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THE FIRST AMENDMENT AND THE RIGHT(S) OF PUBLICITY

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Introduction

The right of publicity may broadly be defined as a state law tort designed to prevent unauthorized uses of a person's identity that typically occur when a person's name, likeness, or voice is used without consent.¹ 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 in common law torts or in 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, therefore, 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. But it is well known that any given tortious act can impair multiple distinct legal *interests*. Consider an example drawn from *Hustler Magazine v. Falwell*: If I accuse you

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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 (9th Cir. 1992) (holding that a right of publicity claim could lie for the use of a robot that brought the plaintiff to mind); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (allowing a claim based on the plaintiff's voice); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (allowing a 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 (Harv. Univ. Press 2018) (tracing the expansion of the right of publicity beyond name and likeness).

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.² Each of these torts arises out of the same act, but each has 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.³ The resulting imprecision has encouraged the tort to expand uncontrollably, becoming, in the words of one commentator, like the “Wild West.”⁴ Not only has litigation involving the right greatly increased,⁵ but disparities in defining the right across different jurisdictions have also grown.⁶ In some states, the right is confined to commercial contexts, and in other states it is not.⁷ In some states plaintiffs asserting the right must establish that they have commercially valuable identities, and in others they do not.⁸ In some states the right is oriented toward economic injuries, while in others it encompasses both economic and personal harm.⁹ Because the harms redressed by the tort are uncertain and ill-defined, so also is First Amendment treatment of the tort.

² *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (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).

³ *See, e.g.*, Cal. Civ. Code §§ 3344, 3344.1; Nev. Rev. Stat. § 597.770; N.Y. Civ. Right Law §§ 50, 51; *Martin Luther King Jr. Ctr. for Social Change, Inc. v. Am. Heritage Prods.*, 296 S.E.2d 697 (Ga. 1982); *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Cal. App. 1983).

⁴ 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 DECISION AND EFFECTIVELY LITIGATING IP CASES, 37, 43 (Aspatore, 2012 ed.); ROTHMAN, *supra* note 1, at 61–62, 87–97.

⁵ In 1977, eight states had some version of a statutory right of publicity or appropriation tort. Today, that number has swelled to twenty-six. To get a rough perspective on the growth in decisions involving the right of publicity, there were approximately 18 published right of publicity decisions in the 1970s, 53 in the 1980s, 63 in the 1990s, 119 in the 2000s, and 124 in the 2010s (up until October of 2019). The uptick in right of publicity filings has been far greater.

⁶ On state-to-state variations in the right, *see* ROTHMAN, *supra* note 1, at 96–98; ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY, accessible at www.rightofpublicityroadmap.com (website providing round-up and commentary on different state laws).

⁷ *See infra* notes 22–23, 29–31 & accompanying text.

⁸ *See infra* notes 22–23, 29–31 & accompanying text.

⁹ *See infra* notes 22–23, 29–31 & accompanying text. As we will discuss, in most states the right of publicity addresses both market-based and personality interests.

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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 online images and comments about actual people, are bereft of reliable and foreseeable protections for the exercise of essential constitutional rights. Courts have disagreed about whether and under what circumstances the use of well-known persons' identities are protected by the First Amendment in the context of video games,¹⁰ news reporting,¹¹ posters,¹² board games,¹³

¹⁰ Compare *In re NCAA Student-Athlete Name & Likeness Litigation*, 724 F.3d 1268 (9th Cir. 2013) (rejecting First Amendment defense in context of alleged uses of athletes' likenesses in video game) with *Noriega v. Activision/Blizzard, Inc.*, 42 Media L. Rep. 2740 (Cal. Sup. Ct. 2014) (holding that First Amendment insulated video game maker for liability for using former dictator's likeness in a video game).

¹¹ Compare *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (rejecting First Amendment defense in context of nightly news broadcast that showed plaintiff's performance) with *Joe Dickerson & Associates, LLC v. Dittmar*, 34 P.3d 995 (Colorado 2001) (rejecting right of publicity claim when the use of a person's identity was in a newsletter and the use was deemed "newsworthy").

¹² Compare *Paulsen v. Personality Posters, Inc.*, 59 Misc.2d 444 (N.Y. Sup. Ct. 1968) (denying right of publicity claim when defendant sold poster with comedian's likeness) and *Montana v. San Jose Mercury News*, 34 Cal.App.4th 790, 797 (1995) (concluding that right of publicity claim in context of poster of famous quarterback was barred by First Amendment) with *Factors, Etc., Inc. v. Pro Arts, Inc.*, 496 F. Supp. 1090 (S.D.N.Y. 1980) (allowing right of publicity claim and rejecting First Amendment defense to use of Elvis Presley's name and image in memorial posters), *rev'd on other grounds*, *Factors, Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981) and *Brinkley v. Casablancas*, 80 A.D.2d 428 (N.Y. Sup. Ct. 1981) (allowing right of publicity claim in context of poster displaying image of plaintiff model).

¹³ Compare *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 72 Misc.2d 788 (N.Y. Sup. Ct. 1973) (allowing right of publicity claim in context of board game about Howard Hughes) with *Aldrin v. Topps Co.*, 2011 WL 4500013 (C.D. Cal. 2011) (allowing First Amendment defense in context of trading card game).

prints,¹⁴ comic books,¹⁵ merchandise,¹⁶ and even movies.¹⁷ The jagged and unpredictable reach of the tort chills speech in extensive and immeasurable ways.

Our hope is to ameliorate these deficiencies in right of publicity law much as William Prosser did nearly 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.¹⁸ 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. Each of these four interests requires its own specific First Amendment analysis. The disaggregation of these interests is an essential first step in addressing the current confusion. 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.¹⁹ When

¹⁴ Compare *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 401 (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 Pub., Inc.*, 332 F.3d 915 (6th Cir. 2003) (allowing a First Amendment defense in the context of prints of a painting of a famous golfer sold in multiple copies).

¹⁵ Compare *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (rejecting First Amendment defense to use of variation on hockey player’s name in comic book) with *Winter v. D.C. Comics*, 69 P.3d 473 (Cal. 2003) (concluding that First Amendment protects author from liability for using a variation on plaintiffs’ names and likenesses in comic book).

¹⁶ Compare *Rosa and Raymond Parks Institute for Self Development v. Target*, 90 F. Supp.3d 1256 (M.D. Ala. 2015), *aff’d on other grounds*, 812 F.3d 824 (11th Cir. 2016) (allowing a First Amendment defense to the use of the civil rights hero’s name and image on a mass-produced plaque) with *Martin Luther King Jr. Ctr. for Social Change, Inc. v. Am. Heritage Prods.*, 296 S.E.2d 697 (Ga. 1982) (rejecting a First Amendment defense in the context of the sale of mass-produced busts of the civil rights leader).

¹⁷ Compare *Porco v. Lifetime Entmt. Servs., LLC*, 147 A.D.3d 1253 (N.Y. App. Div. 2017) (allowing right of publicity claim to proceed in context of docudrama) with *De Havilland v. FX Networks, LLC*, 21 Cal. App.5th 845 (2018) (rejecting right of publicity claim on First Amendment grounds in context of docudrama television series).

¹⁸ William L. Prosser, *The Right to Privacy*, 48 CAL. L. REV. 383, 407 (1960).

¹⁹ Unauthorized uses of a person’s identity sometimes also implicate interests that are protected by other torts. For example, plaintiffs sometimes allege that the unauthorized use of their identity has placed them in a false light, or defamed them, or infringed a trademark. *See, e.g., De Havilland v. FX Networks, LLC*, 21 Cal. App.5th 845 (2018) (bringing both false light and right of publicity claims in lawsuit arising out of use of plaintiff’s name and personality in character based on her in

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 clarity of First Amendment analysis will be much improved if publicity claims are disaggregated into the four interests that we identify. Difficult constitutional judgments will of course remain, but our hope is that the framework we propose 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.

I. THE FOUR RIGHTS OF PUBLICITY

In this Part, we identify four different kinds of right of publicity claims. Each promotes a distinct interest. In an ideal world, each would possess a different set of *prima facie* elements and each would require a distinct framework of First Amendment scrutiny. Each of these interests is visible in contemporary right of publicity litigation. Cogent jurisprudential and constitutional scrutiny is not possible until these distinct interests have been disaggregated and separately evaluated.²⁰

American law has been protecting plaintiffs' commercial and personality interests in their identity for more than a century. As one of us has demonstrated, this body of law long predates Jerome Frank's and Melville Nimmer's development in the 1950s of the tort that they dubbed the "right of publicity."²¹ Justifications for barring the unauthorized use of identity presently encompass the protection of both market-based and personality-based interests.²² Although some courts (and scholars) distinguish the tort of appropriation

a miniseries); *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915 (6th Cir. 2003) (bringing trademark, unfair competition, and right of publicity claims against artist who made prints from his painting of plaintiff winning the Master's Tournament).

²⁰ See Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NORTHWESTERN L. REV. 891, 894, 928–32 (2018) (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 determinations of the adjectival aspects of the tort, like inheritability and transferability, which to date have been particularly controversial.

²¹ ROTHMAN, *supra* note 1, 11–29; *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (opinion drafted by Judge Jerome Frank, suggesting the existence of a "right of publicity"); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954) (advocating for adoption of a broad "right of publicity" in wake of *Haelan* decision). The frequent, though erroneous, claim that Frank coined and created the "right of publicity" is addressed in detail in ROTHMAN, *supra* note 1, at 30–64; see also *id.* at 65–86.

²² See, e.g., *Bullard v. MRA Holding, LLC*, 740 S.E.2d 622 (Ga. 2013) (recognizing that Georgia's right of publicity protects against both dignitary and monetary injuries); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1102–04 (9th Cir. 1992) (recognizing singer's economic and personal injuries stemming from use of similar-sounding voice under California's common law right of

(which they argue protects personality interests in identity) from the tort of right of publicity (which they argue protects the market value of identity),²³ many states in fact treat the two torts interchangeably.²⁴ And even in states that claim to distinguish between appropriation and the right of publicity, 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 laws, "the elements of the two torts are essentially the same."²⁵

The vagueness that envelops the right of publicity is exemplified by the *Second Restatement of Torts*, which defines the tort of "Appropriation of Name or Likeness" in this way: "One who appropriates to his own use or benefit the name or likeness of another

publicity); *Baugh v. CBS, Inc.*, 828 F. Supp 745, 753 (N.D. Cal. 1993) (suggesting that claims under Cal. Civ. Code § 3344 "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.*, 15 Cal. App.4th 536, 541–42 (1993)); *see also* RESTATEMENT (SECOND) OF TORTS, § 652C (recognizing the right of publicity and appropriation tort are synonymous and protect 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. 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," as well as the person's "commercial value").

²³ *See, e.g.*, *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 714 n.6 (1983) ("The right of privacy protects individual personality and feelings, the right of publicity protects the commercial value of a name or likeness."); *Joe Dickerson & Associates, LLC v. Dittmar*, 34 P.3d 995, 1000 (Colorado 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')").

²⁴ *See e.g.*, *Prima v. Darden Restaurants, 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*, 80 A.D.2d 428, 440 (N.Y. 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 as Cal. Civ. Code § 3344); Assemblyman John Vasconcellos to Governor Ronald Reagan, Nov. 10, 1971, Governor's Chaptered Bill File, California State Archives; *see also* ROTHMAN, *supra* note 1, at 208 n.40. Accordingly, the statutory codification of the privacy-based appropriation tort and the right of publicity in California are literally identical, as are the common law versions of the torts, and both allow recovery of both personal and market-based injuries. *See Eastwood v. Superior Court*, 149 Cal. App.3d 409, 416–18 (1983).

²⁵ *Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003).

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is subject to liability to the other for invasion of privacy.”²⁶ 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.²⁷

The tort of appropriation is one of four privacy torts delineated in the *Second Restatement*. 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.²⁸ 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.²⁹ But the *Second Restatement* did not intend the appropriation tort merely to vindicate a plaintiff’s dignity. It instead designed the tort to protect *both* personality and market-based interests. It therefore formulated the tort to encompass *all* appropriations that can be said in some sense to “benefit” a defendant, which literally includes uses by biographers, historians, newspapers, credit-reporting agencies, publishers of directories, and so on, *ad infinitum*.

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” or “for advertising purposes or for the purposes of trade.”³⁰ Yet these requirements usually neither require a showing of market damages nor exclude showings of injuries to dignity.³¹

The failure of the tort 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

²⁶ RESTATEMENT (SECOND) OF TORTS § 652C; *see also* Prosser, *supra* note 18, at 401–07. Many states have adopted the formulation of § 652C. California’s common law right of publicity, for example, requires a showing that (1) the defendant use 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 results. *See Eastwood v. Superior Court*, 149 Cal. App.3d 409 (1983); *see also* Dittmar, 34 P.3d at 1002 (adopting similar formulation in Colorado law).

²⁷ RESTATEMENT (SECOND) OF TORTS § 652C cmts a & d.

²⁸ *Compare* RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D, 652E with § 652C.

²⁹ Robert C. Post, *The Social Foundations of Privacy*, 77 CAL. L. REV. 957 (1989); *see also* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990).

³⁰ *See, e.g.*, Pa. Ann. Stat. 42 § 8316; 765 Ill. Comp. Stat. 1075/1 et seq.; N.Y. Civ. Rights L. §§ 50, 51; *see also* Jennifer E. Rothman, *Commercial Speech, Commercial Use and the Intellectual Property Quagmire*, 101 VIRG. L. REV. 1929, 1950–1955, 1959–1964 (2015) (noting the variety and variability of right of publicity’s provisions around commerciality).

³¹ *See, e.g.*, Cal. Civ. Code § 3344; *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001); *Brinkley v. Casablancas*, 80 A.D.2d 428 (1981).

to, a publication concerning a matter that is newsworthy or of legitimate public concern.”³² Yet in 1977 the Supreme Court of the United States had allowed a right of publicity claim to proceed in the context of a presumptively newsworthy nightly news broadcast.³³ 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.³⁴

In this Part, we identify four different interests that right of publicity claims typically seek to vindicate. These four interests concern protection of performances, the commercial value of identity, the autonomy of personality, and the dignity of personality. In practice, plaintiffs may in any given lawsuit allege harm to more than one of these interests. But since each of these interests requires a distinct constitutional analysis, we think it most helpful for heuristic purposes 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 a *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.

The right of performance is commonly asserted. Athletes sue to prevent the broadcast of their matches;³⁵ entertainers sue to prevent the broadcast of their acts;³⁶ announcers (and their heirs) sue to prevent the reproduction of their commentary;³⁷ actors sue to prevent

³² Joe Dickerson & Associates, LLC v. Dittmar, 34 P.3d 995, 1003 (Colorado 2001).

³³ Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 564, 566 (1977).

³⁴ 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.

³⁵ See, e.g., *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 490, 497 (3d Cir. 1956). 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.

³⁶ See, e.g., *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354 (1952).

³⁷ 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).

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unauthorized distribution of films in which they have appeared;³⁸ singers sue to prevent the recycling of their tracks.³⁹

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*.⁴⁰ 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.”⁴¹ 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 * * * (plaintiff’s) act without his consent and such conduct by the defendant was unlawful appropriation of plaintiff’s professional property.”⁴²

The Supreme Court of Ohio conceptualized Zacchini’s claim as “one for invasion of the right of privacy by appropriation,” which was synonymous under Ohio state law with its right of publicity.⁴³ 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.”⁴⁴ The court observed that “The 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*.”⁴⁵

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 actually focused its analysis quite specifically 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

³⁸ See, e.g., *Fleet v. CBS, Inc.*, 50 Cal. App.4th 1911 (1996); *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1145 (9th Cir. 2010).

³⁹ See, e.g., *Laws v. Sony Music Entertainment, Inc.*, 448 F.3d 1134 (9th Cir. 2006); *Armstrong v. Eagle Rock Entertainment, Inc.*, 655 F. Supp.2d 779 (E. D. Mich. 2009).

⁴⁰ 433 U.S. 562 (1977).

⁴¹ *Zacchini v. Scripps-Howard Broad.*, 351 N.E.2d 454, 455 (Ohio 1976).

⁴² *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. Compl., *Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562 (No. 76—577), Petition for a Writ of Certiorari at app. A49–A50.

⁴³ *Id.* at 456, 460.

⁴⁴ *Id.* at 458 (citing RESTATEMENT (SECOND) OF TORTS (Tentative Draft No. 13, 1967), § 652C).

⁴⁵ *Zacchini*, 351 N.E.2d at 459 (emphasis added).

and efforts, and we think that this right is entitled to legal protection, contrary to the holding of some earlier cases.⁴⁶

Zacchini's act was not in a fixed form and hence was not copyrightable under federal or state copyright laws.⁴⁷ But the Ohio court concluded that even unfixed performances deserve legal protection. It sought to close this perceived gap in the coverage of copyright law by recognizing Zacchini's claim under the state's right of publicity.⁴⁸

The Ohio court ultimately held that Zacchini's legal rights were overridden by the First Amendment "privilege" of a "nightly news program" to broadcast a film of his act. The films shown by the program were presumptively newsworthy.⁴⁹ "[T]he press has a privilege to report matters of legitimate public interest 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."⁵⁰

The Supreme Court of the United States 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,"⁵¹ 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."⁵² But the Supreme Court differed with the Ohio court's interpretation of the First Amendment.

The Ohio court had applied constitutional precedents arising in the context of cases involving defamation and false light privacy-based claims. The Supreme Court understood these cases to be about the protection of plaintiffs from dignitary harms.⁵³ But these harms were irrelevant to Zacchini's claim. Instead the Court conceived Zacchini's interest in his performance as a "proprietary" interest whose protection was "closely analogous to the

⁴⁶ *Id.* at 460 (emphasis added).

⁴⁷ 17 U.S.C. § 102; *Zacchini*, 351 N.E.2d at 456–457 (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.

⁴⁸ *Cf. SK & F, Co. v. Premo Pharmaceutical Labs., Inc.*, 625 F.2d 1055, 1065 (3d Cir. 1980) (Citing *Zacchini* for the proposition that "state law can protect right of publicity in uncopyrighted performance").

⁴⁹ *Zacchini*, 351 N.E.2d at 460, 462.

⁵⁰ *Id.* at 461.

⁵¹ *Zacchini*, 433 U.S. at 565.

⁵² *Id.* at 565, 569.

⁵³ *Id.* at 573.

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goals of patent and copyright law.”⁵⁴ 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.”⁵⁵

The Supreme Court observed that:

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.⁵⁶

Stressing the close analogy to copyright, the Supreme Court concluded that “[t]he Constitution no more prevents a State from requiring respondent to 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.”⁵⁷

The Supreme Court properly based its First Amendment analysis on the exact purpose of the common law tort recognized by Ohio. It extended legal protection specifically to reproductions of Zacchini’s “performance” of his cannonball act.⁵⁸ 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 that performance, but his performance was conceptually distinct from his likeness and identity.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 575–76.

⁵⁷ *Id.* 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 oral arguments in *Zacchini*).

⁵⁸ *Zacchini*, 433 U.S. at 575; see also *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, 875 (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.*”).

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. 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 unfixed.⁵⁹ "The economic rationale for copyright law—that market failure would occur in the absence of the legal right"—applies with equal force in the context of performances.⁶⁰

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.⁶¹ 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 appropriated Zacchini's "entire" act.⁶² Such a criterion would be meaningless if applied to Zacchini's likeness, name, or voice.

⁵⁹ *Zacchini*, 433 U.S. at 573. "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." *Id.* at 576.

⁶⁰ Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1187–88 (2006) (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"). A number of scholars have challenged copyright's incentive rationale. *See, e.g.*, Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VIRG. L. REV. 1687 (2006); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970). To the extent those critiques are valid, they may hold equal weight in the context of the right of performance.

To the extent copyright is supported by rationales other than the incentive rationale, such justifications would also apply to the right of performance. *Cf.* 17 U.S.C. § 106A; U.S. Copyright Office, REPORT ON MORAL RIGHTS (2019) (noting ways that U.S. protects authors' moral rights, including the right of publicity); Shyamkrishna Balganesh, *Private Copyright*, 73 VANDERBILT L. REV. 1 (2020) (chronicling authorial rights-based aspects of copyright law); Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VIRG. L. REV. 1745 (2012) (observing that even in a purely incentive-based approach to copyright law rewarding authors in ways that further their personality-based interests has an incentivizing effect).

⁶¹ J. THOMAS MCCARTHY AND ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY, § 5.45 (2nd ed. 2019).

⁶² *Zacchini*, 433 U.S. at 564, 569, 570, 574, 575 (emphasizing the unauthorized use of Zacchini's "entire act," a term used seven times in the opinion); *see also id.* at 579–80 (Powell, J., dissenting) (criticizing the "entire act" standard). There was a dispute about whether Zacchini's "entire act" was actually broadcast. As Justice Powell noted in his dissent:

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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.⁶³ Moreover, 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.

To claim protection under a right of performance, a plaintiff must have intentionally created a performance. 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 all are “performing” in public.⁶⁴ No doubt there will 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” existing apart from a plaintiff’s lived identity.⁶⁵

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

Although 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.

See id. at 579 n. 1.

⁶³ We note that in these contexts the YouTube performances are also likely protected by copyright.

⁶⁴ To the extent that livestreaming is captured in a fixed form, copyright protection may apply to that fixation.

⁶⁵ Although we do not intend 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 terms of longer than twenty-five years are not well justified, but suggesting that indefinite renewals of commercially successful works might make sense).

unauthorized creation of new performances using previously captured footage of a plaintiff's performance. The case of *No Doubt v. Activision Publishing* provides such an example.⁶⁶ In *No Doubt*, a video game company violated the plaintiff band members' rights of performance by creating and employing digital avatars of the rock group in its game *Band Hero*. Even though the band, including its lead singer Gwen Stefani, had authorized Activision to digitally scan their performances 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 (which greatly limited how the avatars could be used). The distribution of these recreated performances was therefore without authorization and violated the band members' rights of performance.⁶⁷

If Activision had instead used different performers to create "new" No Doubt performances and avatars or created them without use of previously captured data, then the appropriate action would not be a 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, First Amendment doctrine restricts the right of commercial value quite differently than it restricts claims asserting a right of performance.⁶⁸

The right of performance must be carefully limited so as not to restrict the creation of new performances that refer to or create characters based on real people. The right of performance therefore 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 Gun* (without his participation) could violate Cruise's right of performance, but hiring a new actor to imitate Cruise would not.⁶⁹

⁶⁶ 192 Cal. App.4th 1018 (2011).

⁶⁷ *Id.* The California appellate court's analysis in the case focused broadly on the misappropriation of the identities of the members of the band, but the circumstances also implicate the entirely distinct interest that we identify as the right of performance.

⁶⁸ See *infra* Sections III.B.1. & III.B.2.

⁶⁹ This example is based on a question posed by Judge Jay Bybee of the Ninth Circuit Court of Appeals during the oral argument in *Keller v. Electronic Arts*. He 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, *Keller v. Elec. Arts*, 724 F.3d 1268 (9th Cir. 2013). Were a studio to recreate Tom 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 as to whether Cruise was actually performing in the role or 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 72–75 & accompanying text.

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Understood in this way, the right of performance should protect against digital reanimation when it is done by using previously captured performances, something that is becoming increasingly common as avatars of living and dead actors are now presented as performing in motion pictures⁷⁰ and holograms of deceased performers are going on tour.⁷¹ But if these recreated performances are produced without using previously captured footage of those performances, 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.⁷² 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

⁷⁰ Alex Lee, *The Messy Legal Scrap to Bring Celebrities Back from the Dead*, Wired UK, Nov. 17, 2019, available at <https://www.wired.co.uk/article/james-dean-dead-actors-rights> (discussing plans to produce a film starring a reanimated James Dean); Benjamin Lee, “Discretion, Not CGI: How Philip Seymour Hoffman was kept in the Hunger Games,” *Guardian* (U.S.), November 17, 2015, <http://perma.cc/3G4P-P8HC>; Carolyn Giardina, “How ‘Furious 7’ Brought the Late Paul Walker Back to Life,” *Hollywood Reporter*, December 11, 2015, <http://perma.cc/6TPG-YEKO>; Ashley Cullins, “Carrie Fisher, ‘Star Wars’ and the Legal Issues of Dead but In-Demand Actors,” *Hollywood Reporter*, May 1, 2017, <http://perma.cc/M26R-GNTY>. We note that these issues were present even before modern CGI technology, see Eriq Gardner, “Back to the Future II” *From a Legal Perspective: Unintentionally Visionary*, *THE HOLLYWOOD REPORTER* (October 21, 2015), at <https://www.hollywoodreporter.com/thr-esq/back-future-ii-a-legal-833705>.

It is not surprising that 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 MAGAZINE, 30–33 (Summer 2018); see also Brief of Amici Curiae in Support of Appellee by Screen Actors Guild, Inc., *Keller v. Electronic Arts, Inc.*, NO. 10-15387, at 2 (9th Cir.) filed Nov. 5, 2010 (considering allowance of digital avatars in video games “ruinous to performers’ career and financial interests”); Jennifer E. Rothman, *The Right of Publicity: Privacy Reimagined for New York?*, 36 *CARDOZO ARTS & ENT. L.J.* 573, 575–76, 597–98 (2018).

⁷¹ See, e.g., Associated Press, *In the Spirit of Whitney, Houston Hologram Tour Set to Begin*, N.Y. TIMES, FEB. 19, 2020; Stephen Humphries, *Buddy Holly’s Back . . . as a Touring Hologram. But is it ‘Live’ Music?*, CHRISTIAN SCI. MONITOR, Dec. 4, 2019; see also Gregory Zinman, “Going ‘Full Tupac,’” *The Atlantic*, August 26, 2016, <http://perma.cc/RZV2-HG9W>; Eriq Gardner, “Hollywood Hologram Wars: Vicious Legal Feud behind Virtual Mariah, Marilyn and Mick,” *Hollywood Reporter*, May 28, 2015, <http://perma.cc/ER4E-LU9B>.

⁷² The lack of clarity about what is meant by the Copyright Act’s explicit preemption provision, 17 U.S.C. § 301, has led to conflicts in evaluating copyright preemption defenses, particularly in the context of right of publicity cases. See ROTHMAN, *supra* note 1, at 160–79; Jennifer E. Rothman, *The Other Side of Garcia: The Right of Publicity and Copyright Preemption*, 39 *COLUM. L. & ARTS* 441 (2016) (hereinafter “*The Other Side of Garcia*”); Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 *U.C. DAVIS L. REV.* 199 (2002) (hereinafter “*Copyright Preemption*”) (advocating for a Supremacy Clause preemption analysis to address the confusion).

performance.”⁷³ 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 lawfully captured and then is used or licensed by a copyright holder.⁷⁴ 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.⁷⁵

⁷³ *Fleet*, 50 Cal. App. 4th 1911, 1921 (1996) (emphasis added); see also *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003–04 (9th Cir. 2001); *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 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); see also ROTHMAN, *supra* note 1, at 163–164. Fixed performances, by contrast, are copyrightable.

⁷⁴ See *Laws*, 448 F.3d at 1143; see also *Baltimore Orioles, Inc. v. Major League Baseball Players*, 805 F.2d 663, 677n.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*, 50 Cal. App. 4th at 1923.

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 case arose in the Ninth Circuit case *Jules Jordan Video, Inc., v. 144942 Canada, Inc.* 617 F.3d 1146 (9th Cir. 2010). The plaintiff in that case was the company owned by an adult entertainer that held the copyrights to his own performances. His company sued for both copyright infringement and a violation of his right of publicity when the defendant copied and distributed his videos. 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 the two rights are not in conflict and work toward protecting the very same interests, as they did in *Jules Jordan Video*. See ROTHMAN, *Copyright Preemption*, *supra* note 72, at 241–43; see also *Michaels v. Internet Entmt Grp., Inc.*, 5 F. Supp.2d 823, 836–37 (C.D. Cal. 1998).

⁷⁵ Copyright law requires any fixation to be “by or under the authority of the author” before copyright attaches. 17 U.S.C. § 101. See also 1 NIMMER ON COPYRIGHT § 2.03[3] (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 its original copyrighted digital material to create a new performance, and the recreated performance exceeds the uses agreed to by the person whose initial performance was captured with consent. 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 would raise such an issue because the movie studio likely holds the copyright to the original material. See *supra* note 69 & accompanying text; see also *Ahn v. Midway Mfg.*, 965 F. Supp. 1134 (N.D. Ill. 1997) (holding martial artists’ right of publicity claims preempted when their performances were reused in new video games); *Lewis v. Activision Blizzard, Inc.*, No. 12-1096 (N.D. Cal. 2014) (dismissing

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.⁷⁶

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. The *Third Restatement 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."⁷⁷ Many scholars have highlighted this commercial aspect of the right of 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.⁷⁸ J. T. McCarthy, the author of the most authoritative treatise on the subject, defines the right as an "intellectual property right whose infringement is a commercial tort of unfair competition" that provides a right

publicity claim on the basis of preemption when an employee's voice performance was reused in video game without additional compensation or permission).

In addition to preempting some right of performance claims brought against the copyright-holders 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." See ROTHMAN, *supra* note 1, at 177–78.

⁷⁶ Although the term "commercial" means many different things across state publicity laws, see Rothman, *supra* note 30, at 1950–1955, 1959–1964, we use the term here to indicate the monetary value that the use of a person's identity can command in the marketplace.

⁷⁷ RESTATEMENT (THIRD) UNFAIR COMPETITION, § 46 cmt. c (emphasis added). Although the *Third Restatement* observes that the right of publicity encompasses both personality-based interests 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; "commercial advantage," Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003); "for advertising purposes or for the purposes of trade," N.Y. Civ. Rights Law. §§ 50, 51; or in "products, merchandise, or goods, or for the purpose of advertising or selling, or soliciting." Cal. Civ. Code § 3344. Notably, the *Second Restatement of Torts* § 652C does not limit appropriation claims to those involving the appropriation of a person's commercial value. Many state laws also do not require such a showing. See, e.g., Stewart v. Rolling Stone LLC, 181 Cal.App.4th 664, 679 (2010) (noting that California's common law right of publicity tort allows liability when the use is "to the defendant's advantage, commercially or otherwise.") (quoting Eastwood v. Superior Court, 149 Cal. App.3d 409, 417 (1983)). See also Rothman, *supra* note 30, at 1950–1955, 1959–1964.

⁷⁸ LANDES & POSNER, *supra* note **Error! Bookmark not defined.** at 64, 222–28; Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUSTON L. REV. 621 (2003).

to “control the commercial use of . . . identity . . . and recover in court damages and the *commercial value* of an unpermitted taking.”⁷⁹

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, to loss of revenue from licensing and merchandising deals, to the overall diminishment of goodwill (understood as the public’s positive associations with that individual).⁸⁰ As we shall see, however, right of commercial value claims can also, in particular circumstances, be brought by ordinary persons who are entirely unknown to the general public.

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 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 to attribute intrinsic value to the creation of celebrity personalities.⁸¹ Society has no reason to treasure people being famous for the sake of being famous. And even if society were determined to encourage such stardom, it is doubtful that a right of commercial value would significantly incentivize people to become celebrities.⁸²

⁷⁹ J.T. MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY*, § 1:3 (2018 ed.) (emphasis added).

⁸⁰ See ROTHMAN, *supra* note 1, at 110–11; see also LANDES & POSNER, *supra* note **Error! Bookmark not defined.**, at 222–28; Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97 (1994).

⁸¹ In fact, incentivizing fame might skew behavior toward notoriety rather than toward more meaningful contributions to society. For further discussion and challenges to the incentive rationale rubric for right of publicity laws see ROTHMAN, *supra* note 1, at 100–102; Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 215–19 (1993).

⁸² “The 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, 973–974 (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); LANDES & POSNER, *supra* note **Error! Bookmark not defined.** 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.

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It has sometimes been said, therefore, that the right of commercial value rests instead on the jurisprudential premise that persons *own* the commercial value of their identity. As a Missouri Court of Appeals 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?⁸³

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, publishers of fan magazines, creators of movie databases, all derive profit from the identity of celebrities. It would be overreaching to interpret a property right so broadly as to prevent such uses of celebrity identities.

In practice, therefore, 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 is to act fairly in the commercial marketplace.⁸⁴

The first concerns uses of a plaintiff's identity that create *confusion* about a plaintiff's participation or sponsorship. An example of such a claim is *Abdul-Jabbar v. General Motors Corp.*, 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 its Oldsmobile cars. His primary complaint was that viewers of the commercial would think that Abdul-Jabbar had agreed to have his name used in the advertisement and endorsed Oldsmobile cars.⁸⁵ 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 super-star celebrity like Abdul-Jabbar to have such confusing uses interfere with one's commercial pursuits. For example, a recent class action lawsuit brought against Groupon by Christine Dancel for using her and others' likenesses and

Posner, *Misappropriation: A Dirge*, *supra* note 78, at 634.

⁸³ *Munden v. Harris*, 134 S.W. 1076, 1078 (Mo. Ct. App. 1911).

⁸⁴ *Cf. Lemley & Dogan*, *supra* note 60, 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).

⁸⁵ *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996) (GMC used Abdul-Jabbar's previous name, Lew Alcindor, but the court concluded that consumers would recognize that name as pointing to Abdul-Jabbar).

names without permission (scraped from their Instagram accounts), 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 deal itself.” The complaint contended that Groupon did this intentionally to profit from the specific Instagram users’ “social influence.”⁸⁶ In effect, the allegation was that Groupon was 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 about the source or sponsorship of products and services.⁸⁷ 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 have to establish sufficient commercial interests to meet the standing requirements of bringing a false endorsement claim.⁸⁸

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 a portable toilet company named “Here’s Johnny Portable Toilets.” The company used the cheeky slogan “The World’s Foremost Comedian.” The Sixth Circuit 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.⁸⁹ The

⁸⁶ Complaint, *Dancel v. Groupon*, at 6–7 (Ill. Cir. Ct., filed Feb. 5, 2016).

⁸⁷ See 15 U.S.C. §§ 1114, 1125(a); see also *Parks v. La Face Records*, 329 F.3d 437 (6th Cir. 2003) (allowing false advertising claim to proceed against record label for use of Rosa Parks name as song title); *Allen v. Nat’l Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985).

⁸⁸ 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 (Rosa Parks could bring 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, 881–82 (E.D. Wisc. 2009) (rejecting 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 commercial marketing of her identity,” and did “not allege an intent to commercialize” her identity); cf. *Lexmark Intern., 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 Foundation*, 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”).

⁸⁹ *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834–35 (6th Circuit 1983).

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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 unauthorized uses might diminish the value of Carson's brand when it came to obtaining compensation for sanctioned endorsements.

Diminishment serves an analogous function to trademark dilution laws. As the Supreme Court has observed, dilution laws do not turn on likely confusion.⁹⁰ Instead, they seek to "preserv[e] the uniqueness of a trademark."⁹¹ Dilution laws are "intended 'to protect famous trademarks from subsequent uses that blur the distinctiveness of the mark or tarnish or disparage it.'"⁹² We recognize that some scholars have expressed concern about the legitimacy of the goals of dilution law, as well as about its effectiveness at achieving those goals.⁹³ 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.⁹⁴

Diminishment claims 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 dilution law.⁹⁵ In the context of the right of commercial value, diminishment can occur in two ways that are analogous to trademark dilution claims. The first is by

⁹⁰ *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 429 (2003), abrogated on other grounds by the Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat.

⁹¹ Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 831 (1927).

⁹² *Moseley*, 537 U.S. at 431 (quoting Senator Orin Hatch, 141 Cong. Rec. 38599–38561 (1995)); see also 15 U.S.C. 1125(c) (providing statutory definitions of blurring and tarnishment); *Starbucks Corp. v. Wolfe Borough Coffee, Inc.*, 736 F.3d 198 (2d Cir. 2013).

⁹³ See, e.g., Barton Beebe et al., *Testing for Trademark Dilution in Court and the Lab*, 86 U. CHI. L. REV. 611 (2019); 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 (2008); Rebecca Tushnet, *Gone in Sixty Milliseconds* *Trademark Law & Cognitive Science*, 86 TEX. L. REV. 507 (2008); Clarisa Long, *Dilution*, 106 COLUM. L. REV. 1029 (2006); Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 UNIV. PITTSBURGH 789 (1997).

⁹⁴ Cf. Barton Beebe, *What Trademark Law is Learning from the Right of Publicity*, 42 COLUM. J.L. & ARTS 389, 394–95 (2019); but see Lemley & Dogan, *supra* 60, at 1198–1200 (questioning whether blurring and tarnishment of "personal names" is likely "to be a common occurrence").

⁹⁵ See 15 U.S.C. § 1225(c). 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 (2d Cir. 1994); *Pillsbury Co. v. Milky Way Prods., Inc.*, 1981 WL 1402 (N.D. Ga. 1981); *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183 (E.D.N.Y. 1972).

“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.⁹⁶

We must be careful in our formulation of actions for diminishment, 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 critical 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, therefore, to confine diminishment claims to those that occur in a purely commercial context involving the marketing or advertising of products.

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.⁹⁷ 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.

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 to those plaintiffs whose identities already possess goodwill in the market. The commercial value of such identities is 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.⁹⁸ 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.⁹⁹

⁹⁶ See LANDES & POSNER, *supra* note **Error! Bookmark not defined.**, 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, 142–47 & nn.67–71 (2004) (questioning the “overuse” justifications, among others, for the right of publicity).

⁹⁷ 15 U.S.C. § 1125(c); see also H.R. Rep. No. 104-374, at 8 (1995), *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. H14,317-01 (daily ed. Dec. 12, 1995) (statement of Rep. Moorhead); *Radiance Foundation 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); *but see Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. 1979) (applying dilution law to noncommercial speech); *Pillsbury Co.*, 1981 WL 1402 (same); *Coca-Cola Co.*, 346 F. Supp. 1183 (E.D.N.Y. 1972) (same). For a more detailed discussion of this conflict see Rothman, *supra* note 30, at 1942–44.

⁹⁸ 15 U.S.C. § 1125 (c); see also Dogan & Lemley, *supra* note 60, at 1199.

⁹⁹ We note that the federal dilution provision of the Lanham Act initially required a plaintiff to demonstrate that a defendant’s use *actually* diluted the plaintiff’s mark, but now has been amended to allow for liability with a showing only that the use is “*likely* to cause dilution.” 15 U.S.C. §

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In addition to confusion and diminishment, right of commercial value claims also invoke yet a third theory of liability. Courts frequently say that a defendant was unjustly enriched by an “unfair” appropriation of the economic value of the plaintiff’s identity.¹⁰⁰ 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 goods and services effectively appropriates the economic value that he would otherwise have had to pay for the use of that identity. The defendant accordingly owes the plaintiff a remedy sounding in restitution.¹⁰¹ 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.*¹⁰² is a good example of an action for unjust enrichment. The plaintiffs in *Fraleigh* were all ordinary folk without otherwise commercially valuable identities. Without their consent, Facebook facilitated the use of their identities to advertise products. The plaintiffs successfully alleged “that their individual, personalized

1125(c)(1) (emphasis added); see *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) (holding that the prior version of the statute required a demonstration of actual dilution), abrogated by the Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. We think that the standard of either likely or actual diminishment would pass constitutional muster in the context of commercial speech. See *infra* Part III.B.2. We take no position on which standard states should adopt as a matter of substantive law.

¹⁰⁰ “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.” *McFarland v. Miller*, 14 F.3d 912, 918 (3d Cir. 1994) (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 straightforward one of preventing unjust enrichment by the theft of good will’”) (quoting Kalven, *Privacy in Tort Law*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966)).

¹⁰¹ See, e.g., *Dancel v. Groupon, Inc.*, 940 F.3d 381 (7th Cir. 2019); *In re NCAA Student-Athlete Name & Likeness Litigation*, 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 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 156–157; 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 17–18 (eds. Rochelle Cooper Dreyfuss & Jane C. Ginsburg) (Cambridge Univ. Press 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.”).

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

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.”¹⁰³ 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 age of social media, so-called “anonymous” individuals can sometimes have great value to advertisers when used to appeal to an online circle of “friends.”

The right of commercial value has caused endless confusion because it has so easily been conflated with a generalized property right in the commercial value of identity. But because any such account of the right would immediately lead to intolerable results, more precise jurisprudential and constitutional analysis is facilitated if we conceive the tort as instead addressed to the market-based damages caused by the three specific variations 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 produce profound confusion about 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 ultimately seek to invest persons with a general right to control how others use their identity. We therefore isolate this interest in an ideal tort that we call the *right of control*.

The right of control is most 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 autonomously 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 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. Improvements in technology allowed these images to be used in advertisements, on products, and in magazines and newspapers. These technological changes inspired calls for a right of control that would enable persons to govern the use of their images by others.¹⁰⁴

¹⁰³ *Id.* at 799.

¹⁰⁴ ROTHMAN, *supra* note 1, at 11–29; *see also The Right of Privacy*, N.Y. TIMES, Aug. 23, 1902, p. 8; *infra* notes 105–116 and accompanying text.

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A bill was introduced into the New York legislature in 1897 making it a crime “to print or publish in any newspaper, periodical, pamphlet or book ‘any portrait or alleged portrait of any person or individual living in this State without have first obtained his or her written consent.’”¹⁰⁵ Two years later, in 1899, California actually passed such a portraiture ban.¹⁰⁶ In 1894, a district court in Massachusetts concluded that “a private individual has . . . the right to control the reproduction of his picture or photograph.”¹⁰⁷ Articles and essays of this era justified the right by theorizing that persons possessed a “natural copyright” in their own features.¹⁰⁸

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.”¹⁰⁹ That these uses of photographs were experienced as “offensive” is a sign that they were also understood as disrespectful and inconsistent with the dignity of persons.¹¹⁰ We shall discuss this discrete interest in the next section, in which we discuss 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: “It is difficult to understand why the peculiar cast of one’s features is not . . . one’s property.”¹¹¹

In the influential words of Judge John Clinton Gray, dissenting in *Roberson v. Rochester Folding Box Co.*,¹¹² 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

¹⁰⁵ *The Protection of Privacy*, N.Y. TIMES (Mar. 14, 1897), <http://query.nytimes.com/mem/archive-free/pdf?res=9F04E4D61F31E132A25757C1A9659C94669ED7CF> [https://perma.cc/88TP-9U76]; see also ROTHMAN, *supra* note 1, at 16–20.

¹⁰⁶ Act of Feb. 23, 1899, ch. 29, 1899 Cal. Stat. 28 (codified at Cal. Penal Code § 258). See ROTHMAN, *supra* note 1, at 19, 191 n.17.

¹⁰⁷ *Corliss v. E.W. Walker Co.*, 64 F. 280, 282 (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).

¹⁰⁸ J. A. J., *The Legal Relations of Photographs*, 17 AM. L. REG. 1, 8 (1869); see also *Portrait Right*, 12 WASH. L. REP. 353 (1884); *Current Topics*, 24 SOLICITORS’ J. 1–2 (1879); Watkin Williams, *The Sale of Photographic Portraits*, *Id.* at 4–5; *The Right to Privacy*, 6 THE GREEN BAG 498, 499 (1894).

¹⁰⁹ *Pavesich v. New England Life. Ins. Co.*, 50 S.E. 68, 80 (Ga. 1905).

¹¹⁰ *The Protection of Privacy*, *supra* note 105.

¹¹¹ *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Eq. 136, 140 (N.J. Ct. of Chancery 1907).

¹¹² 171 N.Y. 538 (1902).

were publishing her literary compositions.”¹¹³ 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.”¹¹⁴

Why might it be said that law should endow persons with “a property right” in the “exclusive use”¹¹⁵ of their names and likenesses? Early decisions protecting identity lamented that the misappropriation of names or likenesses impaired personal autonomy. The influential 1905 opinion of *Pavesich v. New England Life Ins. Co.*, for example, forcefully asserted that:

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.¹¹⁶

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 by her associational decisions, then unauthorized use of her identity interferes with her autonomy because the third party

¹¹³ *Id.* at 564 (Gray, J., dissenting).

¹¹⁴ *Id.* at 561. 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 their labor. Their features are instead a given and unavoidable aspect of their identity. The analogy to copyright thus is more analogous to what Peggy 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 Balganes, *supra* note 60; Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEORGETOWN L.J. 287, 330–65 (1988); see also Seana Valentine Shiffrin, *Intellectual Property*, in A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 653, 660 (eds. Robert Goodin et al 2007); MARK ROSE, *AUTHORS AND OWNERS* (1995) (documenting the longstanding role of author-based justifications for copyright law, and considering role of “personality” in justifying copyright laws).

¹¹⁵ RESTATEMENT (SECOND) OF TORTS § 652C, cmt. a.

¹¹⁶ *Pavesich*, 50 S.E. at 80.

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takes at least partial control over the meaning associated with her.”¹¹⁷ The underlying thought is that if persons cannot control the use of their identity by others, they will become heteronomous—controlled by others—and lose the freedom necessary fully to develop their own personality.

Comments in the *Second Restatement of Torts* can be read to support such a right of control. So, for example, the *Restatement* asserts that “the right created” is “in the nature of a property right.”¹¹⁸ 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 identity.¹¹⁹

Just as a 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 identity 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, Twitter users object to being portrayed in online trading games akin to baseball cards, or when historical figures object to being included in video games or movies.¹²⁰

Something like a right of control seems also to underlie the burgeoning movement throughout the world to protect data privacy on the ground that there should be a right “of

¹¹⁷ Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 UNIVERSITY OF PITTSBURGH L. REV. 225, 282, 231 (2005); see also ROTHMAN, *supra* note 1, at 111; Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEORGETOWN L.J. 185 (2012); 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”).

¹¹⁸ RESTATEMENT (SECOND) OF TORTS § 652C, cmt. a. The *Second Restatement* affirms “the interest of the individual in the exclusive use of his own identity.” *Id.*

¹¹⁹ See, e.g., N.Y. Civ. Rights L. § 51 (allowing issuance of injunction without establishment of damages or injury and allowing “exemplary damages”). 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). See also 765 ILCS 1075/40; *Ainsworth v. Century Supply Co.*, 295 Ill. App.3d 644, 647–50 (1998); Ala. Code §§ 6-5-772, 6-5-774.

¹²⁰ 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); Complaint, *Parker v. Hey, Inc.*, No. CGC-17-556257 (Cal. Sup. Ct. Jan. 4, 2017); *Noriega v. Activision/Blizzard, Inc.*, 42 Media L. Rep. 2740 (Cal. Sup. Ct. 2014); *De Havilland v. FX Networks, LLC*, 21 Cal. App.5th 845 (2018).

‘individual control over personal data.’¹²¹ Data privacy is most prominently enshrined in the General Data Protection Regulation of the European Union (“GDPR”), which affirms that “[n]atural persons should have control of their own personal data.”¹²² “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.’”¹²³ As one commentator has observed, such “informational self-determination follows from human autonomy,” because “in the modern information age, control of information is power. 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.”¹²⁴

Contemporary efforts to protect data privacy are at root concerned with 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.¹²⁵ It is believed that these imbalances “threaten human liberty. The more that is known about a person, the easier the person is to control.”¹²⁶

Some of these concerns might meaningfully be addressed by endowing persons with a right of control over their own personal information, including their identity. 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

¹²¹ 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). See also Avner Levin & Patricia Sánchez Abril, *Two Notions of Privacy Online*, 11 VAND. J. ENG. & TECH. L. 1001, 1009 (2009); 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).

¹²² 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 (“GDPR”), 2016 O.J. (L 119) 1, at recital 7; *Id.* article 4, (Personal data, which includes names and likenesses, is a broad concept that encompasses any information “relating to an identified or identifiable natural person.”); see also ORG. FOR ECON. CO-OPERATION & DEV., THE OECD PRIVACY FRAMEWORK 41 (2013); Joel R. Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 STAN. L. REV. 1315, 1325–26 (2000).

¹²³ Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 1001–02.

¹²⁴ *Id.* at 1002. see also Edward J. Eberle, *The Right to Information Self-Determination*, 2001 UTAH L. REV. 965, 974; J.C. Buitelaar, *Privacy: Back to the Roots*, 13 GERMAN L.J. 171, 185, 188 (2012).

¹²⁵ See Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393 (2001).

¹²⁶ Eberle, *supra* note 123, at 1001.

forgotten, which threatens to remove large stretches of public information from internet searches.¹²⁷

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.¹²⁸ Persons who are formed through socialization cannot simply be characterized as autonomous, because the very maintenance of their personalities depends upon the attitudes of others.¹²⁹

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 dependent upon intersubjective processes of recognition and validation.¹³⁰ 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 personality. “Our ‘dignity,’” writes Charles Taylor, “is our sense of ourselves as commanding (attitudinal) respect.”¹³¹

The dignitary torts protect dignity by enforcing “civility rules” that embody the social norms we deem necessary for the maintenance of our personality.¹³² Hence the dignitary torts imagine individuals as dependent upon a complex web of norms that sustain their identity as persons worthy of respect. Well-socialized persons experience the violation of civility rules as offensive, demeaning, and humiliating.¹³³ 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 against 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

¹²⁷ Post, *supra* note 121 *passim*.

¹²⁸ Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 475 (1997).

¹²⁹ GEORGE H. MEAD, MIND, SELF AND 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.”)

¹³⁰ Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in DEMOCRATIC COMMUNITY: NOMOS XXXV (eds. John W. Chapman & Ian Shapiro 1993); ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995).

¹³¹ CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY 15 (1989).

¹³² Post, *Social Foundations*, *supra* note 29, at 959–68.

¹³³ *Id.*

in any advertisements.¹³⁴ 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.¹³⁵ Models have objected to being featured in advertisements for strip clubs, claiming that such uses cause them shame and embarrassment.¹³⁶ 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.¹³⁷

The right of dignity was asserted at the beginning of the 20th 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.”¹³⁸ 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.¹³⁹ Roberson alleged that these advertisements had “greatly humiliated” her due to “the scoffs and jeers of persons who have recognized her face and picture on this advertisement,” and that she had suffered “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.”¹⁴⁰

¹³⁴ *Waits v. Frito-Lay*, 978 F.2d 1093, 1102–03 (9th Cir. 1992) (describing the use as causing “shock, anger, [] embarrassment,” and “humiliat[ion]”).

¹³⁵ *Gabiola v. Sarid*, 2017 WL 4264000 (N.D. Ill. 2017); *Gabiola v. Mugshots.com, LLC*, Second Amended Compl., No. 14-CV-9351 (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” is longstanding. *See, e.g., Itzkovitch v. Whitaker*, 39 So. 499 (La. 1905) (concluding that “[w]here a person is not guilty, is honest . . . he may obtain an injunction to prevent his photograph from being sent to the rogues’ gallery”).

¹³⁶ *See, e.g., Timed Out LLC v. Pajounia, Compl.*, No. BC599207 (Cal. Sup. Ct., Oct. 27, 2015).

¹³⁷ *See, e.g., Bullard v. MRA Holding, LLC*, 740 S.E.2d 622 (Ga. 2013); *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914 (N.D. Ohio 2004); *Michaels v. Internet Entm’t Grp.*, 5 F. Supp.2d 823 (C.D. Cal. 1998); *Gawker Media, LLC v. Bollea*, 129 So.3d 1196 (D. Ct. App. Fla. 2014); *see also Doe v. Backpage.com*, 817 F.3d 12 (1st Cir. 2016) (rejecting right of publicity claims by sex trafficking victims against online classified advertising because content was posted by third parties). We note that a number of states have begun to pass more 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.

¹³⁸ *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 80 (Ga. 1905).

¹³⁹ *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

¹⁴⁰ *Id.* at 442. The Appellate Division, which had 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

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In the uproar that followed the New York Court of Appeals' denial of Roberson's claim, unauthorized publications 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."¹⁴¹

In retrospect, it is difficult to pinpoint the exact source of the 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 defendant's flour products.¹⁴² It might have been that the defendant's advertisements were "conspicuously posted and displayed in stores, warehouses, saloons, and other public places."¹⁴³ It might have been that it was especially inappropriate to commandeer the photograph of a minor female.¹⁴⁴ 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 identity would be "highly offensive" to a reasonable person. Three of the four privacy torts defined in the *Second Restatement*—public disclosure of private facts, intrusion, and false light—are explicitly formulated to sanction only "highly offensive" conduct, which is to say conduct that can be presumed to cause emotional damage because 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 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 the

unnecessary and unwarrantable notice." *Roberson v. Rochester Folding Box Co.*, 64 A.D. 30, 33–34 (N.Y. App. Div. 1901).

¹⁴¹ *The Right of Privacy*, *supra* note 104, 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 nominee of the Democratic Party, 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 that "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.* Abigail Roberson wrote him a long, sophisticated, 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.

¹⁴² See *Flake v. Greensboro News Co.*, 212 N.C. 780 (1938).

¹⁴³ *Roberson*, 64 N.E. at 442.

¹⁴⁴ Roberson was seventeen years of age at the time the lawsuit was filed. *Her Beauty a Possession: A New York Court Declares a Woman's Face Property*, WASHINGTON EVENING TIMES, JULY 24, 1901, at 5 (describing Roberson as 18 in 1901); see also ROTHMAN, *supra* note 1, at 17–18, 190 n.12.

defendant in a false light; and yet it may still be highly offensive.¹⁴⁵ 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.¹⁴⁶

II. THE CURRENT FIRST AMENDMENT CHAOS

The right of publicity tort is probably unique in American law in the startlingly disparate array of interests that it is used to 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.’”¹⁴⁷ After distinguishing actions for false light privacy, 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.¹⁴⁸

By rejecting a First Amendment defense in the context of news, *Zacchini* sparked a virtual explosion of right of publicity claims and statutes across the nation.¹⁴⁹ Although the right of performance that was at issue in *Zacchini* is frequently not involved in right of publicity claims, *Zacchini* was nevertheless cited for the broad proposition that “there is no

¹⁴⁵ Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1346 (2009); 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 (1999).

¹⁴⁶ Post, *Social Foundations*, *supra* note 29.

¹⁴⁷ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 565 (1977).

¹⁴⁸ *Id.* at 571. The main precedent distinguished by the Supreme Court in *Zacchini* was *Time, Inc. v. Hill*, 385 U.S. 374 (1967), which had been brought under New York’s right of privacy statute, N.Y. Civil Rights Law §§ 50, 51. That statute provides New York’s only basis for right of publicity (and 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.” 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*, 85 A.D.2d 74 (N.Y. App. Div. 1982); *Gautier v. Pro-Football*, 278 A.D. 431 (N.Y. App. Div. 1951). 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 highlights how important it is to distinguish the particular interests that any given right of publicity claim is brought to vindicate.

¹⁴⁹ See ROTHMAN, *supra* note 1, at 145–153.

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First Amendment privilege with respect to the appropriation of another's name or likeness for commercial purposes."¹⁵⁰

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*.”¹⁵¹ 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 a right of commercial value, a right of control, or a right of dignity. Yet it was 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.”¹⁵²

Many courts nevertheless continue to invoke *Zacchini* in contexts that do not involve performances.¹⁵³ This common error suggests the need rigorously to separate the four

¹⁵⁰ *Fitzgerald v. Penthouse International, Ltd.*, 525 F. Supp 585, 601 n.79 (D. Md. 1981). For the persistent influence of *Zacchini*'s holding, see, e.g., *Doe v. TCI Cablevision*, 110 S.W.3d 363, 372–74 (Mo. 2003); *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); see also ROTHMAN, *supra* note 1, at 143–54; Jennifer E. Rothman, *The Right of Publicity's Intellectual Property Turn*, 42 COLUM. L. & ARTS J. 277 (2019).

¹⁵¹ *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 401 (2001) (emphasis added); see also *Wisconsin Interscholastic Athletic Ass'n v. Gannett Co.*, 658 F.3d 614 (7th Cir. 2011) (observing that “[t]he 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 Pub., 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 (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”).

¹⁵² *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 858, 973 (10th Cir. 1996) (“*Zacchini* . . . complained of the appropriation of the economic value of his *performance*, not the economic value of his *identity*.”)

¹⁵³ See, e.g., *Doe*, 110 S.W.3d at 372–74 (rejecting First Amendment defense in context of comic book); *Comedy III Prods.*, 25 Cal.4th at 401 (same in context of lithograph sold in multiple copies and on T-shirts); *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268, 1284 n.1 (9th Cir. 2013) (Thomas, J., dissenting) (noting that *Zacchini* stands for the proposition that the right of publicity is an “economic right to use the value of one's own celebrity,” and therefore deserves a different framework for First Amendment analysis than Lanham Act claims which usually turn on consumer confusion); *Toffoloni v. LFP Publ'g Grp., LLC*, 572 F.3d 1201, 1207 (11th Cir. 2009) (*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, 925–26 (N.D.

distinct interests we identified in Part I. Because the “entire act” standard of *Zacchini* does not port easily into other contexts, courts have found themselves struggling to craft additional 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.”¹⁵⁴ “The point of confusion most associated with the right of publicity law is its interplay with the First Amendment.”¹⁵⁵ “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.”¹⁵⁶

The situation goes far beyond a mere circuit split. Courts across the country apply multiple different approaches to constitutional analysis.¹⁵⁷ 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 and First Amendment rights”¹⁵⁸ chills speech and incentivizes jurisdictional gamesmanship.¹⁵⁹

Ohio 2004) (“The Supreme Court [in *Zacchini*] indicated that the right to publicity was constitutional and did comport with the First Amendment.”).

¹⁵⁴ William McGeeveran, *Selfmarks*, 56 HOUSTON L. REV. 333, 362 (2018).

¹⁵⁵ See *ETW Corp.*, 332 F.3d at 954 (Clay, J., dissenting).

¹⁵⁶ Note, Gloria Franke, *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 recognizes 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.

¹⁵⁷ ROTHMAN, *supra* note 1, at 145–48; Kwall, *A Perspective on Human Dignity*, *supra* note 145, at 1356–57 (identifying five different “balancing tests for determining how the right of publicity should be applied in cases presenting First Amendment challenges”).

¹⁵⁸ 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).

¹⁵⁹ *Cf.* *Experience Hendrix LLC v. Hendrixlicensing.com*, 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 (2016) (discussing strategic filing of patent claims in particular jurisdictions).

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It suffices for present purposes merely to sketch the chaos that currently envelops the field.¹⁶⁰ 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 publicity-holder. The Eighth Circuit took this approach in *C.B.C. Distribution & Marketing v. Major League Baseball Advanced Media*.¹⁶¹ Applying this standard, 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 uses did not materially undermine the baseball players' incentives to engage in "productive activities."¹⁶²

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 a "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. 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. The court concluded that naming a character after Twist was "predominantly a ploy to sell comic books and related products rather than artistic or literary expression."¹⁶³

In a seemingly similar case, 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 a distinct approach, 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.¹⁶⁴

California's transformative-work test derives from one consideration used in copyright law's multi-factor 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."¹⁶⁵ This approach was first adopted by the California

¹⁶⁰ 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; see also 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); 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).

¹⁶¹ *C.B.C. Dist. & Mktg. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007).

¹⁶² *Id.* at 824.

¹⁶³ *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003).

¹⁶⁴ *Winter v. D.C. Comics*, 69 P.3d 473 (Cal. 2003).

¹⁶⁵ *Comedy III Prods. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001).

Supreme Court in *Comedy III Productions v. Gary Saderup, Inc.*, in which the court held that a realistic portrait of the Three Stooges infringed the then-dead comedians' rights of publicity. The court used the test to reject a First Amendment defense because the lithograph at issue (which was also printed on multiple T-shirts) was realistic and did not add significant additional material or commentary that turned the work into a transformative one.¹⁶⁶

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. But it is hard to square this conclusion with the analysis of the California Supreme Court 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.¹⁶⁷

Some courts, notably the Third and Ninth Circuits, have developed what appears to be an unacknowledged variation on this transformative-work test.¹⁶⁸ 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." The use must be "more of a 'fanciful, creative character,' rather than an 'imitative character.'"¹⁶⁹ This narrower version of the test appears on its face to disfavor more realistic portrayals of people.

A more speech-protective doctrine has been adopted by some jurisdictions in the form of what 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."¹⁷⁰ Some courts also allow liability under

¹⁶⁶ *Id.* at 811.

¹⁶⁷ *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915 (6th Cir. 2003). To see images of these two works, see ROTHMAN, *supra* note 1, at 149–50.

¹⁶⁸ 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.

¹⁶⁹ *Hilton v. Hallmark*, 599 F.3d 894, 910–11 (9th Cir. 2010). Compare *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 165–70 (3d Cir. 2013) and *In re NCAA Student-Athlete Name & Likeness Litigation*, 724 F.3d 1268, 1275–79 (9th Cir. 2013) with *Hart*, 717 F.3d at 171 (Ambro, J., dissenting) (interpreting transformative-work analysis as about transforming the work itself rather than the identity) and *In re NCAA*, 724 F.3d at 1284–87 (Thomas, J., dissenting) (same).

¹⁷⁰ *Rogers v. Grimaldi*, 875 F.2d 994, 1004–05 (2d Cir. 1989).

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this approach if the use is “solely to attract attention to a work.”¹⁷¹ The Second, Fifth, and (sometimes) the Sixth Circuit Courts of Appeals, as well as Kentucky and New York courts, have adopted some version of this approach, sometimes as an internal limit on right of publicity claims under state law, and sometimes as an independent First Amendment test.¹⁷²

The relatedness test is often also referred to as the *Rogers* test because of its adoption in a Second Circuit case, *Rogers v. Grimaldi*.¹⁷³ 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 to avoid a conflict with the First Amendment, the court concluded that no right of publicity claim could proceed.¹⁷⁴

Yet another approach has been to apply strict scrutiny. A panel of the Ninth Circuit in *Sarver v. Chartier*¹⁷⁵ held that in the context of a movie the application of the right of publicity constituted a content-based restriction and should therefore be subject to strict scrutiny.¹⁷⁶ The case involved a lawsuit brought by an army sergeant who claimed that a

¹⁷¹ *Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47).

¹⁷² See *Parks*, 329 F.3d at 460–461; *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994); *Romantics v. Activision Publ’g*, 574 F. Supp. 2d 758, 765–766 (E.D. Mich. 2008); *Montgomery v. Montgomery*, 60 S.W.3d 524, 528–530 (Ky. 2001); *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828, 829 (App. Div. 1980). The *Third Restatement 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.

¹⁷³ This relatedness/*Rogers* test is different from a distinct and widely-adopted “*Rogers* test” that applies in the context of First Amendment defenses to false endorsement and trademark-based claims brought under the Lanham Act. The two tests were developed in the same case. See *Rogers*, 875 at 999–1000 (concluding that there can be no liability under the Lanham Act “[w]here a title with at least some artistic relevance to the work is not explicitly misleading as to the content of the work”). We note that although the Lanham Act *Rogers* test is broadly applied in trademark cases, 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 (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*).

¹⁷⁴ *Rogers*, 875 F. 2d at 1004–05.

¹⁷⁵ *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016); cf. *Pooley v. National Hole-In-One Ass’n.*, 89 F. Supp.2d 1108 (D. Ariz. 2000).

¹⁷⁶ *Id.* at 905–06.

character in a movie was based on his identity and life story.¹⁷⁷ 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.¹⁷⁸

As is apparent from this brief survey, courts are flailing about in a sea of inconsistent, vague, and unhelpful First Amendment tests.¹⁷⁹ This is unsurprising given that careful First Amendment doctrine requires “[p]recision of regulation.”¹⁸⁰ 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 different interests that sail under the flag of a state “right of publicity” law 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 state interests that we have identified. We do not expect that isolating and addressing the particular interests of plaintiffs 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. Just as any given right

¹⁷⁷ *Sarver* also objected to reporting on his experiences as a bomb disposal expert using his actual name in *Playboy* and *Readers Digest*. *Sarver*, 813 F.3d at 896.

¹⁷⁸ *Id.* at 904–906. Previous Ninth Circuit decisions had applied the transformative-use test in right of publicity cases in which First Amendment defenses had been asserted in the context of noncommercial speech. See *In re NCAA*, 724 F.3d 1268 (rejecting a First Amendment defense in the context of alleged uses of student-athletes’ likenesses in video games); *Davis v. Elec. Arts*, 775 F.3d 1172 (9th Cir. 2015) (same in context of professional football players). 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. See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).

¹⁷⁹ For critiques of the transformativeness test, see ROTHMAN, *supra* note 1, at 148–51; Rebecca Tushnet, *A Mask That Eats Into the Face: Images and the Right of Publicity*, 38 COLUMB. L. REV. 157, 169–88 (2015); Dougherty, *supra* note 160, at 28–36, 69–77; Volokh, *supra* note 160, at 913–25. For critiques of the predominant purpose test, see *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 154 (3d Cir. 2013) (describing “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”); ROTHMAN, *supra* note 1, at 148–51. For critiques of the relatedness test, see *Hart*, 717 F.3d at 157–58; *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003); *Montgomery v. Montgomery*, 60 S.W.3d 524, 535 (Ky. 2001) (Keller, J. dissenting); ROTHMAN, *supra* note 1, at 148–51.

¹⁸⁰ *NAACP v. Button*, 371 U.S. 415, 438 (1963).

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of publicity claim may involve distinct state interests, so it may also involve distinct First Amendment interests, depending upon 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.¹⁸¹

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

A. *Tiers of First Amendment Review*

To properly evaluate 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, 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 suggested that the Supreme Court had adopted what he called a “two-level free-speech theory.”¹⁸² 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.¹⁸³ Although the Court has recently reiterated the two-level theory,¹⁸⁴ 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 first amendment” that receive distinctive (and diminished) kinds of constitutional review.¹⁸⁵ Most notably, “commercial speech” has

¹⁸¹ ROTHMAN, *supra* note 1, at 157 (contending that courts must evaluate the speech interests at stake in right of publicity cases to properly conduct First Amendment analysis).

¹⁸² Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10 (1960).

¹⁸³ *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); *Roth v. United States*, 354 U.S. 476, 483 (1957). 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.

¹⁸⁴ *United States v. Stevens*, 559 U.S. 460, 468–69 (2010).

¹⁸⁵ Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1185 (1988).

explicitly been regulated in ways that core First Amendment protections forbid.¹⁸⁶ Speech that embodies intellectual property also receives diminished First Amendment scrutiny.¹⁸⁷ 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,¹⁸⁸ like warnings in product liability cases¹⁸⁹ or lawyers’ advice in actions for professional malpractice.¹⁹⁰

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 our official First Amendment jurisprudence is quite crude when it comes to making such distinctions.

The Court has a penchant for abstract, categorical, and overbroad pronouncements that, if taken literally, would radically reshape 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 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”

¹⁸⁶ *Id.*; *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

¹⁸⁷ *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 v. U.S. Olympic Comm.*, 483 U.S. 522, 535–41 (1987) (rejecting a First Amendment defense even to non-confusing, non-commercial speech in the face of a quasi-trademark claim); *see also* ROTHMAN, *supra* note 1, at 143–45, 220–21nn.11–13; Rothman, *The Right of Publicity’s Intellectual Property Turn*, *supra* note 150, at 312; Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 226–29 (1998); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and the Press?*, 17 UCLA L. Rev. 1180, 1192, 1203–1204.

¹⁸⁸ *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.”); Fred Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV./FORUM 346 (2015).

¹⁸⁹ *See, e.g.*, *Moore v. Ford Motor Co.*, 332 S.W.3d 749 (Mo. 2011).

¹⁹⁰ *Estate of Spencer v. Gavin*, 400 N.J. Super. 220 (App. Div. 2008). *See* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 269–72 (1981); Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. Rev. 318 (2018).

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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.¹⁹¹

The right of publicity is a content-based regulation that “target[s] speech based on its communicative content.” 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 doctrine propounded in *Reed*, if taken at face value, would radically restrict the right of publicity, perhaps eradicating it entirely except 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, taken together, will encompass the vast majority of right of publicity actions, and which, taken separately, will facilitate clearer and more appropriate constitutional review. A defendant’s misappropriation of a plaintiff’s identity can occur in “*public discourse*,”¹⁹² in “*commercial speech*,”¹⁹³ or in (or on) *commodities*.¹⁹⁴ 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.

¹⁹¹ *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226–27 (2015); *see also id.* at 2230 (“A speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.”).

¹⁹² *Snyder v. Phelps*, 562 U.S. 443, 460 (2011) (emphasis added); *see also* *Metromedia, Inc., v. City of San Diego*, 453 U.S. 490, 515 (1981); ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012); Post, *The Constitutional Concept of Public Discourse*, *supra* note 29, at 626–84.

¹⁹³ *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561–66 (1980); *Bd. of Trustees v. Fox*, 492 U.S. 469, 473–481 (1989); *Florida Bar v. Went For it, Inc.*, 515 U.S. 618, 623–24 (1995).

¹⁹⁴ 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 the three categories of speech we discuss, is not well integrated into First Amendment doctrine, is only rarely invoked, and tends uniquely to arise in the context of the right of dignity. We shall discuss it in Section III.B.4. *infra*. *See* discussion *infra* at notes 327–345 and accompanying text.

1. Public Discourse

Adopting the language of the Supreme Court, we designate as “public discourse”¹⁹⁵ the core forms of speech that receive the full array of what is ordinarily recognized as essential First Amendment protections.¹⁹⁶ Content and viewpoint discrimination are presumptively forbidden within public discourse.¹⁹⁷ This is because, as Chief Justice Roberts has opined, “a vibrant public discourse . . . is at the foundation of our democracy.”¹⁹⁸

Public discourse is not defined by its content, but by its function. Because democracy is essentially “government by public opinion,”¹⁹⁹ public discourse is comprised 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 so long as individuals are free to participate in the formation of public opinion.²⁰⁰

In modern states, public opinion is underwritten by a public sphere that is in turn sustained by a “structural skeleton”²⁰¹ of “media for the communication of ideas,” like books, films, magazines, art, music, or newspapers.²⁰² Public opinion is largely formed in the communicative exchanges that occur through these and similar media. Speech within such media is presumptively public discourse.²⁰³ This is true even in the context of media

¹⁹⁵ *Snyder*, 562 U.S. at 460; *Metromedia*, 453 U.S. at 515; *Cohen v. California*, 403 U.S. 15, 22 (1971); *National Review, Inc. v. Mann*, 2019 WL 6257408 (U.S. Nov. 25, 2019) (Alito, J., dissenting from denial of *certiorari*).

¹⁹⁶ One need not adopt a public discourse 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.

¹⁹⁷ Robert Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*, in *THE FREE SPEECH CENTURY* (Lee C. Bollinger & Geoffrey R. Stone eds. 2019).

¹⁹⁸ *Citizens United v. FEC*, 558 U.S. 310, 373 (2010) (Roberts, C.J., concurring).

¹⁹⁹ CARL SCHMITT, *CONSTITUTIONAL THEORY* 275 (Jeffrey Seizer ed., trans., Duke Univ. Press 2008) (1928).

²⁰⁰ POST, *supra* note 192, at 18–22 27–28; Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 *NORTHWESTERN L. REV.* 1053, 1063–68, 1072–79 (2016).

²⁰¹ Robert C. Post, *Recuperating First Amendment Doctrine*, 47 *STAN. L. REV.* 1249, 1253–55, 1276 (1995).

²⁰² See *Joseph Burstyn, Inc., v. Wilson*, 343 U.S. 495, 501 (1952) (Motion pictures are protected by the First Amendment because they “are a significant medium for the communication of ideas.”); Post, *supra* note 201, at 1253–55.

²⁰³ 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).

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traditionally perceived as low-brow, like gossipy articles in the NATIONAL ENQUIRER,²⁰⁴ as well as in the context of newer media, like blog posts²⁰⁵ and video games.²⁰⁶

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.”²⁰⁷ This is because in a democracy what *becomes* “political” in Bork’s sense results from how the public chooses to exercise its judgment, and the First Amendment prohibits the state from setting the agenda of public attention.²⁰⁸ Public opinion often comes to know itself through discussion about celebrities like Clint Eastwood and Reese Witherspoon, not to mention TV reality star Donald Trump.²⁰⁹ Public discourse

²⁰⁴ Eastwood v. Superior Court, 198 Cal. Rptr. 342 (Cal. App. 1983).

²⁰⁵ Cf. First Am. Compl., Witherspoon v. Mktg. Advantages, No. SC120883 (Cal. Sup. Ct., filed Jul. 15, 2013); Compl., Grande-Butera v. Forever 21, Inc., No. 2:19-cv-07600 (filed in C.D. Cal., Sept. 2, 2019); Jennifer E. Rothman, *Ariana Grande Sues Forever 21 Over Social Media Posts*, ROTHMAN’S RIGHT OF PUBLICITY ROADMAP, Sept. 10, 2019, <https://www.rightofpublicityroadmap.com/news-commentary/ariana-grande-sues-forever-21-over-social-media-posts>; Julia Jacobs, *Ariana Grande Sues Forever 21 Over ‘Look-Alike Model’ in Ads*, N.Y. TIMES, Sept. 3, 2019; Jennifer E. Rothman, *L.A. Court Allows Reese Witherspoon to Proceed with Right of Publicity Claim Against Jeweler*, ROTHMAN’S RIGHT OF PUBLICITY ROADMAP, Dec. 2, 2015, <https://www.rightofpublicityroadmap.com/news-commentary/revise-la-court-allows-reese-witherspoon-proceed-right-publicity-claim-against>; Eriq Gardner, *Katherine Heigl Ends Lawsuit Over Duane Reade Tweet (Exclusive)*, Aug. 27, 2014, <https://www.hollywoodreporter.com/thr-esq/katherine-heigl-ends-lawsuit-duane-728552>.

²⁰⁶ *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786 (2011); *see also* *Noriega v. Activision/Blizzard, Inc.*, 42 MEDIA L. REP. 2740 (Cal. Sup. Ct. 2014) (rejecting lawsuit by former Panamanian dictator arising out of use of his persona in *Call of Duty: Black Ops II*).

²⁰⁷ Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 20, 26–28 (1971).

²⁰⁸ POST, *supra* note 192, at 19–21; Balkin, *supra* note 200, at 1063–68, 1072, 1075–79 (contending that public discourse includes participation in popular culture).

²⁰⁹ *See id.*; Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of the Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004); *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”); *see also* Thomas E. Kadri, *Drawing Trump Naked: Curbing the Right of Publicity to Protect Public Discourse*, 78 MARYLAND 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 (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).

is thus not limited to matters that are overtly about matters of governance; it includes broader communicative activities such as art, music, and comedy.²¹⁰

2. Commercial Speech

Not all speech, however, is public discourse. A second tranche of communication consists of what courts have called “commercial speech.”²¹¹ Commercial speech was initially defined as speech for “advertising purposes” in the context of promoting non-expressive products or services.²¹² The Supreme Court has called the distinction between commercial speech and public discourse a “commonsense” one.²¹³ Although in practice we recognize that the distinction between public discourse and commercial speech has sometimes proven difficult to articulate,²¹⁴ the distinction is often decisive in right of publicity cases.²¹⁵

²¹⁰ POST, *supra* note 192, at 19–21; Balkin, *supra* note 200, at 1057, 1062, 1067–68, 1071–79, 1089 (contending that public discourse encompasses protections for cultural discourse, including nonrepresentational and nonverbal art and music).

²¹¹ For a discussion, see Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000).

²¹² *Virg. State Bd. of Pharmacy v. Virg. Citizens Consumer Counsel, Inc.*, 425 U.S. 748 (1976).

²¹³ *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455–456 (1978); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

²¹⁴ *See, e.g., Kasky v. Nike, Inc.*, 45 P.3d 243, 258–70 (Cal. 2002) (holding that the shoe company’s statements about its labor policies and practices were commercial speech); *Nike, Inc. v. Kasky*, 539 U.S. 654, 676–80 (2003) (Breyer, J., dissenting from denial of cert.) (contending that very same speech was *not* commercial speech); *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014) (reversing district court and concluding that congratulatory page in magazine was commercial speech); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001) (noting that the “boundary between commercial and noncommercial speech has yet to be clearly delineated”); Rothman, *supra* note 30, at 1973–77 (describing the particular challenges of categorized 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, 1130–31 (2006) (“From the beginning the commercial speech doctrine has threatened to unravel free speech theory”).

²¹⁵ 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.” *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp.2d 823, 839 (C.D. Cal. 1998); *see also Brown v. Showtime Networks, Inc.*, 394 F.Supp.3d 418, 437–38 (S.D.N.Y. 2019).

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The key determinant of whether a communicative act is commercial speech is the constitutional value that courts perceive to be at stake in the act.²¹⁶ At the dawn of the modern First Amendment era, Justice Brandeis eloquently explained that freedom of speech rests on the idea that “the greatest menace to freedom is an inert people” and “that public discussion is a political duty.”²¹⁷ Courts will deem communication commercial speech when it advertises non-expressive products and services without any analogous sense of civic orientation; communication is deemed commercial speech when it is regarded as merely an effort to sell goods rather than to reshape 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.”²¹⁸ But commercial speakers have traditionally not been characterized as sovereign in the same way.²¹⁹ Instead, commercial speech has been recognized as primarily serving the interests of listeners; the Court has characterized commercial speech as constitutionally valuable because it serves “the informational function of advertising.”²²⁰

Commercial speech may accordingly be suppressed if it is false or misleading.²²¹ The Court has explicitly concluded that “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”²²² If this were not true, 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.²²³ Content discrimination is also allowed in the context of commercial speech so

²¹⁶ See POST, *supra* note 192, at 27–60 (concluding that the First Amendment protects commercial speech to maintain the “democratic competence” of listeners); Post, *supra* note 211; Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867 (2015).

²¹⁷ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

²¹⁸ *Masses Pub. Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

²¹⁹ Robert Post and Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. FOR. 165, 171–72 (2015).

²²⁰ *Central Hudson*, 447 U.S. at 563. “Commercial 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 200, at 1084–88.

²²¹ *Central Hudson*, 447 U.S. at 566; *see also* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974); Post, *supra* note 211, at 29.

²²² *Central Hudson*, 447 U.S. at 563.

²²³ *NAACP v. Button*, 371 U.S. 415, 433 (1963); *see also* *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964); *Care Committee v. Arneson*, 766 F.3d 774 (8th Cir. 2014).

long as “the asserted governmental interest is substantial” and “the regulation directly advances the governmental interest asserted, and . . . is not more extensive than is necessary to serve that interest.”²²⁴

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.²²⁵ But it is striking that even those who are otherwise skeptical of the distinction between commercial speech and public discourse nevertheless give the distinction ample respect in the context of trademark dilution claims,²²⁶ and we expect 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 have no First Amendment value at all. Aeronautical charts are a good example. They are undoubtedly communicative. But when the publishers of such charts are sued in liability for having conveyed inaccurate information that causes accidents, First Amendment defenses are irrelevant because the charts are treated by courts as mere “‘products’ for the purpose of products liability law.”²²⁷

We shall call this class of communicative acts *commodities*. Right of publicity claims will often arise in the context of what one court has called “mundane products,” in which a plaintiff’s identity appears on mass-produced items like T-shirts, coasters, and pencil sharpeners.²²⁸ As the term commodities suggests, these tend to be “mass-produced

²²⁴ *Central 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* remains in place.

²²⁵ See *Sorell v. IMS Health Inc.*, 564 U.S. 552 (2011); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); Post, *supra* note 216; Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VANDERBILT L. REV. 639 (2016) (commenting on the shifting treatment of corporate speech to focus on speakers rather than listeners, and the disconnect of this analysis with corporate structure).

²²⁶ *Compare* *Mattel, Inc., v. MCA Records, Inc.*, 296 F.3d 894, 905-07 (9th Cir. 2002), with Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech*, 76 VA. L. REV. 627, 652-53 (1990). See, e.g., *San Francisco Arts & Athletics, Inc. v. USOC*, 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); *United States Olympic Committee v. American Media, Inc.*, 156 F. Supp.2d 1200, 1202, 1205-06 (D. Col. 2001).

²²⁷ *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), *cert. denied*, 474 U.S. 1101 (1986)); cf. *Salomey v. Jeppesen & Co.*, 707 F.2d 671, 676-77 (2d Cir.1983) (concluding that navigational charts are “products” for products liability determinations); *Aetna Casualty & Surety Co. v. Jeppesen & Co.*, 642 F.2d 339, 342-43 (9th Cir. 1981) (same); *Fluor Corp. v. Jeppesen & Co.*, 170 Cal.App.3d 468, 475-76 (1985) (same).

²²⁸ *Univ. of Ala. Bd. of Trustees 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);

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unspecialized” items.²²⁹ Although they are imprinted with unique representations of celebrities’ identities, courts do not treat commodities as artistic expressions. They receive no respect from constitutional law.

In *The Martin Luther King Jr. Center for Social Change v. American Heritage Products*,²³⁰ for example, 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 his 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.”²³¹

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.’”²³² 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,”²³³ the New York court concluded that defendants were merely “selling a commodity, a commercial product, an entertaining game of chance,” rather than “educating the public as to the achievements of Howard Hughes.”²³⁴

see also William K. Ford & Raizel Liebler, *Games are Not Coffee Mugs: Games and the Right of Publicity*, 29 SANTA CLARA COMP. & 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,” and then distinguishing “coffee mugs, posters and T-shirts” from “books, magazines, and films”; ultimately concluding that “games are not coffee mugs”).

²²⁹ *Commodity*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003) (defining “commodity” as an “economic good: [such] as . . . a mass-produced unspecialized product”).

²³⁰ 296 S.E.2d 697 (1982).

²³¹ *Id.* at 700.

²³² 72 Misc.2d 788, 789–790, *aff’d as modified*, 42 A.D.2d 544 (1973).

²³³ *Hoepker v. Kruger*, 200 F. Supp.2d 340, 348 (S.D.N.Y. 2002); see also *Messenger v. Gruner Jahr Printing & Publ’g*, 94 N.Y.2d 436, 441–43 (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 or deceptive even in the context of public discourse. See *id.* at 446; see also *Porco v. Lifetime Entmt. Servs., LLC*, 147 A.D.3d 1253 (N.Y. App. Div. 2017); *Spahn v. Julian Messner, Inc.*, 233 N.E.2d 840 (N.Y. 1967); *Binns v. Vitagraph Co. of Am.*, 103 N.E. 1108 (N.Y. 1913).

²³⁴ *Rosemont Enters.*, 72 Misc.2d at 789–790.

California Chief Justice Rose Bird sought to summarize the intuition behind these decisions in her influential dissent in *Lugosi v. Universal Pictures*.²³⁵ 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."²³⁶

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*:

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.

* * *

[M]annequins 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.²³⁷

²³⁵ 25 Cal.3d 813 (1979).

²³⁶ *Id.* at 851 (Bird, C.J., dissenting); *see also* *Rosemont Enters., Inc. v. Choppy Prods., Inc.*, 347 N.Y.S.2d 83, 84–85 (Sup. Ct. 1972) (finding "no validity" in argument that "marketing [of] T-shirts, sweatshirts and buttons offering comical and satirical comment on 'one Howard Hughes'" was "protected by the constitutional right of free speech."); RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 46, cmt. c (1995) ("An unauthorized appropriation of another's name or likeness for use on posters, buttons, or other memorabilia is thus ordinarily actionable as an infringement of the right of publicity. Attempts to defend the sale of such merchandise on first amendment grounds through analogies to the marketing of books, magazines, and other traditional media of communication . . . have typically been rejected.").

²³⁷ *Hoepker v. Kruger*, 200 F. Supp.2d 340, 352, 354 (S.D.N.Y. 2002). *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 46, cmt. c (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 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. MLB Players Ass'n*, 95 F.3d 959 (10th Cir. 1996) (holding parodic baseball trading cards protected by First Amendment); *Paulsen v. Personality Posters, Inc.*, 59 Misc.2d 444 (N.Y. Sup. Ct. 1968) (rejecting right of publicity claim for sale of poster with plaintiff's likeness when plaintiff ran mock campaign for presidency).

THE FIRST AMENDMENT AND THE RIGHT(S) OF PUBLICITY

There is no magic bullet that can distinguish whether a given use occurs in a commodity, or instead in public discourse or commercial speech. Yet some such categorization is clearly at the root of many right of publicity cases. In *Aldrin v. Topps Co.*,²³⁸ 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”²³⁹ were neither commodities nor commercial speech. 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.”²⁴⁰

Aldrin should be contrasted with *Hilton v. Hallmark Cards*,²⁴¹ in which 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.²⁴² The fictional Hilton informs the patron “Don’t touch that, it’s hot,” which is a play on Hilton’s well-known catch-phrase “that’s hot,” which she used on her television series “The Simple Life” whenever she found “something interesting or amusing.”²⁴³ The Ninth Circuit rejected Hallmark’s First Amendment defense as a matter of law. Although the court ostensibly applied the “transformative use” test,²⁴⁴ it seems more plausible that it was actually motivated by the belief that Hallmark’s use of Hilton’s identity was as a mere commodity: “Hallmark’s card is not advertising the product; it *is* the product.”²⁴⁵

²³⁸ 2011 WL 4500013 (C.D. Cal. 2011).

²³⁹ *Id.* at *1.

²⁴⁰ *Id.* at *3. 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.” *Id.* at 1098–99.

²⁴¹ *Hilton v. Hallmark Cards*, 599 F.3d 894, 905 n. 7 (9th Cir. 2010).

²⁴² *Id.* at 899.

²⁴³ *Id.* at 899.

²⁴⁴ *Id.* at 910–911.

²⁴⁵ *Id.* at 905 n. 7 (emphasis in original). 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:

The court in *Aldrin* regarded the astronaut trading card as a vehicle through which the public could inform itself about “historically significant achievements.” By contrast the court in *Hilton* regarded the Hallmark birthday card as a mere commercial product, without communicative implications apart from its sale. The difference illustrates how courts attribute constitutional significance to particular communicative acts.²⁴⁶ If a court does not characterize the use of a person’s identity as integral either to the formation of public opinion or to the public distribution of useful information (commercial or otherwise), it is likely to classify the use as a mere commodity.²⁴⁷

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 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. 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.

²⁴⁶ Judicial inquiry will be informed in part by surrounding social practices and conventions associated with particular categories of objects. *See Post, supra* note 201, at 1253–55.

²⁴⁷ We should be clear that First Amendment scrutiny can be independently triggered if the state attempts to restrict commodities for unconstitutional purposes. *See Post, supra* note 201, 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.

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

Each of the four branches of the right of publicity that we have identified protects a distinct state interest. In this section we discuss how each interest constitutionally intersects with the First Amendment values in the three tranches of communication that we have distinguished.

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. 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 publication of free expression."²⁴⁸ Citing *Zacchini*, the Supreme Court has even held that an action for copyright can proceed against a major news magazine seeking to publish the memoirs of an ex-President.²⁴⁹ It did not matter that the publication was newsworthy or that it involved a quintessential public figure. It did not matter 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.²⁵⁰

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.

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"²⁵¹ that reduce its impact on communication. These accommodations include the idea/expression dichotomy and the

²⁴⁸ *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2002).

²⁴⁹ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556–57 (1985).

²⁵⁰ *Id.* at 557. "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.

²⁵¹ *Eldred*, 537 U.S. at 219.

“‘fair use’ defense,” which “allows 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.’”²⁵²

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.” 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.²⁵³

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.²⁵⁴ 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.²⁵⁵

²⁵² *Id.* at 219–20.

²⁵³ Copyright’s fair use doctrine first developed at common law to accommodate speech interests. *See Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (D. Mass. 1841).

²⁵⁴ This jurisprudence has been codified at 17 U.S.C. § 107. 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 nonprofit educational purposes.” Uses for “criticism, comment, news reporting, teaching . . . scholarship, or research” are more likely to be considered fair than those that are for profit—although liability can lie even for these uses. *See, e.g., Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014); *Harper & Row Publishers*, 471 U.S. 539. 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 (1994). The other enumerated fair use factors include consideration of “the nature of the copyrighted work,” “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” and “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107. Each of these factors can with relative ease be imported into a fair use-style analysis applicable to right of performance cases. *Cf. Roberta Rosenthal Kwall, Is Independence Day Dawning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191, 229–255 (1983); Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TULANE L. REV. 836, 915–39 (1983); *see also* ROTHMAN, *supra* note 1, at 222 n.29.

²⁵⁵ We do not say that the determination of fair use is easy, but only that a doctrine of fair use should be in applied in the context of the right of performance *in pari materia* with the application of the doctrine in copyright. *See Pierre N. Leval, Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990); Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1138–40 (1990); *see also* Jennifer E. Rothman, *Copyright’s Private Ordering and the “Next Great Copyright Act,”* 29 BERKELEY TECH. L.J. 1595, 1601–05 (2014) (describing some practical challenges for the fair use doctrine); *but see* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009) (suggesting predictable aspects of fair use analysis);

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*, and its object is to prevent usages that impair the commercial value of a plaintiff's identity by misleading as to source or sponsorship. We denominated the second as *diminishment*, and its object 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*, and its object is to prevent the unfair commercial misappropriation of the commercial value of another's identity.

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 upon 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,²⁵⁶ for example, the Constitution will impose no constitutional restraints on a plaintiff's efforts to vindicate injuries to the commercial value of his identity caused by these three kinds of harms. Uses that occur in the context of public discourse or commercial speech, by contrast, require more extended analysis.

We argued in Part 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. But should state law overreach and apply these claims to public discourse, courts ought to face no great constitutional 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 kinds of 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 and established in the marketplace.²⁵⁷ This value ultimately depends upon the attitudes of third parties. The First Amendment prohibits 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."²⁵⁸ 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

Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WILLIAM & MARY L. REV. 1525 (2004) (suggesting that there are predictable and recognizable patterns to fair use determinations).

²⁵⁶ See *supra* Section I.A.3.

²⁵⁷ See *supra* note 88–98 & accompanying text.

²⁵⁸ *New York Times v. Sullivan*, 376 U.S. 354, 270 (1964).

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.”²⁵⁹

Actions for unjust enrichment seek to indemnify 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. Actions for unjust enrichment in effect presuppose that persons possess a “limited property right” in their identity.²⁶⁰ Public discourse, however, is a domain in which “speech that merely communicates readily available public information” is constitutionally protected.²⁶¹

Unlike copyright (and the right of performance), which allocates ownership of particular, discrete expressions, unjust enrichment purports to give persons property rights in public information itself, in the simple fact 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 persons. It contradicts the constitutional function of public discourse to make speakers pay for this privilege.

The First Amendment thus properly prevents unjust enrichment claims from reaching either the photographer who makes art out of the image of people captured on the street,²⁶² or the writer who discusses real people in a novel.²⁶³ 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.”²⁶⁴

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

²⁵⁹ *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 (1999).

²⁶⁰ *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 309 (9th Cir. 1992). It has thus been pointed out that the “unjust enrichment argument . . . presumes that someone must have property rights in the value” of a persona. *See* Dogan & Lemley, *supra* note 60, at 1182.

²⁶¹ *Polinsky v. Bolton*, 2017 WL 224391 (Minn. D. Ct. 2017), at *5; *see also* *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495–96 (1975); *C.B.C. Dist. & Mktg., Inc. v. MLB Advanced Media*, 505 F.3d 818 (8th Cir. 2007).

²⁶² *See, e.g.*, *Nussenzweig v. DiCorcia*, 2006 WL 871191 (N.Y. Sup. Ct. 2006), at *3.

²⁶³ *See, e.g.*, *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994).

²⁶⁴ *Sarver v. Chartier*, 813 F.3d 891, 905 (9th Cir. 2016).

mislead the public into thinking that he has been endorsed by a particular celebrity.²⁶⁵ “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.”²⁶⁶

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.²⁶⁷ Although such claims are most often brought in the context of commercial speech, they are also brought against infringing uses within public discourse.²⁶⁸ Because all state regulation of public discourse is potentially problematic, it is well recognized that such claims create an obvious tension with the First Amendment. In the context of applying the Lanham Act, therefore, courts have 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.”²⁶⁹ 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.”²⁷⁰

This is the point of the widely-adopted test developed in *Rogers v. Grimaldi* in the context of false endorsement claims.²⁷¹ Fearing that an “overextension of Lanham Act restrictions in the area of movie 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.”²⁷² Such an

²⁶⁵ *Browne v. McCain*, 611 F.Supp.2d 1062, 1070–72 (C.D. Cal. 2009).

²⁶⁶ *Rogers v. Grimaldi*, 875 F.2d 994, 997 (2d Cir. 1989).

²⁶⁷ *See, e.g.*, 15 U.S.C. §§ 1114, 1125(a).

²⁶⁸ *See, e.g.*, *ETW v. Jireh*, 332 F.3d 915, 918, 920–21 (6th Cir. 2003); *Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003); *Westchester Media v. PRL USA Holding, Inc.*, 214 F.3d 658 (5th Cir. 2000); *King v. Innovation Books*, 976 F.2d 824 (2d Cir. 1992); *Ocean Bio-Chem, Inc. v. Turner Network Television, Inc.*, 741 F. Supp. 1546 (S.D. Fla 1990); *but see Farah v. Esquire Magazine*, 736 F.3d 528, 541 (D.C. Cir. 2013) (contending that 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 30, at 1937–1944, 1989–92.

²⁶⁹ *Westchester Media*, 214 F.3d at 664.

²⁷⁰ *Twin Peaks Productions, Inc. v. Publications Intern., Ltd.*, 996 F.2d 1366, 1379 (2d Cir. 1993); *see Univ. of Ala. Bd. of Trustees 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).

²⁷¹ 875 F.2d 994 (2d Cir. 1989).

²⁷² *Id.* at 998–99; *see also Girl Scouts of the United States of America v. The Bantam Doubleday Dell Publishing Group, Inc.*, 808 F. Supp. 1112 (S.D.N.Y. 1992). The *Rogers* test has been expanded to apply beyond titles and is applicable to the substance of all works deemed

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.’”²⁷³

Analogous constitutional considerations should apply to right of publicity claims based on confusion 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 and 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.”²⁷⁴ 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

“expressive.” See *Univ. of Alabama Bd. of Trustees v. New Life Art, Inc.*, 683 F.3d 1266, 1275–79 (11th Cir. 2012) (applying *Rogers* test to allow use of plaintiff’s marks within paintings, prints, and calendars); *ESS Entmt. 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099–1101 (9th Cir. 2008) (applying *Rogers* test in context of video game); *ETW Corp. v. Jireh Publ’g*, 332 F.3d 915, 918–19 (6th Cir. 2003) (applying *Rogers* test to use of athlete’s name in material accompanying prints that depicted that athlete); see also *VIP Prods. LLC v. Jack Daniel’s Properties, Inc.*, ___ F.3d ___, 2020 WL 1527077 at *3–*5 (March 31, 2020) (holding that *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’ ”).

²⁷³ *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1245 (9th Cir. 2013) (emphasis and alterations in the original) (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 same 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, *Brown v. Elec. Arts*, No. BC 520019 (Cal. Sup. Ct., Aug. 30, 2013); see also Darren Rovell, “Jim Brown receives \$600,000 to dismiss lawsuit against Electronic Arts,” ESPN, June 28, 2016, <http://perma.cc/5DUZ-SA2B>.

²⁷⁴ *Central Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557, 563 (1980).

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.²⁷⁵ Right of commercial value claims should similarly allow defenses that track the descriptive and nominative "fair use" defenses to Lanham Act claims.²⁷⁶ Although these defenses are internal to trademark law, they are recognized as "built-in First Amendment accommodations" without which there would be "serious First Amendment concerns" about the enforcement of the Lanham Act.²⁷⁷ These fair use defenses should also apply to diminishment and unjust enrichment claims.²⁷⁸

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

²⁷⁵ See 15 U.S.C. § 1115 (b)(4); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118–23 (2004); *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 308–09 (9th Cir. 1992); *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125 (1947); *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111, 121–22 (1938).

²⁷⁶ 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 reference or any other such purpose without using the mark." *Am. Soc'y for Testing & Materials v. Public. Resource.Org., Inc.*, 896 F.3d 437, 456 (D.C. Cir. 2018). 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 v. Jireh*, 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 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 model to highlight the kind of cars it repairs.'").

²⁷⁷ *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171 (9th Cir. 2010); cf. *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003) (concluding that such analogous accommodations are what allow for copyright law's constitutionality). See also *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 430–31 (suggesting that dilution claims adequately accommodate First Amendment concerns because they exempt "noncommercial uses" and provide "fair use" defenses); Summary of Testimony of the International Trademark Ass'n on H.R. 1295 & 1270, July 19, 1995, available at 1995 WL 435750 (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).

²⁷⁸ Cf. 15 U.S.C. § 1125 (c) (expressly providing for such defenses in the context of dilution).

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.”²⁷⁹ In the context of commercial speech, most would characterize the maintenance of the commercial goodwill of public figures as a substantial government interest. Diminishment 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. Most 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,²⁸⁰ 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 are widely accepted as constitutional in the context of commercial speech.²⁸¹ Diminishment claims, however, can be brought only by celebrities with otherwise well-known personalities. Actions for unjust enrichment ensure that ordinary persons, whose names and images are without independent 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 unknown persons, 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 right of commercial value are summarized in Table A:

²⁷⁹ *Central Hudson*, 447 U.S. at 566.

²⁸⁰ 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 **Error! Bookmark not defined.**, 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 93; Tushnet, *Gone in Sixty Milliseconds*, *supra* note 93.

²⁸¹ See *Moseley*, 537 U.S. at 430–31; see also *United States v. Alvarez*, 567 U.S. 709, 735–36 (Breyer, J., concurring) (suggesting constitutionality of trademark 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 of fancy watches and designer handbags” by preventing the “lessening [of] the distinctiveness” of marks); cf. *San Francisco Arts & Athletics, Inc. v. U.S.O.C.*, 483 U.S. 522 (1987) (rejecting a First Amendment defense to use of term “Olympics” in both public discourse and commercial speech even in the absence of a showing of likely confusion).

TABLE A

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

Table A 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.”²⁸² 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.²⁸³ Although there is doctrine that purports to instruct courts how to distinguish commercial speech from public discourse,²⁸⁴ such doctrine is generally conceded to be vague and unhelpful, and assuredly of little assistance in helping courts evaluate the myriad different communicative contexts in which right of commercial value claims are embedded.²⁸⁵

²⁸² *Spence v. Washington*, 418 U.S. 405, 410–11 (1974). For a discussion, see Post, *supra* note 201 *passim*.

²⁸³ For other recent judicial efforts to draw this line, see, e.g., *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S.Ct. 1719, 1742–44 (2018) (Thomas, J., concurring) (concluding that custom wedding cake is expressive speech, rather than a mere product); *Brush & Nib Studio v. Phoenix*, 448 P.3d 890 (Ariz. 2019) (custom wedding invitations treated as fully protected “pure speech”).

²⁸⁴ 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).

²⁸⁵ See e.g., *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637 (1985); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993); *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 709–10 (9th Cir.), *reh’g granted, opinion withdrawn*, 192 F.3d 1208 (9th Cir. 1999), *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).

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 considered 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.²⁸⁶

In *Brinkley v. Casablancas*,²⁸⁷ 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.²⁸⁸

Contrast *Brinkley* with *Nussenzweig v. DiCorcia*,²⁸⁹ 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 “photography is ‘art,’ and ‘art cannot constitutionally be within the protection of New York’s privacy laws because it is constitutionally protected speech.”²⁹⁰

²⁸⁶ See, e.g., *Factors, Etc., Inc. v. Pro Arts, Inc.*, 496 F. Supp. 1090 (S.D.N.Y. 1980) (rejecting First Amendment defense to use of Elvis Presley’s name and image in memorial posters because “there is no constitutional protection for selling posters of Elvis Presley as Elvis Presley.”), *rev’d on other grounds*, *Factors, Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981); *Comedy III v. Gary Saderup Inc.*, 21 P.3d 797 (Cal. 2001) (rejecting First Amendment defense in context of sale of defendant’s lithograph of Three Stooges in multiple copies and on T-shirts).

²⁸⁷ 80 A.D.2d 428 (1981).

²⁸⁸ *Id.* at 433–34, 439 (distinguishing *Brinkley* 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 receive “first amendment protection” or be considered “newsworthy” under New York statute if they were a “separate product”).

²⁸⁹ *Nussenzweig v. DiCorcia*, 2006 WL 871191 (N.Y. Sup. Ct. 2006).

²⁹⁰ *Id.* at *6–*8; see also *Altbach v. Kulon*, 302 A.D.2d 655, 657–8 (2003) (“artistic expressions . . . are entitled to protection under the First Amendment and excepted 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’”). For an analogous contrast to that between *Brinkley* and *Nussenzweig*, compare *Young v. Greener Studios, Inc.*, 175 Misc. 1027 (N.Y. Sup. Ct. 1941) (allowing 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. Tieg*s, 159 Misc. 2d 54, 57–60 (N.Y. Sup. Ct. 1993) (concluding that the First

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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 creates 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,”²⁹¹ or the entire field of photography could never qualify as public discourse, which it plainly does.²⁹²

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.²⁹³ 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.

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”).

²⁹¹ *Nussenzweig*, 2006 WL 871191 at *6.

²⁹² 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 Ninth Circuit do not. *See* discussion *supra* notes 163–170 & accompanying text. In practice, the transformative-work test has disfavored realistic depictions.

²⁹³ The attribution of constitutional value is a difficult and contextual problem, even in the context of commercial posters. In *Rosa and Raymond Parks Institute for Self Development v. Target*, 90 F. Supp.3d 1256 (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” 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*, 99 F. Supp.2d 829, 835 (N.D. Ohio 2000), *aff’d on other grounds*, 332 F.3d 915 (6th Cir. 2003), the 5,000 “limited edition” prints 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*, 34 Cal.App.4th 790, 797 (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 Superbowl victory.

When uses appear in a traditionally recognized “medium for the communication of ideas,”²⁹⁴ such as fine art, film, newspapers, radio or books, courts are comfortable classifying them as presumptively public discourse.²⁹⁵ But difficulties of constitutional categorization arise when uses occur outside of these contexts, as for instance on T-shirts or coffee mugs. Uniquely among state torts, right of publicity cases involve a plethora of such non-traditional uses. So, for example, even though the Supreme Court has held that video games constitute a preferred “medium” for the communication of ideas,²⁹⁶ lower courts have evidently struggled with this conclusion in the context of the right of publicity, sometimes treating uses in 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.²⁹⁷

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. Such exchanges involve the imaginative potential of 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.²⁹⁸

²⁹⁴ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

²⁹⁵ *Post*, *supra* note 201, at 1252-56.

²⁹⁶ *Brown v. Entertainment Merchants 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).”)

²⁹⁷ *See, e.g.*, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268 (9th Cir. 2013); *Hart v. Electronics Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013); *see also* *Champion v. Take Two Interactive Software, Inc.*, No. 158429/2018, 2019 WL 2079889 (N.Y. Sup. Ct. May 10, 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, e.g.*, *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 72 Misc.2d 788 (N.Y. Sup. Ct. 1973); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 197); *Palmer v. Schonhorn Enters., Inc.*, 232 A.3d 458 (N.J. Sup. Ct. 1967); *but see* *C.B.C. Dist. & Mktg, Inc. v. MLBA Media, L.P.*, 505 F. 3d 818 (8th Cir. 2007) (holding that First Amendment protects use of athletes’ names and statistics in fantasy sports); *Aldrin v. Topps Co.*, 2011 WL 4500013 (C.D. Cal. 2011) (allowing First Amendment defense in context of trading card game).

²⁹⁸ *See* *Post*, *supra* note 201, at 1252-55.

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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.²⁹⁹ We suggest that the test is best interpreted as an effort to determine 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,”³⁰⁰ and so 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.³⁰¹

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

²⁹⁹ See *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989); *supra* notes 169–174 & accompanying text.

³⁰⁰ *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 describes well 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.

³⁰¹ *Rogers*, 875 F.2d at 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 (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 artistic concept inheres in the proposed title,” and because “somewhat lesser protection” attaches to “commercial speech” than to films, “the Court concludes 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.”).

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 widely been adopted 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 application of *Rogers* test to uses within the body of works and within a video game); *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095 (9th Cir. 2008) (applying test to use of club name in video game); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003) (using test in context of photographs of Barbie); *ETW Corp. v. Jireh Pub’g, Inc.*, 332 F.3d 915, 937 (applying test to image within in an “artwork”).

commodities.³⁰² Missouri’s “predominant purpose” test, which we discussed in Part II, seems to us an unsuccessful effort to do exactly this.³⁰³

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 artistic or literary expression.”³⁰⁴ 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 “exploiting the commercial value” of a celebrity. Whether Andy Warhol chose his celebrity subjects because they 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.”³⁰⁵ 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.”³⁰⁶ 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.

³⁰² 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.”); *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 88 (2d Cir. 1989) (the defendant “could not staple a T-shirt bearing the likeness of a Titan wrestler between magazine covers and claim exemption from section 51 and first amendment protection for a ‘wrestling T-shirt magazine.’”)

³⁰³ See *supra* notes 162–163 & accompanying text.

³⁰⁴ 110 S.W.3d 363, 374 (Mo. 2003). In *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85 (2d Cir. 1989), 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.’” *Id.* at 88–89.

³⁰⁵ *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1100 (9th Cir. 2008).

³⁰⁶ *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000).

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 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.³⁰⁷

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 upon 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 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 and narrow 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 the “right to be forgotten,” would likely be unconstitutional in the United States.³⁰⁸ 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.³⁰⁹

³⁰⁷ McKenna, *supra* note 117, at 282; *supra* notes 111–126 & accompanying text.

³⁰⁸ Post, *supra* note 121, at 1047–54; *see also* 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 (2000).

³⁰⁹ We realize that there is loose language in *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), which states that the “creation and dissemination of information are speech within the meaning of the First Amendment.” 564 U.S. at 571. 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 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 restricts the transmission of information than does the Vermont law *Sorrell* found unconstitutional. *Sorrell*, 564 U.S. 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 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, Florida*, 848 F.3d 1293, 1313–1314 (11th Cir. 2017) (“Florida may generally believe that doctors and medical professionals should not ask about, nor express views

The right of control may perhaps fare better when it arises in the context of commercial speech. We assume for purposes of discussion 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. 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,”³¹⁰ as for example when a defendant’s advertisement contains a crowd scene that happens to include an image of a plaintiff.³¹¹

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, but the latter 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 when 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 the forms of respect essential to the integrity of personality. Long-established First Amendment doctrine is quite hostile to the

hostile to, firearm ownership, but it ‘may not burden the speech of others in order to tilt public debate in a preferred direction.’”); *Boelter v. Hearst Communications, Inc.*, 192 F. Supp.3d 427, 450 (S.D.N.Y. 2016); *King v. General Information Servs., Inc.*, 903 F. Supp.2d 303, 309 (E.D. Pa. 2012). See PRINCIPLES OF THE LAW OF DATA PRIVACY § 1 note 7 (Am. Law. Inst. 2019).

³¹⁰ See, e.g., *Champion v. Take Two Interactive Software, Inc.*, 100 N.Y.S.3d 838, 844, 847 (2019) (rejecting 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”); *Stayart v. Google Inc.*, 710 F.3d 719, 723 (7th Cir. 2013) (concluding that Internet search engine’s use of plaintiff’s name was incidental rather than “substantial”); *Candelaria v. Spurlock*, 2008 WL 2640471 at *5 (E.D.N.Y. July 3, 2008) (dismissing right of publicity claim in part on incidental use exception when plaintiff’s appearance in documentary was “fleeting,” lasting for only three to four seconds).

³¹¹ 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 61, at § 7.30 (“An insignificant or fleeting use of a person’s name or image in an advertisement will not trigger liability”).

enforcement of such civility rules in public discourse.³¹² “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.”³¹³ 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.³¹⁴ 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.³¹⁵

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.³¹⁶ Nevertheless some members of the Court intimated that there is a constitutional difference between “a law disfavoring ‘ideas that offend,’”³¹⁷ 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.”³¹⁸

³¹² Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 486–87, 503 (2003).

³¹³ *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also* *Snyder v. Phelps*, 562 U.S. 443, 458–59 (2011). “The 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.” *FCC v. Pacifica Foundation*, 438 U.S. 726, 745–46 (1978).

³¹⁴ *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

³¹⁵ *See, e.g.,* *Bullard v. MRA Holding, LLC*, 740 S.E.2d 622, 753 (Ga. 2013) (allowing right of publicity claim where plaintiff could be seen as “*endorsing* the *College Girls Gone Wild* video through the use of her image) (emphasis in original); *Douglas v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985) (allowing right of publicity claim in context in which use of nude photographs in *Hustler* could suggest consent to appear in that magazine, as well as to reflect falsely on the nature of Douglas’s sexuality).

³¹⁶ *Iancu v. Brunetti*, 139 S.Ct. 2294, 2999–2301 (2019); *Matal v. Tam*, 137 S.Ct. 1744 (2017).

³¹⁷ *Iancu*, 139 S.Ct. at 2301.

³¹⁸ *Id.* (emphasis added); *see also id.* at 2302 (Alito, J., concurring); *id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 2306 (Breyer, J., concurring in part and dissenting in part); *id.* at 2309 (Sotomayor, J., concurring in part and dissenting in part). Several justices suggested that one could limit the registration of trademarks that were “obscene, vulgar, or profane” because those would be barred because of their “mode of expression,” rather than for the “ideas they convey”); *id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part).

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.”³¹⁹ 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.”³²⁰ In public discourse speakers can deploy offensive modes of expression as well as express offensive ideas.³²¹

Commercial speech, however, is protected primarily to safeguard the “informational function” of commercial communications.³²² The question is therefore whether it is constitutionally acceptable to regulate commercial speech to exclude or limit offensive modes of expression but nevertheless to permit an audience to receive whatever 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.³²³ Although the distinction between the manner of speech and the substance of speech is a troubled one,³²⁴ it may nevertheless explain why the right of dignity, as a remedy “for mental anguish caused by one individual to another,”³²⁵ commonly prevails within commercial speech.³²⁶ 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

³¹⁹ *Cohen v. California*, 403 U.S. 15, 24 (1971).

³²⁰ *Id.* at 25–26.

³²¹ For a discussion of the reasoning behind this conclusion, see Post, *The Constitutional Concept of Public Discourse*, *supra* note 29, at 626–33.

³²² *Central Hudson*, 447 U.S. at 563.

³²³ *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.”).

³²⁴ See, e.g., Peter Jones, *Blasphemy, Offensiveness and Law*, 10 BRIT. J. POL. SCI. 129, 141–43 (1980).

³²⁵ *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 280 (1959).

³²⁶ See, e.g., *Waits v. Frito-Lay*, 978 F.2d 1093, 1102–03 (9th Cir. 1992); *Gabiola v. Sarid*, 2017 WL 4264000 (N.D. Ill. 2017); *Bullard v. MRA Holding, LLC*, 740 S.E.2d 622 (Ga. 2013); *Michaels v. Internet Entmt. Grp., Inc.*, 5 F. Supp.2d 823 (C.D. Cal. 1998); *Beverly v. Choices Women’s Med. Ctr., Inc.*, 170 A.D.2d 475 (N.Y. App. Div. 1991), *aff’d*, 587 N.E.2d 275 (N.Y. 1991).

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,”³²⁷ which in such contexts is contrasted to “speech on ‘matters of public concern.’”³²⁸ The Court has not-very-helpfully instructed us that “[d]eciding whether speech is of public or private concern requires us to examine the “‘content, form, and context’” of that speech, “‘as revealed by the whole record.’”³²⁹ Speech about matters of public concern, which receives the protections of public discourse, has been identified as “the standard in determining whether a common-law action for invasion of privacy is present.”³³⁰ What is of public concern is most often identified with communications that are considered “newsworthy.” When a use is deemed newsworthy, neither privacy nor publicity claims can be maintained.³³¹

³²⁷ *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

³²⁸ *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985). The Supreme Court has defined “speech about matters of public concern” as speech that relates to “any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004).

³²⁹ *Snyder*, 562 U.S., at 453.

³³⁰ *Connick v. Myers*, 461 U.S. 138, 143 n.5 (1983).

³³¹ *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); *Toffoloni v. LFP Publ’g Grp., LLC*, 572 F.3d 1201, 1208 (11th Cir. 2009); *Michaels v. Internet Entertainment Group, Inc.*, 5 F.Supp.2d 823, 838 (C.D. Ca. 1998). 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 (exempting from right of publicity laws of “newsworthy value”); *Rosa and Raymond Parks Institute for Self Development v. Target Corp.*, 812 F.3d 824 (11th Cir. 2016) (holding that Michigan’s right of publicity law doesn’t apply to newsworthy uses); *Daniels v. Fanduel, Inc.*, 94 N.E. 3d 696 (Ind. 2018); *Messenger v. Gruner + Jahr Printing & Publ’g*, 94 N.Y.2d 436, 441–42 (2000) (describing New York’s newsworthiness exception to its statutory publicity law as being “broadly construed” and applying to “any subject of public interest.”); *Dora v. Frontline Video, Inc.* (15 Cal. App.4th 536 (1993) (rejecting a misappropriation of identity claim under California law on the basis that the use was newsworthy and a matter “in the public interest.”). California’s definition is fairly 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.*, 201 Cal. App.3d 662 (1988) (quoting *Eastwood v. Superior Court*, 149 Cal. App.3d 409, 421 (1983)).

Although newsworthiness is often an element of substantive state law, the Supreme Court in *Zacchini v. Scripps-Howard Broadcasting* held that the newsworthiness defense to Ohio’s right of publicity, at least as applied by the state supreme court in that case, was a reviewable First

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,”³³² in point of fact courts sometimes classify speech that is highly sexually degrading as merely of private concern.³³³ Such speech can be regulated in ways that would be impermissible within public discourse. Thus, the wrestler Hulk Hogan was famously 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 that “the explicit content of the Gawker Video was an exploitation of public curiosity where no legitimate public interest exists.”³³⁴

These cases are not easy to explain. That non-obscene speech 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*³³⁵ or *Cohen v. California*.³³⁶ Yet it is undeniable that at the margins such anomalous cases exist, seemingly with the Court’s own blessing.³³⁷

Amendment judgment. *Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562 (1977); *Zacchini v. Scripps-Howard Broad.*, 351 N.E.2d 454, 455 (Ohio 1976).

³³² *Snyder*, 562 U.S., at 453.

³³³ *See, e.g.*, *San Diego v. Roe*, 543 U.S. 77, 84 (2004) (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 v. LFP Publ’g Grp., LLC*, 572 F.3d 1201, 1208–12 (11th Cir. 2009) (“[T]he published nude photographs were in no conceivable way related to an ‘incident of public concern’ or the current ‘drama’” surrounding the decedent’s death); *Bosley v. Wildwett.com*, 310 F. Supp.2d 914, 920 (N.D. Ohio 2004) (noting that in the context of images of the plaintiff competing in a wet t-shirt contest, “the phrase ‘public or general interest’ . . . does not mean mere curiosity”);

³³⁴ *Bollea v. Gawker Media, LLC, Permanent Injunction* ¶ 49 (6th Cir. Fla., December 9, 2016). *See* Eriq Gardner, *Hulk Hogan Gets \$115 Million Verdict Against Gawker at Sex Tape Trial*, THE HOLLYWOOD REPORTER, March 18, 2016, available at <https://www.hollywoodreporter.com/thr-esq/hulk-hogan-gets-115m-verdict-876768>.

³³⁵ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

³³⁶ *Cohen v. California*, 403 U.S. 15 (1971). *See; e.g.*, *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (“Sexual expression which is indecent but not obscene is protected by the First Amendment.”).

³³⁷ *San Diego v. Roe*, 543 U.S. 77, 84 (2004). ““[N]ot all speech is of equal First Amendment importance,” however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous.” *Snyder*, 562 U.S., at 452.

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In the context of privacy actions, for example, courts have long imagined that the criteria of “legitimate concern to the public”³³⁸ and “newsworthiness”³³⁹ empower them to make “a normative assessment of the ‘social value’ of a publication.”³⁴⁰ Yet because the arrogation of this authority is so incompatible 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,³⁴¹ no doubt on the orthodox constitutional ground that:

Under 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.³⁴²

³³⁸ RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1965).

³³⁹ *Judge v. Saltz Plastic Surgery, P.C.*, 367 P.3d 1006, 1012–13 (Utah 2016); *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 478–79 (Cal. 1998); *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 83 (W. Va. 1983).

³⁴⁰ *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 483–84 (Cal. 1998). For a discussion, see *Post, supra* note 121, at 1057–61. In the context of privacy, judgments of newsworthiness are closely intertwined with judgments of offensiveness. “The two criteria, 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).

³⁴¹ *Shulman*, 955 P.2d at 485; see Diane Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 350–62 (1983); Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326, 336 (1966).

³⁴² *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157–58 (1946). See *Jenkins v. Dell Pub. 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

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 nevertheless a distinctly observable phenomenon in the context of right of publicity actions,³⁴³ which is testament to the grip of civility rules on the judicial imagination.³⁴⁴ We flag them 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; or why on 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 formulations the right is said to focus on market damages, whereas in other formulations the right protects against mental anguish and emotional distress. We can see now that the nature and elements of the right of publicity will vary as it is used 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 are asserted in a particular case, as well as upon whether the infringing use occurs in public discourse, commercial speech, or commodities.³⁴⁵ It is plain that many of what presently pass as First Amendment “tests” for right of publicity cases are in fact efforts to distinguish among these three constitutional tranches 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.

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

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.

³⁴³ See, e.g., *Toffoloni v. LFP Publ’g Grp., LLC*, 572 F.3d 1201 (11th Cir. 2009); *Bosley v. Wildwett.com*, 310 F. Supp.2d 914 (N.D. Ohio 2004).

³⁴⁴ On the “paradox of public discourse” that may explain this anomaly, see Post, *The Constitutional Concept of Public Discourse*, *supra* note 29, at 642–44; Post, *supra* note 121, at 1008–09.

³⁴⁵ To which we might add, in the unique context of right of dignity actions, speech of purely private concern.

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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.