Right of Publicity and THE FIRST AMENDMENT

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human artistry campaign

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Executive Summary

Across the United States, legislators are racing to address the many challenges posed by generative artificial intelligence—including the risk that such AI will destroy Americans' individual rights in their own voice and visual likeness. Until recently, that concern was the stuff of science fiction and fantasy. But widespread AI tools now make it easy to generate sophisticated, unauthorized fakes. With the push of a button, we can create extremely convincing visual copies and voice clones of virtually anyone. This technological development will surely result in marvelous and valuable achievements. But it also poses threats to the marketplace of ideas, fundamental privacy rights, the safety of minors, and intellectual property protections. Across every field of social and economic life—for private citizens and celebrities alike—bad faith actors can misappropriate both voice and visage to steal, confuse, threaten, and humiliate.

Many states already provide some legal protections against misappropriation of a person's name, voice, or likeness. Those laws are important, but they are variable and uneven. The federal government should therefore establish baseline protections for every American.

Of course, the design of any such legislation gives rise to questions of its own. One key question concerns the balance between rights of publicity and the freedom of speech.

This white paper offers a primer on that issue. It first defines the right of publicity and identifies some points of disagreement in articulating the scope of the right. It next identifies the potential conflict between publicity rights and free speech: simply put, protecting a person's interest in their own identity may sometimes require limiting what others can say (e.g., by limiting their use of a person's voice, likeness, or name in their expression). This white paper then explains how leading courts have addressed that tension between the First Amendment and rights of publicity—and also considers how these legal issues might be understood as a matter of constitutional first principles (even as the law in this field continues to evolve). Finally, this white paper highlights ways in which protecting publicity rights can promote core constitutional values—including free and open public discourse, which suffers when our voice and likeness can be stolen, sabotaged, or subverted by third parties.

Of course, the design of any such legislation gives rise to questions of its own. One key question concerns the balance between rights of publicity and the freedom of speech.

The main upshot of this analysis is that legislators should reject claims that the First Amendment requires rigid, categorical exemptions from rights of publicity—for instance, a rule that misappropriations of a person's identity are always authorized when they occur in "expressive" content. That is a misstatement of the law. If accepted, it would leave too many people without protection from dangerous or duplicitous misappropriations of their identity.

Respect for the freedom of speech does not require overriding every other competing value protected by the law. Indeed, major parts of the American legal system—including safeguards for privacy rights, personal dignity, and intellectual property—rest on the premise that free speech principles exist in balance with other constitutional values. That view has heavily shaped First Amendment doctrine in

this field. Consistent with those precedents, right of publicity laws are not required to include categorical exemptions for "expressive" works; instead, they can allow for a more balanced and context-sensitive approach. That framework allows disagreements about First Amendment doctrine to be resolved by courts in the definite, clarifying setting of concrete cases. Practically speaking, most disputes that reach courts will be quickly and easily resolved based on threshold legal issues. For instance, works of parody, including shows like South Park, would obviously be shielded by the First Amendment. And in the narrow set of cases that present harder legal questions, it is good for courts to engage in energetic debate—informed by real-world evidence, as opposed to sweeping theoretical generalities—as they define which misappropriations are shielded by the First Amendment.

That conclusion rests on several foundations. *First*, where parties have raised First Amendment challenges to right of publicity claims, most state and federal judges have used balancing tests (rather than categorical rules) to resolve those disagreements. Under such tests, it is well recognized that even non-commercial, expressive speech may in some circumstances be limited to secure rights of publicity. Of course, continued judicial debate about how to balance competing values is a sign that courts are thoughtfully engaged with the issues, and cuts against any categorical exemption that would eliminate such debate by mandating an unbalanced approach to these rights. *Second*, as a matter of First Amendment first principles, there is no universal rule or exemption that properly applies to right of publicity claims. To the contrary, a careful assessment of First Amendment doctrine and the interests promoted by the right of publicity demonstrates the importance of a highly context-sensitive approach, which would be undermined by adopting categorical exemptions to the right. *Third*, and finally, a balancing test is more appropriate because it will allow courts to update and tailor First Amendment legal principles in light of other ongoing developments in the law—including changes to intellectual property doctrine and disputes over the degree to which the First Amendment applies to expression produced primarily through the use of generative AI.

Needless to say, right of publicity statutes reflect a wide range of policy and political considerations. Those are beyond the scope of my analysis. But to the extent legislators are concerned about upholding the First Amendment in the design of such statutes, this white paper offers a guide to the issues and a caution against unduly rigid or categorical rules.

First, where parties have raised First Amendment challenges to right of publicity claims, most state and federal judges have used balancing tests (rather than categorical rules) to resolve those disagreements.

Second, as a matter of First Amendment first principles, there is no universal rule or exemption that properly applies to right of publicity claims.

Third, and finally, a balancing test is more appropriate because it will allow courts to update and tailor First Amendment legal principles in light of other ongoing developments in the law—including changes to intellectual property doctrine and disputes over the degree to which the First Amendment applies to expression produced primarily through the use of generative AI.

DEFINING THE RIGHT OF PUBLICITY

"There is probably nothing so strongly intuitive as the notion that our identities are ours." 1 McCarthy & Schechter, The *Rights of Publicity and Privacy*, § 2:5 (2d. ed.). Consistent with that intuition, many states protect a "right of publicity," though the contours of that right have been defined differently across jurisdictions. *See id*. §§ 6:1-6:143. In light of emerging technological challenges, some states have understandably begun revisiting this issue.

A leading definition of the right is set forth is the *Restatement (Second) of Torts*: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy." § 652C (1977). As the Restatement explains, the right of publicity is "in the nature of a property right." *Id*. cmt. a. It thus secures "the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others." *Id*. The most "common form of invasion" of the publicity right is "the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose." *Id*. cmt. b. But under the Restatement, protection is "not limited to commercial appropriation"—it also applies "when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one." *Id*.

Other authorities highlight different aspects of the right. Some focus on appropriations of name, likeness, or voice in diverse settings and for a wide range of purposes. *See* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 Yale L.J. 86, 89 (2020) ("The right of publicity is broadly defined as a state-law tort designed to prevent unauthorized uses of a person's identity that typically involve appropriations of a person's name, likeness, or voice."). Some focus more explicitly on commercial value or commercial use. *See, e.g*., Restatement (Third) of Unfair Competition § 46 (1995) ("One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability . . ."); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 117, at 851-852 (5th ed. 1984) ("The first form of invasion of privacy to be recognized by the courts consists of the appropriation, for the defendant's benefit or advantages, of the plaintiff's name or likeness."). And these disagreements are merely the tip of the iceberg in defining the scope and structure of the right of publicity. *See generally* Jennifer E. Rothman, *The Right of Publicity* (2018).

Given the existence of divergent state law standards for the right of publicity, it would be sensible to consider the enactment of federal legislation that creates baseline nationwide protections for every American, no matter what additional protections each individual state may decide to offer. The importance of such potential federal legislation is only enhanced by the recent emergence of new technologies that allow quick, easy, inexpensive, and high-quality appropriations of a person's voice or visual likeness without their prior agreement. Because the right of publicity is threatened like never before—and because the potential consequences of violations are graver than ever—the need for a remedy grows more urgent.

Of course, enacting further legislation at the state or federal level would raise important questions for legislators. One particularly thorny question concerns the best way to account for First Amendment considerations. Federal legislators have proposed a range of approaches to that issue, including a discussion draft of the NO FAKES Act (from a bipartisan group of Senators) and the No AI FRAUD Act (from a

bipartisan team of House members). The rest of this white paper is addressed to that specific point—and it begins with a tour of the judicial landscape, where courts have generally favored balancing tests over categorical rules.

COURTS ARE ACTIVELY DEBATING APPLICABLE FIRST AMENDMENT LIMITS

The right of publicity restricts the use of certain images, names, and sounds by third parties. In that respect it sometimes implicates First Amendment protections for freedom of speech. But First Amendment protections are almost never absolute: there are well recognized circumstances where they yield to competing interests. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757 (1985).

Courts have articulated several distinct approaches to resolving tensions between the First Amendment and the right of publicity, resulting in a complex and sometimes conflicting body of precedent. *See* Post & Rothman, *supra*, at 89-91. These disagreements partly reflect different views of the First Amendment. But they also reflect the context-sensitive nature of the underlying inquiry, which generally involves "balancing free speech against the right of publicity." McCarthy & Schechter, *supra*, at § 2:4; *see also, e.g., C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007) ("The Supreme Court has directed that state law rights of publicity must be balanced against first amendment considerations."). In drafting legislation to address the right of publicity, legislators should therefore be wary of claims that the First Amendment imposes many specific requirements—let alone categorical exemptions from the scope of the right. Such constitutional matters are the subject of active, energetic judicial debate in state and federal courts, and the nature of that debate suggests a preference for fact-sensitive balancing tests rather than bright-line rules.

The foundational case in this field is *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562 (1977). There, Hugo Zacchini—a "human cannonball" entertainer—sued a TV broadcasting station for recording his entire performance and showing it on the nightly news. *Id*. at 564. On appeal, the Supreme Court held that "the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent." *Id*. at 575. The Court added as follows: "The 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, or to film and broadcast a prize fight, or a baseball game, where the promoters or the participants had other plans for publicizing the event." *Id*. Central to *Zacchini* was its focus on the performer's intellectual property interest in the commercial value of his human cannonball act. *See id*. ("The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance."). That was true even though the performer (Zacchini) was not a celebrity. Pointing to related fields of law, the Supreme Court emphasized that protecting such individual intellectual property interests is fundamental to "the patent and copyright laws long enforced by this Court." *Id*. at 276.

First Amendment protections are formidable when a media organization presents the nightly news. Nevertheless, *Zacchini* held that any available First Amendment defenses were overcome by the intellectual property interests underlying the right of publicity, at least in the context of a decision to broadcast an entire performance without the performer's consent.

This was a significant ruling. It does not protect "the ordinary experience of living a life, even if that life happens to be captured on video or livestreamed." Post & Rothman, *supra*, at 102. But it does apply to the misappropriation of a wide range of independent, intentional performances that exist "apart from a plaintiff's ordinary lived identity" and are fixed in an appropriate medium. *Id*. at 103. Further, *Zacchini* applies regardless of whether the performer is a celebrity, and it applies even to misappropriations of a performance for traditionally expressive purposes. *See id*. at 102 ("[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 . . . . Nor need plaintiffs show a commercial use by defendants."). In that respect, *Zacchini* protects everybody from Taylor

Swift to a lonesome college student posting intentionally performative make-up or exercise tutorials on TikTok, and the right of publicity can properly extend legal protections to all such full performances.

As two scholars have explained, *Zacchini* might also defeat First Amendment claims in cases involving "the unauthorized creation of new performances using previously captured footage of a plaintiff's performance." *Id.*; *see id*. (emphasizing that this interpretation of *Zacchini* would apply "only when a performance is truly derived—digitally or otherwise—from a plaintiff's actual performance."). Understood that way, *Zacchini* would potentially defeat any First Amendment defenses to a right of publicity claim arising from "digital reanimation when done by using previously captured performances, which is becoming increasingly common as avatars of living and dead actors are now presented as performing in motion pictures, and holograms of deceased performers are going on tour." *Id*. at 104-05.

By its terms, *Zacchini* addressed the misappropriation of an entire performance. Since *Zacchini*, courts have adopted a range of approaches to analyzing right of publicity claims in other contexts. For present purposes, we will identify some of the leading methodologies.

The leading approach is referred to as the "transformative use" test. As first developed by the California Supreme Court, it is "essentially a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 391 (2001). As that formulation suggests, the "inquiry into whether a work is 'transformative'" rests at the heart of this judicial attempt "to square the right of publicity with the First Amendment." *Id*. at 404. In describing what qualifies as "transformative," the California Supreme Court looked to copyright law—specifically, to the first element of a fair use defense to a claim of copyright infringement. *See id*. at 404-05. It reasoned that copyright law, like the right of publicity, protects free speech and creativity "by protecting the creative fruits of intellectual and artistic labor." *Id*. at 405. Where a person's name, image, or likeness is appropriated and then transformed into something different, the First Amendment shields that new expression; but when the appropriated material remains the "very sum and substance of the work in question," the First Amendment interests give way. *Id*. at 406. That rule applies even when the appropriation occurs for an expressive rather than commercial purpose. *See id.* at 396.

The transformative use test is well illustrated by *No Doubt v. Activision Publishing, Inc.*, 192 Cal. App. 4th 1018, 1036 (2011). There, the rock band No Doubt sued a videogame publisher (Activision) for releasing a game called *Band Hero*, which featured computer-generated images of the members of No Doubt. *Id*. at 1022. These images exceeded the scope of a licensing agreement between the parties, so No Doubt sued for a violation of the right of publicity. *Id*. at 1024. Ultimately, the court rejected Activision's First Amendment defense, concluding that "the creative elements of the *Band Hero* videogame do not transform the images of No Doubt's band members into anything more than literal, fungible reproductions of their likenesses." *Id*. at 1035. In reaching this view, the court reasoned as follows: "[T]he avatars perform rock songs, the same activity by which the band achieved and maintains its fame. Moreover, the avatars perform those songs as literal recreations of the band members. That the avatars can be manipulated to perform at fanciful venues including outer space or to sing songs the real band would object to singing, or that the avatars appear in the context of a videogame that contains many other creative elements, does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities." *Id*. at 1034. Here we see *Comedy III*'s test in action and applied to a new setting: video games.

Consistent with the widespread practice of seeking to balance publicity and free speech rights, several federal appellate courts have since endorsed the transformative use test. Most notably, the Third Circuit adopted the test following a rigorous analysis of competing options in *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013). See also *Keller v. Elec. Arts., Inc.*, 724 F.3d 1268 (9th Cir. 2013) (adopting test); *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 936 (6th Cir. 2003) (describing this test as useful). In embracing this approach, however, federal courts have

"developed what appears to be an unacknowledged variation." Post & Rothman, *supra*, at 130. Whereas the California Supreme Court asked whether a work is transformative when viewed in its entirety, federal courts have focused more narrowly on the specific elements that appropriate the plaintiff's identity: where those elements are not sufficiently transformed, the work lacks First Amendment protection from a right of publicity claim, even if the overall work may otherwise contain substantial transformation or new protected expression. *See id*.

In a widely noted opinion, the Missouri Supreme Court took a different approach. In its view, a "more balanced balancing test" is needed for cases where "speech is both expressive and commercial." *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003). It formulated its "predominant use" test as follows: "If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some 'expressive' content in it that might qualify as 'speech' in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight." *Id*. (citation omitted). Under Missouri's version of a balancing test, the key question is not about transformation, but rather about the manner and purpose for which the appropriated name, voice, or likeness is used. Of course, this test (like transformative use) could defeat of a First Amendment defense even when the misappropriation of identity has occurred in speech that qualifies as "expressive."

A different and less significant approach has been derived from the Second Circuit's decision in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). There, citing a concern for "the protection of free expression," the court suggested that a right of publicity claim could not bar "the use of a celebrity's name in a movie title unless the title was 'wholly unrelated' to the movie or was 'simply a disguised commercial advertisement for the sale of goods or services.'" *Id*. at 1004. On this view, there is still a balance to be struck, but most right of publicity claims fail. Perhaps for that reason, while the test is often mentioned, it is only rarely treated as the governing legal standard. *See Parks v. LaFace Recs.*, 329 F.3d 437, 449 (6th Cir. 2003); *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994); *Tyne v. Time Warner Entm't Co. L.P.*, 901 So. 2d 802, 810 (Fla. 2005); *Montgomery v. Montgomery*, 60 S.W.3d 524, 529 (Ky. 2001).

A distinct minority of lower courts have taken a more categorical view that "[u]nder the First Amendment, a right of publicity cause of action may not be maintained against 'expressive works, whether factual or fictional.'" *Brown v. Showtime Networks, Inc.*, 394 F. Supp. 3d 418, 437 (S.D.N.Y. 2019). On this logic, "[t]he First Amendment also prohibits right of publicity causes of action related to the publication of matters in the public interest," and such claims may be sustained only in cases where a defendant used famous images, likeness, and phrases for economic gain in their own commercial advertisements and product sales. *Id*. at 438-39. Separately, on similar logic, some courts have indicated that the First Amendment precludes right of publicity claims by private individuals who did not invest "time and money to build up economic value in a marketable performance or identity" and who challenge the appropriation of their identity in a non-commercial context (e.g., a movie or play). *See, e.g., Sarver v. Chartier*, 813 F.3d 891, 905–06 (9th Cir. 2016) (rejecting right of publicity claim filed by a private person who had not accrued a protectible interest in the general story of his life).

As this quick review of precedent suggests, courts are actively thinking through and debating how the First Amendment applies in right of publicity cases. There is broad (though not universal) consensus that a balancing test—rather than a more categorical approach—is the proper approach. There is also broad (though not universal) consensus that, at least in some cases, a right of publicity claim can justifiably prevail against "expressive" rather than purely "commercial" speech. But despite the comparative prevalence of the transformative use test, courts continue to disagree over how to identify and weigh the most important considerations.

For that reason, legislators should be doubtful of claims that the First Amendment requires any particular (or any categorical) exemptions from a right of publicity. Courts are actively discussing and shaping the First Amendment principles that apply here, and

a review of judicial precedent from across the country reveals a vibrant dialogue on those issues.

RIGHT OF PUBLICITY CLAIMS ARE TOO VARIED FOR A SINGLE FIRST AMENDMENT TEST

One reason why the right of publicity does not lend itself to generalities is that it can vindicate different interests across different settings. Of course, this is a concern not only for judges, but also for legislators deciding whether to adopt broad, acontextual exceptions.

As every law student learns, First Amendment analysis usually depends on several core questions: Is there a burden on speech? If so, what kind of speech is being burdened, and in what manner? And are the interests at stake sufficiently weighty and well-tailored to justify that burden? In right of publicity cases, the answer to these questions can be highly variable, which makes it challenging to speak in categorical terms about First Amendment limits.

Starting with the first question, right of publicity claims will usually be understood as imposing a burden on speech. After all, the premise of such a claim is that someone should be held liable for using the plaintiff's voice or visual likeness (or sometimes her name) without consent. And that use will generally occur through expression. But as two experts recently remarked, courts sometimes treat mass-produced, unspecialized commodities as falling wholly outside First Amendment protection. *See* Post & Rothman, *supra*, at 142; *see also* Restatement (Third) of Unfair Competition, § 47 cmt. b ("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.").

On that premise, it may be necessary in some right-of-publicity cases to make an initial inquiry as to whether the defendant's conduct gives rise to First Amendment protections at all. Where mere commodities are at issue, the answer may in some legal settings be "no." Moreover, as emphasized later in this white paper, the threshold inquiry into whether speech is burdened may independently become more complex when generative AI is involved.

Assuming that a claim *does* burden speech, the next question is what kind of speech is being burdened. As relevant here, courts often distinguish "commercial" from "expressive" speech. *See generally City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Riley v. Nat'l Fed. of the Blind of N.C.*, 487 U.S. 781 (1988); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The reason why this distinction matters is that commercial speech receives less protection under the First Amendment—and may thus, in principle, be more heavily regulated, including through the right of publicity. The line between commercial and expressive speech, however, is slippery. *See* Post & Rothman, *supra*, at 138 (remarking that "this distinction has sometimes proven difficult to articulate"). And many courts have taken pains to recognize that right of publicity claims can prevail even against non-commercial speech, at least in some settings. *E.g., Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 514 (7th Cir. 2014); Hart, 717 F.3d at 165; *Comedy III*, 25 Cal. 4th at 396; Doe, 110 S.W.3d at 374. For these reasons, describing the right of publicity as one that applies only to commercial speech—and not to any expressive speech—would depart from the judicial majority view and invite further litigation over the fraught distinction between commercial and expressive speech (not to mention speech that includes intermingled commercial and expressive elements).

That approach would also be faulty because it would skip past the remaining steps in the constitutional analysis: assessing what level of scrutiny applies and determining whether that standard is met. Some courts and commentators have taken the view that the right of publicity is a content-based restriction on speech and must therefore survive strict scrutiny. *See, e.g.*, Sarver, 813 F.3d at 905; Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 Hous. L. Rev. 903, 912 (2003); Note, *Ninth Circuit Rejects First Amendment Defense to Right-Of-Publicity Claim*, 127 Harv. L. Rev. 1212, 1218 (2014). As

explained above, other courts and scholars have approached the issue differently, relying on cases from the Supreme Court's intellectual property jurisprudence to describe more cautious scrutiny. *See supra* at 4-5.

Whatever level of scrutiny applies, the First Amendment then calls for a weighing of free speech interests against the purposes advanced by the right of publicity. And this inquiry, too, necessarily varies across cases—principally because the right of publicity can be invoked to achieve a wide range of different purposes. Sometimes, it protects a person's right to engage in a performance and to protect that full performance from misappropriation. *See* Post & Rothman, *supra*, at 96-97. In such cases, as the Supreme Court noted in *Zacchini*, the plaintiff's legal interest is highly analogous to a copyright—and "the enforcement of copyright law does not receive heightened constitutional scrutiny." *Id*. at 146. Thus, this "right of performance" can be enforced against both commercial and expressive speech—regardless of commercial use or benefit by the defendant—to protect the plaintiff's legal interest. See *id*. at 100-12.

In other cases, however, the right of publicity functions less like a copyright interest and more like a trademark or equitable property interest. We see this most clearly when the right is invoked by someone who claims that their voice, visual likeness, or name enjoys pre-existing commercial value (a.k.a., "celebrity") which the defendant has misappropriated. In such cases, as Professors Post and Rothman have explained, the plaintiff may sue to avoid *confusion* about their own participation or sponsorship; she may sue to avoid a *diminishment* of the value of her brand or identity; and/or she may claim that the defendant has been *unjustly enriched* by commercially employing her identity without paying a fair market value for that opportunity. *See id*. at 146-171. Each of these theories of harm may be thought to evoke a distinct set of interests under both intellectual property and constitutional law. *Id*. It would make little sense to apply the exact same First Amendment standard to each type of claim.

In yet another class of cases, right-of-publicity plaintiffs may not rely on theories of performance or commercial value, but may instead claim that the misappropriation of their identities inflicted a dignitary harm—*e.g.*, where their identity has been misappropriated in a highly offensive or sexually degrading manner, or in a context involving speech of merely private concern. *Cf. Snyder v. Phelps*, 562 U.S. 443, 452 (2011) ("[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." (citation omitted)); *see also* Post & Rothman, *supra*, at 121-25, 165-71. That kind of claim does not sound in property: in other words, the plaintiff's main concern is not solely with the value of their own brand. Instead, this claim more closely resembles dignitary torts, such as intentional infliction of emotional distress. *See id*. at 165-66. Traditionally, First Amendment doctrine in such cases looks to a showing of "actual malice" by the defendant, rather than the distinct balancing standards described above. Which leads to a quirk in this area of the law. The Supreme Court has twice noted that the "actual malice" inquiry does not apply to right of publicity claims. *See Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988); *Zacchini*, 433 U.S. at 573. It based that statement mainly on the premise that right of publicity claims are about protecting intellectual property, whereas defamation and false light claims are instead focused on reputation and mental distress. See *Zacchini*, 433 U.S. at 573. That premise, however, is open to doubt, since some right of publicity plaintiffs may allege precisely such dignitary injuries. Further, some courts have applied the actual malice standard to right of publicity claims. *See, e.g., Hoffman v. Cap. Cities/ABC, Inc.*, 255 F.3d 1180, 1186–87 (9th Cir. 2001); *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994). Thus, there may be colorable arguments that certain right of publicity claims should properly evoke an "actual malice" analysis under the First Amendment.

One final point bears emphasis: while the First Amendment is focused on protections from government, free speech requires more than just freedom from regulation. In a society where our very voices can readily be stolen and put to nefarious use, free speech is threatened in new and extraordinary ways. Imagine a world where you can never be sure who is actually speaking: where a phone call from your child might come from a fraudster; where deepfakes of prominent public officials are used to spread election disinformation; where you could be extorted or harassed with pornography apparently featuring you;

or where musicians, artists, and athletes see their life's work pirated or distorted or even put to morally repulsive uses. In this new world, a video might go viral in which you appear to say or do something that shocks you and destroys your reputation before you have any serious opportunity to respond. For speech to be free in any sense worth caring about, the law must provide some protection—and it must impose meaningful limitations on the outright theft of our individual identities.

The upshot of this analysis is that there is no single "First Amendment limitation" on right of publicity claims—in no small part because right of publicity claims can take many forms and evoke many different interests. As a matter of ordinary First Amendment analysis, the balance between free speech concerns and right of publicity interests must be addressed on a more granular basis. While generalized approaches like the transformative use test can be helpful across some categories of right of publicity claims, there is no universal rule. For that reason, too, legislators should be skeptical of claims that the First Amendment requires rigid or categorical exemptions from the right of publicity. The law is more nuanced than that.

APPLICABLE LEGAL PRINCIPLES ARE UNDERGOING SUBSTANTIAL EVOLUTION

The law is also in flux in ways that bear directly on the right of publicity. That is true in many respects; this white paper will identify a few of the most notable. The upshot of this analysis is that federal statutory protections should be designed to accommodate and reflect continuing developments in the law. As should now be clear, categorical exceptions for all misappropriations that involve "expression" would not serve that purpose. It would instead be preferable to define the core of a right of publicity—and to recognize that courts are best suited to define First Amendment principles in diverse contexts as the law continues to evolve.

There are at least four separate respects in which that is true.

First, the Supreme Court has issued a spate of decisions over the past five years that reflect a sustained revisitation of the boundary between intellectual property law and the First Amendment. *See, e.g., Jack Daniel's Properties, Inc. v. VIP Prod. LLC*, 599 U.S. 140, 158-59 (2023); *Iancu v. Brunetti*, 139 S. Ct. 2294, 2298-99 (2019); *Matal v. Tam*, 582 U.S. 218, 239-44 (2017). Some of these rulings reflect a pronounced willingness to subject trademark law to invigorated constitutional scrutiny when it discriminates based on viewpoint (*e.g.*, based on how disparaging, immoral, or scandalous a trademark is). *See Iancu*, 139 S. Ct. at 2299-2301; *Matal*, 582 U.S. at 243-45. But the boundaries of those rulings—and how they might apply in this setting—remain very much in dispute. Other opinions, moreover, have *limited* the scope of First Amendment scrutiny in certain trademark law settings, and have reaffirmed that "the trademark law generally prevails over the First Amendment" in core trademark cases—*e.g.*, where a mark (or a confusingly similar mark) is used without permission as a source identifier. *See Jack Daniel's*, 599 U.S. at 159. Notably, the *Jack Daniel's* ruling limited the scope of the Rogers test, which (as discussed above) some courts have cited in addressing the balance between free speech and the right of publicity. As the Supreme Court remains actively engaged in this space, the law that it creates will have important implications for the right of publicity, especially to the extent that right is understood as a form of intellectual property protection. *See also Vidal v. Elster*, No. 22-704 (another case at the intersection of trademark and First Amendment law, which the Supreme Court is expected to decide by June 2024).

Second, the Supreme Court has revisited the copyright law doctrine of "fair use" in a ruling that could have important implications for the "transformative use" test—which, as described above, is one of the principal constitutional standards used to balance free speech and rights of publicity. That revisitation occurred in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023). There, the Supreme Court clarified (and arguably reframed) what it means for a use to be "transformative." Specifically, it rejected the idea that "new meaning or message" could alone suffice to achieve a transformation. *Id*. at 540-41. The Court also rejected a focus on the "stated or perceived intent of the artist." *Id*. at 545. Instead, the Court re-centered other considerations in the transformativeness inquiry, including

a focus on whether the use of a copyrighted work shared "the same or a highly similar purpose" and whether it was also of a "commercial nature." *Id*. at 532-33. If imported into the right of publicity "transformative use" test—as seems sensible, given that the test originated from the fair use defense in copyright law—the *Andy Warhol* ruling could narrow First Amendment limitations on the right of publicity. But that question remains as-yet unresolved by the courts.

Third, the Supreme Court has floated and debated more foundational changes to the First Amendment categories at stake in right of publicity cases. For example, in a handful of cases decided in the early 2000s, it indicated that that the line between commercial speech and expressive speech may be less significant than it once was. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566-71 (2011); *United States v. United Foods, Inc.*, 533 U.S. 405, 409-11 (2001). If this view is pursued further by the Supreme Court, that development could have broad implications for right of publicity claims. More recently, the Supreme Court initially described an extraordinarily aggressive view of when laws must face strict scrutiny as content-based regulations on speech, *see Reed v. Town of Gilbert*, 576 U.S. 155, 163-171 (2015), but then seemingly retreated from that position and offered a more nuanced account of content-based regulations, see *City of Austin, Texas v. Reagan Nat'l Advert*. of Austin, LLC, 596 U.S. 61, 69-76 (2022). It seems likely the Court will soon have occasion to revisit the issue, which may well affect debates about the appropriate level of judicial scrutiny for right of publicity claims.

Finally, the application of full First Amendment protections to speech that is partly, or even mainly, generated by AI will raise questions that courts have not yet resolved. Scholars have expressed a range of views about the degree to which the First Amendment would protect AI-involved expression. *See, e.g.*, Eugene Volokh et al., *Freedom of Speech and AI Output*, 3 J. Free Speech L. 651 (2023); Cass Sunstein, *Artificial Intelligence and the First Amendment*, SSRN (April 27, 2023); Karl M. Manheim & Jeffrey Atik, White Paper: AI Outputs and the First Amendment, SSRN (July 31, 2023); Lawrence Lessig, *The First Amendment Does Not Protect Replicants*, SSRN (September 16, 2021); Toni Massaro et al., *Siri-Ously 2.0*: *What Artificial Intelligence Reveals About the First Amendment*, 101 Minn. L. Rev. 2481 (2017). In the (distinct) copyright context, courts have thus far taken a limited view of the circumstances in which AI-generated content can receive protection. *See Thaler v. Perlmutter*, No. 22 Civ. 1564, 2023 WL 5333236, at *3 (D.D.C. Aug. 18, 2023) ("United States copyright law protects only works of human creation."). But those courts have recognized that AI will pose line-drawing problems. *See id*. at *6 ("The increased attenuation of human creativity from the actual generation of the final work will prompt challenging questions regarding how much human input is necessary to qualify the user of an AI system as an 'author' of a generated work, the scope of the protection obtained over the resultant image, how to assess the originality of AI-generated works where the systems may have been trained on unknown pre-existing works, how copyright might best be used to incentivize creative works involving AI, and more."). There is thus meaningful uncertainty about whether (and, if so, how) the First Amendment will be held to apply to AI-generated expression that intrudes on the individual right of publicity—and that is true even concerning AI-generated expression that may appear to be "expressive."

In light of these ongoing developments, categorical claims about the First Amendment and the right of publicity stand on uncertain footing. Moreover, the law that applies in this space will further evolve in the years ahead as courts reckon with these issues. Therefore, legislators would be well served to enact flexible and adaptable statutory frameworks.

Conclusion

The First Amendment is vitally important to American public life and law. For that reason, legislators are properly sensitive to free speech concerns when drafting legislation that may result in burdens on speech. When it comes to the right of publicity, those concerns are important but not categorical. In light of the judicial precedent and constitutional analysis set forth above, as well as continuing developments in law and technology, statutes in this field should allow for flexibility and balance in how free speech intersects with rights of publicity.

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