or in newer media, like blog posts<sup>216</sup> or social media.<sup>217</sup>

Public discourse is not defined merely as speech that Robert Bork might have categorized as “political,” which is to say “speech concerned with governmental behavior, policy or personnel.”<sup>218</sup> In a democracy what *becomes* “political” in Bork’s sense is a result of how the public chooses to exercise its judgment. The First Amendment prohibits the state from setting the agenda of

211. See POST, *supra* note 205, at 18-22, 27-28; Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1063-68, 1072-79 (2016).
212. Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1276 (1995); *see id.* at 1253-55.
213. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (granting First Amendment protection to motion pictures because they “are a significant medium for the communication of ideas”); Post, *supra* note 212, at 1253-55.
214. The presumption is defeasible. Speech within a medium may, for example, constitute unprotected obscenity. See James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 496 n.35 (2011).
215. *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983).
216. Cf. First Amended Complaint, *Witherspoon v. Mktg. Advantages Int’l, Inc.*, No. 2:13-cv-07847-RSWL-SS (Cal. Super. Ct. July 15, 2013); Jennifer E. Rothman, *L.A. Court Allows Reese Witherspoon to Proceed with Right of Publicity Claim Against Jeweler*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY (Dec. 2, 2015, 3:30 PM PT), <https://www.rightofpublicityroadmap.com/news-commentary/revise-la-court-allows-reese-witherspoon-proceed-right-publicity-claim-against> [https://perma.cc/4HW7-K4SH].
217. Cf. Complaint, *Grande-Butera v. Forever 21, Inc.*, No. 2:19-cv-07600 (C.D. Cal. Sept. 2, 2019); Eriq Gardner, *Katherine Heigl Ends Lawsuit over Duane Reade Tweet (Exclusive)*, HOLLYWOOD REP. (Aug. 27, 2014, 12:20 PM PT), <https://www.hollywoodreporter.com/thresq/katherine-heigl-ends-lawsuit-duane-728552> [https://perma.cc/X5ZC-W7Z3]; Julia Jacobs, *Ariana Grande Sues Forever 21 over ‘Look-Alike Model’ in Ads*, N.Y. TIMES (Sept. 3, 2019), <https://www.nytimes.com/2019/09/03/arts/music/ariana-grande-forever-21.html> [https://perma.cc/H9EN-JPM8]; Jennifer E. Rothman, *Ariana Grande Sues Forever 21 over Social Media Posts*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY (Sept. 10, 2019, 12:30 PM PT), <https://www.rightofpublicityroadmap.com/news-commentary/ariana-grandes-sues-forever-21-over-social-media-posts> [https://perma.cc/QA6M-95D4].
218. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20, 26-28 (1971).

public attention, and in this way it protects the processes by which public opinion is formed.<sup>219</sup> Public opinion often comes to know itself through discussion about celebrities like Clint Eastwood and Reese Witherspoon – not to mention reality-TV star Donald Trump.<sup>220</sup> Public discourse is thus not limited to matters that are overtly about governance; it includes broader communicative activities such as art, music, and comedy.<sup>221</sup>

## 2. Commercial Speech

Not all speech, however, is public discourse. A second tranche of communication consists of what courts have called “commercial speech.”<sup>222</sup> Commercial speech was initially defined as speech for advertising purposes in the context of promoting nonexpressive products or services.<sup>223</sup> The Supreme Court has called the distinction between public discourse and commercial speech a “common-sense” one.<sup>224</sup> Although we recognize that this distinction has sometimes proven difficult to articulate,<sup>225</sup> it is often decisive in right of publicity cases.<sup>226</sup>

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219. POST, *supra* note 205, at 19-21; Balkin, *supra* note 211, at 1063-68, 1072, 1075-79 (contending that public discourse includes participation in popular culture); Post, *supra* note 209, at 108-09.
220. See Balkin, *supra* note 211, at 1063-68, 1072, 1075-79; Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004); see also Thomas E. Kadri, *Drawing Trump Naked: Curbing the Right of Publicity to Protect Public Discourse*, 78 MD. L. REV. 899 (2019) (analyzing possible right of publicity lawsuits Trump could bring); David S. Welkowitz & Tyler T. Ochoa, *The Terminator as Eraser: How Arnold Schwarzenegger Used the Right of Publicity to Terminate Non-Defamatory Political Speech*, 45 SANTA CLARA L. REV. 651 (2005) (discussing the former movie star and then Governor of California’s right of publicity lawsuit against the sale of bobblehead dolls that used his name and likeness); cf. JOHN FISKE, TELEVISION CULTURE 95, 239 (1988) (describing television and other popular media as treating viewers and readers as part of a “semiotic democracy”).
221. POST, *supra* note 205, at 19-20; Balkin, *supra* note 211, at 1057, 1062, 1067-68, 1071-79, 1089 (contending that public discourse encompasses protections for cultural discourse, including nonrepresentational and nonverbal art and music).
222. For a discussion of commercial speech, see Robert C. Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 *passim* (2000).
223. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 762-70 (1976).
224. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64 (1983) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978)).
225. See, e.g., *Nike, Inc. v. Kasky*, 539 U.S. 654, 676-80 (2003) (Breyer, J., dissenting from the dismissal of certiorari as improvidently granted) (contending that the shoe company’s statements about its labor policies and practices were *not* purely commercial speech); *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 522 (7th Cir. 2014) (reversing the district court and

The key determinant of whether a communicative act constitutes commercial speech is the constitutional value that courts perceive to be at stake in the act.<sup>227</sup> The protections that courts accord to public discourse ultimately derive from Justice Brandeis's eloquent warning "that the greatest menace to freedom is an inert people" and "that public discussion is a political duty."<sup>228</sup> Speech that advertises nonexpressive products and services without any analogous sense of civic orientation is typically deemed commercial speech because it is regarded merely as a communication that sells goods or services rather than one that is addressed to shaping public attitudes about public matters. Within public discourse, courts protect the autonomy of speakers, who are regarded as democratic sovereigns authorized to determine the content of "that public opinion which is the final source of government in a democratic state."<sup>229</sup> But within commercial speech, speakers have traditionally not been characterized as sovereign in the same way.<sup>230</sup> Instead, the constitutional value of commercial speech has long been said to lie in how it serves the interests of listeners. The Court has characterized commercial speech as constitutionally valuable because it serves "the informational function of advertising."<sup>231</sup>

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- concluding that a congratulatory page in a magazine was commercial speech); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001) ("[T]he boundary between commercial and noncommercial speech has yet to be clearly delineated . . ."); *Kasky v. Nike, Inc.*, 45 P.3d 243, 258-63 (Cal. 2002) (holding that the shoe company's statements about its labor policies and practices were commercial speech); Rothman, *supra* note 31, at 1973-77 (describing the particular challenges of categorizing commercial speech in intellectual property cases); Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1130 (2006) ("From the beginning, the commercial speech doctrine has threatened to unravel free speech theory . . .").
226. *Michaels v. Internet Entm't Grp., Inc.*, 5 F. Supp. 2d 823, 839 (C.D. Cal. 1998) ("[The] distinction between speech that proposes a commercial transaction, and speech that comments on matters of public interest has been applied regularly to distinguish protected speech from actionable misuse of a person's name or likeness for commercial gain."); *see, e.g., Brown v. Showtime Networks, Inc.*, 394 F. Supp. 3d 418, 437-38 (S.D.N.Y. 2019).
227. *See* POST, *supra* note 205, at 27-60 (concluding that the First Amendment protects commercial speech to maintain the "democratic competence" of listeners); Robert C. Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 871-73 (2015); Post, *supra* note 222 *passim*.
228. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
229. *Masses Publ'g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).
230. Robert C. Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 171-72 (2015).
231. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980). "[C]ommercial speech has a different social function from public discourse. Commercial speech doctrine protects the ability of listeners to receive information, rather than the autonomy of advertisers to express themselves." Balkin, *supra* note 211, at 1084.

Commercial speech may accordingly be suppressed if it is false or misleading.<sup>232</sup> The Court has explicitly held that “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”<sup>233</sup> Without this holding, the government’s ability to regulate deceptive advertising could be greatly impaired. By contrast, merely misleading speech cannot be penalized in public discourse, and the state must provide “breathing space” even for untruthful speech.<sup>234</sup> Even if commercial speech concerns lawful activity and is not misleading, content discrimination is nevertheless allowed so long as “the asserted governmental interest is substantial” and “the regulation directly advances the governmental interest asserted, and . . . it is not more extensive than is necessary to serve that interest.”<sup>235</sup>

We recognize that some recent pronouncements by the Court have suggested increased protections for commercial speech that seem to express solicitude for the interests of commercial speakers, as though they were exercising the same kind of autonomous democratic sovereignty as participants in public discourse.<sup>236</sup> But it is notable that even those who are otherwise skeptical of the difference between commercial speech and public discourse nevertheless give the distinction ample respect in the context of trademark claims,<sup>237</sup> and we ex-

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232. *Cent. Hudson*, 447 U.S. at 566; see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); Post, *supra* note 222, at 29.

233. *Cent. Hudson*, 447 U.S. at 563.

234. *NAACP v. Button*, 371 U.S. 415, 433 (1963); see, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 278-82 (1964); 281 *Care Comm. v. Arneson*, 766 F.3d 774, 782-84, 786-96 (8th Cir. 2014).

235. *Cent. Hudson*, 447 U.S. at 566. Although several recent cases, including *Reed*, have suggested that review of commercial speech may be becoming increasingly robust, the intermediate scrutiny standard of *Central Hudson* nevertheless remains in place.

236. See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566-71 (2011); *United States v. United Foods, Inc.*, 533 U.S. 405, 409-11 (2001); Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 *VAND. L. REV.* 639 *passim* (2016) (exploring recent D.C. Circuit decisions reflecting the same tendency).

237. See, e.g., *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 535, 536 n.15 (1987); *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1015-18 (3d Cir. 2008); *U.S. Olympic Comm. v. Am. Media, Inc.*, 156 F. Supp. 2d 1200, 1205-06 (D. Colo. 2001). Compare *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 905-07 (9th Cir. 2002) (employing the commercial/noncommercial use distinction for a trademark dilution claim), with Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 *VA. L. REV.* 627, 652-53 (1990) (contesting the assumption that commercial speech deserves less protection than other forms of speech). Even though the Lanham Act expressly includes consideration of whether a use is “commercial” in evaluating whether a dilution claim can be brought, the term has been interpreted by most courts on constitutional grounds as meaning that only uses within commercial speech can be liable for dilution. Rothman, *supra* note 31, at 1942-44, 1962, 1968-69.

pect that they will also do so in the context of right of publicity claims. Otherwise, the reach of the tort would be radically restricted.

### 3. *Commodities*

There is yet a third tranche of communicative acts, which courts appear to treat as if they had no First Amendment value at all. We shall call this class of communicative acts *commodities*. An instructive example of courts treating communicative acts in this way comes from outside the realm of publicity cases. In the context of products liability law, aeronautical charts have been treated as if they were devoid of any First Amendment value, even though such charts undoubtedly convey information. When publishers of such charts are sued for having conveyed inaccurate information causing accidents, First Amendment defenses are irrelevant. Courts treat such charts as mere “‘products’ for the purpose of products liability law.”<sup>238</sup>

There is an analogous phenomenon in the context of right of publicity cases. Courts frequently allow regulation of “mass-produced unspecialized”<sup>239</sup> items without acknowledging any First Amendment concerns at all. Such claims often arise in the context of merchandise, or what one court has called “mundane products,” in which plaintiffs’ identities appear on items like t-shirts, coasters, and pencil sharpeners.<sup>240</sup> Even when they are imprinted with unique representations of celebrities’ identities, products of this kind are often treated as if they lack constitutional or artistic value. The *Restatement (Third) of Unfair Competition* notes:

An unauthorized appropriation of another’s name or likeness for use on posters, buttons, or other memorabilia is thus ordinarily actionable

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238. *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1035 (9th Cir. 1991) (citing *Brocklesby v. United States*, 767 F.2d 1288, 1294-95 (9th Cir. 1985)); accord *Saloomey v. Jeppesen & Co.*, 707 F.2d 671, 676-77 (2d Cir. 1983); *Aetna Cas. & Sur. Co. v. Jeppesen & Co.*, 642 F.2d 339, 342-43 (9th Cir. 1981); *Fluor Corp. v. Jeppesen & Co.*, 216 Cal. Rptr. 68, 71-73 (Ct. App. 1985).

239. *Commodity*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 250 (11th ed. 2003) (defining “commodity” as an “economic good: [such] as . . . a mass-produced unspecialized product”).

240. *Univ. of Ala. Bd. of Trs. v. New Life Art, Inc.*, 683 F.3d 1266, 1279 (11th Cir. 2012) (concluding that “mugs, cups, . . . flags, towels, t-shirts, or any other mundane products” are treated differently for First Amendment purposes and potentially lack any constitutional considerations); see also William K. Ford & Raizel Liebler, *Games Are Not Coffee Mugs: Games and the Right of Publicity*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 3, 14, 98 (2012) (observing that “[m]erchandising uses occupy a somewhat difficult middle ground between advertising uses and traditional expressive uses,” distinguishing “coffee mugs, posters and T-shirts” from “books, magazines, and films,” and concluding that “games are not coffee mugs”).



as an infringement of the right of publicity. Attempts to defend the sale of such merchandise on [F]irst [A]mendment grounds through analogies to the marketing of books, magazines, and other traditional media of communication . . . have typically been rejected.<sup>241</sup>

A controversial example is *The Martin Luther King, Jr., Center for Social Change v. American Heritage Products*,<sup>242</sup> in which the Center, as the assignee of King's surviving right of publicity, sued American Heritage to prevent the manufacture and sale of mass-produced plastic busts of Martin Luther King, Jr. The Supreme Court of Georgia held that the Center's claim should be allowed under Georgia's right of publicity, and that the use of King's likeness on the busts did not raise "the slightest semblance of an expression of an idea, a thought, or an opinion, within the meaning of the constitutional provision which guarantees to a person the right to publish his sentiments on any subject."<sup>243</sup>

Similarly, in *Rosemont Enterprises, Inc. v. Urban Systems, Inc.*, the court allowed Howard Hughes to prevent "the marketing and distribution of an adult educational career game entitled 'The Howard Hughes Game.'"<sup>244</sup> Although the New York right of publicity statute is ordinarily interpreted in a manner designed to keep the requirements of "the First Amendment in mind,"<sup>245</sup> the New York court concluded that defendants were merely "selling a commodity, a

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241. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. b (AM. LAW INST. 1995).

242. 296 S.E.2d 697 (Ga. 1982).

243. *Id.* at 700 (quoting *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 80 (Ga. 1905)).

244. 340 N.Y.S.2d 144, 145-46 (Sup. Ct.), *aff'd as modified*, 345 N.Y.S.2d 17 (App. Div. 1973).

245. *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 348 (S.D.N.Y. 2002); *see also Messenger v. Gruner + Jahr Printing & Publ'g*, 727 N.E.2d 549, 553 (N.Y. 2000) ("Consistent with the statutory—and constitutional—value of uninhibited discussion of newsworthy topics, we have time and again held that, where a plaintiff's picture is used to illustrate an article on a matter of public interest, there can be no liability under sections 50 and 51 unless the picture has no real relationship to the article or the article is an advertisement in disguise."). We note that an idiosyncratic line of cases in New York has rejected findings of newsworthiness when a story is determined to be false, deceptive, or fictionalized, even in the context of what otherwise would be classified as public discourse. *See Messenger*, 727 N.E.2d at 555; *see also Spahn v. Julian Messner, Inc.*, 233 N.E.2d 840, 842 (N.Y. 1967) (concluding that the claim against the publisher of a biography was constitutional because the author knowingly fictionalized and falsified events, dialogue, and thoughts); *Binns v. Vitagraph Co. of Am.*, 103 N.E. 1108, 1110-11 (N.Y. 1913) (allowing the claim by the plaintiff because the film in which he was depicted was a fictionalized version of true events); *Porco v. Lifetime Entm't Servs., LLC*, 47 N.Y.S.3d 769, 772 (App. Div. 2017) (allowing the claim against a docudrama because the television movie's account of real events was alleged to be "materially and substantially fictitious").

commercial product, an entertaining game of chance,” rather than “educating the public as to the achievements of Howard Hughes.”<sup>246</sup>

California Chief Justice Rose Bird sought to summarize the intuition behind these decisions in her influential dissent in *Lugosi v. Universal Pictures*.<sup>247</sup> Bird argued that California’s right of publicity should be inheritable, but she assured her readers that it would cause no “conflict with freedom of expression” when a plaintiff’s likeness was used “in connection with the sale of such objects as plastic toy pencil sharpeners, soap products, target games, candy dispensers and beverage stirring rods. Such conduct hardly implicates the First Amendment.”<sup>248</sup>

It is plain, however, that not all t-shirts, coasters, and other merchandise are mere commodities when it comes to First Amendment analysis. They can sometimes constitute public discourse. As a federal district court observed in *Hoepker v. Kruger*,

mannequins and pencil sharpeners and other such products can also qualify as art, and museums sometimes collect and display them as such. And case law makes clear that “First Amendment doctrine does not disfavor nontraditional media of expression.” Courts should not be asked to draw arbitrary lines between what may be art and what may be prosaic as the touchstone of First Amendment protection.

. . . .

Museum gift shops sell merchandise that, in general, replicates the art displayed in the museum, thus enabling the museum to distribute art in a common and ordinary form that can be appreciated in everyday life. That the art is reproduced in formats and in quantities sold for modest sums makes the art popular, but does not change the essential nature of the artistic expression that is entitled to First Amendment protection.<sup>249</sup>

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<sup>246</sup>. *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144, 144 (Sup. Ct. 1973).

<sup>247</sup>. 603 P.2d 423, 434 (Cal. 1979) (Bird, C.J., dissenting).

<sup>248</sup>. *Id.* at 449; see also *Rosemont Enters., Inc. v. Choppy Prods., Inc.*, 347 N.Y.S.2d 83, 84-85 (Sup. Ct. 1972) (finding “no validity” in the argument that “marketing [of] T-shirts, sweat-shirts and buttons offering comical and satirical comment on ‘one Howard Hughes’” was “protected by the constitutional right of free speech”).

<sup>249</sup>. *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 352-54 (S.D.N.Y. 2002) (citations omitted); see RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (AM. LAW INST. 1995) (“In some circumstances, however, the informational content of the particular merchandise or its utility to purchasers as a means of expression may justify the conclusion that the use is protected under the first amendment. A candidate for public office, for example, cannot invoke the

Although there is no magic bullet that can distinguish whether a given use occurs in a commodity, or instead in public discourse or commercial speech, some such categorization is at the root of many right of publicity decisions. In *Aldrin v. Topps Co.*,<sup>250</sup> for example, a federal district court found that a set of trading cards with “images of well-known American politicians, actors, athletes, scientists, organizations, artifacts, and events” were neither commodities nor commercial speech.<sup>251</sup> The court rejected astronaut Buzz Aldrin’s claim that a card with an image of him on the moon violated his right of publicity, concluding that the cards used “Aldrin’s name in the course of conveying information about his historically significant achievements. Furthermore, the cards propose no commercial transaction, and are not advertisements for any product, let alone an unrelated product. Rather . . . the speech is the product, and is protected.”<sup>252</sup>

*Aldrin* should be contrasted with *Hilton v. Hallmark Cards*.<sup>253</sup> In *Hilton*, the Ninth Circuit considered a humorous birthday card produced by “a major national purveyor of greeting cards” that featured a photograph of celebrity Paris Hilton’s head “super-imposed” on the body of a cartoon waitress bringing a plate of food to a restaurant customer.<sup>254</sup> The fictional Hilton informs the patron, “Don’t touch that, it’s hot,” which is a play on Hilton’s well-known catchphrase “that’s hot,” which she used on her television series *The Simple Life* whenever she found “something interesting or amusing.”<sup>255</sup> The Ninth Circuit rejected Hallmark’s First Amendment defense as a matter of law.<sup>256</sup> Although the court ostensibly applied the transformative-use test,<sup>257</sup> it seems more plau-

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right of publicity to prohibit the distribution of posters or buttons bearing the candidate’s name or likeness, whether used to signify support or opposition.”); *see, e.g.,* *Cardtoons v. Major League Baseball Players Ass’n*, 95 F.3d 959 (10th Cir. 1996) (holding parodic baseball trading cards protected by the First Amendment); *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501 (Sup. Ct. 1968) (rejecting a right of publicity claim for the sale of a poster with plaintiff’s likeness when plaintiff ran a mock campaign for presidency).

250. No. CV 10-09939 DDP (FMOx), 2011 WL 4500013 (C.D. Cal. Sept. 27, 2011).

251. *Id.* at \*1, \*3.

252. *Id.* at \*3 (emphasis omitted). The court contrasted the Topps cards to the use of test pilot Chuck Yeager’s name in *Yeager v. Cingular Wireless LLC*, 673 F. Supp. 2d. 1089 (E.D. Cal. 2009), which “constituted commercial speech because it had no informative purpose other than to create positive associations with a brand and used Chuck Yeager’s identity to promote an unrelated product.” *Aldrin*, 2011 WL 4500013, at \*2 (citing *Yeager*, 673 F. Supp. 2d at 1098-99).

253. 599 F.3d 894 (9th Cir. 2010).

254. *Id.* at 899.

255. *Id.*

256. *Id.* at 912.

257. *Id.* at 909-12.

sible that it was actually motivated by the belief that Hallmark's use of Hilton's identity was a mere commodity: "Hallmark's card is not advertising the product; it *is* the product."<sup>258</sup> Underlying this classification lay the court's judgment that the Hallmark card did not constitute a contribution to public discourse—whether about Hilton or any other topic. The card was simply a "rip-off" of Hilton's identity for Hallmark's commercial advantage.<sup>259</sup>

If the court in *Aldrin* regarded the astronaut trading card as a vehicle that would prompt public discussion about "historically significant achievements,"<sup>260</sup> the court in *Hilton* regarded the Hallmark birthday card as a mere

258. *Id.* at 905 n.7. The precise question in the case was whether Hallmark's First Amendment defense could be upheld as a question of law, or whether it was so fact dependent that it could be decided only in the context of a fully developed factual record. *Id.* at 900. Although it is plain that refiguring Hilton into an ironic cartoon character satisfies any ordinary understanding of artistic transformation, the court nevertheless reasoned:

Hilton's basic contention is that Hallmark lifted the entire scene on the card from the "Simple Life" episode, "Sonic Burger Shenanigans." The conceit behind the program was to place Hilton and her friend Nicole Ritchie into the life of an average person, including working for a living. In the episode, the women work at a drive-through fast-food restaurant. They cruise up to customers' cars on roller skates and serve them their orders. True to form, Hilton occasionally remarks that a person, thing, or event is "hot."

Hallmark's card, Hilton claims, is a rip-off of this episode. Hallmark maintains that its card is transformative because the setting is different and the phrase, "that's hot," has become a literal warning about the temperature of a plate [of] food.

To be sure, there are some differences between the waitressing Hilton does in the "Simple Life" episode and the portrayal in Hallmark's card. Hilton's uniform is different, the style of the restaurant is different (drive-through service rather than sit-down service), and the food is different (burgers-and-fries rather than diner-style bacon and eggs). In the card, the body underneath Hilton's over-sized head is a cartoon drawing of a generic female body rather than a picture of Hilton's real body. Finally, Hilton's catchphrase appears consistently in its familiar, idiomatic meaning. Despite these differences, however, the basic setting is the same: we see Paris Hilton, born to privilege, working as a waitress.

... [T]here is enough doubt as to whether Hallmark's card is transformative under our case law that we cannot say Hallmark is entitled to the defense as a matter of law.

*Id.* at 911. In the end, the Ninth Circuit rejected Hallmark's First Amendment defense chiefly because an ordinary reader would understand the birthday card to refer to Hilton and her TV adventures. *See id.* But if such referentiality is enough to defeat a First Amendment claim of transformative use, the test cannot perform any constitutional work at all, because such referentiality is a necessary element for every claim of a misappropriated identity.

259. *See id.* at 911; *supra* text accompanying note 258.

260. *Aldrin v. Topps Co.*, No. CV 10-09939 DDP (FMOx), 2011 WL 4500013, at \*3 (C.D. Cal. Sept. 27, 2011).

commercial product lacking the purpose or effect of sparking public conversation. The difference illustrates how courts attribute constitutional significance to particular communicative acts.<sup>261</sup> The question is whether a court will characterize the use of a person's identity as contributing to the formation of public opinion or to the distribution of useful information (commercial or otherwise). If not, it is likely to classify the use as a mere commodity.<sup>262</sup>

There is no question that courts in the context of the right of publicity actually do classify certain communicative uses as public discourse, endowed with the full panoply of First Amendment immunities; that they classify other uses as commercial speech, accorded some but not all of these immunities; and that they classify still other uses as commodities, given no First Amendment protections at all. As we shall see in Section III.B, these differences have enormous implications for the constitutionality of right of publicity actions.

### *B. The First Amendment and the Right(s) of Publicity*

Each of the four branches of the right of publicity that we identified in Part I protects a distinct state interest. In this Section we discuss how each interest intersects with First Amendment values in the contexts of public discourse, commercial speech, and commodities.

#### *1. The First Amendment and the Right of Performance*

In *Zacchini* the Supreme Court exactly and forcefully analogized the state's interest in protecting a right of performance to the state's interest in protecting copyright.<sup>263</sup> The enforcement of copyright law does not receive heightened constitutional scrutiny.

The Supreme Court has explained that one of copyright's main purposes is, like that of the First Amendment itself, "to promote the creation and publica-

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261. Judicial inquiry will be informed in part by social practices and conventions associated with particular categories of objects. *See Post, supra* note 212, at 1253-55.

262. We will further discuss the challenges of making such distinctions in Section III.B.2. We should also be clear that First Amendment scrutiny can be independently triggered if the state attempts to restrict commodities for unconstitutional purposes. *See id.* at 1255-60. Even if coffee mugs imprinted with the faces of celebrities were considered commodities and hence subject to the right of publicity without constitutional restriction, First Amendment concerns would nevertheless be raised if the state sought to prohibit only the sale of mugs imprinted with images of celebrities opposed to the President.

263. *See supra* note 59 and accompanying text (discussing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977)).

tion of free expression.”<sup>264</sup> Citing *Zacchini*, the Supreme Court has even held that an action for copyright can proceed against a major news magazine seeking to publish an ex-President’s memoirs.<sup>265</sup> It did not matter that the publication was newsworthy, that it involved a quintessential public figure, or that the publication was indisputably public discourse. Absent “copyright protection in the work of a public figure,” the Supreme Court reasoned:

[T]here would be little incentive to create or profit in financing such memoirs, and the public would be denied an important source of significant historical information. The promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use “news report” of the book.<sup>266</sup>

If copyright actions apply without constitutional restriction to public discourse, commercial speech, and commodities, *Zacchini* stands for the proposition that the First Amendment will not restrict analogous assertions of the right of performance. *Zacchini* itself upheld a right of performance claim against a nightly news broadcast.<sup>267</sup>

It is important to note, however, that the Supreme Court has been careful to explain that copyright enjoys relative immunity from First Amendment review because “copyright law contains built-in First Amendment accommodations”<sup>268</sup> that reduce its impact on communication. These accommodations include the idea/expression dichotomy and the fair use defense, which “allow[] the public to use . . . expression itself” in ways that preserve “traditional First Amendment safeguards” by affording “considerable ‘latitude for scholarship and comment,’” as well as for “parody.”<sup>269</sup>

264. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (emphasis omitted).

265. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556-57 (1985) (citing *Zacchini*, 433 U.S. at 575).

266. *Id.* at 557. The Supreme Court stated:

In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas. . . .

. . . If every volume that was in the public interest could be pirated away by a competing publisher, . . . the public [soon] would have nothing worth reading.

*Id.* at 558-59 (citations omitted) (quoting Lionel Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 ASCAP COPYRIGHT L. SYMP. 43, 78 (1971)).

267. See *Zacchini*, 433 U.S. at 575-79.

268. *Eldred*, 537 U.S. at 219.

269. *Id.* at 219-20 (quoting *Harper & Row*, 471 U.S. at 560).

Insofar as the right of performance enjoys constitutional immunity in *pari materia* with copyright, the right of performance must also be construed to contain analogous “built-in First Amendment accommodations.”<sup>270</sup> It seems clear enough that if the First Amendment requires such accommodations in the context of copyright, it must also require them in the context of a right of performance. Such accommodations should either be read into the elements of the tort as a matter of state common or statutory law, or they can be exogenously imposed as a matter of First Amendment limitations.<sup>271</sup>

Because the right of performance has not been recognized as such, it has yet to receive the kind of discriminating common-law and statutory attention that caused copyright to develop its own fair use jurisprudence.<sup>272</sup> One way or another, however, either through judicially imposed constitutional restraints or through state common or statutory law, the right of performance should be prevented from reaching uses that in the context of copyright would be exempt from legal regulation as fair uses.<sup>273</sup>

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270. *Id.* at 219.

271. Copyright’s fair use doctrine first developed at common law to accommodate speech interests. See *Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (C.C.D. Mass. 1841) (No. 4901).

272. This fair use jurisprudence has been codified at 17 U.S.C. § 107 (2018). Section 107 provides four nonexclusive factors that courts consider when evaluating whether a defendant’s use is fair and therefore exempt from liability. The first factor asks courts to consider “the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes.” *Id.* § 107(1). Uses for “criticism, comment, news reporting, teaching . . . scholarship, or research” are more likely to be considered fair than those that are for profit. *Id.* § 107; see *Harper & Row*, 471 U.S. at 588; Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1282 (11th Cir. 2014). The Supreme Court has added to this first factor consideration of whether the use is a “transformative” one. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). The other enumerated fair use factors include consideration of “the nature of the copyrighted work,” 17 U.S.C. § 107(2) (2018), “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” *id.* § 107(3), and “the effect of the use upon the potential market for or value of the copyrighted work,” *id.* § 107(4). Each of these factors can, with relative ease, be imported into a fair use-style analysis applicable to right of performance cases. See ROTHMAN, *supra* note 1, at 222–23 n.29 (noting that a number of scholars have taken this position); see also Roberta Rosenthal Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191, 229–53 (1983) (mapping out such an argument while noting some of its challenges); cf. Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836, 915–18 (1983) (proposing use of something like copyright’s fair use doctrine in right of publicity cases).

273. We do not say that the determination of fair use is easy. See, e.g., Pierre N. Leval, Commentaries, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990) (“Judges do not share a consensus on the meaning of fair use.”); Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1137 (1990) (analyzing the “confusion” surrounding the fair use doctrine); see also Jennifer E. Rothman, *Copyright’s Private Ordering and the “Next Great Copyright Act,”* 29 BERKELEY TECH. L.J. 1595, 1601–03 (2014) (describing some

## 2. *The First Amendment and the Right of Commercial Value*

The muddled state of First Amendment doctrine with regard to the right of publicity is especially benighted in the context of the right of commercial value. That is why we have taken pains to distinguish three distinct kinds of injuries that the right of commercial value may seek to vindicate. We denominated the first as *confusion*, the object of which is to prevent uses that impair the commercial value of a plaintiff's identity by misleading as to source or sponsorship. We denominated the second as *diminishment*, the object of which is to prevent uses that might reduce the commercial value of a plaintiff's identity through overexposure or tarnishment. We denominated the third as *unjust enrichment*, the object of which is to prevent the unfair commercial misappropriation of the commercial value of another's identity.<sup>274</sup>

First Amendment analysis should differ depending on which of these three injuries the right of commercial value seeks to vindicate. First Amendment scrutiny should also differ depending on the kind of communication at issue in the allegedly tortious use. If a defendant violates a plaintiff's right of commercial value in the context of a use deemed to be a mere commodity, for example, the Constitution will (by definition) impose no constitutional restraints on a plaintiff's efforts to vindicate injuries to the commercial value of her identity caused by any of these three kinds of harms. Uses that occur in the context of public discourse or commercial speech, by contrast, require more extended analysis.

We suggested in Section I.B that right of commercial value claims based on *diminishment* and *unjust enrichment* ought, as a matter of state law, to reach only unauthorized uses that occur in the context of either commodities or commercial speech.<sup>275</sup> But should state law overreach and apply these claims to public discourse, courts should face no great First Amendment difficulty in rejecting such claims as constitutionally prohibited. This is because it is fundamentally incompatible with the basic structure of public discourse to seek to vindicate the harms that diminishment and unjust enrichment are designed to remedy.

Diminishment actions seek to maintain the commercial value of those whose identities are already well known in the marketplace.<sup>276</sup> This value ultimately depends on the attitudes of third parties. The First Amendment prohib-

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practical challenges that accrue from uncertainty in the fair use doctrine). Our claim is rather that a doctrine of fair use should be applied in the context of the right of performance and that the doctrine should be interpreted in *pari materia* with the application of fair use in copyright.

274. See *supra* Section I.B.3.

275. See *supra* notes 105-108, 110-111 and accompanying text.

276. See *supra* notes 106-108 and accompanying text.



its the state from controlling what people think in public discourse. Diminishment plaintiffs likely qualify as public figures, about whom public discussion must be “uninhibited, robust, and wide-open.”<sup>277</sup> The Constitution does not permit the state to truncate the public assessment of public figures merely because persons wish to talk “too much” about them and hence to overexpose their identities. Nor does it permit the state to maintain the reputation of public figures whom the public wishes to denigrate by associating their identities with unsavory connections. As is said in the context of trademark dilution: “[T]he trademark owner does not have the right to control public discourse whenever the public imbues his mark with a meaning beyond its source-identifying function.”<sup>278</sup>

Actions for unjust enrichment seek to compensate plaintiffs for the “unfair” appropriation of the commercial value of their identity. The premise of such actions is that a defendant ought to pay fair market value for the privilege of using a plaintiff’s identity, even though that identity is otherwise public.<sup>279</sup> Public discourse, however, is a domain in which “speech that merely communicates readily available public information” is constitutionally protected.<sup>280</sup>

Unlike copyright (and the right of performance), which allocates ownership of particular, discrete expressions, unjust enrichment purports to give persons rights to control the use of public information itself, including the simple facts of a plaintiff’s name or likeness. But the First Amendment requires that in public discourse the public be constitutionally entitled to discuss whatever public information comes to its attention, including the names and images of

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277. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

278. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900 (9th Cir. 2002); see also Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 *YALE L.J.* 1717, 1718, 1731-35 (1999) (arguing that trademark holders should not be able to control the meaning and “atmospherics” of their marks beyond their informative source-identifying function).

279. See, e.g., *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 309 (9th Cir. 1992). In an effort to explain the nature of this right, it has been argued that the “unjust enrichment argument . . . presumes that *someone* must have property rights in the value” of a persona. Dogan & Lemley, *supra* note 63, at 1182.

280. *Polinsky v. Bolton*, No. A16-1544, 2017 WL 2224391, at \*5 (Minn. Ct. App. May 22, 2017); see also *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495-96 (1975) (holding that the press cannot be sanctioned for publishing true information disclosed in public court records); *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007) (holding that a producer of fantasy-baseball games cannot be sanctioned for using in its games the names and statistics of players that are available in the public domain).

persons. It contradicts the constitutional function of public discourse to make speakers pay for this privilege.<sup>281</sup>

The First Amendment thus properly prevents unjust enrichment claims from reaching either the photographer who makes art out of an image of people captured on the street,<sup>282</sup> or the writer who discusses real people in a novel.<sup>283</sup> Participants in public discourse have a constitutional right to “take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays.”<sup>284</sup>

In contrast to actions for diminishment or unjust enrichment, actions for *confusion* do not effectuate a purpose that is fundamentally incompatible with the structure of public discourse. On the whole, public discourse is improved if the public is not misled about whether a particular person is the source of a particular use of their identity or has sponsored such a use. It serves no one’s interest if a political candidate can with impunity mislead the public into thinking that he has been endorsed by a particular celebrity.<sup>285</sup> “The purchaser of a book, like the purchaser of a can of peas, has a right not to be misled as to the source of the product.”<sup>286</sup>

Confusion actions serve analogous purposes to trademark and unfair competition claims that regulate communications that are likely to cause confusion about a mark or an endorsement.<sup>287</sup> Although such claims are most often brought in the context of commercial speech, they are also brought against infringing uses within public discourse.<sup>288</sup> But because all state regulation of

281. See *Haglund v. Sawant*, 781 F. App’x 586, 588-90 (9th Cir. 2019) (rejecting on First Amendment grounds a right of publicity claim arising out of the use of a landlord’s name as the title of legislation protecting tenants).

282. See, e.g., *Nussenzweig v. DiCorcia*, No. 50171(U), 2006 WL 871191, at \*3 (N.Y. Sup. Ct. Feb. 8, 2006), *aff’d*, 878 N.E.2d 589 (N.Y. 2007).

283. See, e.g., *Matthews v. Wozencraft*, 15 F.3d 432, 436 (5th Cir. 1994).

284. *Sarver v. Chartier*, 813 F.3d 891, 905 (9th Cir. 2016).

285. See *Browne v. McCain*, 611 F. Supp. 2d 1062, 1070-72 (C.D. Cal. 2009).

286. *Rogers v. Grimaldi*, 875 F.2d 994, 997-98 (2d Cir. 1989).

287. See 15 U.S.C. §§ 1114, 1125(a) (2018).

288. See, e.g., *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 918-21 (6th Cir. 2003); *Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003); *Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, 663-68 (5th Cir. 2000); *King v. Innovation Books*, 976 F.2d 824, 829-31 (2d Cir. 1992); *Ocean Bio-Chem, Inc. v. Turner Network Television, Inc.*, 741 F. Supp. 1546, 1553-54 (S.D. Fla. 1990). *But see* *Farah v. Esquire Magazine*, 736 F.3d 528, 540-41 (D.C. Cir. 2013) (contending that the Lanham Act is limited to uses in commercial speech); *Taubman Co. v. Webfeats*, 319 F.3d 770, 774 (6th Cir. 2003) (same). For further discussion, see Rothman, *supra* note 31, at 1937-45, 1989-92.

public discourse is potentially problematic, it is also well recognized that such claims create an obvious tension with the First Amendment.

In the context of applying the Lanham Act, courts have therefore properly fashioned distinctive First Amendment doctrine to mediate “the tension between the protection afforded by the Lanham Act to trademark owners and the protection afforded by the First Amendment to expressive activity.”<sup>289</sup> The precise wording of the doctrine differs, but in one way or another, courts have sought to ensure that “the finding of likelihood of confusion must be particularly compelling to outweigh the First Amendment interest.”<sup>290</sup>

This is the point of the widely adopted test developed in *Rogers v. Grimaldi* in the context of false endorsement claims.<sup>291</sup> Fearing that an “overextension of Lanham Act restrictions in the area of titles might intrude on First Amendment values,” the court in *Rogers* held that the Lanham Act ought to be applied “only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.”<sup>292</sup> Such an occurrence will be rare and only allowed when the speaker “*explicitly* mislead[s] consumers. ‘[T]he slight risk that . . . use of a celebrity’s name might implicitly suggest endorsement or sponsorship to some people is outweighed by the danger of restricting artistic expression, and [in cases where there is no explicit misleading] . . . the Lanham Act is not applicable.’”<sup>293</sup>

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289. *Westchester Media*, 214 F.3d at 664.

290. *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1379 (2d Cir. 1993); see *Univ. of Ala. Bd. of Trs. v. New Life Art, Inc.*, 683 F.3d 1266, 1278 (11th Cir. 2012) (“[W]e have no hesitation in joining our sister circuits by holding that we should construe the Lanham Act narrowly when deciding whether an artistically expressive work infringes a trademark.”); *Sugar Busters, LLC v. Brennan*, 177 F.3d 258, 269 n.7 (5th Cir. 1999) (citing *Twin Peaks Prods.*, 996 F.2d at 1379).

291. *Rogers*, 875 F.2d 994.

292. *Id.* at 998–99; see also *Girl Scouts of the U.S. v. Bantam Doubleday Dell Publ’g Grp., Inc.*, 808 F. Supp. 1112, 1121 (S.D.N.Y. 1992) (applying the *Rogers* test in the context of fictional children’s books). The *Rogers* test has been expanded to apply beyond titles and is applicable to the substance of all works deemed “expressive.” See *New Life Art, Inc.*, 683 F.3d at 1275–79 (applying the *Rogers* test to allow the use of plaintiff’s marks within paintings, prints, and calendars); *E.S.S Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099–1101 (9th Cir. 2008) (applying the *Rogers* test in the context of video games); *ETW Corp.*, 332 F.3d at 937 (applying the *Rogers* test to the use of an athlete’s name in material accompanying prints that depicted the athlete); see also *VIP Prods. LLC v. Jack Daniel’s Props., Inc.*, 953 F.3d 1170, 1175 (9th Cir. 2020) (holding that the *Rogers* test applies to a dog toy because the “Bad Spaniels Silly Squeaker” toy is an expressive work that “communicates ‘a humorous message,’ using word play to alter the serious phrase that appears on a Jack Daniel’s bottle— ‘Old No. 7 Brand’— with a silly message— ‘The Old No. 2’” (citation omitted)).

293. *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1245 (9th Cir. 2013) (quoting *Rogers*, 875 F.2d at 999–1000). Notably, the same court that recognized a First Amendment defense to a false endorsement claim under the Lanham Act in *Brown* rejected one in the context of the very

Analogous constitutional considerations should apply to confusion-based right of publicity claims in the context of public discourse. The legitimate state purpose of preventing confusion must be balanced against the potential chilling effects of any effort to regulate public discourse. The upshot is that, as in Lanham Act and related state claims, First Amendment considerations should prevent confusion-based claims from proceeding within public discourse unless there is very strong evidence that a speaker has seriously or perhaps explicitly misled the public as to a plaintiff's participation in, or sponsorship of, the allegedly infringing use.

No such tight restrictions on confusion-based claims are required in the context of commercial speech. Because commercial speech is protected primarily due to its "informational function," the Supreme Court has been quite clear that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."<sup>294</sup> Claims of confusion precisely allege that identities have been misappropriated in ways that are likely to mislead the public about source or sponsorship. Hence there is no question of their constitutionality when applied in the domain of commercial speech, just as there is no question of the enforcement of analogous claims under the Lanham Act.

Even in the context of commercial speech, however, trademark and unfair competition laws accommodate free speech concerns. These laws have long tolerated some degree of confusion when a defendant has acted in good faith and fairly to describe its own goods or services, or to comment on another's product when doing so requires reference to a mark or a common term or symbol.<sup>295</sup> Right of commercial value claims should similarly allow defenses that track the descriptive and nominative fair use defenses to Lanham Act claims.<sup>296</sup>

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same video game as to a right of publicity claim brought by a different set of plaintiffs. *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172 (9th Cir. 2015). This led the plaintiff in *Brown* to refile his complaint in state court with a right of publicity claim, which the court allowed to proceed. Complaint at 1, *Brown v. Elec. Arts, Inc.*, No. BC 520019 (Cal. App. Dep't Super. Ct. Aug. 30, 2013); Darren Rovell, *Jim Brown Receives \$600,000 Judgment to Dismiss Lawsuit vs. EA, ESPN* (June 28, 2016), [https://www.espn.com/nfl/story/\\_/id/16589853/jim-brown-gets-600000-dismiss-lawsuit-electronic-arts](https://www.espn.com/nfl/story/_/id/16589853/jim-brown-gets-600000-dismiss-lawsuit-electronic-arts) [<https://perma.cc/6YSM-VG25>].

294. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980).

295. See 15 U.S.C. § 1115(b)(4) (2018); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118-23 (2004); *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125, 130-31 (1947); *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111, 121-22 (1938); *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 308-09 (9th Cir. 1992).

296. Descriptive or "classic" fair use is a defense when a defendant uses a term or symbol "fairly and in good faith" to describe aspects of its own goods or services. See 15 U.S.C. § 1115(b)(4); *KP Permanent Make-Up*, 543 U.S. at 118-23. Nominative or referential fair use allows the use of another's mark to "accommodate[]" situations where it would be "virtually impossible to refer to a particular product for purposes of comparison, criticism, point of

Although these defenses are internal to trademark law, they are recognized as the kind of “built-in First Amendment accommodations”<sup>297</sup> without which there would be “serious First Amendment concerns” about the enforcement of the Lanham Act.<sup>298</sup> These fair use defenses should also apply to diminishment and unjust enrichment claims.<sup>299</sup>

Absent the applicability of fair use defenses, diminishment and unjust enrichment claims are otherwise likely valid in the context of commercial speech. Under *Central Hudson*, restrictions on commercial speech are constitutional so long as “the asserted governmental interest is substantial” and so long as “the regulation directly advances the governmental interest asserted, and . . . is not more extensive than is necessary to serve that interest.”<sup>300</sup> In the context of commercial speech, many would characterize the maintenance of the commercial goodwill of public figures as a substantial government interest. Diminish-

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reference or any other such purpose without using the mark.” *Am. Soc’y for Testing v. Public.Resource.Org., Inc.*, 896 F.3d 437, 456 (D.C. Cir. 2018) (quoting *New Kids on the Block*, 971 F.2d at 306). To establish the fairness of such referential uses a defendant must establish that: (1) “the product or service in question must be one not readily identifiable without use of the trademark”; (2) “only so much of the mark or marks may be used as is reasonably necessary to identify the product or service”; and (3) the defendant “must do nothing . . . [to] suggest sponsorship or endorsement by the trademark holder.” *New Kids on the Block*, 971 F.2d at 308. In the context of the right of commercial value, the plaintiff’s identity would substitute for the plaintiff’s trademark in a fair use analysis. These defenses apply to uses in both commercial and noncommercial speech. *See, e.g.*, *Sazerac Brands, LLC v. Peristyle, LLC*, 892 F.3d 853, 855, 857–59 (6th Cir. 2018); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 918, 920–21 (6th Cir. 2003); *New Kids on the Block*, 971 F.2d at 308; *see also Am. Soc’y for Testing*, 896 F.3d at 456 (“A prototypical example of nominative fair use would be where ‘an automobile repair shop specializing in foreign vehicles runs an advertisement using the trademarked names of various makes and models to highlight the kind of cars it repairs.’” (citations omitted)).

297. *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003) (concluding that analogous accommodations are what allow for copyright law’s constitutionality).
298. *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1176, 1180 (9th Cir. 2010); *see also Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 430–31 (2003) (suggesting that dilution claims adequately accommodate First Amendment concerns because they exempt “non-commercial use[s]” and provide “fair use” defenses); *Madrid Protocol Implementation Act and Federal Trademark Dilution Act of 1995: Hearing on H.R. 1270 and H.R. 1295 Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 104th Cong. 128 (1995) (statement of Mary Ann Alford, Executive Vice President, International Trademark Association) (suggesting that dilution law would be unconstitutional if applied to noncommercial speech). Frequently courts employ fair use doctrines on a theory of constitutional avoidance instead of engaging in direct First Amendment analysis. *See, e.g.*, *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 808 n.14 (9th Cir. 2003).
299. *Cf.* 15 U.S.C. § 1125(c)(3) (2018) (providing expressly for such defenses in the context of dilution).
300. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

ment directly advances this goal by empowering plaintiffs to exercise effective control over commercial uses of their identity. So limited, diminishment actions do not seem overbroad. Many would also consider it a substantial government interest to prevent the “unfairness” that unjust enrichment seeks to avert in the context of unauthorized uses of a person’s identity in commercial speech. Unjust enrichment directly advances this interest in a narrowly tailored manner.

Although both diminishment- and unjust enrichment-based right of publicity claims decrease the amount of information circulated in commercial speech,<sup>301</sup> they each correspond to deep-seated concepts of commercial propriety, and they each have substantial precedential support in the history of American commercial regulation. Diminishment claims are essentially analogous to trademark dilution claims, which courts have thus far accepted as constitutional in the context of commercial speech.<sup>302</sup> Diminishment claims, however, can be brought only by celebrities who are well known. Actions for unjust enrichment ensure that ordinary persons, whose names and images are without inde-

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301. An argument might be made that although diminishment claims reduce the quantity of information that circulates, they nevertheless increase the quality of that information for consumers because they preserve the distinctiveness of a plaintiff’s identity. An analogous argument has been advanced in the context of trademark dilution claims. See LANDES & POSNER, *supra* note 68, at 207-09; William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 306-08 (1987) (discussing a number of economic arguments posited for dilution laws). But this justification for dilution law has been met with skepticism and empirical challenges. See, e.g., Beebe et al., *supra* note 102; Tushnet, *supra* note 102.

302. See *Moseley*, 537 U.S. at 430-31; see also *United States v. Alvarez*, 567 U.S. 709, 735-36 (2012) (Breyer, J., concurring) (suggesting the constitutionality of trademark dilution laws “focused upon commercial and promotional activities that are likely to dilute the value of a mark”); *id.* at 743-44 (Alito, J., dissenting) (pointing to dilution law as constitutionally allowable because it protects the “prestige associated with fancy watches and designer handbags” by preventing the “lessening [of] the distinctiveness” of marks (citation omitted)); cf. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm’n*, 483 U.S. 522 (1987) (holding constitutional a prohibition on the use of the term “Olympics” without regard to likely consumer confusion). We note that some scholars have been skeptical about dilution’s constitutionality. See, e.g., Lisa P. Ramsey, *Free Speech Challenges to Trademark Law After Matal v. Tam*, 56 HOUS. L. REV. 401, 456-61 (2018); Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 LIQUORMART, and Bartnicki, 40 HOUS. L. REV. 697, 732-39 (2003). For discussion of constitutional challenges to tarnishment-based dilution claims after *Matal v. Tam*, 137 S. Ct. 1744 (2017), and *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), see Jennifer E. Rothman, *Valuing the Freedom of Speech and the Freedom to Compete in Defenses to Trademark and Related Claims in the United States*, in *THE CAMBRIDGE HANDBOOK OF INTERNATIONAL AND COMPARATIVE TRADEMARK LAW* 537, 553-55 (Irene Calboli & Jane C. Ginsburg eds., 2020). To the extent that dilution law is unconstitutional in the trademark context it should be equally problematic in the context of diminishment-based right of publicity claims.

pendent market value, are also able to control commercially valuable uses of their identities. Unjust enrichment actions thus eliminate the striking unfairness of permitting famous persons, but not others, to control commercially valuable appropriations of their identity. If diminishment actions are permitted within commercial speech, eliminating this inequity is likely itself a sufficient constitutional justification for unjust enrichment claims.

The conclusions we have reached so far with respect to the likely constitutional treatment of right of commercial value claims are summarized in Table 1:

TABLE 1.

	Public Discourse	Commercial Speech	Commodities
<b>Confusion</b>	Permissible (if confusion is explicit or serious)	Permissible (with fair use exceptions)	Permissible
<b>Diminishment</b>	Unconstitutional	Likely Permissible (with fair use exceptions)	Permissible
<b>Unjust Enrichment</b>	Unconstitutional	Likely Permissible (with fair use exceptions)	Permissible

Table 1 suggests that the constitutionality of right of commercial value claims depends to a great extent on judicial determinations of whether uses occur in public discourse, commercial speech, or commodities. Standard First Amendment doctrine is, however, not very helpful in assisting courts in making such essential constitutional judgments.

The foundational precedent for identifying commodities is *Spence v. Washington*, which would have courts characterize as “protected expression” any “activity” in which “an intent to convey a particularized message [is] present, and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it.”<sup>303</sup> In every right of commercial value claim, however, a defendant will by hypothesis have successfully communicated a plaintiff’s identity. In the context of the right of commercial value, therefore, the *Spence* test cannot discriminate between commodities and public discourse or commercial speech.<sup>304</sup> Although there is doctrine that purports to

303. 418 U.S. 405, 410–11 (1974). For a discussion, see Post, *supra* note 212, at 1250–60.

304. For other recent judicial efforts to draw this line, see, for example, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1742–44 (2018) (Thomas, J., concurring),

instruct courts how to distinguish commercial speech from public discourse,<sup>305</sup> such doctrine is generally conceded to be vague and unhelpful, and assuredly is of little assistance in helping courts evaluate the myriad different communicative contexts in which right of commercial value claims are embedded.<sup>306</sup>

Given the nearly infinite ways in which the names and images of persons can be communicated, courts dealing with actions for the right of commercial value are virtually at sea in distinguishing the three distinct constitutional tranches of communication that we have identified. It is no surprise, then, that courts have struggled to fashion doctrine that implicitly categorizes the constitutional nature of the speech at issue in right of commercial value cases.

Consider the many decisions in which courts have addressed the mass production and sale of unauthorized commercial posters. Such posters, particularly when depicting celebrities, are often evaluated as if their restriction raised no constitutional issues.<sup>307</sup> In *Brinkley v. Casablancas*,<sup>308</sup> for example, the model Christie Brinkley objected to the unauthorized mass production and sale of posters reproducing a photograph of her that originally had been taken with permission. A New York court discerned nothing of a “newsworthy” nature within the poster and saw no constitutional difficulty in finding a violation of the New York right of publicity statute.<sup>309</sup>

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in which Justice Thomas asserts that a custom wedding cake is expressive speech, rather than a mere product; and *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 909 (Ariz. 2019), which treats custom wedding invitations as fully protected “pure speech.”

305. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-68 (1983); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 68-69 (1976).

306. See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 709-10 (9th Cir. 1999), *reh'g granted, opinion withdrawn*, 192 F.3d 1208 (9th Cir.), and *on reh'g*, 220 F.3d 1134 (9th Cir. 2000); *Dryer v. Nat'l Football League*, 689 F. Supp. 2d 1113, 1117 (D. Minn. 2010).

307. See, e.g., *Factors Etc., Inc. v. Pro Arts, Inc.*, 496 F. Supp. 1090, 1103 (S.D.N.Y. 1980) (“[T]here is no [First Amendment] protection for selling posters of Elvis Presley as Elvis Presley.”), *rev'd on other grounds*, 652 F.2d 278 (2d Cir. 1981); *Comedy III Prods., Inc. v. Gary Saderup Inc.*, 21 P.3d 797, 802-03 (Cal. 2001) (rejecting a First Amendment defense in the context of the sale of the defendant’s lithograph of the Three Stooges in multiple copies and on t-shirts). *But see infra* note 316.

308. 438 N.Y.S.2d 1004 (App. Div. 1981).

309. See *id.* at 1008-09, 1011-12 (distinguishing the case from one in which an actor’s photograph in the nude was reprinted in an adult magazine because that use was a “newsworthy” comment on the plaintiff’s willingness to appear nude in a motion picture); see also *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 88-89 (2d Cir. 1989) (concluding that pull-out posters in a magazine of professional wrestlers would not “automatically” receive “[F]irst [A]mendment protection” or be considered “newsworthy” under the New York statute if they were a “separate product”).



Contrast *Brinkley* with *Nussenzweig v. DiCorcia*,<sup>310</sup> in which a different New York court held that the right of publicity could not apply to an unauthorized photograph taken of an anonymous person on a street. Even though the photographer sought to sell the picture at a commercial art gallery for “between \$20,000 and \$30,000,” the court opined that “photograph[y] is ‘art,’” and “art cannot constitutionally be within the protection of New York’s privacy laws because it is constitutionally protected speech.”<sup>311</sup>

The difference between *Nussenzweig* and *Brinkley* is consequential but mysterious. It turns on whether courts classify a use as public discourse (“art”) or instead as commercial speech or a commodity. Our analysis suggests that the right of commercial value can apply to commercial speech or commodities, but not to public discourse (unless the use happens to create serious confusion). But both the poster in *Brinkley* and the photograph in *Nussenzweig* were sold in a commercial marketplace. Both pass the *Spence* test. How might they be constitutionally distinguished from one another?

The influential transformative-work test that we discussed in Part II is best interpreted as an effort to distinguish art from commodities (or commercial speech) by ascertaining the “transformative” presence of an artist. But once we realize that the larger purpose of any such test is to determine the constitutional value of particular communicative acts, we can also see that the doctrine is woefully inadequate. As the New York court rightly observed in *Nussenzweig*, the category of art cannot be limited “to transformative and not duplicative likenesses,”<sup>312</sup> or the entire field of photography could never qualify as public discourse, which it plainly does.<sup>313</sup>

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310. No. 50171(U), 2006 WL 871191 (N.Y. Sup. Ct. Feb. 8, 2006), *aff’d*, 878 N.E.2d 589 (N.Y. 2007).

311. *See id.* at \*4, \*6; *see also* *Altbach v. Kulon*, 754 N.Y.S.2d 709, 711-12 (App. Div. 2003) (“[A]rtistic expressions . . . are entitled to protection under the First Amendment and accepted from New York’s privacy protections . . . . In addition to the so-called ‘newsworthiness’ exception . . . there is a well-recognized exception for works of art and ‘advertising that is undertaken in connection with a use protected by the First Amendment.’” (citation omitted)). For an analogous contrast to that between *Brinkley* and *Nussenzweig*, compare *Young v. Greener Studios, Inc.*, 26 N.Y.S.2d 357, 357-58 (Sup. Ct. 1941), which allowed liability when an authorized image of a model made by an anonymous artist was used without consent by defendant manufacturer to produce mass-distributed “manikins,” with *Simeonov v. Tiegs*, 602 N.Y.S.2d 1014, 1016-18 (Civ. Ct. 1993), which concluded that the First Amendment barred liability when an internationally known sculptor made an unauthorized bust of a famous model, even if he sold it in multiple copies for profit, because it was the artist’s “creative expression.”

312. *Nussenzweig*, 2006 WL 871191, at \*7-8.

313. We note that although the transformative-work test, as broadly defined by the California Supreme Court, appears to allow for this, the narrower interpretations of that law by the

The fundamental difficulty is that courts cannot distinguish among public discourse, commercial speech, and commodities by using any simple or mechanical “test.” Right of commercial value cases present so many distinct configurations that the necessity of discrete, contextualized judicial judgment is unavoidable. The essential point is that the constitutional classification of communicative acts ultimately depends upon the attribution of constitutional value. If a court believes that a particular communicative act should be characterized as a contribution to the process of public opinion formation, it will classify the use as public discourse.

When uses appear in a traditionally recognized “medium for the communication of ideas,”<sup>314</sup> such as fine art, film, newspapers, radio, or books, courts are comfortable classifying them as presumptively public discourse.<sup>315</sup> But the boundaries of these categories are anything but obvious. A photograph sold in a gallery as fine art will be accorded the constitutional dignity of public discourse, but a photograph sold on the mass market as a commercial poster is less likely to be accorded the same respect.<sup>316</sup> Although the Supreme Court has held that video games should be classified as a protected “medium” for the communication of ideas,<sup>317</sup> lower courts have evidently struggled with this conclusion in the context of the right of publicity, sometimes treating uses in

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Third and Ninth Circuits do not. See *supra* notes 175-183 and accompanying text. In practice, the transformative-work test has disfavored realistic depictions.

314. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).
315. Post, *supra* note 212 *passim* (describing the concept of a medium for the communication of ideas, which includes film, parades, art exhibitions, and so on).
316. The attribution of constitutional value is a difficult and contextual problem even in the context of commercial posters. In *Rosa & Raymond Parks Institute for Self Development v. Target Corp.*, 90 F. Supp. 3d 1256, 1263-65 (M.D. Ala. 2015), *aff'd on other grounds*, 812 F.3d 824 (11th Cir. 2016), for example, the court considered a mass-produced plaque of Rosa Parks sold at Target to be “newsworthy or of legitimate public concern” and “protected by the First Amendment” because it celebrated Parks and her role in the civil rights movement. Similarly, in *ETW Corp. v. Jireh Publishing, Inc.*, 99 F. Supp. 2d 829, 835 (N.D. Ohio 2000), *aff'd on other grounds*, 332 F.3d 915 (6th Cir. 2003), the more than 5,000 “limited edition” copies of a print of Tiger Woods sold by a sports artist were deemed “to convey a message” of Woods’s winning the Masters Tournament, rather than merely to “reproduce an existing photograph” of Woods. In *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639, 642-43 (1995), a poster of legendary 49ers quarterback Joe Montana was classified as “newsworthy” because it reproduced a front-page photograph and headline celebrating the team’s Super Bowl victory.
317. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (holding that video games are a protected “medium” that qualifies “for First Amendment protection. . . . Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world)”).

video games as if they were in commodities or commercial speech. Judicial uncertainty about exactly how to characterize the recent genre of video games may help explain why several recent controversial decisions have rejected First Amendment defenses in the context of such games.<sup>318</sup>

Difficulties of constitutional categorization become especially complicated when uses occur outside of traditional media, as for instance on t-shirts or coffee mugs. Perhaps uniquely among state torts, right of publicity cases involve a plethora of such nontraditional uses. In the context of classifying communications that do not presumptively form part of public discourse, the essential constitutional question facing a court will be whether a reasonable person would expect the relevant communicative act (if, for example, imprinted on an object) to be taken up and used in the kind of communicative exchanges that the First Amendment is designed to protect. A prerequisite for such exchanges is the potential for dialogue. The constitutional categorization of a use on a coffee mug will not be determined by the mug itself, considered in isolation, but rather by how a court determines that the communicative content imprinted on the mug will be perceived and deployed in society.<sup>319</sup> Similarly, constitutional protections do not attach to a photograph as such, but to how a court imagines the photograph will be regarded and used by its audience.

A distinct constitutional difficulty with which courts have grappled in right of publicity cases is what we might call the issue of *severability*. This issue arises in the context of uses related to, but potentially separable from, works that themselves would be categorized as public discourse. Consider, for example, the “relatedness” test set forth in *Rogers v. Grimaldi*, which we discussed in Part II.<sup>320</sup> We suggest that the test is best interpreted as an effort to determine

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318. See, e.g., *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 148-49, 167-70 (3d Cir. 2013); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271 (9th Cir. 2013); see also *Champion v. Take Two Interactive Software, Inc.*, 100 N.Y.S.3d 838, 847-48 (Sup. Ct. 2019) (distinguishing narrative video games from sports-themed ones for analyzing the meaning of New York’s speech-inflected requirement that liability only lie for uses for “purposes of trade”). Courts may sometimes be inclined to analogize video games to board games instead of to movies. On the uncertain judicial treatment of board games in the context of the right of publicity, see, for example, *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970); *Palmer v. Schonhorn Enterprises, Inc.*, 232 A.2d 458 (N.J. Super. Ct. 1967); and *Rosemont Enterprises, Inc. v. Urban Systems, Inc.*, 340 N.Y.S.2d 144 (Sup. Ct. 1973). But see *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 819 (8th Cir. 2007) (holding that the First Amendment protects use of athletes’ names and statistics in fantasy sports); *Aldrin v. Topps Co.*, No. CV 10-09939 DDP (FMOx), 2011 WL 4500013, at \*3 (C.D. Cal. Sept. 27, 2011) (allowing a First Amendment defense in the context of a trading-card game).

319. See Post, *supra* note 212, at 1252-55.

320. See 875 F.2d 994, 1004-05 (2d Cir. 1989); *supra* notes 183-187 and accompanying text.

whether the title of a film might constitutionally be characterized in a manner that is distinct from the film to which it is attached.

The question in *Rogers* was whether the use of Ginger Rogers's name in the title of a movie could be actionable. The movie was itself plainly public discourse, but the issue was whether the title could be regulated apart from the movie. *Rogers* held that unless the name bore "no artistic relevance to the underlying work whatsoever,"<sup>321</sup> or could be characterized as a "disguised advertisement for the sale of goods or services or a collateral commercial product," it ought to receive the same public discourse protections as the movie itself.<sup>322</sup>

The issue of severability turns on whether courts can isolate uses of identity in what is otherwise public discourse and regulate them as if they were commercial speech or commodities.<sup>323</sup> Missouri's predominant-purpose test, which we discussed in Part II, seems to us an unsuccessful effort to do exactly this.<sup>324</sup>

321. *Rogers*, 875 F.2d at 999. Although this language is taken from the court's analysis of the First Amendment defense to Rogers's Lanham Act claim, we think it well describes the principle invoked by the court in its discussion of the right of publicity when it indicated that the use of the title was constitutionally protected unless "wholly unrelated" to the underlying work. *See id.* at 1004-05.

322. *Rogers*, 875 F.2d at 999-1000, 1004-05 (considering First Amendment defenses to both Lanham Act and state publicity claims); *cf.* *Am. Dairy Queen Corp. v. New Line Prods., Inc.*, 35 F. Supp. 2d 727, 732, 734-35 (D. Minn. 1998) (holding that because "New Line's proposed title is not being used primarily as part of an expressive work, but instead is used 'to market, advertise or identify' the film . . . no such artistic concept inheres in the proposed title," and because "somewhat lesser protection" attaches to "commercial speech" than to films, "the balance between the public's interest in free expression and its interest in avoiding consumer confusion and trademark dilution tilts in favor[] of avoiding confusion and dilution" (quoting *Mut. of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 402 (8th Cir. 1987))). In the context of evaluating First Amendment defenses to Lanham Act claims, the *Rogers* test initially provided a bar to liability for uses of another's mark or identity in titles of expressive works as long as the uses had "some artistic relevance" and were "not explicitly misleading." *Rogers*, 875 F.2d at 1000. The test has now been expanded beyond titles and applies to the substance of a work as well. *See, e.g., Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1241-42 (9th Cir. 2013) (recognizing the application of the *Rogers* test to uses within the body of works and within a video game); *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008) (applying the test to the use of a club name in a video game); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 807 (9th Cir. 2003) (using the test in the context of photographs of Barbie); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 937 (6th Cir. 2003) (applying the test to an image within an artwork).

323. *See, e.g., Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003) ("Parks' right of publicity claim presents a genuine issue of material fact regarding the question of whether the title to the song is or is not 'wholly unrelated' to the content of the song. A reasonable finder of fact, in our opinion, upon consideration of all the evidence, could find the title to be a 'disguised commercial advertisement' or adopted 'solely to attract attention' to the work." (quoting *Rogers*, 875 F.2d at 1004-05)); *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 88 (2d Cir. 1989) ("For example, Comics World could not staple a T-shirt bearing the likeness of a

In *Doe v. TCI Cablevision*, Missouri concluded that the use of the hockey player Tony Twist's identity within a comic book that was otherwise public discourse could be regulated if it were "predominantly a ploy to sell comic books and related products rather than an artistic or literary expression."<sup>325</sup> But this is not a helpful criterion by which to distinguish public discourse from either commercial speech or commodities. Biographies, documentaries, and docudramas, which are paradigmatically public discourse, may well be motivated by an interest in "exploit[ing] the commercial value"<sup>326</sup> of a celebrity. Whether Andy Warhol chose his celebrity subjects because their portraits were more likely than portraits of anonymous individuals to produce commercially successful paintings is not relevant to the question of whether his work should constitutionally be categorized as art.

*Rogers* proposes what seems to us a far more defensible approach to the question of severability within public discourse. It essentially holds that a use will retain its "First Amendment protection" so long as its "level of relevance" is "above zero."<sup>327</sup> The *Rogers* test is appropriate because within public discourse "esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree."<sup>328</sup> It is therefore inherently and deeply problematic for a court to second-guess the relevance (artistic or otherwise) of communicative details within public discourse. Within public discourse, judgments of severability ought to be reserved for only the most extreme cases.

### 3. *The First Amendment and the Right of Control*

The *right of control*, in contrast to the right of commercial value, asserts a state interest in maintaining the autonomy of individual personalities. The right of control rests on the idea that when others are able to speak about us

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Titan wrestler between magazine covers and claim exemption from section 51 and [F]irst [A]mendment protection for a 'wrestling T-shirt magazine.'").

324. See *supra* notes 173-175 and accompanying text.

325. 110 S.W.3d 363, 374 (Mo. 2003). In *Titan Sports*, the Second Circuit adopted a similar test to determine whether the right of publicity could apply to posters stapled into the pages of a magazine: "[T]he trial court must consider whether these photos are included primarily for their 'public interest aspect' or whether whatever public interest aspect might be involved 'is merely incidental to [the distributors'] commercial purpose.'" 870 F.2d at 88-89 (alteration in original) (quoting *Davis v. High Soc'y Magazine, Inc.*, 457 N.Y.S.2d 308, 313 (App. Div. 1982)).

326. *TCI Cablevision*, 110 S.W.3d at 374 (quoting *Lee, supra* note 170, at 500).

327. *E.S.S. Entm't 2000*, 547 F.3d at 1100 (interpreting the *Rogers* test).

328. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000).

without limitation, strangers can seize “at least partial control over the meaning associated with” our identity, and we are thereby inhibited in our ability to develop as autonomous persons.<sup>329</sup>

This justification, however, is incompatible with the constitutional value of public discourse. The essence of public discourse lies in the public’s freedom to form its own judgments based on publicly available information. We can control what information we choose to make public, but we cannot control how others will use that information once it has entered the public domain. The state cannot intervene to shape how the public forms its opinion based upon public information. The resulting “pitiless glare”<sup>330</sup> of public attention is simply a cost of living in a world that has agreed to be governed by public opinion.

Because the right of control invests persons with discretionary authority to regulate the communication of otherwise public information, it will be unconstitutional when applied to public discourse. Insofar as a person’s identity is a matter of public information, the state cannot create rules that constrain its use in public discourse, except for specific, narrow, and compelling reasons, like the possibility of serious confusion as to endorsement or participation.

It is for this reason that an expansive right of control, like that accepted in Europe in the context of a broad “right to be forgotten,” would likely be unconstitutional in the United States.<sup>331</sup> Regulating the storage, sale, and manipulation of privately held data, however, is quite different from regulating public discussion based on otherwise public information. It is one thing to prevent Google from selling data gathered from its surveillance of our online searches; it is quite another to prevent Google from communicating to the general public otherwise publicly available information on the web. Freedom of public discourse entails the latter, but not the former.<sup>332</sup>

329. McKenna, *supra* note 127, at 282; *see supra* notes 121-136 and accompanying text.

330. Ken Newton, *The Transformation of Governance?*, in *NEW MEDIA & POLITICS* 151, 152 (Barrie Axford & Richard Huggins eds., 2001).

331. Post, *supra* note 131, at 1047-54; *see* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 *STAN. L. REV.* 1049, 1068-70 (2000). *But see* COHEN, *supra* note 113, at 261 (suggesting that the restrictions on speech of Europe’s right to be forgotten are more modest); ZUBOFF, *supra* note 135, at 57-61, 108-12 (supporting the right to be forgotten as “essential” to preserve individuals’ “identity and sense of dignity,” and contending that the First Amendment arguments marshalled by surveillance capitalists to protect their massive collection and use of data are “antidemocratic” and counter to “First Amendment values”).

332. We realize that there is loose language in *Sorrell v. IMS Health, Inc.*, which states that the “creation and dissemination of information are speech within the meaning of the First Amendment.” 564 U.S. 552, 570 (2011). This language could be read to say that the regulation of stored data involves the regulation of public discourse. But this interpretation of *Sorrell* is overbroad. The case is better construed to mean that government may not regulate the

The right of control may perhaps fare better when it arises in the context of commercial speech. For purposes of argument, we accept that awarding persons a right of control serves a “substantial” state interest under *Central Hudson*. The question is whether, assuming that the right of control can be applied only to commercial speech and commodities, it nevertheless “directly advances” the value of autonomy under *Central Hudson*.<sup>333</sup> Any such constitutional calculation must determine whether the First Amendment would permit the assertion of the right of control if potential damage to a plaintiff’s personality is only *de minimis* because the offending use is “incidental” or “fleeting,”<sup>334</sup> as for example when a defendant’s advertisement contains a crowd scene that happens to include an image of a plaintiff.<sup>335</sup>

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transmission of data “in order to tilt public debate in a preferred direction.” *Id.* at 578-79. Thus, the Court in *Sorrell* specifically approved the Health Insurance Portability and Accountability Act (HIPAA), even though HIPAA far more strictly restrains the transmission of information than does the Vermont law *Sorrell* found unconstitutional. *Id.* at 573. *Sorrell* explicitly notes that Vermont might have followed the path of HIPAA and “advanced its asserted privacy interest broadly by allowing the information’s sale or disclosure in only a few narrow and well-justified circumstances.” *Id.* Lower courts have interpreted *Sorrell* in the more limited way we propose. *See, e.g.,* Wollschlaeger v. Governor, 848 F.3d 1293, 1313-14 (11th Cir. 2017) (“Florida may generally believe that doctors and medical professionals should not ask about, nor express views hostile to, firearm ownership, but it ‘may not burden the speech of others in order to tilt public debate in a preferred direction.’” (quoting *Sorrell*, 564 U.S. at 578-79)); *Boelter v. Hearst Commc’ns, Inc.*, 192 F. Supp. 3d 427, 450 (S.D.N.Y. 2016) (“[T]here is no evidence that the Michigan legislature . . . disagreed with the message of those who use consumer identifying information.” (citing *Sorrell*, 564 U.S. at 578-79)); *King v. Gen. Info. Servs., Inc.*, 903 F. Supp. 2d 303, 309 (E.D. Pa. 2012) (“[T]he *Sorrell* decision largely rested on the fact that Vermont was restraining a certain form of speech communicated by a certain speaker solely because of the State’s disagreement with it.”); *see also* PRINCIPLES OF THE LAW OF DATA PRIVACY § 1 reporters’ n.7 (AM. LAW INST. 2019) (noting that lower courts have construed *Sorrell* as holding that government may not regulate the transmission of data “in order to tilt public debate in a preferred direction” (quoting *Sorrell*, 564 U.S. at 578-79)).

333. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

334. *See, e.g., Stayart v. Google Inc.*, 710 F.3d 719, 723 (7th Cir. 2013) (concluding that the connection between the internet search engine’s use of the plaintiff’s name and its commercial purpose was “incidental” rather than “substantial”); *Candelaria v. Spurlock*, No. 08 Civ. 1830, 2008 WL 2640471, at \*5 (E.D.N.Y. July 3, 2008) (dismissing a right of publicity claim in part based on the incidental use exception when the plaintiff’s appearance in defendant’s documentary was “fleeting,” lasting for only three to four seconds); *Champion v. Take Two Interactive Software, Inc.*, 100 N.Y.S.3d 838, 844, 847 (Sup. Ct. 2019) (rejecting the plaintiff’s right of publicity claim in part because the use, if any, of his name and likeness in a video game was “incidental in nature” rather than “consequential”).

335. In the context of a right of control, what is sometimes called the “incidental use” exemption or defense could, of course, also be conceived as a matter of substantive state law. *See, e.g.,* MCCARTHY & SCHECHTER, *supra* note 65, § 7.20 (“An insignificant or fleeting use of a person’s name or image in an advertisement will not trigger liability . . .”).

Essentially the right of control in commercial speech and commodities would give persons a similar right as would the unjust enrichment branch of the right of commercial value, except that an unjust enrichment claim would be applicable only to the extent that a defendant derives some commercial value from the unauthorized use of a plaintiff's identity. As the common expedient of statutory damages suggests, it may be that a right of control is commonly thought to "directly advance" the autonomy of personality even if it is relevant only in the thin sliver of cases in which defendants misappropriate a plaintiff's identity in commercial speech or commodities without receiving a commercial benefit. Were a right of control to apply in the context of commercial speech, fair use defenses, analogous to those recognized in the context of the right of commercial value, should also be constitutionally required. No constitutional restrictions should limit the right of control with respect to commodities.

#### 4. *The First Amendment and the Right of Dignity*

The *right of dignity* prohibits appropriations of identity that are highly offensive, which means appropriations that are inconsistent with forms of respect essential to the integrity of personality. Long-established First Amendment doctrine is quite hostile to the enforcement of such civility rules in public discourse.<sup>336</sup> "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>337</sup> The Court has thus not permitted actions for dignitary torts like false light or the intentional infliction of emotional distress to be enforced in public discourse absent a showing of "actual malice," which roughly means that a plaintiff must show that a defendant has intentionally promulgated false statements of fact.<sup>338</sup> An actual malice requirement in the context of the right of dignity would effectively require plaintiffs to establish that defendants have used their identities in ways that deliberately mislead the public about plaintiffs' participation in, or endorsement of, defendants' offending uses.<sup>339</sup>

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336. Robert C. Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 486-87, 503 (2003).

337. *Texas v. Johnson*, 491 U.S. 397, 414 (1989); see also *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (citing *Johnson* for this proposition); *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. . . . For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.").

338. *Time, Inc. v. Hill*, 385 U.S. 374, 387 (1967); see *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

339. See, e.g., *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985) (allowing a right of publicity claim where the use of nude photographs in *Hustler* could suggest consent to



In the context of commercial speech, the right of dignity would appear to survive *Central Hudson* review. The interest served by the right is plainly substantial; it has been protected by the dignitary torts for centuries. The right directly and narrowly advances this interest. But in a recent pair of cases addressing federal trademark registration, the Court seems to have suggested that it might be unconstitutional even in the context of commercial speech for the state to suppress or simply disfavor “offensive” speech.<sup>340</sup> Nevertheless some members of the Court intimated that there is a constitutional difference between “a law disfavoring ‘ideas that offend,’”<sup>341</sup> and a law that restricts or discourages the use of words “that are offensive . . . because of their *mode* of expression, independent of any views that they may express.”<sup>342</sup>

Any such distinction ought to be irrelevant in the context of public discourse. As the Court noted in *Cohen v. California*, public discourse “is designed and intended” to put “the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”<sup>343</sup> Because “words are often chosen as much for their emotive as their cognitive force,” the “Constitution leaves matters of taste and style . . . largely to the individual.”<sup>344</sup> In public discourse speakers can deploy offensive modes of expression as well as express offensive ideas.<sup>345</sup>

Commercial speech, however, is protected primarily to safeguard the “informational function” of commercial communications.<sup>346</sup> The question is therefore whether it is constitutionally acceptable to regulate commercial speech to exclude or limit offensive modes of expression but nevertheless to

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appear in that magazine, as well as to reflect falsely on the nature of Douglass’s sexuality); *Bullard v. MRA Holding, LLC*, 740 S.E.2d 622, 753 (Ga. 2013) (allowing a right of publicity claim where plaintiff could be seen as “endorsing the *College Girls Gone Wild* video through the use of her image”).

340. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299-2301 (2019); *Matal v. Tam*, 137 S. Ct. 1744, 1763-65 (2017).

341. *Iancu*, 139 S. Ct. at 2301 (quoting *Matal*, 137 S. Ct. at 1751).

342. *Id.* (internal quotation marks omitted). Several Justices suggested that it would be constitutional to limit the registration of marks that are “obscene, vulgar, or profane” insofar as only the “*mode* of expression,” rather than the “ideas” such marks convey, would be restricted. *Id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part) (emphasis added); *see id.* at 2302 (Alito, J., concurring); *id.* at 2309 (Sotomayor, J., concurring in part and dissenting in part).

343. 403 U.S. 15, 24 (1971).

344. *Id.* at 25-26.

345. For a discussion of the reasoning behind this conclusion, see Post, *The Constitutional Concept of Public Discourse*, *supra* note 30, at 626-33.

346. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980).

permit an audience to receive whatever information or ideas a speaker wishes to convey, albeit in a *manner* that is not offensive. Since the right of dignity regulates only highly offensive misappropriations of identity, it might be conceptualized as regulating merely the mode of expression of commercial speakers.<sup>347</sup> Although the distinction between the manner of speech and the substance of speech is a troubled one,<sup>348</sup> it may nevertheless explain why the right of dignity as a remedy “for mental anguish caused by one individual to another”<sup>349</sup> commonly prevails within commercial speech.<sup>350</sup> As should be apparent at this point, right of dignity claims will be constitutional if the highly offensive use is categorized as a commodity.

Right of dignity claims are also uniquely associated with a category of communicative acts that we have not yet discussed, but which are, speaking precisely, neither public discourse, nor commercial speech, nor commodities. This category is comprised of speech acts that are regarded as so highly offensive that they do not receive the constitutional protections of public discourse even though they occur in mediums (like video) or are distributed through media outlets (like news websites) that would otherwise presumptively be classified as public discourse. As a doctrinal matter, such speech is typically denominated as speech about “matters of purely private significance,”<sup>351</sup> which in such contexts is contrasted to “speech on ‘matters of public concern.’”<sup>352</sup> The Court has not very helpfully instructed us that “[d]eciding whether speech is of pub-

347. *But see* Sorrell v. IMS Health Inc., 564 U.S. 552, 577-78 (2011) (“[T]he State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.”).

348. *See, e.g.*, Peter Jones, *Blasphemy, Offensiveness and Law*, 10 BRIT. J. POL. SCI. 129, 141-43 (1980).

349. Flores v. Mosler Safe Co., 164 N.E.2d 853, 854 (N.Y. 1959).

350. *See, e.g.*, Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1102-03 (9th Cir. 1992); Gabiola v. Sarid, No. 16-cv-02076, 2017 WL 4264000, at \*4-5 (N.D. Ill. Sept. 26, 2017); Michaels v. Internet Entm’t. Grp., Inc., 5 F. Supp. 2d 823, 828 (C.D. Cal. 1998); Bullard v. MRA Holding, LLC, 740 S.E.2d 622, 627 (Ga. 2013); Beverley v. Choices Women’s Med. Ctr., Inc., 565 N.Y.S.2d 833 (App. Div.), *aff’d*, 587 N.E.2d 275 (N.Y. 1991).

351. Snyder v. Phelps, 562 U.S. 443, 452 (2011) (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988)).

352. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985) (quoting First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978)). The Supreme Court has defined speech that “deals with matters of public concern . . . [as speech that relates to] ‘any matter of political, social, or other concern to the community,’ or . . . ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’” *Snyder*, 562 U.S. at 453 (citations omitted) (first quoting Connick v. Myers, 461 U.S. 138, 145 (1983); and then quoting San Diego v. Roe, 543 U.S. 77, 83-84 (2004)).

lic or private concern requires us to examine the ‘content, form, and context’ of that speech, ‘as revealed by the whole record.’”<sup>353</sup> Speech about matters of public concern, which receives the protections of public discourse, has been identified by the Court as “the standard in determining whether a common-law action for invasion of privacy is present.”<sup>354</sup> Apparently what the Court means by this is that speech about matters of public concern is most often identified with communications that are considered “newsworthy,” and that newsworthy communications are typically immune from both privacy and publicity claims.<sup>355</sup>

Although the Court has insisted that the “arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern,”<sup>356</sup> in point of fact courts sometimes classify speech that is considered highly degrading, particularly when of a sexual nature, as merely of *private* concern.<sup>357</sup> Such speech can be regulated in ways that

353. *Snyder*, 562 U.S. at 453 (quoting *Dun & Bradstreet, Inc.*, 472 U.S. at 761).

354. *Connick*, 461 U.S. at 143 n.5.

355. See *Toffoloni v. LFP Publ’g Grp., LLC*, 572 F.3d 1201, 1208 (11th Cir. 2009); *Brown v. Showtime Networks, Inc.*, 394 F. Supp. 3d 418, 438-41 (S.D.N.Y. 2019); *Bosley v. WildWetT.com*, 310 F. Supp. 2d 914, 923-24 (N.D. Ohio 2004); *Michaels*, 5 F. Supp. 2d at 838. Most states provide a newsworthiness defense or exception to right of publicity claims as a matter of state law. See, e.g., IND. CODE § 32-36-1-1 (2020) (exempting from right of publicity laws material of “newsworthy value”); *Rosa & Raymond Parks Inst. for Self Dev. v. Target Corp.*, 812 F.3d 824, 832 (11th Cir. 2016) (holding that Michigan’s right of publicity law does not apply to newsworthy uses); *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 794-95 (Ct. App. 1993) (rejecting a misappropriation of identity claim under California law because the use was newsworthy and a matter “in the public interest”); *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 393 (Ind. 2018) (recognizing Indiana’s newsworthiness exception to its right of publicity law); *Messenger v. Gruner + Jahr Printing & Publ’g*, 727 N.E.2d 549, 552 (N.Y. 2000) (describing New York’s newsworthiness exception to its statutory publicity law as being “broadly construed” and applying to “any subject of public interest”). California’s limit on liability is typical:

[T]he tort of appropriation of name and personality, whether labeled a form of intrusion into privacy or a publicity right, invokes constitutional protections. “Publication of matters in the public interest, which rests on the right of the public to know, and the freedom of the press to tell it, cannot ordinarily be actionable.”

*Maheu v. CBS, Inc.*, 247 Cal. Rptr. 304, 312 (Ct. App. 1988) (quoting *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 349 (Ct. App. 1983)).

356. *Snyder*, 562 U.S. at 453 (quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987)).

357. See, e.g., *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (per curiam) (holding that a sex video made by an off-duty police officer did “not qualify as a matter of public concern under any view of the public concern test”); *Toffoloni*, 572 F.3d at 1211 (“[T]he published nude photographs were in no conceivable way related to the ‘incident of public concern’ or the current ‘drama’ [surrounding the decedent’s] death.”); *Bosley*, 310 F. Supp. 2d at 920 (noting that in the context of images of the plaintiff competing in a wet t-shirt contest, “the phrase ‘public

would be impermissible within public discourse. Thus the wrestler Hulk Hogan, a well-known public figure, famously was able to succeed in a right of publicity action against a news outlet for publishing tapes showing him having sex with a friend's wife on the precise ground that the offending videos did not "address any matter of legitimate public concern" and "the explicit content of the Gawker Video was an exploitation of public curiosity where no legitimate public interest exists."<sup>358</sup>

These cases are not easy to explain. That nonobscene speech about a public figure released through a news outlet could be stripped of the protections of public discourse because of its offensive or indecent character is inconsistent with canonical and explicit Supreme Court precedents, like *Texas v. Johnson*<sup>359</sup> or *Cohen v. California*.<sup>360</sup> Yet it is undeniable that at the margins such anomalous cases exist, seemingly with the Court's own blessing.<sup>361</sup>

In the context of privacy actions, for example, courts have long imagined that the criteria of "legitimate concern to the public"<sup>362</sup> and "newsworthiness"<sup>363</sup> empower them to make "a normative assessment of the 'social value' of a publication."<sup>364</sup> Yet because the arrogation of this authority is so incompatible

or general interest' . . . does not mean mere curiosity" (quoting *Cason v. Baskin*, 20 So. 2d 243, 251 (Fla. 1948) (en banc)); see also *Catsouras v. Dep't of Cal. Highway Patrol*, 104 Cal. Rptr. 3d 352, 393 (Ct. App. 2010) (Aronson, J., concurring) (concluding that the "dissemination of the accident-scene photographs" of the plaintiffs' daughter's decapitation in a car accident was not newsworthy because they served "no social value" and their "graphic facts" and "gore" did not serve any "public purpose").

358. Permanent Injunction ¶¶ 44, 49, *Bollea v. Gawker Media, LLC*, No. 12-012447CI-11 (Fla. Cir. Ct. Dec. 9, 2016) (granting the injunction on the basis of multiple claims, including one for the violation of Hogan's right of publicity under Florida law); see Eriq Gardner, *Hulk Hogan Gets \$115M Verdict Against Gawker at Sex Tape Trial*, HOLLYWOOD REP. (Mar. 18, 2016 3:56 PM PT), <https://www.hollywoodreporter.com/thr-esq/hulk-hogan-gets-115m-verdict-876768> [<https://perma.cc/Z95J-MRBS>].

359. 491 U.S. 397, 414 (1989).

360. 403 U.S. 15, 19-20 (1971); see, e.g., *Sable Comm'ns of Ca., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment.").

361. See, e.g., *Roe*, 543 U.S. at 84. "[N]ot all speech is of equal First Amendment importance . . . and where matters of purely private significance are at issue, First Amendment protections are often less rigorous." *Snyder*, 562 U.S. at 452 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)).

362. RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

363. *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 478-79 (Cal. 1998); *Judge v. Saltz Plastic Surgery, P.C.*, 367 P.3d 1006, 1012-13 (Utah 2016); *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 83 (W. Va. 1983).

364. *Shulman*, 955 P.2d at 483-84 (quoting *Kapellas v. Kofman*, 459 P.2d 912, 922 (Cal. 1969)). For a discussion, see Post, *supra* note 131, at 1057-61. In the context of privacy, judgments of newsworthiness are closely intertwined with judgments of offensiveness. "The two criteria,

with basic premises of public discourse, courts have simultaneously sought assiduously to avoid making such assessments by ceding “considerable deference to reporters and editors” in defining newsworthiness,<sup>365</sup> no doubt on the orthodox constitutional ground that

[u]nder our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. . . .

. . . [A] requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. . . . From the multitude of competing offerings, the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values.<sup>366</sup>

Cases allowing a right of dignity to proceed in the context of speech of merely private concern that would normally be classified as public discourse are

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offensiveness and newsworthiness, are related. An individual, and more pertinently perhaps the community, is most offended by the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger.” *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993).

365. *Shulman*, 955 P.2d at 485; see Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 336 (1966); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 350–56 (1983).

366. *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157–58 (1946) (footnote omitted); see *Jenkins v. Dell Publ’g. Co.*, 251 F.2d 447, 451 (3d Cir. 1958).

For present purposes news need be defined as comprehending no more than relatively current events such as in common experience are likely to be of public interest. In the verbal and graphic publication of news, it is clear that information and entertainment are not mutually exclusive categories. A large part of the matter which appears in newspapers and news magazines today is not published or read for the value or importance of the information it conveys. Some readers are attracted by shocking news. Others are titillated by sex in the news. Still others are entertained by news which has an incongruous or ironic aspect. Much news is in various ways amusing and for that reason of special interest to many people. Few newspapers or news magazines would long survive if they did not publish a substantial amount of news on the basis of entertainment value of one kind or another. This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account. In brief, once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged.

*Jenkins*, 251 F.2d at 451 (footnote omitted).

nevertheless a distinctly observable phenomenon in the context of right of publicity actions,<sup>367</sup> which is testament to the grip of civility rules on the judicial imagination.<sup>368</sup> We flag these cases because they pose a difficult conundrum of First Amendment doctrine that persists and is likely to arise in some extreme right of dignity actions.

## CONCLUSION

By crisply distinguishing the specific interests that the right of publicity can be used to protect, we have sought to untangle jurisprudential puzzles that have long afflicted courts trying to apply the right of publicity. We hope we have clarified why in some formulations the right can be brought only in commercial contexts, whereas in other formulations the right is enforceable against uses that occur in all forms of speech; why in some accounts plaintiffs must establish the commercial value of their identity before enforcing the right, whereas in other accounts all persons can bring right of publicity actions; or why in some contexts the right is said to focus on market damages, whereas in other contexts the right protects against mental anguish and emotional distress. We can see now that the nature and elements of the right of publicity should vary as states use it to vindicate one or another of the distinct interests that we have identified.

Regardless of whether states ultimately choose to alter the prima facie elements of right of publicity actions, disaggregating the interests protected by these actions provides significant guidance about how to escape the currently tortured relationship between the right of publicity and the First Amendment. The constitutional treatment of the tort should depend heavily upon which of the four interests we identify is asserted in a particular case, as well as upon whether the infringing use occurs in public discourse, commercial speech, or commodities.<sup>369</sup> It is plain that many of what presently pass as First Amendment “tests” for right of publicity cases are in fact oblique efforts to distinguish among these three categories of communication. These tests are inadequate because they are indirect. They do not squarely face the question of why the Constitution might divide communication into these categories.

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367. See, e.g., *Toffoloni v. LFP Publ'g Grp., LLC*, 572 F.3d 1201 (11th Cir. 2009); *Bosley v. WildWerT.com*, 310 F. Supp. 2d 914 (N.D. Ohio 2004).

368. On the “paradox of public discourse” that may explain this anomaly, see Post, *The Constitutional Concept of Public Discourse*, *supra* note 30, at 642-44; and Post, *supra* note 131, at 1008-09.

369. To which we might add, in the unique context of right of dignity actions, speech of purely private concern.

We do not imagine that our attempt to illuminate the jurisprudential and constitutional landscape of the right of publicity will dispel all difficulties. Significant problems will no doubt remain. Our hope, however, is that by carefully surfacing the constitutional and policy stakes that beset the conflict between right(s) of publicity and the First Amendment, we have sketched a map that might substantially assist those who must navigate this obscure and tumultuous terrain.