

# Social Media and the Internet Drive the Need for a Federal Statute to Protect the Commercial Value of Identity

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“Though the earth, and all inferior creatures, be common to all men, yet every man has a ‘property’ in his own ‘person.’ This nobody has any right to but himself.”<sup>1</sup>

—John Locke

From there, the law of the right of publicity developed: protecting one’s right to commercialize her name, image, and likeness. However, as noted in the fifty-state survey attached as an Appendix to this Article, as

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1. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ch. 5.27 (Project Gutenberg 2010) (ebook #7370) (1690), <http://www.gutenberg.org/files/7370/7370-h/7370-h.htm>.

of 2020, less than half of the states have enacted right of publicity statutes, and only some of those protect postmortem rights, which can be worth millions of dollars. Some states rely on a common law right of publicity, but twenty states do not recognize such a right by statute or common law. Since each state has approached the right of publicity in its own way, the governing law is inconsistent and uncertain, making it difficult for holders and acquirers of these rights to act definitively. Due to the pervasive use of social media and the Internet for international distribution of sponsored content, a federal right of publicity statute similar to the one recommended in this Article is needed now more than ever.

## I. INTRODUCTION

In his *Second Treatise of Government*, John Locke wrote, “Though the earth, and all inferior creatures, be common to all men, yet every man has a ‘property’ in his own ‘person.’ This nobody has any right to but himself.”<sup>2</sup> That is the foundation of the current right of publicity, which is a property right. Historically, however, if one’s name, image, or likeness were appropriated for a commercial purpose without consent, one could only bring a tort claim for invasion of privacy.<sup>3</sup>

The value associated with a celebrity’s popularity has been used by a variety of brands to connect with consumers for centuries. Josiah Wedgwood, the founder of Wedgwood pottery, first used endorsements from British royals in the 1760s.<sup>4</sup> Later, Mark Twain “endorsed Fountain Pens, had his own co-brand of Mark Twain cigars, clothing, shaving

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2. *Id.*

3. *See* *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902) (rejecting plaintiff’s case of first impression privacy claim following defendant’s unauthorized use of plaintiff’s picture in its advertising that resulted in plaintiff becoming bedridden as a result of “great distress” and “nervous shock”). Three years later, in *Pavesich v. New England Life Insurance Co.*, the Supreme Court of Georgia upheld Pavesich’s privacy claim after the defendant used Pavesich’s picture in a life insurance ad. 50 S.E. 68, 70, 80-81 (Ga. 1905) (“So thoroughly satisfied are we that the law recognizes, within proper limits, as a legal right, the right of privacy, and that the publication of one’s picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability . . .”); *see also* RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW. INST. 1977) (“One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”).

4. *Celebrity Endorsement—Through the Ages*, IBS CASE DEV. CTR., <http://ibscdc.org/Free%20Cases/Celebrity%20Endorsement%20Through%20the%20Ages%20p1.htm> (last visited Dec. 19, 2019).

accessories, Old Crow Whisky” and even railroads.<sup>5</sup> Silent films, radio, and vaudeville became new opportunities for celebrity endorsements.<sup>6</sup> “By 1975, one in eight TV commercials featured a celebrity.”<sup>7</sup> As technology progressed, the value of a celebrity’s name, image, and likeness became more valuable to both the celebrity and the brand with “television and other media creat[ing] marketable celebrity identity value.”<sup>8</sup> Celebrities could endorse products on the radio, television, Internet, or social media for tens of millions of dollars, and such advertising could be on a national or even international scale.<sup>9</sup> Mark Rooks, Pepsi’s Senior Marketing Manager of Multicultural Marketing, said that celebrity endorsement is “truly vital to our customer base. Not only does that celebrity bring new value, excitement, or humor but they bring an energy and memorability that you don’t get sometimes with non-celebrity advertising.”<sup>10</sup>

A state right of publicity was first recognized in 1953 in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, which identified the right to control the commercialization of name, image, and likeness as a property right rather than a personal right to be left alone.<sup>11</sup> The *Haelan* court moved away from invasion of privacy and the focus on a personal

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5. *History of Celebrity Endorsements and Product Placements*, CELEBRITY CRED, <http://celebritycred.com/history-of-endorsements/> (last visited Dec. 19, 2019).

6. *Id.*

7. Nike signed Tiger Woods in 1996 to endorse its golf balls and then realized growth of \$50 million in revenue by 2002. *Celebrity Endorsement—Through the Ages*, *supra* note 4.

8. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992).

9. Stacy Jones, *How Hollywood Celebrities Are Used For Global Endorsements*, HOLLYWOOD BRANDED (July 2, 2018, 10:30 AM), <http://blog.hollywoodbranded.com/how-hollywood-celebrities-are-used-for-global-endorsements/> (“[I]n both South Korea and Japan, about 70% of commercials now feature a celebrity. . . . [I]t is now celebrities rather than military heroes who symbolize knowledge and trust in the eyes of Chinese consumers. India has learned to channel its well-known Bollywood celebrities. . . .”); Lisa Rinna, actress and “Real Housewife,” was paid \$2 million for one advertisement for Depend adult diapers in 2015. Golfer Michelle Wie made between \$4 and \$5 million annually endorsing Nike. Jennifer Aniston’s endorsement of Emirates Airlines garnered \$5 million, and Justin Timberlake said “I’m Lovin’ It” to McDonald’s \$6 million payout. But those amounts pale in comparison to Floyd Mayweather’s \$25 million from endorsements on his fight clothes, and George Clooney’s \$40 million for Nespresso endorsements. Sofia Vergara (*Modern Family* star) has made \$94.5 million from her endorsements of Head & Shoulders, Pepsi, Quaker Oats, and CoverGirl. Andrew Lisa, *Celebrity Endorsement Deals with Insane Payouts*, GOBANKINGRATES (July 26, 2019), <http://www.gobankingrates.com/net-worth-celebrities/celebrity-endorsement-deals-paid-how-much/#4>.

10. *Celebrity Endorsement—Through the Ages*, *supra* note 4.

11. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (“[P]rominent persons . . . would feel sorely deprived if they no longer received money for authorizing advertisements. . . . [T]he tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth.”).

intrusion or bruised dignity, to the economic value associated with one's name, image, or likeness.<sup>12</sup> Since *Haelan*, states have adopted right of publicity statutes to protect these inherent rights as property and protect them from misappropriation.<sup>13</sup> “[T]he right of publicity prevents the unauthorized commercial use of an individual’s name, likeness, or other recognizable aspects of one’s persona. It gives an individual the exclusive right to the use of their identity for commercial promotion.”<sup>14</sup> But that concept of value has been further broken down into economic and noneconomic categories.<sup>15</sup> “Stimulating athletic and artistic achievement, promoting efficient allocation of resources, and protecting consumers” are the economic justifications of a right of publicity in comparison with the noneconomic justifications of “safeguarding natural rights, securing the fruits of celebrity labors, preventing unjust enrichment, and averting emotional harm.”<sup>16</sup>

Taking that a step further, since rights of publicity are viewed as property, and property can be passed to an estate upon death, it would follow that rights of publicity should be descendible too.<sup>17</sup> John Locke’s theory was that the state was created to protect individuals’ rights to the fruits of their labor. If property rights, as fruits of labor, were descendible, then so should be rights of publicity as merely a different type of property.<sup>18</sup> As will be further discussed below, twenty-two states have extended the right of publicity, whether under statutory or common law, to include postmortem rights, which protect a person’s publicity rights to some degree even after death.<sup>19</sup> Postmortem rights are extremely valuable to the estates that receive them.<sup>20</sup> Under pressure from Hollywood

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12. *Id.*

13. *Id.*; *see infra* Appendix.

14. *Publicity*, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/publicity> (last visited Dec. 22, 2019).

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

16. *Id.*; *see also* *C.B.C. Distrib. & Mktg., Inc. v. MLB Advanced Media*, 505 F.3d 818, 824 (8th Cir. 2007) (“Economic interests that states seek to promote include the right of an individual to reap the rewards of his or her endeavors and an individual’s right to earn a living.”).

17. *See, e.g.*, *Edison v. Edison Polyform Mfg. Co.*, 67 A. 392, 395 (N.J. Ch. 1907) (extending the term “property rights” to include the use of one’s name and pictorial representation).

18. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

19. *See infra* Appendix.

20. *See, e.g.*, *Lugosi v. Universal Pictures Co.*, 172 U.S.P.Q. 541 (Cal. Super. Ct. 1972) (finding that Bela Lugosi’s identity as Dracula was a property right and it descended to his heirs; reversed since Lugosi did not exploit the right during his lifetime), *rev’d*, 603 P.2d 425 (Cal. 1979); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978) (concluding that Agatha Christie had exploited her right of publicity during her lifetime and it was therefore descendible); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 846 (S.D.N.Y. 1975) (holding that Stan Laurel’s and

celebrities and their estates, California expanded its postmortem rights to include rights of publicity, while Tennessee enacted its Elvis Law, to protect Presley's heirs.<sup>21</sup>

According to J. Thomas McCarthy, a proponent of the right of publicity, "[E]ach statute is really 'one of a kind' in that it is largely a product of its time and place."<sup>22</sup> The state law development of the right of publicity has not been a smooth path with one court suggesting it has been "spasmodic," because there is no federal right of publicity to either guide or preempt any state law.<sup>23</sup> As of the writing of this Article, only twenty-two states have passed a right of publicity statute.<sup>24</sup> Eight states have a common law right of publicity; eighteen states protect misappropriation under invasion of privacy based upon the Restatement (Second) of Torts; and two states—North Dakota and Wyoming—provide no protection at all.<sup>25</sup> The common law right of publicity often refers to section 46 of the Restatement (Third) of Unfair Competition, which provides that "[o]ne

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Oliver Hardy's rights of publicity descended to their widows); SHERRI L. BURR, ENTERTAINMENT LAW CASES AND MATERIALS ON ESTABLISHED AND EMERGING MEDIA 341 (2017) ("During her 36 years of life, Marilyn Monroe earned less than \$1 million in total, yet her estate annually generates eight times that amount as it exploits her publicity rights.").

21. CAL. CIV. CODE § 3344.1 (West 2012); 1999 Cal. Legis. Serv. Ch 998 (S.B. 209) (West); see *Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89, 99 (Tenn. Ct. App. 1987) ("[R]ecognizing that the right of publicity can be descendible will further the public's interest in being free from deception with regard to the sponsorship, approval or certification of goods and service. . . . It should likewise be discouraged after a celebrity has died."); see also Rhett H. Laurens, *Year of the Living Dead: California Breathes New Life into Celebrity Publicity Rights*, 24 HASTINGS COMM. & ENT. L.J. 109, 111 (2001) (noting that the Astaire Celebrity Image Protection Act "extends the period of protection for deceased celebrities' images by twenty years and, more significantly, protects the use of these images without the deceased celebrities' families' permission").

22. J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:24 (2011).

23. *C.B.C. Distrib. & Mktg., Inc. v. MLB Advanced Media*, 505 F.3d 818, 822 (8th Cir. 2007) ("An action based on the right of publicity is a state-law claim."); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 836 (Cal. 1979) ("Despite this increasing trend toward recognizing a distinct right to control the commercial exploitation of one's name and likeness, the development of this right has been spasmodic. This is in part a consequence of courts adjudicating claims which might be categorized as invasions of plaintiff's right of publicity as privacy claims. . . . The resulting confusion often noted by commentators, has impeded the development of the right.").

24. See *infra* Appendix (noting that Alabama, Arizona, Arkansas, California, Florida, Hawaii, Illinois, Indiana, Kentucky, Massachusetts, Nevada, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin have passed a right of publicity statute).

25. See RESTATEMENT (SECOND) OF TORTS § 652A-E (AM. LAW. INST. 1977); see *infra* Appendix (noting that California, Georgia, Michigan, Missouri, New Hampshire, New Jersey, New Mexico, and South Carolina have recognized the right of publicity at common law, and further noting that Alaska, Colorado, Connecticut, Delaware, Idaho, Iowa, Kansas, Maine, Maryland, Minnesota, Mississippi, Montana, Nebraska, New York, North Carolina, Oregon, Vermont, and West Virginia recognize a misappropriation tort under invasion of privacy).

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."<sup>26</sup>

With a variety of approaches to protect the right of publicity under statutory and common law, inconsistencies among the states make planning, acquisition, and enforcement difficult for both plaintiffs and defendants (including forum shopping), all of which will be explored in Parts II through IV.<sup>27</sup> Due to the incongruities in state law protection and the pervasive use of social media and the Internet for international distribution of sponsored content, a federal right of publicity statute, as recommended in Part V, is needed now more than ever.

## II. CATEGORIES OF PROTECTION

### A. *States with a Right of Publicity Statute*

As mentioned above, as of 2020, there are twenty-two states with right of publicity statutes.<sup>28</sup> While the state statutes differ significantly, California's statute serves as an example and provides that:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.<sup>29</sup>

The states that have right of publicity statutes can be further divided into eighteen with postmortem rights and four without.<sup>30</sup> In addition, there are some interesting distinctions among the states. For example, Louisiana has a criminal statute protecting the rights of publicity of deceased soldiers, but the common law protection offered under the tort claim of invasion of

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26. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

27. See, e.g., John Gomis, *Publicity Law: The Line Between Creativity and Identity Theft*, LAW STREET (Oct. 21, 2014), <http://lawstreetmedia.com/issues/entertainment-and-culture/is-the-current-landscape-of-publicity-rights-laws-properly-balancing-artists-and-non-artists-rights/> (noting that forum shopping is when a party chooses to bring their case in the state with the law most favorable to that party).

28. See *infra* Appendix.

29. CAL. CIV. CODE § 3344(a) (West 1984).

30. See *infra* Appendix (noting that right of publicity statutes in Alabama, Arizona, Arkansas, California, Florida, Hawaii, Illinois, Indiana, Kentucky, Nevada, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Virginia, and Washington include postmortem rights ranging from ten to 100 years).

privacy to any individual is a personal right and does not survive death.<sup>31</sup> However, Louisiana is currently considering the Allen Toussaint Legacy Act (the “Act”), named for a deceased New Orleans musician, following the unlicensed sale of “koozies” featuring Toussaint’s image at the 2016 Jazz Fest shortly after Toussaint’s death.<sup>32</sup> If the Act is passed, Louisiana will extend postmortem rights beyond soldiers to everyone, regardless of whether the decedents exercised those rights during their lifetime.<sup>33</sup>

Nebraska does not have a property right of publicity, which generally means that there are no postmortem rights either. However, a cause of action can be brought against an individual who violates Nebraska’s invasion of privacy statute by commercially exploiting a decedent’s name or likeness, which is an unusual extension of a personal tort claim to a decedent’s survivors.<sup>34</sup>

There are states that have not extended postmortem rights, such as New York, Rhode Island, and Wisconsin, and other states that have not mentioned this right in their right of publicity statutes, such as Massachusetts and Utah.<sup>35</sup> Interestingly, while some states like Hawaii

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31. LA. STAT. ANN. § 14:102.21 (2006) (“It shall be unlawful for any person to use for the purpose of advertising for the sale of any goods, wares, or merchandise, or for the solicitation of patronage by any business the name, portrait, or picture of any deceased soldier, without having obtained prior consent to such use by the soldier, or by the closest living relative, by blood or marriage, of the deceased.”); *Jaubert v. Crowley Post-Signal, Inc.*, 375 So.2d 1386, 1388 (La. 1979) (“One type of invasion takes the form of the appropriation of an individual’s name or likeness, for the use or benefit of the defendant.”); *Tatum v. New Orleans Aviation Bd.*, 2011-1431 (La. App. 4 Cir. 04/11/12); 102 So.3d 144, 147 (finding “that the right to privacy is a personal right,” which cannot be asserted by the deceased’s relatives); *see also infra* Appendix.

32. H.R. 276, 2018 Leg., Reg. Sess. (La. 2018) (proposing to enact Subpart K of Part VIII of Chapter 1 of Title 51 of the Louisiana Revised Statutes of 1950, composed of R.S. 51:470.1 through 470.11); James A. Smith, *Toussaint Legacy Act Would Outlaw Use of Deceased Celebrities’ Name, Image Without Consent*, COLORADOAN (May 1, 2019, 11:14 AM), <http://www.coloradoan.com/story/news/local/louisiana/2019/05/01/toussaint-legacy-act-would-outlaw-use-deceased-celebrities-name-image-without-consent/3636574002/> (defining koozies as “fabric or foam sleeves used to keep beverages chilled”).

33. H.R. 276 (“Subject to a transfer, an assignment, or a licensing agreement, the property rights provided by this Subpart are exclusive to the executors, administrators, heirs, legatees, and assignees of the individual for a period commencing after the individual’s death and terminating upon the earlier of either fifty years or three consecutive years of nonuse of the individual’s identity for any commercial purpose.”); *see also infra* Appendix.

34. NEB. REV. STAT. § 20-208 (1979) (“The right of action for invasion of privacy created by sections 20-201 to 20-211 and 25-840.01, with the single exception of the action arising out of exploitation of a person’s name or likeness in section 20-202, shall not be deemed to survive the death of the subject of any such invasion of privacy.”).

35. N.Y. CIV. RIGHTS LAW § 50 (2014) (“A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.”). Postmortem rights were addressed in the case of *James*

have created the statute to protect both an individual's and celebrity's right of publicity, other states, such as South Dakota, have only protected the rights of celebrities.<sup>36</sup> A problem arising from that distinction is the definition of celebrity. While the dictionary defines celebrity as "a famous or well-known person," many might define it as one who achieves success as an athlete or actor.<sup>37</sup> However, today's millennials might point to a social media influencer with a million followers, who may be a celebrity for no reason other than posting cute cat videos.

California has gone a step further and protected per-mortem rights—the rights of publicity for those who are celebrities because of their death, following the sale of T-shirts protesting the Iraq War that listed the names of Americans who died in service.<sup>38</sup>

Further inconsistencies are demonstrated by Tennessee's protection of postmortem rights for only ten years while Oklahoma protects them for 100 years.<sup>39</sup> Alabama protects any "indicia of identity,"<sup>40</sup> but Arizona only protects soldiers.<sup>41</sup> Hawaii makes a distinction between individuals and personalities, but Nevada simply refers to persons.<sup>42</sup> These inconsistencies make planning for the holders and acquirers of the rights of publicity almost impossible.

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v. *Delilah Films*, in which a New York court stated that, "to those plaintiffs who are successors in interest, they have no cause of action under Civil Rights Law Section 50, as the statutory rights created by said law do not survive death." 544, N.Y.S.2d 447, 451 (N.Y. Sup. Ct. 1989); *see infra* Appendix.

36. *See infra* Appendix.

37. *Celebrity*, DICTIONARY.COM, <http://www.dictionary.com/browse/celebrity> (last visited Dec. 19, 2019).

38. CAL. CIV. CODE § 3344.1(h) (West 2012) (providing that the right of publicity extends to "any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, or because of his or her death"); *see* 2009 Legis. B. Hist. Cal. A.B. 585 (Bill Analysis, Assembly Floor), May 3, 2010, [http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_0551-0600/ab\\_585\\_cfa\\_20090629\\_135953\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0551-0600/ab_585_cfa_20090629_135953_sen_comm.html) (noting that *Frazier v. Boomsma*, No. 07-CV-8040-PHX-NVW, 2008 U.S. DIST. LEXIS 63896 (D. Ariz. Aug. 20, 2008), regarding the failed action against a peace activist who sold T-shirts with "'They Died' superimposed over the names of 3,461 soldiers that died in Iraq" inspired the change in the California statute); Keenan C. Fennimore, *Reconciling California's Pre, Post, and Per Mortem Rights of Publicity*, 22 IND. INT'L & COMP. L. REV. 377, 378 (2012) (coining the term "*per mortem* to describe the right of publicity as established for identities with commercial value *because of their death*").

39. OKLA. STAT. tit. 12, § 1448(G) (2019); TENN. CODE ANN. § 47-25-1104(a) (2010).

40. ALA. CODE §§ 6-5-770 to -774 (2016).

41. ARIZ. REV. STAT. ANN. § 12-761 (2007).

42. HAW. REV. STAT. § 482P-2 (2009); NEV. REV. STAT. § 597.790 (1995).



*B. States with a Common Law Precedent*

The second large grouping of states with similar approaches to the right of publicity are those states that follow a common law precedent and generally follow section 652A of the Restatement (Second) of Torts.<sup>43</sup> Similar to the states with statutory protection, some states with common law protection extend to postmortem rights while others do not.<sup>44</sup>

New Jersey is one such state, in which a person “has the right to enjoy the fruits of his own industry free from unjustified interference.”<sup>45</sup> In *McFarland v. Miller*, the United States Court of Appeals for the Third Circuit concluded that “infringement of a person’s right to exploit commercially his own name or the name of a character so associated with him . . . is a cause of action that under New Jersey law survives the death of a person with whom the name has become identified.”<sup>46</sup>

In another example, the Maryland Court of Appeals in *Lawrence v. A.S. Abell Co.* stated that the name of the person affected must have “commercial or other value” for a right of privacy invasion to be accepted.<sup>47</sup> Maryland follows section 652C of the Restatement (Second) of Torts, which says that “one who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”<sup>48</sup> The commercial value aspect of the right of publicity shows that Maryland only considers that right to be for celebrities.<sup>49</sup> While there is no case in point in Maryland, it is reasonable to conclude that a commercially valuable celebrity name does not lose that value after death, as history has shown with celebrities such as Marilyn Monroe. Therefore, Maryland’s common law protection of celebrities’ commercial value should extend postmortem.<sup>50</sup>

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43. See *infra* Appendix (noting that Alaska, Colorado, Connecticut, Delaware, Georgia, Idaho, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, South Carolina, Texas, Vermont, and West Virginia have a common law approach).

44. See *infra* Appendix (noting that common law states with postmortem rights are Georgia, Michigan, Missouri, New Hampshire, New Jersey, New Mexico, and South Carolina).

45. *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967).

46. *McFarland v. Miller*, 14 F.3d 912, 914 (3d. Cir. 1994).

47. *Lawrence v. A.S. Abell Co.*, 475 A.2d 448, 454 (Md. 1984) (noting that photos of infant children used in a newspaper advertising campaign without permission of the mothers did not have “commercial or other value” as the infants were not famous nor were they professional models).

48. See RESTATEMENT (SECOND) OF TORTS § 652A-E (AM. LAW. INST. 1977).

49. See *Lawrence*, 475 A.2d at 454.

50. BURR, *supra* note 20, at 341.

C. *States Without Protection: North Dakota and Wyoming*

While most of the states either follow a state statute or a common law precedent, there are two states, North Dakota and Wyoming, that have no protection for right of publicity at all. North Dakota does not recognize either the personal tort protecting the right of privacy or the property right of publicity.<sup>51</sup> Wyoming has skirted around the issue, though in *Town of Green River v. Bunger*, the Wyoming Supreme Court suggested that there may be a right of privacy.<sup>52</sup>

III. FEDERAL RIGHT OF PUBLICITY STATUTE

A. *Support*

As discussed above, with multiple state approaches to the right of publicity, it is difficult for anyone to plan, particularly the holders and the acquirers of the right of publicity. Without a federal statute, whether a right of publicity exists and how broad the protection is depends upon the state in which one is asserting such a right. Relying on state law makes it difficult to know not only what the law is but also how to plan the cost of compliance with the law of multiple jurisdictions. In addition, a single federal statute will discourage forum shopping.<sup>53</sup> Author Melinda Eades summarized this point well:

The unpredictability for litigants is distressing, to say the least. Plaintiffs run the risk of later learning that they have set up their licensing schemes in the wrong state upon the untimely death of their cash-cow licensor. Defendants run the risk of printing a poster or advertisement that must be kept out of states with extremely broad protective statutes, or of being forced to comply with a state's most restrictive guidelines.<sup>54</sup>

The idea of a federal statute is not new, having been proposed in the mid-1990s by the International Trademark Association, yet it still has not happened. There is support for a federal statute from a wide variety of sources, including the American Bar Association, which recommended

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51. *Hougum v. Valley Mem'l Homes*, 574 N.W.2d 812, 815 (N.D. 1998).

52. *Town of Green River v. Bunger*, 58 P.2d 456, 460 (Wyo. 1936).

53. Melinda R. Eades, *Choice of Law and the Right of Publicity: Domicile as an Essential First Step*, 66 BROOK. L. REV. 1301, 1301 (2001) ("Choice of law analyses in right of publicity cases can lead to disturbingly disparate results. Sharp differences in state laws render the application of one state's law over another the deciding factor in many right of publicity actions."); see *Gomis*, *supra* note 27.

54. Eades, *supra* note 53, at 1302.

such a federal statute “in order to curb significant forum shopping and to provide advertisers and celebrities with the precise boundaries of protection.”<sup>55</sup> To be fair, there has been opposition by various lobbying groups, but the topic continues to be raised and promoted.<sup>56</sup> Since the Uniform Law Commission declined to create a uniform act on the right of publicity at its 2018 annual meeting, some have argued that a federal statute would be better than a proposed uniform act.<sup>57</sup> For example, the United States Copyright Office suggested: “If Congress wished to address some of the uncertainty and ambiguity created by the lack of harmonization among state right of publicity laws, Congress might consider adopting a federal right of publicity law.”<sup>58</sup> Since advertising campaigns are broadcast nationally and products endorsed by celebrities are sold in interstate commerce, Congress has the authority to pass a federal right of publicity statute under the Commerce Clause.<sup>59</sup>

While no federal right of publicity statute currently exists, the Supreme Court acknowledged the right of publicity in an Ohio case, *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>60</sup> In addition, the Lanham Act provides federal protection against false endorsement, which is similar to a violation of the right of publicity, and the American Law Institute has

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55. *Right of Publicity*, 1996 ABA SEC. INTELL. PROP. L. ANN. REP. 202, 250; Kathy Heller, *Deciding Who Cashes in on the Deceased Celebrity Business*, 11 CHAP. L. REV. 545, 566 (2008); *Board Resolutions U.S. Federal Right of Publicity*, INT’L TRADEMARK ASS’N (Mar. 3, 1998), [www.inta.org/Advocacy/Pages/USFederalRightofPublicity.aspx](http://www.inta.org/Advocacy/Pages/USFederalRightofPublicity.aspx); see, e.g., Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL J. ART, TECH. & INTELL. PROP. L. 227 (1999); Richard S. Robinson, *Preemption, the Right of Publicity, and a New Federal Statute*, 16 CARDOZO ARTS & ENT. L.J. 183 (1998); Sean D. Whaley, *I’m a Highway Star: An Outline for a Federal Right of Publicity*, 31 HASTINGS COMM. & ENT. L.J. 257 (2009); Brittany A. Adkins, Comment, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity Act*, 40 CUMB. L. REV. 499 (2010).

56. Jonathan L. Faber & Wesley A. Zirkle, *Spreading Its Wings and Coming of Age: With Indiana’s Law as the Model, State-Based Right of Publicity Is Ready to Move to the Federal Level*, 45 RES. GESTAE 31, 37 (2001) (“While these efforts over the years have lost momentum under the strain of unresolved debate by powerful lobbying forces . . . the idea of federalizing the Right of Publicity is consistently renewed by scholars, organizations, and special interest groups.”).

57. See Minutes, Annual Meeting of the Executive Committee, Uniform Law Commission 6 (July 23, 2018), <http://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.aspx?DocumentFileKey=2986559b-3c7c-658b-06a8-7dfc00bac2d3&forceDialog=0>.

58. REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 117 (Apr. 2019), <http://www.copyright.gov/policy/moralrights/full-report.pdf>.

59. U.S. CONST. art. I, § 8, cl. 3.

60. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 572-77 (1977) (recognizing the right of publicity and holding that a television news broadcast of a commercial entertainer’s performance that aired without consent was not protected by the First Amendment).

added right of publicity to the Restatement (Third) of Unfair Competition.<sup>61</sup> These examples show that it is not a stretch to recognize a right of publicity at the federal level.

To be clear, the proposal here is for a federal civil law, not a criminal statute. While some states do have criminal consequences for misappropriation, a criminal statute is beyond the scope of this Article's proposal. Instead, the focus here is to achieve consistency and avoid forum shopping with a federal, civil statute, which would preempt state law by express language therein.<sup>62</sup> This Article's proposal includes detailed rights to be protected, exceptions for expressive works and activities protected by the First Amendment, transferability, and postmortem rights.<sup>63</sup>

#### B. *Rights to Be Protected*

While many states' rights are dependent on domicile at the time of death,<sup>64</sup> the federal statute would be better served by following the Nevada statute that applies to "any commercial use within this state [country] of a living or deceased person's name, voice, signature, photograph or likeness regardless of the person's domicile."<sup>65</sup> The federal statute should also protect more than one's name, voice, signature, photograph, and likeness, and incorporate the Restatement (Third) of Unfair Competition's statement of the right of publicity, which includes identity: "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

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61. 15 U.S.C. § 1125(a); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

62. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987) ("[W]hen acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms."); *see* 17 U.S.C. § 301(a) (2018) (providing that "no person is entitled to any such right . . . under the common law or statutes of any State"). *But see* N.Y. CIV. RIGHTS LAW § 50 (2014) ("A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."); REGISTER OF COPYRIGHTS, *supra* note 58, at 117 ("[A federal right of publicity law should] serve as a 'floor' for right of publicity protections, while allowing individual states to adopt more extensive protections in the event they determine that such additional protections would be beneficial. This approach would be consistent with the approach taken by Congress in passing the Lanham Act [15 U.S.C. § 1125(a)] and the Defend Trade Secrets Act [Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (codified in scattered sections of 18 U.S.C.)], both of which elected not to preempt state law and accordingly allowed for the continued development of state laws in the shadow of the federal statute.").

63. *See* REGISTER OF COPYRIGHTS, *supra* note 58, at 118-19.

64. *See* Eades, *supra* note 53 (noting that New York and California first look to the decedent's domicile "to determine whether the right of publicity exists").

65. NEV. REV. STAT. § 597.780 (1993).

purposes of trade is subject to liability for the relief appropriate . . . .”<sup>66</sup> It is important that the protected rights not be limited specifically to name and image, because the exploited rights, and often the misappropriated rights, are broader than that.

For example, Johnny Carson’s long-running reign as the king of late night television was well known for Ed McMahon’s welcoming introduction “Here’s Johnny.”<sup>67</sup> That phrase was “generally associated with Carson by a substantial segment of the television viewing public,” so much so that Carson licensed the use of that phrase to a chain of restaurants called “Here’s Johnny Restaurants” and later to an apparel manufacturer for men’s clothing and to another company for men’s toiletries.<sup>68</sup> However, Here’s Johnny Portable Toilets, Inc., a Michigan corporation, did not seek Carson’s permission to use the phrase coupled with “The World’s Foremost Comedian,” so Carson sued.<sup>69</sup> While the United States District Court dismissed the suit since Johnny Carson’s name or likeness was not used, the United States Court of Appeals for the Sixth Circuit reversed, stating that the right of publicity requires

that a celebrity has a protected pecuniary interest in the commercial exploitation of his identity. If the celebrity’s identity is commercially exploited, there has been an invasion of his right whether or not his “name or likeness” is used. Carson’s identity may be exploited even if his name, John W. Carson, or his picture is not used.<sup>70</sup>

As California recognizes, one’s voice can be just as valuable as one’s name, image, and likeness. This similarity was noted when Bette Midler sued Ford for using an impersonator to sound like her in a television commercial and when Tom Waits’ unique, raspy voice was misappropriated in a radio commercial for Salsa Rio Doritos.<sup>71</sup> Both artists successfully recovered large monetary awards even though neither of their

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66. See *id.*; CAL. CIV. CODE § 3344(a) (West 2010); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

67. *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 838 (6th Cir. 1983).

68. *Id.* at 832-33.

69. *Id.* at 833.

70. *Carson*, 698 F.2d at 835; *Carson v. Here’s Johnny Portable Toilets, Inc.*, 498 F. Supp. 71, 77 (E.D. Mich. 1980); see *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974) (holding that the unauthorized use of a picture of the distinctive race car of Lothar Motschenbacher, a well-known professional race car driver, violated Motschenbacher’s right of publicity, even though neither his name or likeness were used).

71. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1112 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (“[W]hen a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California.”).

names or photos were used.<sup>72</sup> The Internet, including social media, makes it very easy to upload and copy video and sound files, which means there are many opportunities for misappropriation of the rights of publicity related to voice and images.

The definition of likeness was also extended in Vanna White's case against Samsung in *White v. Samsung Electronics America, Inc.*<sup>73</sup> White is the blonde letter turner on the *Wheel of Fortune* game show and is known for wearing evening gowns on the show. In its advertisement, Samsung used a robot wearing an evening gown and a blonde wig near a game board that suggested it was the "Wheel of Fortune." The court in *White* noted that "[t]he identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice."<sup>74</sup>

Borrowing from the secondary meaning concept of trademark law, if slogans, race cars, and evening gowns can be so associated with a person as to identify them, it is that identity that should be protected by a federal right of publicity.<sup>75</sup>

### C. *Exceptions for Expressive Works and Activities Protected by the First Amendment*

While protected rights should be broad, those rights should not interfere with First Amendment protection of news accounts and matters of public interest.<sup>76</sup> However, that is another difficult line to draw from state to state, which would benefit from federal guidance. Consider the case of the famed pilot Chuck Yeager, who sued Cingular Wireless for using his name and achievement of breaking the sound barrier without consent.<sup>77</sup> Cingular argued that it used historic facts and did not violate

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72. *Waits*, 978 F.2d at 1112; *Midler*, 849 F.2d at 463.

73. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992).

74. *Id.* at 1399.

75. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 851 (1982) ("To establish secondary meaning, a manufacturer must show that, in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.").

76. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 805 (N.D. Cal. 2011) ("[E]ven newsworthy actions may be subjects of § 3344 liability when published for commercial rather than journalistic purposes."); see *Rosemont Enters., Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122, 129 (N.Y. Sup. Ct. 1968), *aff'd*, 301 N.Y.S.2d 948 (N.Y. App. Div. 1969) ("Just as a public figure's 'right of privacy' must yield to the public interest so too must the 'right of publicity' bow where such conflicts with the free dissemination of thoughts, ideas, newsworthy events and matters of public interest.").

77. See *Yeager v. Cingular Wireless LLC*, 673 F. Supp. 2d 1089 (E.D. Cal. 2009).

Yeager's rights, but Yeager successfully argued that his achievement was not used for an historic purpose by Cingular, but rather to call attention to Cingular's emergency response programs.<sup>78</sup> A federal statute also cannot interfere with First Amendment protection of expressive works, as noted in the California statute and as held by the Florida Supreme Court in a case involving the producers of the movie, *The Perfect Storm*, in which the names and likenesses of fishermen killed at sea were permitted in both the movie and the advertisements for the movie.<sup>79</sup>

#### D. Transferability

The federal statute should clearly state that the right of publicity is a property right similar to the California statute.<sup>80</sup> This will prevent the unjust enrichment of those who seek to profit either from the time and effort a celebrity has invested in developing the value of his image or from a tragedy that creates value after death.<sup>81</sup> As a property right, the right of publicity can be assigned, as celebrities often do with their own loan-out companies.<sup>82</sup> For example, a Texas statute provides for transferability by stating that "the property right is freely transferable, in whole or in part."<sup>83</sup> The federal statute should parallel this language, however, the right of publicity is not ordinary property because of its relationship to the person's identity. Therefore, the federal statute should further provide that such a federal right of publicity is not seizable by the government to satisfy a tax debt nor to be split in a divorce settlement. Reaching back to John Locke,

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78. *Id.* at 1099 ("[T]he use of plaintiff's name was carefully crafted as part of a strategy to promote defendant's brand.").

79. CAL. CIV. CODE § 3344.1(a)(2) (West 2012) (providing a First Amendment expressive works defense for such works and their associated advertisements); *Tyne v. Time Warner Entm't Co.*, 901 So. 2d 802, 810 (Fla. 2005).

80. CAL. CIV. CODE § 3344.1(b) ("The rights recognized under this section are property rights . . .").

81. *Id.*; *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977); *Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89, 98 (Tenn. Ct. App. 1987);

82. A loan-out company is a corporation formed by a celebrity for tax planning and limitation of liability purposes. A celebrity assigns its services to the loan-out, and where permitted, its rights of publicity. An interested party engages the loan-out to provide the services or rights of the celebrity, all payment flows through the loan-out, and all liability is with the loan-out. See generally David J. Cook, *When Is a Right of Publicity License Granted to a Loan-Out Corporation a Fraudulent Conveyance?*, 20 U. DENV. SPORTS & ENT. L.J. 1 (2017); Russ Alan Prince, *What Is a Celebrity Loan Out Corporation?*, FORBES (Oct. 27, 2014, 6:26 AM), <http://www.forbes.com/sites/russalanprince/2014/10/27/what-is-a-celebrity-loan-out-corporation/#1f89e55e335e>.

83. TEX. PROP. CODE ANN. § 26.004(a) (West 1987).

one's property right in his person should be controlled exclusively by himself.<sup>84</sup>

### E. *Postmortem Rights*

Without postmortem rights, a federal statute would be of little value. As demonstrated above, postmortem rights of publicity can be very valuable, and in some cases, the commercial value arises because of death.<sup>85</sup> The postmortem rights of states that recognize those rights vary between thirty to 100 years after the death of the individual.<sup>86</sup> This Article proposes that the federal statute should follow California's right of publicity statute and extend postmortem rights for seventy years. This approach is consistent with the federal Copyright Act and is reasonable since five states already afford that much protection.<sup>87</sup> An additional step that may give comfort to those resistant to postmortem rights is to require a registry to put potential licensees on notice of the owner of a decedent's identity.<sup>88</sup> California, Nevada, and Texas require that the successor in interest to a decedent's postmortem rights file a claim with the respective Secretary of State.<sup>89</sup> The federal statute should include per-mortem rights as well.

In the absence of actual damages, the federal statute should provide for statutory damages of \$1000 in order to deter violations.<sup>90</sup> While it may

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84. See LOCKE, *supra* note 1.

85. See *Celebrity Endorsement—Through the Ages*, *supra* note 4; Fennimore, *supra* note 38.

86. See *infra* Appendix.

87. 17 U.S.C. § 302(a); see *infra* Appendix (noting that California, Hawaii, and South Dakota extend rights of publicity for seventy years postmortem and that Indiana and Oklahoma extend them for 100 years).

88. See CAL. CIV. CODE § 3344.1(f) (West 2012) (“A successor in interest to the rights of a deceased personality under this section or a licensee thereof shall not recover damages for a use prohibited by this section that occurs before the successor in interest or licensee registers a claim of the rights [with the Secretary of State].”).

89. *Id.*; NEV. REV. STAT. § 597.803-4 (1995); TEX. PROP. CODE ANN. § 26.006-.008 (West 1987).

90. See CAL. CIV. CODE § 3344(a) (West 1984) (providing that one can recover “an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages” and that “[i]n establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses”); IND. CODE § 32-36-1-10 (1)(a) (2014) (“A person who violates section 8 of this chapter may be liable for . . . [d]amages in the amount of: (A) one thousand dollars (\$1000) . . . .”); TEX. PROP. CODE ANN. § 26.013 (1987) (providing for \$2500 in statutory damages).



be easier to quantify actual damages for a celebrity that is actively exploiting her identity, statutory damages would help any individual whose identity has been misappropriated regardless of celebrity status. In addition, punitive damages should be available for knowing, willful, or intentional acts, and the prevailing party should be able to recover attorney fees.<sup>91</sup>

#### F. *Now Is the Time for a Federal Right of Publicity*

“Before the social media invasion, it is unlikely that any of us who practice in this area of law would have conceived of a case wherein the plaintiffs are average citizens trying to prevent others from commercially exploiting their identities.”<sup>92</sup> While the right of publicity has been evolving, it has not kept up with technology. In addition to radio and television, we now have video games, the Internet, social media, smart phones, and even holograms, which adds more opportunities not only for commercial exploitation of one’s identity, but also for third parties to infringe on one’s rights of publicity. Hologram concerts, such as the Tupac hologram at the Coachella Valley Music and Arts Festival in California, are examples of such technology.<sup>93</sup> A hologram concert is when a deceased musician’s image, in this case Tupac Shakur’s image, is projected through a hologram at a concert to create a new performance.<sup>94</sup> Hologram concerts are a relatively new concept but are increasing in popularity, and a federal right of publicity would provide protection from and guidance for the use of such technology.<sup>95</sup> Otherwise, the hologram tour promoter would need to research the law of each state before setting up the tour.

Deceased celebrities are also appearing in creative works long after their deaths. In some cases, these creative works are digital

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91. See CAL. CIV. CODE § 3344(a) (“Punitive damages may also be awarded to the injured party or parties.”); IND. CODE § 32-36-1-10(2) (“Treble or punitive damages, as the injured party may elect, if the violation . . . is knowing, willful, or intentional.”); *id.* § 32-36-1-12(1) (“[T]he court . . . shall award to the prevailing party reasonable attorney’s fees, costs, and expenses . . .”).

92. Lynne M.J. Boisineau, *Giving the Right of Publicity a Much-Needed Makeover for the Social Media Revolution*, 5 LANDSLIDE (Nov./Dec. 2012), [http://www.americanbar.org/groups/intellectual\\_property\\_law/publications/landslide/2012-13/november\\_december/giving-right-publicity-much-needed-makeover-social-media-revolution/](http://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2012-13/november_december/giving-right-publicity-much-needed-makeover-social-media-revolution/).

93. *Id.*

94. *Id.* (“[A hologram is] an illusion of the deceased musician created utilizing a high-definition 3D holographic video projection system involving a custom rigging and mechanical solution . . .”).

95. Victor Fiorillo, *It’s Official: Dead Musicians Are Now Touring as Holograms*, PHILA. MAG. (Sept. 19, 2018, 11:05 AM), <http://www.phillymag.com/news/2018/09/19/hologram-concert-roy-orbison-tupac/> (noting that there have been hologram performances of Tupac Shakur, Ol’ Dirty Bastard, Michael Jackson, Ronnie James Dio, and Roy Orbison).

reimaginings, and in other cases, old footage is reworked into new films.<sup>96</sup> In these cases, rather than casting actors in films, producers need to acquire rights of publicity to include these actors' identities in their films through various digital processes.

Finally, the rise in social media has led to right of publicity claims by people who are not celebrities. No one could have predicted the huge impact that social media would have on the right of publicity. Commentator Lynne M.J. Boisineau has explained the ways in which social media can be utilized to use another person's identity:

A person's "name" can be used as a Twitter handle, as the profile name of a Facebook page, as a YouTube channel, as a character in a video game, or in the title of a smartphone app. Similarly, a person's "portrait," "picture," or "likeness" can come in the shape of a digital image that can be copied and pasted thousands of times in any of the scenarios above, as well as appearing as a video on YouTube, a "pin" on Pinterest, as the wallpaper on a cell phone, or as an avatar on a smartphone app. A person's "voice" can be used in a podcast, as the navigational guide on your GPS, or as a narrator of an electronic book; recorded as a "voice memo" on a smartphone and posted on a social media site; attached as digital file to an electronic message; and so on.<sup>97</sup>

Of course, each of the above examples from social media may not result in successful claims, but they are examples of how evolving technology has raised the need for federal protection of the right of publicity and how a myriad of claims could be raised in the future. Demonstrating that anyone can successfully assert right of publicity claims, LinkedIn agreed to a \$13 million settlement after using its members' identities to promote its platform.<sup>98</sup> In another class action that ultimately settled, parents argued in *Fraley v. Facebook, Inc.* that their minor children's Facebook profiles were used to suggest endorsement of various products.<sup>99</sup> Plaintiffs

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96. Alexia Fernandez, *Carrie Fisher's Final Movie Role—See a Glimpse of Her Emotional Scene in Star Wars: Episode IX*, PEOPLE (Apr. 12, 2019, 9:33 PM), <http://people.com/movies/carrie-fisher-emotional-scene-star-wars-episode-ix/>; Erin Winick, *Actors Are Digitally Preserving Themselves to Continue Their Careers Beyond the Grave*, MIT TECH. REV. (Oct. 16, 2018), <http://www.technologyreview.com/s/612291/actors-are-digitally-preserving-themselves-to-continue-their-careers-beyond-the-grave/>.

97. Fernandez, *supra* note 96.

98. Perkins v. LinkedIn, 53 F. Supp. 3d 1190 (N.D. Cal. 2014); Nathaniel Mott, *Check Your Mail for a \$20 Payment from LinkedIn This Week*, INVERSE (Oct. 21, 2016), <http://www.inverse.com/article/22544-perkins-linkedin-settlement-lawsuit-checks-start-arrive>.

99. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 799 (N.D. Cal. 2011) ("[Plaintiffs] allege that their individual, personalized endorsement of products, services, and brands to their friends and acquaintances has concrete, provable value in the economy at large, which can be measured

survived a motion to dismiss by showing a “direct, linear relationship between the value of their endorsements of third-party products, companies, and brands to their Facebook friends and the alleged commercial profit gained by Facebook.”<sup>100</sup>

Unlike celebrity endorsements, which may have value because of a consumer’s admiration of a celebrity, these endorsements to friends of plaintiffs are arguably more influential because of the personal connection. Facebook COO Sheryl Sandberg stated that “[m]arketers have always known that the best recommendation comes from a friend. . . . This, in many ways, is the Holy Grail of advertising.”<sup>101</sup> Some might argue that the Communications Decency Act (CDA) immunizes Internet service providers from claims based on content posted by third parties.<sup>102</sup> In a case like *Fraley*, however, in which Facebook was accused not of “publishing tortious content, but rather of creating and developing commercial content that violates their statutory right of publicity,” the CDA does not provide immunity from either state or federal intellectual property claims, which would include a federal right of publicity.<sup>103</sup>

Another unauthorized use of a person’s likeness in social media is known as “twitterjacking,” when someone sets up an account, pretends to be a celebrity, athlete, executive, or other well-known individual, and tweets unauthorized messages to followers of that account.<sup>104</sup> Twitter has created “Verified Accounts” to help users identify trusted sources, and companies may link their Twitter profiles to their official websites to guide consumers. This solution though just leads followers to the true accounts and does not eliminate the fraudulent accounts.<sup>105</sup>

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by the additional profit Facebook earns from selling Sponsored Stories compared to its sale of regular advertisements.”)

100. *Id.* at 800.

101. *Id.* at 799; see *Celebrity Endorsement—Through the Ages*, *supra* note 4.

102. 47 U.S.C. § 230(c)(1) (2018) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”); see *Perfect 10, Inc. v. CCBill LLC*, 481 F.3d 751, 768 (9th Cir. 2007) (holding that a right of publicity is intellectual property and therefore an Internet service provider is immune from liability for a right of publicity claim).

103. See *Perfect 10, Inc.*, 481 F.3d at 768; *Fraley*, 830 F. Supp. 2d at 801; *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009) (“Section 230(c)(1) does not provide immunity for either federal or state intellectual property claims.”).

104. Joshua Rhett Miller, ‘Twitterjacking’—Identity Theft in 140 Characters or Less, FOX NEWS (May 16, 2015), <http://www.foxnews.com/story/twitterjacking-identity-theft-in-140-characters-or-less>.

105. See *About Verified Accounts*, TWITTER, <http://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts> (last visited June 17, 2019).

In today's global economy, marketing is worldwide, which means that the misappropriation of one's name and likeness is not confined to a general store in a small town or a local newspaper advertisement. Global advertising is expected to increase by 4.7% to \$623 billion in 2019, and social media supports an increasing share of all such advertising and endorsements.<sup>106</sup> A recent global study by the advertisement agency Zenith revealed that advertisers are forecasted to set aside 49% of their budgets for online advertising by 2021.<sup>107</sup> Such enormous budgets for online advertising, which is international in scope, signal that now is the time for a federal right of publicity statute.

#### IV. CONCLUSION

We cannot continue to expect plaintiffs to bring suits in fifty different states in order to protect their rights of publicity. This Article demonstrates that a clear basis for a federal statute exists, that there is support for a federal statute, and that now is the time to enact a federal statute. Furthermore, the federal statute should extend to individuals regardless of celebrity status and should include per-mortem and postmortem rights for seventy years. Just as Josiah Wedgwood could not possibly have imagined that technology and social media would develop 250 years into his future, today's technology savvy generations are also unable to predict our future. Enacting a federal right of publicity statute would be a strong step toward protecting those rights today and in the foreseeable future.

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106. JONATHAN BARNARD, ZENITH MEDIA, ADVERTISING EXPENDITURE FORECASTS MARCH 2019 (2019), <http://www.zenithmedia.com/wp-content/uploads/2019/03/Adspend-forecasts-March-2019-executive-summary.pdf>.

107. *Id.*

## APPENDIX: FIFTY STATE SURVEY

*Alabama*

Right of Publicity Statute	Common Law Rights	Postmortem Rights
<p>ALA. CODE §§ 6-5-770 to -774 (2015):</p> <ul style="list-style-type: none"> <li>• General protection of any “indicia of identity” of a person for life.</li> <li>• Applicable if used for “purposes of advertising or selling, or soliciting purchases of, products, goods, merchandise, or services, or for purposes of fund-raising or solicitation of donations, or for false endorsement, without consent.”</li> <li>• Statutory damages of \$5000 per case or compensatory damages, and “any other damages available under Alabama law, including punitive damages.”</li> </ul>	<p>Invasion of Privacy:</p> <ul style="list-style-type: none"> <li>• “[O]ne who intentionally intrudes, physically or otherwise, upon the <i>solitude</i> or <i>seclusion</i> of another or his <i>private</i> affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be <i>highly offensive</i> to a reasonable person.”</li> </ul> <p>Schifano v. Green Cty. Greyhound Park, Inc., 624 So. 2d 178, 180 (Ala. 1993) (quoting RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977)).</p> <p>Right of Publicity:</p> <ul style="list-style-type: none"> <li>• “Alabama has not expressly recognized the right to publicity; however . . . Birmingham Broadcasting Co. v. Bell, 259 Ala. 656, 68 So. 2d 314 (1953), indicates that the right to privacy in Alabama does protect the commercial value of a public figure’s identity.” Minnifield v. Ashcraft, 903 So. 2d 818, 825-26 (Ala. Civ. App. 2004) (citing Birmingham Broad. Co. v. Bell, 68 So. 2d 314 (Ala. 1953)).</li> </ul>	<p>ALA. CODE §§ 6-5-771:</p> <ul style="list-style-type: none"> <li>• Right of Publicity endures “for 55 years after his or her death.”</li> <li>• “The right is freely transferable and descendible, in whole or in part, and shall be considered property of the estate of the decedent unless otherwise transferred.”</li> </ul>

*Alaska*

Right of Publicity Statute	Common Law Rights	Postmortem Rights
None	Invasion of Privacy: <ul style="list-style-type: none"> <li>• “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”</li> </ul> Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1133 (Alaska 1989) (citing RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977)).	None

*Arizona*

Right of Publicity Statute	Common Law Rights	Postmortem Rights
ARIZ. REV. STAT. ANN. § 12-761 (2007) (limiting right to soldiers): <ul style="list-style-type: none"> <li>• Every soldier has the “right to control and to choose whether and how to use a soldier’s name, portrait or picture for commercial purposes.”</li> <li>• The soldier’s consent is required in order to use name, picture, or portrait for advertising, soliciting, and sales.</li> </ul>	Right of Publicity: <ul style="list-style-type: none"> <li>• “We see no reason to depart from the Restatement Third in this matter, and therefore hold that an individual has a right of publicity that protects his or her name and/or likeness from appropriation for commercial or trade purposes.” <i>In re Estate of Reynolds</i>, 327 P.3d 213, 216 (Ariz. Ct. App. 2014).</li> </ul>	ARIZ. REV. STAT. ANN. § 12-761.G: <ul style="list-style-type: none"> <li>• “The right of publicity is a property right that survives a soldier’s death.”</li> <li>• “[T]he right of publicity is ‘freely assignable’ . . . . Consistent with that principle, we hold the right of publicity is descendible, and therefore may be enforced by a decedent’s estate.” <i>In re Estate of Reynolds</i>, 327 P.3d at 217.</li> </ul>

*Arkansas*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
ARK. CODE ANN. §§ 4-75-1101 to -1111 (2016): • Protects five aspects of an individual’s identity: “name, voice, signature, photograph, or likeness” from unauthorized commercial use. <i>Id.</i> § 4-75-1104.	Invasion of Privacy: • “So we have recognized that in some instances there may be recovery for humiliation and mental suffering in the absence of any physical injury; and we hold that in an action like this one—for violation of the right of privacy—there may be such recovery, just as in cases of willful and wanton wrong.” <i>Olan Mills, Inc. v. Dodd</i> , 353 S.W.2d 22, 24 (Ark. 1962).	ARK. CODE ANN. § 4-75-1107: • Right of publicity lasts throughout the life of the person and for fifty years after the person’s death.

*California*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
<p>CAL. CIV. CODE § 3344(a) (West 1984):</p> <ul style="list-style-type: none"> <li>• “Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.”</li> <li>• “[I]n any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of . . . (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages.”</li> </ul>	<p>Invasion of Privacy:</p> <ul style="list-style-type: none"> <li>• “We believe that the publication by respondents of the unsavory incidents in the past life of appellant after she had reformed, coupled with her true name, was not justified by any standard of morals or ethics known to us and was a direct invasion of her inalienable right guaranteed to her by our Constitution, to pursue and obtain happiness. Whether we call this a right of privacy or give it any other name is immaterial because it is a right guaranteed by our Constitution that must not be ruthlessly and needlessly invaded by others.” <i>Melvin v. Reid</i>, 297 P. 91, 93-94 (Cal. Dist. Ct. App. 1931).</li> </ul> <p>Right of Publicity:</p> <ul style="list-style-type: none"> <li>• “In this state the right of publicity is both a statutory and a common law right.”</li> <li>• “But because the common law right was derived from the law of privacy,” that “cause of action did not survive the death of the person whose identity was exploited and was not descendible to his or her heirs or assignees.” <i>Comedy III Prods., Inc. v. Gary Saderup, Inc.</i>, 21 P.3d 797, 799 (Cal. 2001).</li> </ul>	<p>CAL. CIV. CODE § 3344.1 (West 2012):</p> <ul style="list-style-type: none"> <li>• “Any person who uses a deceased personality’s name, voice, signature, photograph, or likeness, in any manner, . . . without prior consent from the person . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.”</li> <li>• “The rights recognized under this section are property rights, freely transferable or descendible, in whole or in part . . . .”</li> <li>• “An action shall not be brought under this section by reason of any use of a deceased personality’s name, voice, signature, photograph, or likeness occurring after the expiration of 70 years after the death of the deceased personality.”</li> </ul>



*Colorado*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
None	Invasion of Privacy: <ul style="list-style-type: none"> <li>• Colorado recognizes “a tort claim for invasion of privacy in the nature of unreasonable publicity given to one’s private life.” <i>Ozer v. Borquez</i>, 940 P.2d 371, 377 (Colo. 1997).</li> <li>• “We now hold that Colorado recognizes the tort of invasion of privacy by appropriation of an individual’s name or likeness.” <i>Joe Dickerson &amp; Assocs. v. Dittmar</i>, 34 P.3d 995, 1001 (Colo. 2001).</li> </ul>	None

*Connecticut*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
None	Invasion of Privacy: <ul style="list-style-type: none"> <li>• The four types of invasion of privacy recognized include “(a) unreasonable intrusion upon the seclusion of another; (b) appropriation of the other’s name or likeness; (c) unreasonable publicity given to the other’s private life; or (d) publicity that unreasonably places the other in a false light before the public.” <i>Goodrich v. Waterbury Republican-Am. Inc.</i>, 448 A.2d 1317, 1329 (Conn. 1982).</li> </ul>	None

*Delaware*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
None	Invasion of Privacy: <ul style="list-style-type: none"> <li>• Refers to the First Restatement of the Law of Torts § 867 as treating the right of privacy as an established right, and lists Prosser's "four distinct wrongs," which includes "4. Appropriation of some element of plaintiff's personality for commercial use."</li> <li>• "We see no reason for not recognizing [the right of privacy] as a part of our law." <i>Barberi v. News-Journal Co.</i>, 189 A.2d 773, 774 (Del. 1963).</li> </ul>	None

*Florida*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
FLA. STAT. § 540.08(1) (2007): <ul style="list-style-type: none"> <li>• "No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use . . . ."</li> </ul>	Invasion of Privacy: <ul style="list-style-type: none"> <li>• Since Florida first recognized the tort of invasion of privacy, "Florida decisions have filled out the contours of this tort right of privacy by accepting the following four general categories recognized by Prosser in his Law of Torts, p. 804-14 (4th ed. 1971): (1) Intrusion, i.e., invading plaintiff's physical solitude or seclusion; (2) Public Disclosure of Private Facts; (3) False Light in the Public Eye, i.e., a privacy theory analogous to the law of defamation; and (4) Appropriation, i.e., commercial exploitation of the property value of one's name." <i>Loft v. Fuller</i>, 408 So. 2d 619, 622 (Fla. Dist. Ct. App. 1981).</li> </ul>	FLA. STAT. § 540.08(5): <ul style="list-style-type: none"> <li>• "No action shall be brought under this section by reason of any publication, printing, display, or other public use of the name or likeness of a person occurring after the expiration of 40 years from and after the death of such person."</li> </ul>

*Georgia*

Right of Publicity Statute	Common Law Rights	Postmortem Rights
None	<p>Invasion of Privacy &amp; Right of Publicity:</p> <ul style="list-style-type: none"> <li>• “Therefore, we hold that the appropriation of another’s name and likeness, whether such likeness be a photograph or sculpture, without consent and for the financial gain of the appropriator is a tort in Georgia, whether the person whose name and likeness is used is a private citizen, entertainer, or as here a public figure who is not a public official.”</li> <li>• “We conclude that while private citizens have the right to privacy, public figures have a similar right of publicity, and that the measure of damages to a public figure for violation of his or her right of publicity is the value of the appropriation to the user.”</li> </ul> <p>Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 703 (Ga. 1982).</p>	<ul style="list-style-type: none"> <li>• “[W]e hold that the right of publicity survives the death of its owner and is inheritable and devisable.”</li> <li>• “Having found that there are valid reasons for recognizing the right of publicity during life, we find no reason to protect after death only those who took commercial advantage of their fame.” <i>Id.</i> at 705-06.</li> </ul>

*Hawaii*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
<p>HAW. REV. STAT. § 482P-2 (2009):</p> <ul style="list-style-type: none"> <li>• “Every individual or personality has a property right in the use of the individual’s or personality’s name, voice, signature, and likeness.”</li> </ul>	<p>Invasion of Privacy:</p> <ul style="list-style-type: none"> <li>• Recognizing a cause of action for the invasion of the right of privacy and finding “that protection is available for appropriation of name or picture for commercial purposes.”</li> </ul> <p>Fergerstrom v. Hawaiian Ocean View Estates, 441 P.2d 141, 144 (Haw. 1968).</p>	<p>HAW. REV. STAT. § 482P-2:</p> <ul style="list-style-type: none"> <li>• “The right exists whether or not it was commercially exploited by the individual or the personality during the individual’s or the personality’s lifetime. The right does not expire upon the death of the individual or personality . . . .”</li> </ul> <p><i>Id.</i> § 482P-4(a):</p> <ul style="list-style-type: none"> <li>• “For individuals, except to the extent that the individual may have transferred, assigned, or licensed a right recognized by this chapter, the rights protected in this chapter are exclusive to the individual, and are exclusive to the persons entitled to the rights under section 482P-3 for a period of seventy years after the death of the individual, including to the extent that the persons entitled to the rights under section 482P-3 may have transferred, assigned, or licensed these rights to others.”</li> </ul>

*Idaho*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
None	Invasion of Privacy: <ul style="list-style-type: none"> <li>• “This Court has recognized an action for invasion of privacy. A claim for invasion of privacy falls into one or more of four categories: 1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs. 2. Public disclosure of embarrassing private facts about the plaintiff. 3. Publicity which places the plaintiff in a false light in the public eye. 4. Appropriation, for the defendant’s advantage, of the plaintiff’s name and likeness.” <i>Hoskins v. Howard</i>, 971 P.2d 1135, 1140 (Idaho 1998) (citations omitted).</li> </ul>	None

*Illinois*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
<p>765 ILL. COMP. STAT. 1075/10 (1999):</p> <ul style="list-style-type: none"> <li>• “The right to control and to choose whether and how to use an individual’s identity for commercial purposes is recognized as each individual’s right of publicity.”</li> </ul> <p><i>Id.</i> 1075/30(a):</p> <ul style="list-style-type: none"> <li>• “A person may not use an individual’s identity for commercial purposes during the individual’s lifetime without having obtained previous written consent from the appropriate person or persons . . . .”</li> </ul> <p><i>Id.</i> 1075/40:</p> <ul style="list-style-type: none"> <li>• “(a) A person who violates Section 30 of this Act may be liable for either of the following, whichever is greater: (1) actual damages, profits derived from the unauthorized use, or both; or (2) \$1,000. (b) Punitive damages may be awarded against a person found to have willfully violated Section 30 of this Act.”</li> </ul>	None	<p><i>Id.</i> 1075/30(b):</p> <ul style="list-style-type: none"> <li>• “If an individual’s death occurs after the effective date of this Act, a person may not use that individual’s identity for commercial purposes for 50 years after the date of the individual’s death without having obtained previous written consent from the appropriate person or persons . . . .”</li> </ul>

**Indiana**

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
<p>IND. CODE § 32-36-1-7 (2014):  “[R]ight of publicity’ means a personality’s property interest in the personality’s:  (1) name; (2) voice;  (3) signature;  (4) photograph;  (5) image;  (6) likeness;  (7) distinctive appearance;  (8) gestures; or  (9) mannerisms.”</p>	<p>Invasion of Privacy:  • “[W]hile unknown to the common law, the preponderance of present day authority supports the view that, independent of property rights, contracts, reputation and physical integrity, there is a legal right called the right of privacy, the invasion of which gives rise to a cause of action. <i>Cont’l Optical Co. v. Reed</i>, 86 N.E.2d 306, 308 (Ind. App. 1949).</p> <p>• “Indiana recognizes a number of the claims described generically as invasions of privacy.” <i>Doe v. Methodist Hosp.</i>, 690 N.E.2d 681, 693 (Ind. 1997).</p>	<p>IND. CODE § 32-36-1-8(a):  • “A person may not use an aspect of a personality’s right of publicity for a commercial purpose during the personality’s lifetime or for one hundred (100) years after the date of the personality’s death without having obtained previous written consent from a person specified . . . .”</p> <p><i>Id.</i> § 32-36-1-16:  • “The rights recognized under this chapter are property rights, freely transferable and descendible . . . .”</p>

**Iowa**

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
None	<p>Invasion of Privacy:  • “We recognize a common law tort for invasion of privacy in Iowa.” <i>Winegard v. Larsen</i>, 260 N.W.2d 816, 818 (Iowa 1977).</p>	None

*Kansas*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
None	Invasion of Privacy: <ul style="list-style-type: none"> <li>• “A right of privacy in matters purely private is therefore derived from natural law.”</li> <li>• “One has the exclusive right to his picture as a property right of material profit, and, unless he has expressly or impliedly consented to its use by others, he may sue at law for damages for the invasion of the right.”</li> <li>• “Where one’s exclusive right to his picture is invaded, special damages, though recoverable, if demanded, are not necessary in an action at law for damages, and general damages are recoverable without a showing of specific loss.” <i>Kunz v. Allen</i>, 172 P. 532, 533 (Kan. 1918) (citations omitted).</li> </ul>	None



**Kentucky**

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
KY. REV. STAT. ANN. § 391.170(1) (1984): <ul style="list-style-type: none"> <li>• “The General Assembly recognizes that a person has property rights in his name and likeness which are entitled to protection from commercial exploitation.”</li> </ul>	None	<i>Id.</i> § 391.170: <ul style="list-style-type: none"> <li>• “The General Assembly further recognizes that although the traditional right of privacy terminates upon death of the person asserting it, the right of publicity, which is a right of protection from appropriation of some element of an individual’s personality for commercial exploitation, does not terminate upon death.”</li> <li>• “The name or likeness of a person who is a public figure shall not be used for commercial profit for a period of fifty (50) years from the date of his death without the written consent of the executor or administrator of his estate.”</li> </ul>

*Louisiana*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
<p>While not a right of publicity, Louisiana has a criminal statute protecting commercial appropriation of soldiers' rights: LA. STAT. ANN. § 14:102.21 (2006):</p> <ul style="list-style-type: none"> <li>• "It shall be unlawful for any person to use for the purpose of advertising for the sale of any goods, wares, or merchandise, or for the solicitation of patronage by any business the name, portrait, or picture of any deceased soldier, without having obtained prior consent to such use by the soldier, or by the closest living relative, by blood or marriage, of the deceased."</li> <li>• "Whoever violates the provisions of this Section shall be fined not more than one thousand dollars, imprisoned for not more than one year, or both."</li> </ul> <p>Proposed Legislation—Allen Toussaint Legacy Act, H.R. 276, 2018 Leg., Reg. Sess. (La. 2018):</p> <ul style="list-style-type: none"> <li>• "An individual has a property right in the commercial use by any medium in any manner without the individual's prior consent of the following: (1) The individual's name, voice, signature, photograph, or likeness. (2) Any combination of the individual's name, voice, signature, photograph, or likeness."</li> </ul>	<p>Invasion of Privacy:</p> <ul style="list-style-type: none"> <li>• "One type of invasion takes the form of the appropriation of an individual's name or likeness, for the use or benefit of the defendant."</li> </ul> <p>Jaubert v. Crowley Post-Signal, Inc., 375 So. 2d 1386, 1388 (La. 1979).</p>	<ul style="list-style-type: none"> <li>• "We find that the right to privacy is a personal right," which cannot be asserted by the deceased's relatives." Tatum v. New Orleans Aviation Bd., (La. App. 4 Cir. 04/11/12); 102 So. 3d 144, 147.</li> </ul> <p>Proposed Legislation—Allen Toussaint Legacy Act:</p> <ul style="list-style-type: none"> <li>• "Subject to a transfer, an assignment, or a licensing agreement, the property rights provided by this Subpart are exclusive to the executors, administrators, heirs, legatees, and assignees of the individual for a period commencing after the individual's death and terminating upon the earlier of either fifty years or three consecutive years of nonuse of the individual's identity for any commercial purpose."</li> </ul>

*Maine*

Right of Publicity Statute	Common Law Rights	Postmortem Rights
None	Invasion of Privacy: <ul style="list-style-type: none"> <li>• “(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other. (2) The right of privacy is invaded by . . . (b) appropriation of the other’s name or likeness . . . .” Nelson v. Me. Times, 373 A.2d 1221, 1223 (Me. 1977) (quoting RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977)).</li> </ul>	None

*Maryland*

Right of Publicity Statute	Common Law Rights	Postmortem Rights
None	Invasion of Privacy: <ul style="list-style-type: none"> <li>• “(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other. (2) The right of privacy is invaded by . . . (b) appropriation of the other’s name or likeness . . . .” Lawrence v. A.S. Abell Co., 475 A.2d 448, 451 (Md. 1984) (quoting RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977)).</li> </ul>	None

*Massachusetts*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
MASS. GEN. LAWS ch. 214, § 3A (1973): “Any person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent may bring a civil action in the superior court against the person so using his name, portrait or picture, to prevent and restrain the use thereof; and may recover damages for any injuries sustained by reason of such use.”	None	None

*Michigan*

Right of Publicity Statute	Common Law Rights	Postmortem Rights
None	<p>Invasion of Privacy:</p> <ul style="list-style-type: none"> <li>• “Michigan was one of the first jurisdictions to acknowledge the concept of ‘right of privacy.’”</li> <li>• “Since 1948 Michigan has continued to recognize the right of the individual to privacy.” <i>Beaumont v. Brown</i>, 257 N.W.2d 522, 526-27 (Mich. 1977), <i>overruled in part by Bradley v. Bd. of Educ.</i>, 565 N.W.2d 650 (1997) (limiting state employee’s privacy right to the extent it is superseded by the Freedom of Information Act).</li> </ul> <p>Right of Publicity:</p> <ul style="list-style-type: none"> <li>• “In the Sixth Circuit, appropriation ‘has become known as the “right of publicity.”’ Whereas the other theories of invasion of privacy protect a plaintiff’s right ‘to be let alone,’ ‘the right of publicity’ protects a plaintiff’s ‘pecuniary interest in the commercial exploitation of his identity.’” <i>Arnold v. Treadwell</i>, No. 283093, 2009 WL 2136909, at *4 (Mich. Ct. App. July 16, 2009) (citations omitted).</li> </ul>	<ul style="list-style-type: none"> <li>• “We believe that the weight of authority indicates that the right of publicity is more properly analyzed as a property right and, therefore, is descendible.” <i>Herman Miller, Inc. v. Palazzetti Imps. &amp; Exps., Inc.</i>, 270 F.3d 298, 326 (6th Cir. 2001).</li> </ul>

*Minnesota*

Right of Publicity Statute	Common Law Rights	Postmortem Rights
None	Invasion of Privacy: <ul style="list-style-type: none"> <li>• “Thus we recognize a right to privacy present in the common law of Minnesota, including causes of action in tort for intrusion upon seclusion, appropriation, and publication of private facts, but we decline to recognize the tort of false light publicity.” <i>Lake v. Wal-Mart Stores, Inc.</i>, 582 N.W.2d 231, 236 (Minn. 1998).</li> </ul>	None

*Mississippi*

Right of Publicity Statute	Common Law Rights	Postmortem Rights
None	Invasion of Privacy: <ul style="list-style-type: none"> <li>• The tort of invasion of privacy has “four theories underlying the cause of action” including “2. The appropriation of another’s identity for an unpermitted use.” <i>Candebat v. Flanagan</i>, 487 So. 2d 207, 209 (Miss. 1986) (citing <i>Deaton v. Delta Democrat Publ’g Co.</i>, 326 So. 2d 471, 473 (Miss. 1976)) (reaffirming Mississippi’s recognition of the tort of invasion of privacy).</li> </ul>	None

*Missouri*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
None	Invasion of Privacy & Right of Publicity: <ul style="list-style-type: none"> <li>• “The interest protected by the misappropriation of name tort ‘is 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 others.’”</li> <li>• “Recently, development of the misappropriation of name tort has given rise to a separate yet similar tort termed the ‘right of publicity,’ which is said to ‘protect a person from losing the benefit of their work in creating a publicly recognizable persona.’”</li> <li>• “[A] defendant is liable under the tort when it uses a plaintiff’s name without consent to obtain an advantage.” <i>Doe v. TCI Cablevision</i>, 110 S.W.3d 363, 368-69 (Mo. 2003) (en banc) (citations omitted).</li> </ul>	None

*Montana*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
None	Invasion of Privacy: <ul style="list-style-type: none"> <li>• “The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement to the right to the immunity of one’s person. The 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, and he has the absolute right to be let alone.” <i>Welsh v. Roehm</i>, 241 P.2d 816, 819 (Mont. 1952).</li> </ul>	None

*Nebraska*

Right of Publicity Statute	Common Law Rights	Postmortem Rights
None	None	<p>NEB. REV. STAT. § 20-202 (1979):</p> <ul style="list-style-type: none"> <li>• “Any person, firm, or corporation that exploits a natural person, name, picture, portrait, or personality for advertising or commercial purposes shall be liable for invasion of privacy.”</li> </ul> <p><i>Id.</i> § 20-205:</p> <ul style="list-style-type: none"> <li>• “If the subject of the alleged invasion of privacy is deceased, such consent may be given by the surviving spouse, if any, or by the personal representative.”</li> </ul> <p><i>Id.</i> § 20-208:</p> <ul style="list-style-type: none"> <li>• “The right of action for invasion of privacy . . . , with the single exception of the action arising out of exploitation of a person’s name or likeness in section 20-202, shall not be deemed to survive the death of the subject of any such invasion of privacy.”</li> </ul>



*Nevada*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
<p>NEV. REV. STAT. § 597.790 (1995):</p> <ul style="list-style-type: none"> <li>• “There is a right of publicity in the name, voice, signature, photograph or likeness of every person.”</li> </ul>	<p>Invasion of Privacy:</p> <ul style="list-style-type: none"> <li>• “The tort of invasion of privacy embraces four different tort actions: ‘(a) unreasonable intrusion upon the seclusion of another; or (b) appropriation of the other’s name or likeness; or (c) unreasonable publicity given to the other’s private life; or (d) publicity that unreasonably places the other in a false light before the public.’” Franchise Tax Bd. v. Hyatt, 335 P.3d 125, 139 (Nev. 2014) (quoting RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977)), <i>vacated on other grounds</i>, 136 S. Ct. 1277 (2016).</li> </ul>	<p>NEV. REV. STAT. § 597.790:</p> <ul style="list-style-type: none"> <li>• “The right endures for a term consisting of the life of the person and 50 years after his or her death, regardless of whether the person commercially exploits the right during his or her lifetime.”</li> </ul> <p>NEV. REV. STAT. § 597.800 (1993):</p> <ul style="list-style-type: none"> <li>• “The right of publicity . . . is freely transferable, in whole or in part, by contract, license, gift, conveyance, assignment, devise or testamentary trust by a person or his or her successor in interest.”</li> </ul>

*New Hampshire*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
None	<p>Invasion of Privacy:</p> <ul style="list-style-type: none"> <li>• “In <i>Remsburg v. Docusearch</i>, 816 A.2d 1001 (N.H. 2003), we adopted the tort of invasion of privacy by the appropriation of an individual’s name or likeness.” <i>Thompson v. C&amp;C Research &amp; Dev., LLC</i>, 898 A.2d 495, 500 (N.H. 2006).</li> </ul> <p>Right of Publicity:</p> <ul style="list-style-type: none"> <li>• “New Hampshire recognizes a cause of action for infringement of the right to publicity as set forth in the <i>Restatement (Second) of Torts. Remsburg v. Docusearch, Inc.</i>, 816 A.2d 1001 (N.H. 2003). Under this rule, “[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.” <i>Doe v. Friendfinder Network, Inc.</i>, 540 F. Supp. 2d 288, 303 (D.N.H. 2008) (quoting RESTATEMENT (SECOND) OF TORTS § 652C cmt. a. (AM. LAW INST. 1977)).</li> </ul>	None

*New Jersey*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
None	<p>Invasion of Privacy:</p> <ul style="list-style-type: none"> <li>• “[A] person has the right to enjoy the fruits of his own industry free from unjustified interference. It is unfair that one should be permitted to commercialize or exploit or capitalize upon another’s name, reputation or accomplishments merely because the owner’s accomplishments have been highly publicized.” <i>Palmer v. Schonhorn Enters., Inc.</i>, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967) (citations omitted).</li> </ul> <p>Right of Publicity:</p> <ul style="list-style-type: none"> <li>• “The right to exploit the value of [an individual’s] notoriety or fame belongs to the individual with whom it is associated.”</li> <li>• “A famous individual’s name, likeness, and endorsement carry value and an unauthorized use harms the person both by diluting the value of the name and depriving that individual of compensation.” <i>McFarland v. Miller</i>, 14 F.3d 912, 919, 923 (3d Cir. 1994).</li> </ul>	<ul style="list-style-type: none"> <li>• The court concluded “that infringement of a person’s right to exploit commercially his own name or the name of a character so associated with him that it identifies him in his own right is a cause of action that under New Jersey law survives the death of the person with whom the name has become identified.” <i>McFarland</i>, 14 F.3d at 914.</li> </ul>

*New Mexico*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
None	Invasion of Privacy & Right of Publicity: <ul style="list-style-type: none"> <li>• Noting that “the New Mexico appellate courts have occasionally been called upon to consider whether an invasion of privacy occurred.” <i>Moore v. Sun Publ’g Corp.</i>, 881 P.2d 735, 742 (N.M. Ct. App. 1994).</li> <li>• “Invasion of the ‘right of publicity,’ also known as ‘appropriation,’ consists of the exploitation of the plaintiff’s name or likeness, usually for commercial gain, as in the unauthorized use of the plaintiff’s name in an advertising endorsement for a product.” <i>Id.</i> at 742-43.</li> </ul>	None

*New York*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
<p>While there is no right of publicity statute, there is a criminal privacy statute: N.Y. CIV. RIGHTS LAW § 50 (2014):</p> <ul style="list-style-type: none"> <li>• “A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.”</li> </ul>	None	<p>None</p> <ul style="list-style-type: none"> <li>• N.Y. CIV. RIGHTS LAW § 50 specifically references “any living person.”</li> <li>• “However, as to those plaintiffs who are successors in interest, they have no cause of action under Civil Rights Law §§ 50, 51, as the statutory rights created by said law do not survive death.” James v. Delilah Films, Inc., 544 N.Y.S.2d 447, 451 (N.Y. Sup. Ct. 1989).</li> </ul>

*North Carolina*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
None	<p>Invasion of Privacy:</p> <ul style="list-style-type: none"> <li>• “A review of the current tort law of all American jurisdictions reveals cases identifying at least four types of invasion of four different interests in privacy,” the first being “appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.” Hall v. Post, 372 S.E.2d 711, 713 (N.C. 1988) (citing Renwick v. News &amp; Observer Publ’g Co., 312 S.E. 2d 405, 411 (N.C. 1984).</li> </ul>	None

*North Dakota*

Right of Publicity Statute	Common Law Rights	Postmortem Rights
None	None	None

*Ohio*

Right of Publicity Statute	Common Law Rights	Postmortem Rights
OHIO REV. CODE. ANN. § 2741.02(A) (West 2009): <ul style="list-style-type: none"> <li>•“Except as otherwise provided in this section, a person shall not use any aspect of an individual’s persona for a commercial purpose: (1) During the individual’s lifetime . . . .”</li> </ul>	Invasion of Privacy & Right of Publicity: <ul style="list-style-type: none"> <li>•“The interest which the law protects is that of each individual to the exclusive use of his own identity, and that interest is entitled to protection from misuse whether the misuse is for commercial purposes or otherwise.”</li> <li>•“We think that, in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture . . . . This right might be called a ‘right of publicity.’” <i>Zacchini v. Scripps-Howard Broad. Co.</i>, 351 N.E.2d 454, 458-59 (Ohio 1976), <i>rev’d on other grounds</i>, 433 U.S. 562 (1977) (citations omitted).</li> </ul>	OHIO REV. CODE. ANN. § 2741.02(A): <ul style="list-style-type: none"> <li>•“Except as otherwise provided in this section, a person shall not use any aspect of an individual’s persona for a commercial purpose: . . . (2) For a period of sixty years after the date of the individual’s death; or (3) For a period of ten years after the date of death of a deceased member of the Ohio national guard or the armed forces of the United States.”</li> </ul>

*Oklahoma*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
<p>OKLA. STAT. tit. 12, § 1448(A) (1986):</p> <ul style="list-style-type: none"> <li>• “Any person who uses a deceased personality’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified . . . shall be liable for any damages sustained by the person or persons injured as a result thereof . . . .”</li> </ul> <p><i>Id.</i> tit. 12, § 1449(A):</p> <ul style="list-style-type: none"> <li>• “Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without such person’s prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof, and any profits from the unauthorized use that are attributable to the use shall be taken into account in computing the actual damages.”</li> </ul>	<p>Invasion of Privacy:</p> <ul style="list-style-type: none"> <li>• “As early as 1978, this Court recognized a limited cause of action for invasion of privacy. In <i>McCormack</i>, we specifically adopted the Restatement of Torts’ recognition of appropriation of another’s name or likeness as the tort of invasion of privacy.” <i>Woods v. Prestwick House, Inc.</i>, 247 P.3d 1183, 1188 (Okla. 2011) (footnote omitted).</li> </ul>	<p>OKLA. STAT. tit. 12, § 1448(B):</p> <ul style="list-style-type: none"> <li>• “The rights recognized under this section are property rights, freely transferable, in whole or in part, by contract or by means of trust or testamentary documents, whether the transfer occurs before the death of the deceased personality, by the deceased personality or his or her transferees, or, after the death of the deceased personality, by the person or persons in whom such rights vest under this section or the transferees of that person or persons.”</li> </ul> <p><i>Id.</i> tit. 12, § 1448(G):</p> <ul style="list-style-type: none"> <li>• “No action shall be brought under this section by reason of any use of a deceased personality’s name, voice, signature, photograph, or likeness occurring after the expiration of one hundred (100) years from the death of the deceased personality.”</li> </ul>

*Oregon*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
None	Invasion of Privacy: <ul style="list-style-type: none"> <li>• “Four separate theories comprise the ‘umbrella’ tort referred to as invasion of privacy,” including “appropriation of another’s name or likeness.” <i>Mauri v. Smith</i>, 929 P.2d 307, 310 (Or. 1996).</li> </ul>	None

*Pennsylvania*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
42 PA. CONS. STAT. § 8316(a) (2003): <ul style="list-style-type: none"> <li>• “Any natural person whose name or likeness has commercial value and is used for any commercial or advertising purpose without the written consent of such natural person or the written consent of any of the parties authorized . . . may bring an action to enjoin such unauthorized use and to recover damages for any loss or injury sustained by such use.”</li> </ul>	Invasion of Privacy: <ul style="list-style-type: none"> <li>• “In Pennsylvania the development of a cause of action for invasion of privacy has been somewhat sporadic. Nevertheless, the existence of the right in this Commonwealth is now firmly established, despite the fact that its perimeter is not yet clearly delineated.” <i>Vogel v. W.T. Grant Co.</i>, 327 A.2d 133, 134 (Pa. 1974) (citations omitted).</li> </ul> Right of Publicity: <ul style="list-style-type: none"> <li>• “[W]e hold that plaintiff has an enforceable property right in the good will and commercial value of his name and photograph in connection with the game of golf.” <i>Hogan v. A.S. Barnes &amp; Co.</i>, No. 8645, 1957 WL 7316, at *6 (Pa. Ct. Com. Pl. June 19, 1957).</li> <li>• “We conclude, therefore, that defendant has misappropriated plaintiff’s ‘right of publicity’, but that this is simply an</li> </ul>	42 PA. CONS. STAT. § 8316 (c): <ul style="list-style-type: none"> <li>• “No action shall be commenced under this section more than 30 years after the death of such natural person.”</li> <li>• “If such natural person is deceased, any person, firm or corporation authorized in writing to license the commercial or advertising use of the natural person’s name or likeness by the natural person during the natural person’s lifetime or by will or other testamentary device; . . . then by the deceased person’s surviving spouse at the time of death . . . or, in a case where</li> </ul>



***Pennsylvania (continued)***

	application of the doctrine of unfair competition to a property right entitled 'right of publicity'. This, therefore, is not a separate cause of action, but rather is unfair competition under another label." <i>Id.</i> at *11.	there is no surviving spouse, then any other heir or group of heirs having at least a 50% interest in the deceased person's estate as provided for under law." <i>Id.</i> § 8316 (b)(3).
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***Rhode Island***

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
9 R.I. GEN. LAWS § 9-1-28(a) (2012): <ul style="list-style-type: none"> <li>• "Any person whose name, portrait, or picture is used within the state for commercial purposes without his or her written consent may bring an action in the superior court against the person so using his or her name, portrait, or picture to prevent and restrain the use thereof, and may recover damages for any injuries sustained by reason of such use. If the defendant shall have knowingly used the person's name, portrait, or picture in such manner as is prohibited or unlawful, the court, in its discretion, may award the plaintiff treble the amount of the damages sustained by him or her."</li> </ul>	None	None

*South Carolina*

Right of Publicity Statute	Common Law Rights	Postmortem Rights
None	<p>Invasion of Privacy &amp; Right of Publicity:</p> <ul style="list-style-type: none"> <li>• The appropriation tort for invasion of privacy “is based on the theory that a person has the right to control his or her identity.” <i>Gignilliat v. Gignilliat</i>, 684 S.E. 2d 756, 759 (S.C. 2009).</li> <li>• “South Carolina recognizes three distinct causes of action under the rubric of invasion of privacy,” and “[e]ncompassed in these three recognized torts is the infringement on the right of publicity; it is denominated wrongful appropriation of personality. It addresses the plaintiff’s right to the commercial protection of his name, likeness, or identity.” <i>Id.</i> at 759-60.</li> <li>• “Wrongful appropriation of personality involves the intentional, unconsented use of the plaintiff’s name, likeness, or identity by the defendant for his own benefit.” <i>Id.</i> at 759.</li> <li>• “We hold South Carolina does recognize the tort of infringement on the right of publicity.” <i>Id.</i> at 760.</li> </ul>	<ul style="list-style-type: none"> <li>• “We further hold the right to control the use of one’s identity is a property right that is transferable, assignable, and survives the death of the named individual.” <i>Id.</i></li> </ul>

*South Dakota*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
<p>S.D. CODIFIED LAWS § 21-64-2 (2015):</p> <ul style="list-style-type: none"> <li>• “No person may use any aspect of a personality’s right of publicity for a commercial purpose during the personality’s lifetime or for seventy years after the death of the personality without the express written consent of the personality, or if the personality is deceased without the express written consent of the personality’s next of kin or other person or entity that owns the right of publicity.”</li> </ul> <p><i>Id.</i> § 21-64-5:</p> <ul style="list-style-type: none"> <li>• “If the court finds a violation of § 21-64-2, the court may order: . . . (2) Damages in the amount of one thousand dollars or the actual damages, including profits derived from the unauthorized use, whichever amount is greater . . . .”</li> </ul>	<p>Invasion of Privacy:</p> <ul style="list-style-type: none"> <li>• “The gist of the cause of action in privacy cases is wrongful conduct of a personal character resulting in injury to the feelings, without regard to any effect which the publication may have on the injured party’s pecuniary interest or his standing in the community. The invasion must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities.”</li> </ul> <p>Montgomery Ward v. Shope, 286 N.W.2d 806, 808 (S.D. 1979) (citations omitted).</p>	<p>S.D. CODIFIED LAWS § 21-64-2:</p> <ul style="list-style-type: none"> <li>• The right is protected “for seventy years after the death of the personality.”</li> </ul>

*Tennessee*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
<p>TENN. CODE ANN. § 47-25-1103(a) (2009):</p> <ul style="list-style-type: none"> <li>• “Every individual has a property right in the use of that person’s name, photograph, or likeness in any medium in any manner.”</li> </ul> <p><i>Id.</i> § 47-25-1105(a):</p> <ul style="list-style-type: none"> <li>• “Any person who knowingly uses or infringes upon the use of another individual’s name, photograph, or likeness in any medium, in any manner directed to any person other than such individual, as an item of commerce for purposes of advertising products, merchandise, goods, or services, or for purposes of fund raising, solicitation of donations, purchases of products, merchandise, goods, or services, without such individual’s prior consent, or, in the case of a minor, the prior consent of such minor’s parent or legal guardian, or in the case of a deceased individual, the consent of the executor or administrator, heirs, or devisees of such deceased individual, shall be liable to a civil action.”</li> </ul>	<p>Invasion of Privacy:</p> <ul style="list-style-type: none"> <li>• “Assuming that invasion of privacy existed as a cause of action in Tennessee, this Court recognized the right to privacy as ‘the right to be let alone; the right of a person to be free from unwarranted publicity.’” <i>West v. Media Gen. Convergence, Inc.</i>, 53 S.W.3d 640, 643 (Tenn. 2001) (citation omitted).</li> </ul> <p>Right of Publicity:</p> <ul style="list-style-type: none"> <li>• “Tennessee’s common law thus embodies an expansive view of property. Unquestionably, a celebrity’s right of publicity has value. It can be possessed and used. It can be assigned, and it can be the subject of a contract. Thus, there is ample basis for this Court to conclude that it is a species of intangible personal property.” <i>State ex rel. Elvis Presley Int’l Mem’l Found. v. Crowell</i>, 733 S.W.2d 89, 97 (Tenn. Ct. App. 1987).</li> </ul> <p>TENN. CODE ANN. § 47-25-1106(e):</p> <p>“The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.”</p>	<p>TENN. CODE ANN. § 47-25-1104(a):</p> <ul style="list-style-type: none"> <li>• “The rights provided for in this part shall be deemed exclusive to the individual, subject to the assignment or licensing of such rights as provided in § 47-25-1103, during such individual’s lifetime and to the executors, heirs, assigns, or devisees for a period of ten (10) years after the death of the individual.”</li> </ul>

*Texas*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
<p>TEX. PROP. CODE ANN. § 26.002 (West 1987):</p> <ul style="list-style-type: none"> <li>• “An individual has a property right in the use of the individual’s name, voice, signature, photograph, or likeness after the death of the individual.”</li> </ul> <p><i>Id.</i> § 26.011:</p> <ul style="list-style-type: none"> <li>• “[A] person may not use, without the written consent of a person who may exercise the property right, a deceased individual’s name, voice, signature, photograph, or likeness in any manner, including: (1) in connection with products, merchandise, or goods; or (2) for the purpose of advertising, selling, or soliciting the purchase of products, merchandise, goods, or services.”</li> </ul>	<p>Invasion of Privacy:</p> <ul style="list-style-type: none"> <li>• “As usually defined, the right [to privacy] is said to be the right of an individual to be left alone, to live a life of seclusion, and to be free from unwarranted publicity. It is generally recognized that the right may be violated by . . . [a]ppropriation of the plaintiff’s name or likeness for the defendant’s benefit or advantage.” <i>Moore v. Charles B. Pierce Film Enters.</i>, 589 S.W.2d 489, 490 (Tex. Civ. App. 1979) (citation omitted).</li> </ul> <p>Right of Publicity:</p> <ul style="list-style-type: none"> <li>• “The tort of misappropriation of one’s name or likeness is generally referred to as the ‘Right of Publicity’ . . . which reads, ‘One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.’ . . . The right of publicity is designed to protect the commercial interests of celebrities in their identities.” <i>Henley v. Dillard Dep’t Stores</i>, 46 F. Supp. 2d 587, 590 (N.D. Tex. 1999) (quoting RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977)).</li> <li>• “To prove a cause of action for misappropriation, a plaintiff must show that his or her personal identity has been appropriated by the defendant for some advantage, usually of a commercial nature, to the defendant.” <i>Brown v. Ames</i>, 201 F.3d 654, 661 (5th Cir. 2000) (quoting <i>Moore</i>, 828 F.2d at 275).</li> </ul>	<p>TEX. PROP. CODE ANN. § 26.004:</p> <ul style="list-style-type: none"> <li>• “(a) The property right is freely transferable, in whole or in part, by contract or by means of trust or testamentary documents. (b) The property right may be transferred before or after the death of the individual.”</li> </ul> <p><i>Id.</i> § 26.006(e):</p> <ul style="list-style-type: none"> <li>• “The secretary of state may destroy all documents filed under this section after the 50th anniversary of the date of death of the individual whose property right they concern.”</li> </ul>

*Utah*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
UTAH CODE ANN. § 45-3-3(1) (West 1999): • “[T]he personal identity of an individual is abused if: (a) an advertisement is published in which the personal identity of that individual is used in a manner which expresses or implies that the individual approves, endorses, has endorsed, or will endorse the specific subject matter of the advertisement; and (b) consent has not been obtained for such use from the individual, or if the individual is a minor, then consent of one of the minor’s parents or consent of the minor’s legally appointed guardian.”	Invasion of Privacy: • “Invasion of privacy as a common law tort has evolved over the years into four separate torts. The <i>Restatement (Second) of Torts</i> (1977) defines four different types of invasion of privacy,” including “appropriation of the other’s name or likeness, as stated in § 652C.” Cox v. Hatch, 761 P.2d 556, 563 (Utah 1988).	None

*Vermont*

Right of Publicity Statute	Common Law Rights	Postmortem Rights
None	<p>Invasion of Privacy:</p> <ul style="list-style-type: none"> <li>• “The incidental use of a person’s name is not of course grounds for liability. ‘It is only when [the defendant] makes use of the name to pirate the plaintiff’s identity for some advantage of his own . . . that he becomes liable.’” <i>Staruski v. Cont’l Tel. Co.</i>, 581 A.2d 266, 268 (Vt. 1990) (citations omitted).</li> <li>• “One who appropriates to his [or her] own use or benefit the name or likeness of another is subject to liability to the other for invasion of his [or her] privacy.” <i>Id.</i> (quoting RESTATEMENT (SECOND) OF TORTS § 652c (AM. LAW INST. 1977)).</li> <li>• “In the exercise of our power as a common law court, we now hold that a damage remedy for invasion of privacy by the appropriation of a person’s identity, at least when done for commercial purposes, should be available in appropriate circumstances in Vermont as in other states.” <i>Id.</i></li> </ul>	None

*Virginia*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
<p>VA. CODE ANN. § 8.01-40(A) (2015):</p> <ul style="list-style-type: none"> <li>• “Any person whose name, portrait, or picture is used without having first obtained the written consent of such person, or if dead, of the surviving consort and if none, of the next of kin, or if a minor, the written consent of his or her parent or guardian, for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person’s name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use.</li> </ul> <p>And if the defendant shall have knowingly used such person’s name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award punitive damages.”</p> <p>VA. CODE ANN. § 18.2-216.1 (1977):</p> <ul style="list-style-type: none"> <li>• “A person, firm, or corporation that knowingly uses for advertising purposes, or for the purpose of trade, the name, portrait, or picture of any person resident in the Commonwealth, without having first obtained the written consent of such person, or if dead, of his surviving consort, or if none, his next of kin, or, if a minor, of his or her parent or guardian, as well as that of such minor, shall be deemed guilty of a misdemeanor and be fined not less than \$50 nor more than \$1,000.”</li> </ul>	None	<p>VA. CODE ANN. § 8.01-40(B) (2015):</p> <ul style="list-style-type: none"> <li>• “No action shall be commenced under this section more than 20 years after the death of such person.”</li> </ul>



*Washington*

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
<p>WASH. REV. CODE § 63.60.010 (2008):</p> <ul style="list-style-type: none"> <li>• “Every individual or personality has a property right in the use of his or her name, voice, signature, photograph, or likeness.”</li> </ul> <p>WASH. REV. CODE § 63.60.050 (1998):</p> <ul style="list-style-type: none"> <li>• “Any person who uses or authorizes the use of a living or deceased individual’s or personality’s name, voice, signature, photograph, or likeness, on or in goods, merchandise, or products entered into commerce in this state, or for purposes of advertising products, merchandise, goods, or services, or for purposes of fund-raising or solicitation of donations, or if any person disseminates or publishes such advertisements in this state, without written or oral, express or implied consent of the owner of the right, has infringed such right. An infringement may occur under this section without regard to whether the use or activity is for profit or not for profit.”</li> </ul>	<p>Invasion of Privacy:</p> <ul style="list-style-type: none"> <li>• “[W]e explicitly hold the common law right of privacy exists in this state and that individuals may bring a cause of action for invasion of that right.” Reid v. Pierce Cty., 961 P.2d 333, 339 (Wash. 1998) (en banc).</li> </ul>	<p>WASH. REV. CODE § 63.60.010 (2008):</p> <ul style="list-style-type: none"> <li>• “This right shall be freely transferable, assignable, and licensable, in whole or in part . . . . The property right does not expire upon the death of the individual or personality . . . .”</li> </ul> <p>WASH. REV. CODE § 63.60.040(1) (2004):</p> <ul style="list-style-type: none"> <li>• For individuals, the rights extend to “a period of ten years after the death of the individual.” <i>Id.</i> at (2).</li> <li>• For personalities, the rights extend to “a period of seventy-five years after the death of the personality.” <i>Id.</i></li> </ul>

*West Virginia*

Right of Publicity Statute	Common Law Rights	Postmortem Rights
None	Invasion of Privacy: <ul style="list-style-type: none"> <li>• “[I]n West Virginia, an ‘invasion of privacy’ includes . . . (2) an appropriation of another’s name or likeness.” <i>Crump v. Beckley Newspapers, Inc.</i>, 320 S.E.2d 70, 85 (W. Va. 1983).</li> <li>• “It is only when the publicity is given for the purpose of appropriating to the defendant’s benefit the commercial or other values associated with the name or likeness that the right of privacy is invaded.” <i>Id.</i> at 86.</li> </ul>	None

**Wisconsin**

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
<p>WIS. STAT. § 995.50(1) (2014):</p> <ul style="list-style-type: none"> <li>• “The right of privacy is recognized in this state.”</li> <li>• Invasion of privacy has several definitions, including “[t]he use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.” <i>Id.</i> § 995.50(2)(b).</li> <li>• “One whose privacy is unreasonably invaded is entitled to . . .</li> </ul> <p>(a) Equitable relief . . .</p> <p>(b) Compensatory damages based either on plaintiff’s loss or defendant’s unjust enrichment; and (c) A reasonable amount for attorney fees.” <i>Id.</i> § 995.50 (1).</p>	<p>Invasion of Privacy &amp; Right of Publicity:</p> <ul style="list-style-type: none"> <li>• “The appropriation cause of action protects not merely the right to be let alone but, rather, protects primarily the property rights in the publicity value of aspects of a person’s identity.” <i>Hirsch v. S.C. Johnson &amp; Son, Inc.</i> 280 N.W. 2d 129, 130 (Wisc. 1979).</li> <li>• “[W]e hold that a cause of action for appropriation of a person’s name for trade purposes exists at common law in Wisconsin.” <i>Id.</i> at 138.</li> </ul>	<ul style="list-style-type: none"> <li>• WIS. STAT. § 995.50 (2)(b) limits the right of privacy to “any living person.”</li> <li>• <i>Hagen v. Dahmer</i>, No. 94-C-0485, 1995 WL 822644, at *4 (E.D. Wis. Oct. 13, 1995) (holding that “to the extent there is a Wisconsin common law right of publicity, the Wisconsin courts would only recognize such a cause of action on behalf of a <i>living</i> person”); <i>see also</i> <i>Heinz v. Frank Lloyd Wright Found.</i>, No. 85-C-482-C, 1986 WL 5996, at *7 (W.D. Wis. Feb. 24, 1986) (“Although Wisconsin recognizes a right of publicity, it recognizes such a right only in living persons.”).</li> </ul>

**Wyoming**

<b>Right of Publicity Statute</b>	<b>Common Law Rights</b>	<b>Postmortem Rights</b>
None	None	None