Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis

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Abstract. Many states confer upon natural persons a “right of publicity” that renders unlawful the unauthorized use of a person’s name or other indicia of identity for purposes of trade. Efforts to reconcile publicity rights with the First Amendment and with principles of copyright preemption, however, have differed radically from one state or circuit to another, as well as within the scholarly community. In this Article, we present a comprehensive framework for integrating both First Amendment and copyright preemption principles into standard publicity analysis. Our framework eliminates much of the incoherence found in contemporary right of publicity case law by adopting a narrow reading of Zacchini v. Scripps-Howard Broadcasting Co. (to date, the only Supreme Court decision addressing the right of publicity), and by looking to principles of conflict preemption to cut through the indeterminacy of conventional preemption analysis under § 301 of the Copyright Act. More precisely, we argue that First Amendment and copyright preemption analysis tend to converge on two relatively simple principles: first, that publicity claims arising in the context of commercial speech usually should withstand both First Amendment and copyright preemption challenges; and second, that publicity claims arising in the context of noncommercial speech may proceed only when, among other things, the exercise of publicity rights plausibly can be justified as advancing a state interest in protecting personal privacy or individual autonomy, or (possibly) in preventing consumers from erroneously perceiving that the plaintiff endorses a product that she does not, in fact, endorse. Viable publicity claims involving noncommercial speech should be small in number, however; and should the Supreme Court someday opt to eliminate the distinction between commercial and noncommercial speech regulation, or to overrule Zacchini in favor of a more speech-protective standard, the number of viable claims within both classes should shrink further still.

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I. Introduction

Laws granting individuals a “right of publicity”—the right to prevent the unauthorized use of their names, likenesses, and other indicia of identity for commercial or other purposes—originated over a century ago, and are now in place (either by statute or common law) in well over half of the states. It is, therefore, surprising that the answers to fundamental questions concerning the relationship of publicity rights to
federal law can vary so much from one state or circuit to another. Consider, for example, the following fact patterns based on real-world disputes, in which judicial and scholarly opinion over the viability of publicity claims is all over the map:

- The author of a motion picture, sound recording, or photograph captures a person’s performance or image, with her consent, in a copyrightable work. The performer thereafter claims that a particular exploitation of the video, recording, or photo, to which the performer has not expressly consented, infringes the performer’s right of publicity. Does copyright law preempt the performer’s assertion of publicity rights because those rights would interfere with the (otherwise lawful) exercise of copyright rights in the work? Although many decisions appear to answer this question affirmatively, other decisions have favored publicity plaintiffs. Among the latter are recent cases involving claims by Jackson Browne against the Republican National Committee, based upon the latter’s use of Browne’s recording of *Running on Empty* in a McCain campaign commercial;\(^1\) and another involving a claim by the late Godfather of Soul James Brown against a firm that owned the

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\(^1\) Browne v. McCain, 611 F. Supp. 2d 1062 (C.D. Cal. 2009) (denying motion to strike Browne’s right of publicity claim, on the ground that Browne had demonstrated a possibility of success). Browne also claims copyright ownership of the song, and that the defendants’ use infringes his copyright. *See id.* at 1065. The opinion does not state, however, who owns the copyright in the sound recording (the album originally was released on the Elektra/Asylum label) or whether that entity objected to the defendants’ use.
copyright to certain photographs of Brown, arising from the firm’s display of copies of those photographs on its website to advertise its willingness to license its copyrights to third parties.\footnote{See Brown v. ACMI Pop Div., 873 N.E. 2d 954, 959-64 (Ill. App.), appeal denied, 879 N.E.2d 929 (Ill. 2007).}

- An artist depicts a real person’s image, without that person’s consent, on a shirt, doll, or poster, or in a video game or comic book or other merchandise. Does the First Amendment—or copyright law, insofar as it protects pictorial, graphic, and sculptural works—prevent the unwilling subject from successfully asserting a publicity claim against the artist’s marketing of the merchandise? Courts addressing claims of this type (involving performers as varied as the Three Stooges,\footnote{Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001).} Tiger Woods,\footnote{ETW Corp. v. Jireh Publ’g, Inc., 332 F.3d 915 (6th Cir. 2003).} and “Lady Kier” Kirby\footnote{See Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607 (Ct. App. 2006).} have reached differing outcomes. In a recent variation on this theme, several commentators argued that Ty Inc.’s marketing of “Sweet Sasha” and “Marvelous Malia” dolls that evoked the image of President Obama’s daughters\footnote{See Ty Denies Obama Girls Inspired Sweet Sasha, Marvelous Malia, CNN (Jan. 23, 2009), available at http://www.cnn.com/2009/LIVING/01/22/obama.dolls/. Ty later renamed the dolls. See Stephen M. Silverman, Toy Company Renames Malia, Sasha} likely violated the children’s right of publicity.\footnote{4}
A company stages a show that includes an actor’s imitation of a famous performer’s actual performance, as it once might have occurred, complete with the performance of copyrighted songs (with consent of the relevant copyright owners). Once again, the question arises whether the First Amendment, or copyright law, permits the owner of the original performer’s publicity rights to enjoin the staging of what might appear to be a copyrightable (dramatic) work. To date, courts have shut down unauthorized Elvis impersonators and Beatles tribute bands; another court, however, permitted a play based on the life of Janis Joplin, including one act that replicated a Joplin concert, to proceed.

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In one of the more sensational right of publicity cases in recent memory, Hustler Magazine published nude photographs of Nancy Toffoloni Benoit, a former model and professional wrestler, who was murdered by her husband, wrestler Christopher Benoit, in 2007.\textsuperscript{10} Ms. Benoit had posed for the photos (which she allegedly believed had been destroyed) approximately twenty years earlier.\textsuperscript{11} The district court concluded that the publication was lawful under a “newsworthiness” exception to Georgia’s common law right of publicity, but the Court of Appeals, citing among other things the decedent’s interest in privacy, reversed.\textsuperscript{12} \textit{Toffoloni} is one of many cases that involve the question of whether models and actors can assert right of publicity claims that interfere with the publication of sexually explicit, but nevertheless copyrightable and possibly nonobscene, works in which they appear.\textsuperscript{13}

The confusion reflected in the differing approaches to cases like the ones above can be attributed in large part to two sources. The first is the lingering uncertainty surrounding the relationship of publicity claims to the First Amendment. Because the Supreme Court has addressed (and upheld) the constitutionality of publicity rights in only one case, \textit{Zacchini v. Scripps-Howard Broadcasting Co.},\textsuperscript{14} the outcome of other First

\begin{itemize}
  \item \textsuperscript{10} See Toffoloni v. LFP Publ. Group, LLC, __ F.3d __, 2009 WL 1793180 (11th Cir. 2009). Christopher also killed the couple’s child and, then, himself. \textit{See id.} at *1.
  \item \textsuperscript{11} \textit{See id.}
  \item \textsuperscript{12} \textit{See id.} at *4-6.
  \item \textsuperscript{13} \textit{See cases cited infra notes 54-55.}
  \item \textsuperscript{14} 433 U.S. 562, 573 (1977).
\end{itemize}
Amendment challenges to publicity rights depends on how broadly or narrowly courts should construe Zacchini. The second is the uncertainty surrounding the relationship of publicity claims to federal copyright law. Although the Copyright Act expressly preempts some state law claims that interfere with the federal copyright scheme, it does so in such cryptic language that courts plausibly could reach virtually any position on the question of whether copyright always, sometimes, or never preempts the exercise of state publicity rights. Given these dual uncertainties, it’s not surprising that the resolution of publicity claims often seems unpredictable and incoherent.

In this Article, we make two principal sets of claims, the first relating to the First Amendment and the other to copyright. With respect to the First Amendment, we argue that the exercise of state publicity rights is a content-based regulation of speech; that publicity claims arising in connection with commercial speech therefore must satisfy a form of intermediate scrutiny, while publicity claims arising in connection with noncommercial speech must satisfy a higher standard; and that most applications of publicity rights in connection with commercial speech are probably constitutional, whereas many applications in connection with noncommercial speech are not. To the extent Zacchini remains good law, however, the universe of publicity claims that arise in connection with noncommercial speech but nevertheless withstand First Amendment challenge is not an empty set. To reconcile Zacchini with First Amendment law as it has developed in the thirty-two years since that case was decided, we will argue for a reading of Zacchini that limits the set of viable claims to those in which the plaintiff can demonstrate a compelling state interest in vindicating personal privacy or autonomy, or (possibly) in preventing deceptive marketing. With respect to copyright, we argue that
the fundamental question is whether the exercise of publicity rights would substantially interfere with the copyright scheme that Congress envisioned in enacting the 1976 Copyright Act. In this regard, we think it is reasonably clear that Congress did not intend for copyright to preempt then-existing state laws that target invasions of privacy (or, by extension, autonomy) or that protect against deceptive marketing. At the same time, given Congress's reluctance to confer upon performers and models so-called "neighboring rights" that can interfere with the ability of copyright owners to market or profit from their works, it seems unlikely that Congress would have tolerated applications of state publicity rights that, in effect, create an expansive neighboring rights entitlement. We therefore conclude that First Amendment and copyright preemption principles largely converge in permitting most publicity claims involving commercial speech to proceed, while severely limiting (but not eliminating) the class of viable claims involving noncommercial speech; and we propose a practical framework for screening out state publicity rights that overstep their proper boundaries. Although the application of our framework may involve close questions in some instances, we think that the vast majority of improper cases can be resolved on preliminary motions. This will have the added benefit of minimizing potential chilling effects due to defendants' inability to finance a war of attrition against plaintiffs who (often) hail from the entertainment and sports elite.

It is equally important to note what we are not claiming for purposes of the present analysis. First, we are arguing neither for nor against publicity rights as a matter of policy; our purpose here is only to delineate how far publicity rights may extend given the existing scope of First Amendment and copyright entitlements. Given those existing entitlements, only a subset of the standard rationales for publicity rights can be strong
enough to sustain those rights in the context of noncommercial speech. Second, for present purposes we assume that, at some level, Zacchini remains good law notwithstanding its tension with some other strands of the Court’s First Amendment jurisprudence. Third, we take no position in this paper on the longstanding debate over the distinction between commercial and noncommercial speech regulation. Instead, we assume that the case law distinguishing commercial from noncommercial speech remains valid, and that courts working within the existing frames of reference must do their best to apply these distinctions in a principled fashion. To the extent some future Supreme Court either overrules Zacchini, or extends core First Amendment protection to commercial speech, fewer applications of the right of publicity will survive than under the analysis presented here.

Part II provides an overview of publicity rights and their potential conflicts with the First Amendment and with copyright law. Part III presents our proposed First Amendment analysis; Part IV, our copyright preemption analysis; and Part V an integrated, three-step approach to resolving the tensions among these bodies of law. Part VI presents our analysis of the illustrative examples presented in the introductory paragraphs above. Part VII concludes.

II. Publicity Rights, the First Amendment, and Copyright Preemption

A. Right of Publicity Basics

The right of publicity is a right, existing in about thirty states, that entitles a natural person to prevent certain unauthorized uses of her name or other indicia of identity. One branch of the right of publicity derives from the law of privacy. In 1902, 15

the New York Court of Appeals held that a plaintiff failed to state a claim for emotional distress, based upon the unauthorized use of her photograph in a commercial advertisement. Reaction to this decision prompted the New York legislature to enact a statute in 1903, making it unlawful to use a person’s name, portrait, or picture for advertising purposes or for purposes of trade. The first case recognizing a cause of action on similar facts, however, was the Georgia Supreme Court’s 1905 decision in Pavesich v. New England Life Insurance Co. The plaintiff in Pavesich sat for a photographic portrait; without his consent, the photographer permitted New England Life to use the image in an advertisement. The Georgia court held that the plaintiff stated a claim for violation of his common-law right to privacy. Other decisions have followed Pavesich in recognizing a privacy-based right to prevent certain uses of one’s name or likeness. This approach is reflected in Prosser’s division of the right of privacy into four distinct torts, the fourth of which is “the appropriation for the defendant’s advantage of the plaintiff’s name or likeness,” as well as in the Restatement (Second) of Torts,

17 N.Y. STAT. ch. 132, § 1 (1903).
18 50 S.E. 68 (Ga. 1905).
19 See id.
21 See, e.g., Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 236 (Minn. 1998).
which states that “[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 privacy.”

The other strand of the right of publicity frames the right as protecting a property, rather than exclusively a privacy, interest. An early case adopting this view is the Second Circuit’s 1953 decision in *Haelan Laboratories, Inc. v. Topps Chewing Gum.* Certain major league baseball players agreed to pose exclusively for Haelan’s baseball cards. A third party, Russell, allegedly induced certain players to breach their contracts with Haelan and sign with Russell; Russell then assigned its contracts with these players to Haelan’s competitor Topps. Because Topps had not induced the breaches procured by

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23 *Restatement (Second) of Torts* § 652C (1977). The Restatement commentary states that this principle applies whether the defendant’s use is commercial or noncommercial, *see id.* cmt. b, and that “only when . . . publicity is given for the purpose of appropriating to the defendant’s benefit the commercial or other values associated with the name or the likeness is the right of privacy invaded,” *id.* cmt. d. Some courts interpret § 625C as authority for rejecting a plaintiff’s claim, unless the plaintiff can demonstrate that her name or likeness has commercial value. *See, e.g., Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1446 (11th Cir. 1998)* (discussing Alabama law). The Restatement of Unfair Competition appears to be disapprove of this approach. *Restatement (Third) of Unfair Competition* [hereinafter RUC] §§ 46 cmt. d, 49 cmt. d.

24 202 F.2d 866 (2d Cir. 1953).

25 *Id.* at 867.

26 *See id.*
Russell, Topps could not be liable for tortious interference with respect to these contracts.\textsuperscript{27} The question before the court, therefore, was whether the players had assigned to Haelan the right to exploit the players’ names and likenesses (in which case Topps’s use of the names and likenesses on its cards invaded Haelan’s property interest in those names and likenesses) or merely had released Haelan from liability for invasion of the players’ privacy (in which case Topps was not invading a protected property interest).\textsuperscript{28} Finding no case law on point, Judge Frank concluded, without much explanation, that New York law would recognize both a privacy and a property right in the use of one’s name and likeness for commercial purposes; and that to the extent a property right existed, that right (unlike the privacy right) was assignable.\textsuperscript{29}

Subsequent case law from New York state courts has repudiated this view of the right of publicity under New York law; in New York, the right is said to remain exclusively a privacy-based right.\textsuperscript{30} Other courts and legislatures, however, have found

\textsuperscript{27} See id. Topps could be liable for tortious interference with respect to the breaches it allegedly procured itself. \textit{See id.} at 867.

\textsuperscript{28} See \textit{id.} at 868.

\textsuperscript{29} See \textit{id.}

\textsuperscript{30} See Pirone v. MacMillan, Inc., 894 F.2d 579, 585-86 (2d Cir. 1990) (stating that, under New York law, the right of publicity is exclusively a statutory, non-descendible, privacy right). The fact that celebrities nevertheless can assert claims under New York law for uses that involve their public images suggests that the statute also protects autonomy interests as distinct from privacy interests; we distinguish the two below in Part IIIC & note 260.
the property analogy persuasive. The Restatement of Unfair Competition takes this view, stating that “[o]ne who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identify for purpose of trade is subject to liability,”\(^{31}\) and (in commentary) that the right is in the nature of a property right.\(^{32}\) Following this approach, most states that recognize the right agree that the right may be assigned, either \textit{inter vivos} or through testamentary transfer;\(^{33}\) that it persists for a period of time following a person’s death;\(^{34}\) that the right may be exercised after death regardless of whether the person exploited his or her name or image during his

\(^{31}\) RUC § 46.

\(^{32}\) See id. cmt. g.


\(^{34}\) See, e.g., IND. CODE § 32-36-1-8 (granting publicity rights lasting 100 years beyond death); CAL. CIVIL CODE § 3344.1(g) (granting publicity rights lasting 70 years beyond death); TENN. CODE § 47-25-1104 (granting publicity rights lasting 10 years beyond death, and possibly longer unless not used for two consecutive years). States that continue to view the right of publicity as sounding only in privacy law, including New York, do not recognize postmortem rights. See Shaw Fam. Archives Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 314 (S.D.N.Y. 2007) (citations omitted).
or her lifetime; and that the right may be exercised even by persons who generally seek to publicize their names and identities (i.e., by celebrities).

Rationales for recognizing a property interest in names or other indicia of identity vary. In general, advocates of the right find parallels with the standard justifications for other bodies of intellectual property law. For some, the right of publicity is justified under a Lockean-influenced theory that a person is generally entitled to the fruit of his labor, including whatever labor went into creating his persona. For others, it is the investment of personality that matters, for reasons analogous to the European rationale for copyright and moral rights protection, or the interest in preserving one’s right to

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35 See, e.g., Martin Luther King Jr., Center, 296 S.E.2d at 706 (“[W]e find no reason to protect after death only those who took commercial advantage of their fame.”); CAL. CIV. CODE § 3344.1(h).

36 See RUC § 46 cmt. b. The Restatement, and the cases on which it bases the proposition that celebrities may assert claims for violation of their rights of publicity, disapprove of cases such as O’Brien v. Pabst Sales Co., 124 F.2d 167, 170 (5th Cir. 1941), holding that a plaintiff who actively seeks publicity by licensing his image for some purposes cannot state a claim.


autonomous self-definition. Others cite instrumental reasons, arguing for example that publicity rights encourage the investment of resources in creating a public good (celebrity) that people crave, or enable celebrities to avoid the premature dissipation of a valuable asset, their fame. Finally, the right of publicity at least indirectly may discourage uses that are likely to confuse consumers into believing (erroneously) that the plaintiff endorses a particular product, though to this extent the right largely duplicates protections afforded under trademark and false advertising law. Critics of the right, by contrast, argue that few if any of these rationales present a compelling case for the

39 See Mark P. McKenna, The Right of Publicity and Autonomous Self-Definition, 57 U. Pitt. L. Rev. 225, 279-93 (2005); see also 1 McCARTHY, supra note 15, § 1:7 (viewing as self-evident the proposition that the individual has a better claim than anyone else to the use of his name or other indicia of personality).


recognition of property-like publicity rights. Although we agree with many (though not all) of the critics’ arguments, we will assume for purposes of this Article that, in an appropriate case, each of the rationales mentioned above can be legitimate state interests; the question we pose is what characterizes an appropriate case. As we will show in Parts III and IV, the answer depends in large part on the nature of the defendant’s use.

B. Current Approaches to Resolving Tensions Between the Right of Publicity and the First Amendment

An initial set of problems centers on the relationship between the right of publicity and the First Amendment. One approach, reflected in the Restatement and the laws of some states, attempts to defuse potential tensions between free speech and the right of publicity by defining a wide variety of unauthorized uses as not “for purposes of trade,” and therefore not actionable. In particular, Restatement § 47 states:

43 See, e.g., Dogan & Lemley, supra note 42, at 1180-90 (2006); Madow, supra note 37, at 178-238; McKenna, supra note 39, at 252-79.

44 Do people really need an additional incentive to invest in becoming celebrities, for example—and even if so, is there a social interest in gratifying that need?

45 It seems reasonably clear that both legislative enactments of right of publicity laws, and judicial enforcement of publicity rights, involve state action implicating the First Amendment. See New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (holding that when a litigant invokes the courts to intervene regarding speech, it is sufficient to qualify as state action implicating the First Amendment); see also Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991); Zacchini, 433 U.S. at 573.
The name, likeness, and other indicia of a person’s identity are used “for purposes of trade” under the rule stated in § 46 if they are used in advertising the user’s goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user. However, use “for purposes of trade” does not ordinarily include the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.46

Under this principle, the right of publicity does not forbid authors from publishing unauthorized biographies or from using the biography subject’s photo on the cover of the book, or from using the subject’s name to advertise the book.47 Similarly, the right of publicity “ordinarily” does not forbid the marketing of a motion picture using actors to depict real people,48 or the publication of news stories involving real people,49 or the inclusion of real people as characters in works of fiction.50

46 RUC § 47.

47 See id. cmts. a, c; Matthews, 15 F.3d at 436-39; Jeffries v. N.Y. Evening Journal Publ. Co., 124 N.Y.S. 780, 780 (S. Ct. 1910). But see Cason v. Baskin, 20 So. 2d 243, 244-53 (Fla. 1945) (holding that plaintiff stated a claim based on author’s description of her in the book Cross Creek).

The Restatement nevertheless contemplates some circumstances in which the tension between the right of publicity and free speech should be resolved in favor of the right of publicity. First, the Restatement cautions that “if the name or likeness is used solely to attract attention to a work that is not related to the identified person, the user may be subject to liability for a use of the other’s identity in advertising.”  

In a case arguably involving this type of fact pattern, a district court concluded that the hip-hop band OutKast had violated civil rights icon Rosa Parks’s right of publicity, by marketing a recording of a song titled “Rosa Parks” that, on its face, appeared to have nothing to do with either Ms. Parks or civil rights. The Sixth Circuit reversed, however, finding a

49 See RUC § 47 cmt. c; see also Zacchini, 433 U.S. at 578 (stating that “news” is protected speech under the First Amendment); Eastwood v. Sup. Ct., 149 Cal. App. 3d 409, 421 (1983).

50 See RUC § 47 cmt. c; see also Matthews, 15 F.3d at 436, 439; Leopold v. Levin, 259 N.E.2d 250, 256 (Ill. 1970). But see Messenger ex rel. Messenger v. Gruner + Jahr Printing & Publ., Inc., 727 N.E.2d 549, 555 (N.Y. 2000) (stating that “invented biographies” may be “so infected with fiction, dramatization or embellishment that [they] cannot be said to fulfill the purpose of the newsworthiness exception” to liability under New York law). Defamatory content, of course, remains actionable under defamation law, and copyright law might forbid use of the photo without the photographer’s permission. But the right of publicity normally should pose no obstacle.

51 RUC § 47 cmt. c.
genuine issue of material fact whether the use at issue was “solely to attract attention” to a song that was not related to Ms. Parks.  

Second, the Restatement asserts that “if a photograph of the plaintiff is included in the defendant’s publication merely for the purpose of appropriating the plaintiff’s commercial value as a model rather than as part of a news or other communicative use, the defendant may be subject to liability for a merchandising use of the plaintiff’s identity.” Consistent with this statement, a few courts have concluded that the publication of photographs in (often sexually explicit) magazines, videos, or websites, without the photographic subjects’ authorization, constituted an appropriation of modeling services. In other cases, however, courts have ruled for defendants on a variety of theories.

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53 RUC § 47 cmt. c.

The Restatement commentary also might seem consistent, in broad measure, with
the outcome in Zacchini v. Scripps-Howard Broadcasting Co.,56 to date the only U.S.
Supreme Court case addressing the interplay of publicity rights with the First
Amendment. The plaintiff in Zacchini performed a 15-second “human cannonball” act at
state fairs.57 Over Zacchini’s objection, a television news crew filmed his entire act at the
Ohio State Fair and broadcast it during the evening news.58 The U.S. Supreme Court
rejected the defendant’s argument that the First Amendment precluded Zacchini’s claim
for damages under Ohio’s right of publicity, noting that the defendants had appropriated
his entire act and thus deprived him of “personal control over the commercial display and

resembling boxer); Gritzke v. M.R.A. Holdings, LLC, No. 4:01CV495-RH, 2002 WL

55 See, e.g., Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1326 (11th Cir. 2006) (holding
that bookseller was not liable for selling a photography book that displayed plaintiff’s
image on the cover); Barnhart v. Paisano Publ’ns, LLC, 457 F. Supp. 2d 590, 596 (D. Md. 2006) (holding that plaintiff failed to state a claim, where defendant included her
photograph in a magazine despite defendant’s alleged lack of consent to being
photographed); Lane v. MRA Holdings, LLC, 242 F. Supp. 2d 1205, 1212-15 (M.D. Fla.
2002) (holding that inclusion of plaintiff in video did not violate Florida right of
publicity); Ann-Margret v. High Soc’y Mag., Inc., 498 F. Supp. 401, 403-07 (S.D.N.Y.
1980).


57 See id. at 563.

58 See id. at 563-64.
exploitation of his personality and the exercise of his talents.”

On the type of issue presented in *Zacchini*, however, the Restatement is equivocal, stating that although “[l]iability has been imposed . . . in connection with an unauthorized broadcast of the plaintiff’s performance or a sustained imitation of the plaintiff’s performing style or performing persona that is marketed by the defendant as a simulation of the plaintiff’s performance,” and liability may be appropriate when the unauthorized use “falsely suggests the participation or endorsement of the plaintiff” or infringes the plaintiff’s federal or state common-law copyright, “[b]roader restrictions on the use of another’s identity in entertainment, news, or other creative works threaten significant public and constitutional interests.” Continuing, the commentary notes that “some courts have engaged in any analysis analogous to the determination of fair use in copyright law,” analyzing the “substantiality and market effect of the appropriation . . . in light of the informational or creative content of the defendant’s use.”

Thus:

In cases of imitation, the public interest in competition and in avoiding the monopolization of successful styles, together the interest in the production of new works including parody and satire, will ordinarily outweigh any adverse effect on the plaintiff’s market. When the defendant’s appropriation consists, not of an imitation, but of an actual performance by the plaintiff, the greater likelihood of commercial injury to the plaintiff

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59 *Id.* at 510; *see also id.* at 511 n.11.

60 RUC § 47 cmt. d.

61 *Id.*
and the reduced public interest in permitting the use may justify relief in exceptional circumstances.\textsuperscript{62}

The commentary concludes by approving the result in \textit{Zacchini}, “in light of the substantiality and likely market effect of the appropriation,”\textsuperscript{63} but also suggesting that if the broadcast had occurred two years after the performer’s death, “[a] court may properly conclude in light of the absence of any injury to the personal interests of [the performer] and the minimal market effect of the appropriation on” his heir that the broadcaster would not be liable.\textsuperscript{64} In contrast to the Restatement’s more skeptical approach, however, some cases have held or suggested that defendants could be liable for mounting stage shows designed to imitate performances by celebrities such as the Beatles or Elvis Presley.\textsuperscript{65}

Third, the Restatement takes the position that “[t]he sale of merchandise bearing a person’s name or likeness ordinarily constitutes a use of the identity for purposes of trade,” such that “[a]n unauthorized appropriation of another’s name or likeness for use on posters, buttons, or other memorabilia is thus ordinarily actionable as an infringement of the right of publicity.”\textsuperscript{66} The viability of the distinction between merchandise and expressive works, however, has been challenged in many recent decisions. In \textit{Comedy III Productions v. Gary Saderup, Inc.},\textsuperscript{67} for example, the plaintiffs (assignees of the Three

\textsuperscript{62} \textit{Id.}

\textsuperscript{63} \textit{See id.} illus. 7.

\textsuperscript{64} \textit{See id.} illus. 8.

\textsuperscript{65} \textit{See supra} note 8.

\textsuperscript{66} RUC § 47 cmt. b.

\textsuperscript{67} 106 Cal. Rptr. 2d 126 (2001).
Stooges’ rights of publicity) objected to the unauthorized marketing of tee shirts reproducing the defendant’s drawing depicting Moe, Larry, and Curly. The California Supreme Court rejected the argument that the tee shirts were nothing more than merchandise, stating that “First Amendment doctrine does not disfavor nontraditional media of expression.” Nevertheless, the court devised a type of balancing test, borrowed in part from copyright’s fair use doctrine, that focuses on the “transformativeness” of the defendant’s depiction:

When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.

On the other hand, when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity. Accordingly, First Amendment protection of such works outweighs whatever interest the state may have in enforcing the right of publicity. The right-of-publicity holder continues to enforce the right to monopolize the production of conventional, more or less fungible, images of the celebrity.

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68 See id. at 131.

69 Id. at 135.

70 Id. at 404-05.
Elaborating on this standard, the court asserted that “[a]nother way of stating the inquiry is whether the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized”; 71 emphasized that “[t]he inquiry is more quantitative than qualitative, asking whether the literal and imitative or the creative elements predominate in the work”; 72 and suggested that, “in determining whether a work is sufficiently transformative, courts may find useful,” though not necessarily dispositive, “a subsidiary inquiry . . . does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted?” 73 Applying these standards, the court concluded that the defendant’s “literal, conventional depictions of the Three Stooges” reflected “no significant transformative or creative contribution,” and thus that the plaintiff’s publicity right outweighed the defendant’s interest in freedom of expression. 74

Other cases applying Comedy III’s transformativeness test have resulted in victories for defendants. In ETW Corp. v. Jireh Publishing, Inc., 75 for example, the Sixth Circuit concluded that the defendant’s limited edition serigraphs and lithographs, depicting Tiger Woods golfing at the 1997 Masters Tournament while other legendary golfers from times appear in the background, 76 had sufficient transformative elements to

71 Id. at 406.
72 Id. at 407.
73 Id.
74 See id. at 409-10.
75 332 F.3d 915 (6th Cir. 2003).
76 See id. at 918-19.
outweigh Woods’ assertion of the right of publicity.\textsuperscript{77} Two other California decisions similarly ruled for the defendants. In \textit{Winter v. DC Comics},\textsuperscript{78} the court held that a comic book’s depiction of two villains based on musicians Edgar and Johnny Winter sufficiently transformed the raw material to overcome the musicians’ publicity claim.\textsuperscript{79} And in \textit{Kirby v. Sega of America, Inc.},\textsuperscript{80} the court held that a video game character resembling the lead singer of the musical group “Deee-Lite” reflected “sufficient expressive content to constitute a ‘transformative work’” under \textit{Comedy III}, thus providing an absolute First Amendment defense to Kirby’s right of publicity claim.\textsuperscript{81}

The \textit{Comedy III} “transformativeness” approach has not met with universal approval, however. Some cases, both before and after \textit{Comedy III}, appear to have applied greater First Amendment scrutiny to publicity rights. In \textit{Cardtoons, L.C. v. Major League Baseball Players Association},\textsuperscript{82} for example, the court, after weighing all of the asserted policy reasons for recognizing a right of publicity, concluded that none of them sufficed to overcome the declaratory judgment plaintiff’s interest in marketing a line of parody baseball cards skewering real-life stars such as Barry Bonds.\textsuperscript{83} Similarly, in \textit{C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media},

\textsuperscript{77} See \textit{ETW}, 332 F.3d at 936-38.

\textsuperscript{78} 69 P.3d 473 (Cal. 2003).

\textsuperscript{79} See \textit{id.} at 479.

\textsuperscript{80} 50 Cal. Rptr. 3d 607 (Ct. App. 2006).

\textsuperscript{81} See \textit{id.} at 616-18.

\textsuperscript{82} 95 F.3d 959 (10\textsuperscript{th} Cir. 1996).

\textsuperscript{83} See \textit{id.} at 973-76.
the Eighth Circuit concluded that a declaratory judgment plaintiff’s First Amendment interest in marketing a fantasy baseball league, using real players’ names and statistics, outweighed the players’ right to control the unauthorized use of their names and other identifying characteristics. Both cases engaged in an ad hoc balancing of competing interests, without articulating any particular test or the appropriate level of First Amendment scrutiny. On the other hand, one case that did articulate a high standard of First Amendment scrutiny, *Hoffman v. Capital Cities/ABC, Inc.*, did so on rather peculiar facts. The plaintiff, actor Dustin Hoffman, objected to the Los Angeles Times Magazine’s inclusion, in a fashion edition of L.A. Times Magazine, of a photograph of Hoffman’s head (from the movie *Tootsie*) superimposed on the body of another actor wearing a dress. The Ninth Circuit, purporting to apply California law, concluded that, because the magazine edition at issue was not purely commercial speech, Hoffman (a public figure) needed (and failed) to show “actual malice,” meaning that the defendant knew that the depiction was false or acted in reckless disregard of its truth or falsity, in order to recover under the right of publicity. Oddly, the court never explained why Hoffman would have to show falsity (or reckless disregard) with respect to a cause of action for which falsity is not an element. Perhaps, though, the case can be read as

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84 505 F.3d 818 (8th Cir. 2007).
85 See id. at 825.
86 255 F.3d 1180 (9th Cir. 2001).
87 See id. at 1183.
88 See id. at 1188.
standing for the proposition that in other cases involving noncommercial speech, some degree of heightened First Amendment scrutiny necessarily applies.\(^{89}\)

By contrast, some other courts have opted for a much lower degree of First Amendment oversight. The most significant such case in recent years is probably *Doe v. TCI Cablevision*.\(^{90}\) The plaintiff, former professional hockey player Tony Twist, alleged that the defendants’ inclusion of a mobster character named Anthony “Tony Twist” Twistelli in its *Spawn* comic book series violated the real Tony Twist’s right of publicity under Missouri law.\(^{91}\) The court rejected *Comedy III*’s transformativeness test as being insufficiently protective of plaintiffs’ interests in controlling the use of their names and likenesses.\(^{92}\) In place of the *Comedy III* standard, the court adopted a “predominant purpose” test which focuses on whether the defendant’s predominant purpose for using the plaintiff’s name or identity was commercial or expressive.\(^{93}\) Applying this test, the

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\(^{89}\) Whether the public believes that the person whose indicia have been appropriated endorses the product being advertised is relevant to a false endorsement claim; and in some cases the right of publicity, like the law relating to false endorsement, may help to prevent deceptive advertising. But falsity is not an element of a right of publicity claim. *But see infra* note 168 (noting how the Supreme Court has incorporated an actual malice requirement into the tort of infliction of emotional distress).

\(^{90}\) 110 S.W.3d 363 (Mo. 2003).

\(^{91}\) See id. at 365.

\(^{92}\) See id. at 374.

\(^{93}\) See id.
C. Current Approaches to Resolving Tensions Between
the Right of Publicity and Copyright Law

A second set of problems involves the question of whether the Supremacy Clause
or federal copyright law preempt some applications of state publicity rights. To put the
matter in context, the Supremacy Clause of the United States Constitution states that
“[t]his Constitution, and the Laws of the United States which shall be made in Pursuance
thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be
bound thereby, any Thing in the Constitution or Laws of any State to the Contrary
notwithstanding.”95 Thus far, the only Supreme Court decision that has addressed
whether the Supremacy Clause preempted a state’s power to confer a type of copyright
protection upon subject matter that was left unprotected under federal law is Goldstein v.
California.96 Goldstein involved a California law that made it a criminal offense to
reproduce sound recordings for commercial sale, without consent of the owner of the
master tape.97 Goldstein challenged his conviction under the statute on the ground, first,
that the California law, which created a right of unlimited duration, conflicted with
Congress’s power to enact copyright laws “for limited times”; and second, that it
conflicted with Congress’s decision to exclude sound recordings from the scope of

94 Id.
95 U.S. CONST. art. VI, § 2.
97 See id. at 548 & n.1.
federal statutory copyright protection.\textsuperscript{98} Although the Supreme Court only a few years earlier had invalidated an application of Illinois unfair competition law that conferred exclusive rights in unpatented product designs, on the ground that such protection conflicted with federal \textit{patent} policy,\textsuperscript{99} the Court upheld the California law, reasoning

\textsuperscript{98} \textit{See id.} at 551; \textit{see also} U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress “[t]o promote the Progress of Science . . . by securing \textit{for limited Times} to Authors . . . the exclusive Right to their . . . Writings”) (emphasis added). While Goldstein’s case was pending, Congress amended the Copyright Act to provide copyright protection for sound recordings, but the effect of this legislation was prospective only. \textit{See Goldstein}, 412 U.S. at 551-52 (citing Sound Recording Act of 1971, Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (codified as amended in scattered sections of 17 U.S.C.)).

\textsuperscript{99} \textit{See Sears}, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229–33 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 237–39 (1964). The language of \textit{Sears} makes it somewhat unclear whether the Court’s underlying premise was that the Constitution, the Patent Act, or both rendered the application of state law invalid. In \textit{Compco}, the Court similarly invoked both the Constitution and federal patent statute as grounds for invalidating the application of the Illinois law. \textit{See Compco}, 376 U.S. at 237 (stating that the district court’s order was “in conflict with the federal patent laws,” but also that “[t]o forbid copying would interfere with the federal policy, found in Art. I, § 8, cl.8, of the Constitution \textit{and} in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain”) (emphasis added).
first that, in relinquishing power to Congress to enact national copyright laws, the states did not relinquish all power to enact their own copyright laws; \(^{100}\) that the application of the California law at issue did not “prejudice the interests of other States” because the law would apply only within the State of California; \(^{101}\) and that, on its face, the “limited Times” provision of the Constitution applied only to federal statutory copyrights, not state copyrights. \(^{102}\) Second, the Court concluded that Congress’s decision not to include sound recordings within the scope of federal copyright protection did not amount to an implicit prohibition on the states conferring rights in that subject matter, \(^{103}\) but rather that Congress had “draw[n] no balance” at all, having instead “left the area” of sound recordings “unattended.” \(^{104}\)

Although the *Goldstein* Court provided no clear basis for its conclusion that Congress was indifferent with respect to state protection for sound recordings, whereas state protection for unpatented designs would “disturb the careful balance” \(^{105}\) between

\(^{100}\) See *Goldstein*, 412 U.S., at 552-58, 560.

\(^{101}\) See *id.* at 558-60.

\(^{102}\) See *id.* at 560-61.

\(^{103}\) See *id.* at 561-71.

\(^{104}\) *Id.* at 570; see also *id.* at 571 (“Congress has indicated neither that it wishes to protect, nor to free from protection, recording so musical performances fixed prior to February 15, 1972). By contrast, “[t]he standards established for granting federal patent protection to machines thus indicated not only which articles in this particular category Congress wished to protect, but which configurations it wished to remain free.” *Id.* at 569.
innovation and competition implicit in the Patent Act, one possibility resides in the fact that Congress had long tolerated at least one form of state copyright protection, namely copyright in unpublished writings. In *Kewanee Oil Co. v. Bicron Corp.*, a subsequent case in which the Court concluded that federal patent law did not preempt state trade secret law, the Court expressly noted, as one factor weighing against preemption, that Congress had long tolerated such laws. In another subsequent case, *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, the Court considered (as it had in *Goldstein*) whether the exercise of rights under the state law at issue would unreasonably burden citizens of other states. And in both *Kewanee Oil* and *Bonito Boats* the Court indicated that another relevant factor (perhaps the most relevant) is whether the state law

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105 *Id.* at 570.

106 *See id.* at 576-79 (Marshall, J., dissenting) (arguing that, in light of *Sears* and *Compco*, absent clear evidence of a congressional judgment that state regulation is permitted, courts should presume from “congressional silence . . . a determination that the benefits of competition outweigh the impediments placed on creativity by the lack of copyright protection”).

107 *Cf. id.* at 551, 570 n.28 (noting, but rejecting, Goldstein’s argument that congressional tolerance for state protection of unpublished writings should be read as implicitly preempting state restrictions on copying *published* recordings).


109 *See id.* at 493; *see also id.* at 494 (Marshall, J., concurring).


111 *See Bonito Boats*, 489 U.S. at 158, 163, 165.
at issue confers rights that too closely resemble patent rights—for example, rights against reverse engineering and independent discovery, or against copying in the absence of secondary meaning.\textsuperscript{112} Future cases addressing whether the Supremacy Clause invalidates state laws that confer protection upon persons or activities unprotected by federal copyright law therefore might focus on whether the exclusion from federal protection reflects a congressional judgment that such protection would “substantially interfere[ ]”\textsuperscript{113} with the federal scheme, or whether (as in \textit{Goldstein}) congressional

\textsuperscript{112} \textit{See id.} at 156–61; \textit{Kewanee Oil}, 416 U.S. at 489-91.

\textsuperscript{113} \textit{Bonito Boats}, 489 U.S. at 156-57 (stating that “[a] state law that substantially interferes with the enjoyment of an unpatented utilitarian or design conception which has been freely disclosed by its author to the public at large impermissiblly contravenes the ultimate goal of public disclosure and use which is the centerpiece of federal patent policy”). Although the quoted sentence refers to state laws that confer rights on \textit{subject matter} that Congress has relegated to the public domain, we construe the broader principle to be that state laws that substantially interfere with the federal patent or copyright scheme are preempted. \textit{See Bonito Boats}, 489 U.S. at 156 (referring to laws that “interfere with the policies behind the patent system”); \textit{id.} at 165 (referring to laws that do “not impermissibly interfere with the federal patent scheme”). In our view, a state law that interferes with federal patent or copyright rights by conferring patent- or copyright-like rights upon \textit{persons} whom the federal scheme excludes from ownership should be just as vulnerable as a state law conferring rights upon excluded subject matter. \textit{See} 1 \textsc{Melville W. \textsc{Nimmer} \& David \textsc{Nimmer, \textsc{Nimmer} on \textsc{Copyright} § 1.01[B][3][b][i]}, at 1-85 (2009) (arguing, as do we, that “if a derivative work can be
silence should be equated with indifference to state experimentation; courts also should consider the burden the state right imposes upon citizens of other states.\textsuperscript{114}

Nevertheless, since the enactment of the 1976 Copyright Act, most courts considering copyright preemption issues have focused on statutory preemption pursuant to Copyright Act § 301.\textsuperscript{115} In relevant part, § 301 states:

(a) . . . all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of

\begin{quote}
halted under color of an actor’s right of publicity claim, then state law can set at naught the benefits that Congress has conferred”\textsuperscript{\textsuperscript{)}}).
\end{quote}


\textsuperscript{115} Contrary to the conventional practice, however, within the last few years a few courts have begun to consider (as we advocate above) whether the Supremacy Clause preempts state publicity rights, independently of § 301. \textit{See} Facenda v. N.F.L. Films, Inc., 542 F.3d 1007, 1028-32 (3d Cir. 2008); Brown v Ames, 201 F.3d 654, 659-61 (5th Cir. 2000); Siefer v. PHE, Inc., 196 F. Supp. 2d 622, 627-28 (S.D. Ohio 2002); \textit{see also} 1 NIMMER & NIMMER, supra note 113, § 1.01[B][3][b][i], at 1-83 (advocating this approach); Joseph Bauer, \textit{Addressing the Incoherency of the Preemption Provision of the Copyright Act of 1976}, 10 VAND. J. ENT. & TECH. L.J. 1, 9-10, 106-18 (2007); at 9-10, 106-18; Paul Heald, \textit{Federal Intellectual Property Law and the Economics of Preemption}, 76 IOWA L. REV. 959, 997-1000 (1991); Lemley, supra note 114, at 141-51; Jennifer Rothman, \textit{Copyright Preemption and The Right of Publicity}, 36 U.C. DAVIS L. REV. 199, 236-40 (2002).
expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to – (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or . . . (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . .

Under the common interpretation of § 301, the Copyright Act preempts a state-law claim when two conditions are met. First, under the “general scope” or “extra element” condition, the rights asserted under state law must be “equivalent to any of the exclusive rights within the general scope of copyright as specified in § 106.” Most observers agree that this would include not only rights that are literally equivalent to one of more of the copyright owner’s exclusive rights under § 106 (for example, the right to reproduce the work in tangible copies), but also rights that are not “qualitatively” different from

\[116\] 17 U.S.C. § 301(a), (b).

\[117\] See Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 850 (2d Cir. 1997).


\[119\] 17 U.S.C. § 301(a).
copyright rights. The Nimmer treatise, for example, argues that a state law forbidding private performances of copyrighted works, or intentional reproduction of these works, would not be qualitatively different from the copyright rights against public performances and reproductions tout court. By contrast, a state law that requires proof of “extra elements” beyond those required to prove copyright infringement is qualitatively different and therefore avoids statutory preemption. Second, for statutory preemption to occur the subject matter of the state law must come within the subject matter of copyright as specified by Copyright Act §§ 102 and 103 (the “subject matter” requirement). State laws regulating copyrightable subject matter, such as musical or


121 See 1 Nimmer & Nimmer, supra note 113, § 1.01[B][1], at 1-10 to 1-12.


123 17 U.S.C. § 301(a) (stating that equivalent legal or equitable rights within the general scope of copyright under § 106 must also “come within the subject matter of copyright as specified by section 102 and 103” in order to be exclusively governed by the Copyright Act).
pictorial works, easily satisfy this condition. So too, according to some courts, do state laws governing the unauthorized use of facts and ideas, because the Copyright Act expressly relegates facts and ideas to the public domain. Note, however, that both the “extra element” and “subject matter” conditions must be satisfied for § 301 to preempt state law. State laws providing limited protection to facts and ideas therefore sometimes survive preemption, as long as they require proof of some extra element.

Case law interpreting § 301 is so riddled with inconsistency that one could plausibly read the statute as preempting all, some, or no applications of the right of publicity, depending on the meaning one gives to the terms “equivalent” and “subject matter.” On the one hand, a literal reading of the statute might appear to raise few if any obstacles to the exercise of state publicity rights. The mere use of another’s name for

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124 Section 102 specifically lists original musical compositions and pictorial works as copyrightable subject matter. 17 U.S.C. § 102; see also Ehat v. Tanner, 780 F.2d 876, 878 (10th Cir. 1985) (holding that state laws governing literary works satisfy the subject matter requirement for preemption).

125 See Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 848-50 (2d Cir. 1997); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1453 (7th Cir. 1996).

126 See, e.g., Wrench LLC v. Taco Bell Corp., 256 F.3d 446, 462-63 (6th Cir. 2001) (holding that Copyright Act did not preempt application of state common law relating to idea submissions); NBA, 105 F.3d at 852 (holding that Copyright Act did not preempt state common law forbidding the misappropriation of hot news); ProCD, 86 F.3d at 1453–55 (holding that Copyright Act did not preempt enforcement of a shrinkwrap license prohibiting duplication of noncopyrightable facts).
purposes of trade, for example, would not trigger the first statutory preemption condition, as long as it does not entail the reproduction (or adaptation, distribution, performance, or display) of a preexisting work of authorship; in such a case, the elements of a publicity claim and of a copyright claim would not coincide.\textsuperscript{127} Moreover, even in cases in which the use of a person’s identity for purposes of trade \textit{does} entail (say) the reproduction of a copyrightable work of authorship, copyright liability does not necessarily depend upon the user’s purpose, commercial or otherwise.\textsuperscript{128} Some courts therefore have concluded that publicity rights necessarily entail proof of an extra element (i.e., use for purposes of trade) and therefore are not equivalent to copyright holder rights under § 106.\textsuperscript{129} In addition, because a person’s name, likeness, or other indicia of identity are not, in any

\textsuperscript{127} Of course, the use itself frequently will be embodied in a copyrightable work of authorship. Advertisements, for example, can qualify as copyrightable literary, pictorial, or audiovisual works.

\textsuperscript{128} If the defendant raises the defense of fair use, however, the commerciality or noncommerciality of the use does play a role in determining whether the use is fair (and hence lawful). \textit{See} 17 U.S.C. § 107(1).

\textsuperscript{129} \textit{See, e.g.}, Toney v. L’Oreal USA, Inc., 406 F.3d 905, 910 (7\textsuperscript{th} Cir. 2005) (holding that a model’s publicity claim, based on the alleged unauthorized use of her image in advertising, survived a preemption challenge); \textit{see also} Trandes Corp. v. Guy F. Atkinson Co., 996 F.2d 655, 659-60 (4th Cir. 1993) (“To avoid preemption, a cause of action defined by state law must incorporate elements beyond those necessary to prove copyright infringement, and must regulate conduct qualitatively different from the conduct governed by federal copyright law.”).
literal sense, copyrightable subject matter, some courts have concluded that, as a general matter, copyright cannot preempt the right of publicity because publicity rights will never trigger the “subject matter” condition. Other courts, however, disagree with the preceding analysis with respect to both the first and second conditions. As for the first condition, some courts have held that the need to prove a “use for purposes of trade” does not render publicity rights qualitatively different from copyright rights in all cases. In Laws v. Sony Music Entertainment, Inc., for example, the court held that publicity and copyright rights were not qualitatively different where the plaintiff alleged that the defendant violated the plaintiff’s right of publicity by using (for purposes of trade) her voice as captured in a copyrighted sound recording. Similarly, where the exercise of

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130 See, e.g., Toney, 406 F.3d at 910; Brown v. Ames, 201 F.3d 654, 658 (5th Cir. 2000) (holding that publicity rights associated with a person’s persona do not fall within the subject matter of copyright and therefore do not conflict for preemption purposes); Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001) (holding that a claim for misappropriation of plaintiff’s image in a catalog was not preempted).

131 See, e.g., Laws v. Sony Music Enter., Inc., 448 F.3d 1134, 1143-45 (9th Cir. 2006), cert. denied, 127 S. Ct. 1371 (2007); see also Harper & Row Publ., Inc. v. Nation Enters., 501 F. Supp. 848, 853-54 (S.D.N.Y. 1980) (holding that the additional elements of a contract claim were redundant because they did not “afford plaintiff rights that are ‘different in kind’ from those protected by the copyright laws”), rev’d on other grounds, 471 U.S. 539 (1985).

132 448 F.3d 1134 (9th Cir. 2006).

133 See id. at 1143-45.
publicity rights would prevent a copyright owner from exercising her right to reproduce (or adapt, distribute, perform, or display) the plaintiff’s image or performance as captured in a recording or photograph or on film, some decisions (including *Laws*)\(^{134}\) have concluded that the subject matter condition is met as well.\(^{135}\)

\(^{134}\) *See id.* at 1139-43. In *Laws*, the court found analogous an earlier case in which the court held preempted singer Nancy Sinatra’s claim that the defendant infringed her publicity rights by its commercial use of a song that Sinatra had made famous. Given that the defendant had obtained permission from the songwriter, and had not used a recording or imitation of Sinatra’s voice, to grant Sinatra publicity rights in the song would conflict with federal copyright law. *Id.* at 1140 (discussing Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970)). The court distinguished *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), a case in which the Ninth Circuit held that Bette Midler’s claim was not preempted, where the defendant, in connection with an ad campaign, employed a singer to imitate Midler’s voice in a cover version of a song Midler had made famous. *See Laws*, 448 F.3d at 1140 (distinguishing *Midler*). The court also distinguished *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), another case involving the commercial use of an imitative voice, albeit (unlike *Midler*) in connection with a song the plaintiff himself (Tom Waits) had never recorded. Whereas in *Sinatra* (and in *Laws* itself) the plaintiff was asserting rights in a copyrightable work that she did not own, in *Midler* and *Waits*, as the court understood them, the plaintiffs were asserting rights in their voices as such—not (as in *Laws*) their vocal performances as captured in recordings they had made. *See Laws*, 448 F.3d at 1139-43. For other cases consistent
Disagreement over the meaning of § 301’s two conditions results in conflicting decisions in cases involving very similar fact patterns. For example, while the Ninth Circuit in Laws has held that preemption forbids the plaintiff from asserting publicity rights in her vocal performance as captured in a particular sound recording, the Second Circuit remanded a case involving a similar claim for further proceedings. Similarly, while the California Court of Appeals in Fleet v. CBS, Inc. held that actors were preempted from asserting publicity rights against the authorized distributor of a film that captured their performances, another panel of that same court later held, in KNB


135 See, e.g., Mahue v. CBS, Inc., 247 Cal. Rptr. 304 (Ct. App. 1988) (holding that copyright preempted state law conversion claim premised on a right conferred by the Copyright Act).

136 See Laws, 448 F.3d at 1145-46.

137 See Oliveira v. Frito-Lay, Inc., 251 F.3d 56, 63-64 (2d Cir. 2001) (reversing grant of summary judgment for plaintiff Oliveira, premised on there being no genuine issue of material fact whether she had “disposed of” her performance as captured in the master tape of the recording The Girl from Ipanema, and remanding for consideration of her right of publicity claim relating to the use of that recording in a commercial).

138 See Fleet v. CBS, Inc., 58 Cal. Rptr. 645, 650 (Ct. App. 1996). Specifically, actors who allegedly were not paid their agreed-upon compensation for performing in a film filed suit against the distributor of the film for using their likenesses, for purposes of trade, without consent. The court held that (1) once the actors’ performances were put on
film, with their consent, those performances became dramatic works falling within the subject matter of copyright; and (2) the rights asserted were equivalent to copyright rights, insofar as the actors were trying to prevent the distribution of a copyrighted work. See id. at 650-51. The court distinguished Zacchini on the ground that, in that case, the performer had not consented to the fixation of his performance on film. See id. at 650 n.5. But if consent to the fixation of one’s performance is the touchstone for determining whether the “subject matter” condition is satisfied, then cases such as Pavesich and Toney also might appear to be preempted, because the subjects in those cases consented to the fixation of their images on film. The court nevertheless expressed agreement with the Nimmer treatise that “a ‘name and likeness does not become a work of authorship simply because it is embodied in a copyrightable work such as a photograph,’” id. at 651 (quoting 1 MELVILLE W. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 1.01[B][1][c], at 1-22 to 1-23 (1996)), on the ground that “a celebrity who has merely had his picture taken has not engaged in a ‘dramatic work’ or other ‘work of authorship’ . . . .” Id. But this reasoning is not satisfactory, insofar as it defines the actors’ performances as copyrightable dramatic works. See id. Although the Copyright Act itself does not define the term “dramatic work,” the Copyright Office, drawing on case law, defines a dramatic work as

one that portrays a story by means of dialogue or acting and [that] is intended to be performed. It gives directions for performance or actually represents all or a substantial portion of the action as actually occurring, rather than merely being narrated or described.
Enterprises v. Matthews, that the assignee of a model’s right of publicity (who also happened to own the copyright in the model’s photographs) could assert publicity rights against a defendant who was using the photographic images for purposes of trade.\cite{footnote-139} Limiting Fleet to situations in which “an actor or model with no copyright interest in the work seeks to prevent the exclusive copyright holder from displaying the copyrighted work,” but not to cases “where, as here, the defendant has no legal right to publish the copyrighted work,” the KNB court held that neither the “subject matter” nor the “general scope” condition was satisfied.\cite{footnote-140} Understood literally, however, this standard might result in the preemption of claims like those brought in Pavesich and Toney, in which photographic subjects (who owned no copyright interest in the works at issue) sought to

\begin{footnotes}
\footnote{footnote-139}{See KNB Enters. v. Matthews, 92 Cal. Rptr. 2d 713, 722 (Ct. App. 2000).}
\footnote{footnote-140}{Id. at 723.}
\end{footnotes}
prevent copyright owners from exploiting their photographic works. An expansive reading of § 301 also would result in the preemption of the claims at issue in *Wendt v. Host International, Inc.*, insofar as the actors’ exercise of publicity rights inhibits the copyright owner’s right to prepare derivative works (sculptural works based upon copyrightable fictional characters). Taken to its logical conclusion, the *Fleet* standard

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141 See *supra* note 138.

142 125 F.3d 806, 810-12 (9th Cir. 1997) (holding that actors who portrayed Norm and Cliff on “Cheers” tv show stated a claim for violation of their rights of publicity against a defendant that had obtained permission from the owner of copyright in “Cheers” to establish “Cheers” bars that included animatronic robots resembling the Norm and Cliff characters); see also *Wendt v. Host Int’l, Inc.*, 197 F.3d 1284, 1285-89 (9th Cir. 1999) (Kozinski, J., dissenting from denial of rehearing en banc) (arguing that copyright and First Amendment law preempted the claims).

143 See 17 U.S.C. § 106(2) (granting the owner of a copyright the exclusive right to prepare derivative works based upon that copyrighted work). In a similar vein, some scholars have questioned whether cases recognizing publicity rights in an (imitated) vocal style, such as *Midler* and *Waits*, can be reconciled with Copyright Act § 114(b), which explicitly permits the making of soundalike recordings; or whether rights that interfere with consumers’ first sale rights with respect to public displays of copyrighted pictorial works can be squared with § 109(e). See, e.g., 1 McCarthy, *supra* note 15, § 7:31 (discussing first sale); Rothman, *supra* note 115, at 218-22 (discussing § 114(b)) and first sale); see also Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1449 (11th Cir. 1998) (holding that first sale doctrine limits the right of publicity).
might even preempt the exercise of publicity rights in a case involving only the unauthorized use of another’s name in a commercial advertisement. Advertising, after all (including false advertising), constitutes copyrightable subject matter, and the plaintiff’s exercise of publicity rights does indeed “seek[] to prevent the copyright holder from displaying the copyrighted work.” Indeed, to the extent the right of publicity interferes with authors’ abilities to use even individual words or short phrases (such as names or slogans), one might argue that the right improperly confers protection with respect to subject matter that copyright confines to the public domain. Alternatively, a narrow interpretation of § 301 might not preempt even claims such as those at issue in Fleet and Laws. This result potentially could provide performers with more expansive rights than the rights afforded them in foreign states under “neighboring” rights laws.

144 See Belcher v. Tarbox, 486 F.2d 1087, 1088 (9th Cir. 1973) (stating that “[t]here is nothing in the Copyright Act to suggest that the courts are to pass upon the truth or falsity, the soundness or unsoundness, of the views embodied in a copyrighted work”); 1 NIMMER & NIMMER, supra note 113, § 2.17, at 2-199.

145 KNB, 92 Cal. Rptr. at 722.


147 Many countries provide performers (including actors, musicians, and singers) with so-called “neighboring” or “related” rights that enable performers to prevent or obtain compensation for certain acts, including the fixation, reproduction, distribution, and communication to the public of their performances. See Agreement on Trade-Related
Whether or not such protection is desirable as a matter of policy, it seems implausible that Congress intended for the states to be free to enact such sweeping protection in the face of federal copyright law’s minimalist approach to neighboring rights.148


The narrow reading of § 301 suggested above would enable states to confer rights upon performers in excess of anything required under TRIPs article 14(1) (requiring members only to confer rights against unauthorized fixation and communication of live performances) or WPPT article 8(2) (permitting members to exhaust performers’ rights to control distribution after the first sale). On the other hand, at least in some countries certain neighboring rights are unwaivable, see EC Directive arts. 4, 8(2), whereas publicity rights are not.

148 At present, the U.S. Copyright Act recognizes neighboring rights only to the limited extent of conferring protection against the unauthorized fixation of live musical performances. See 17 U.S.C. § 1101. This provision itself has been questioned on constitutional grounds. See United States v. Martignon, 492 F.3d 140, 152 n.8 (2d Cir. 2007) (reserving judgment on the constitutionality of § 1101); KISS Catalog v. Passport
In light of these conflicting interpretations of § 301, an examination of the legislative history leading up to the enactment of the 1976 Copyright Act might seem in order. In this regard, several congressional reports preceding the enactment of the 1976 Act stated that “[t]he evolving common law rights of ‘privacy,’ ‘publicity,’ and trade secrets, and the general law of defamation and fraud, would remain unaffected as long as the causes of action contain elements, such as an invasion of personal rights or a breach

Int’l Prods., Inc., 405 F. Supp. 2d 1169, 1171-77 (C.D. Cal. 2005) (vacating earlier decision to the contrary, and holding § 1101 constitutional). Perhaps one could argue that the existence of expansive publicity rights under state law is what enables the United States to comply with TRIPs article 14(1) (which appears to require members to confer rights against any unauthorized fixation, not only unauthorized fixations of musical performances) and with WPPT articles 5-10 (which require members to confer rights upon performers with respect to unauthorized reproductions, distributions, and performances, as well as certain moral rights). To our knowledge, however, the United States has never advanced the argument that state publicity laws are the tool that enables U.S. compliance with these treaty provisions. More likely, if domestic copyright law traditionally has elected not to confer upon performers rights that would interfere with the exercise of copyright law, state laws purporting to do precisely that (such as laws conferring privacy and antifraud laws) require some degree of justification; they are not automatically permissible, and cannot interfere in a way that crosses the Goldstein threshold.
of trust or confidentiality, that are different in kind from copyright infringement,"\textsuperscript{149} but did not further elaborate upon this point. Similarly, a 1965 report of the Register of Copyright stated that an example of a nonpreempted claim “might include, depending upon the particular circumstances in the case . . . [t]he unauthorized exploitation of a person’s name or photograph for commercial advertising,”\textsuperscript{150} but did not provide any further discussion of publicity rights. Several other portions of the legislative history, however, make clear that Congress did not intend for § 301 to effect a general preemption

\textsuperscript{149} The language quoted above is found in the following reports: H.R. Rep. 94-1476, 94\textsuperscript{th} Cong., 2d Sess., at 132, \textit{reprinted in} 1976 U.S.C.C.A.N. 5659, 5674; S. Rep. 93-983, 93\textsuperscript{d} Cong., 2d Sess., at 166 (July 3, 1974); H.R. Rep. No. 90-83, 90\textsuperscript{th} Cong., 1\textsuperscript{st} Sess., at 99 (Mar. 8, 1967); \textit{reprinted in} 11 Omnibus Copyright Revision Legislative History (1976); and H.R. Rep. No. 89-2237, 89\textsuperscript{th} Cong., 2d Sess., at 128 (Oct. 12, 1966) (identical except for the quotation marks around the words “privacy” and “publicity”), \textit{in} 11 Omnibus Copyright Revision Legislative History (1976).

\textsuperscript{150} Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, at 85 (May 1965), \textit{reprinted in} 4 Omnibus Copyright Revision Legislative History (1976). \textit{See also} Copyright Law Revision Part 5, 1964 Revision Bill with Discussion and Comments 318 (Sept. 2, 1965) (comments of Professor Melville B. Nimmer) (urging that the bill “[i]nclude[] in state rights which are preserved . . . the right of publicity,” which “unlike the right of privacy . . . is a ‘property’ right and might therefore be considered subject to the preemption unless expressly saved therefrom”), \textit{reprinted in} 4 Omnibus Copyright Revision Legislative History (1976).
of state laws relating to matters such as deceptive marketing or invasion of privacy.\footnote{The principal evidence of Congress’s intent in this regard is that all of the versions of what ultimately became § 301 of the 1976 Act, as reflected in copyright revision bills introduced from 1964 through 1975, contained an identical provision stating that “[n]othing in this title annuls or limits any rights or remedies under the law of any State with respect to . . . activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright . . . including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.” See S. 22, 94th Cong., 1st Sess., § 301(b) (as introduced Jan. 15, 1975); S. 1361, 93d Cong., 1st Sess., § 301(b) (as introduced Mar. 26, 1973); S. 644, 92d Cong., 1st Sess., § 301(b) (as introduced Feb. 8, 1971); S. 543, 91st Cong., 1st Sess., § 301(b) (as introduced Jan. 22, 1969); H.R. 4347, 89th Cong., 1st Sess., § 301(b) (as introduced Feb. 4, 1965); H.R. 2512, 90th Cong., 1st Sess., § 301(b) (as introduced Jan. 17, 1967); H.R. 4347, 89th Cong., 2d Sess., § 301(b) (as introduced Oct. 12, 1966); S. 3008, 88th Cong., 1st Sess., § 19(b) (as introduced July 20, 1964). Contemporaneous Copyright Office and congressional reports also clearly indicated that Congress did not intend to preempt claims of this nature. See, e.g., H.R. Rep. 94-1476, 94th Cong., 2d Sess., at 132, \textit{reprinted in} 1976 U.S.C.C.A.N. 5659, 5674; S. Rep. 93-983, 93d Cong., 2d Sess., at 166 (July 3, 1974); H.R. Rep. No. 90-83, 90th Cong., 1st Sess., at 99 (Mar. 8, 1967); \textit{reprinted in} 11 Omnibus Copyright Revision Legislative History (1976); H.R. Rep. No. 89-2237, 89th Cong., 2d Sess., at 128 (Oct. 12, 1966), \textit{in} 11 Omnibus Copyright Revision Legislative History (1976). The list of nonpreempted claims was thereafter expanded to include as nonpreempted “rights against}
Taken together, the evidence suggests that Congress probably would have been willing to tolerate at least those publicity claims that are premised on the protection of personal privacy or the prevention of deceptive marketing. Nothing in the legislative history, however, specifically addresses whether Congress intended § 301 to permit or to preempt claims similar to those at issue in Laws, Fleet, KNB, Midler, Waits, or Wendt, though portions of that history express the view that § 301 would preempt state laws conferring copyright-like protection on public-domain materials,152 or public performance rights with respect to sound recordings.153

misappropriation not equivalent to any of” the exclusive rights set forth in § 106, see S.22, 94th Cong., 1st Sess., § 301(b) (Committee Print, June 13, 1975). Concerns were raised, however, that as expanded the list would be interpreted as signaling approval of the hot news doctrine as propounded by the U.S. Supreme Court in International News Service v. Associated Press, 248 U.S. 215 (1918). See Cong. Rec. 32015 (Sept. 22, 1976); Letter from Thomas Kauper, Ass’t Att’y Gen., Antitrust Div., to Hon. Hugh Scott, Cong. Rec. 3836-37 (Feb. 19, 1976). In response, the House Committee agreed to delete the list altogether, on the ground that this recitation was unnecessary in light of § 301(a), see Cong. Rec. 32015 (Sept. 22, 1976), and the statute as finally enacted contains no such list. Insofar as the deletion was intended only to avoid a specific problem posed by the expansion of the list to include misappropriation claims, however, it is reasonable to conclude that Congress did not intend the deletion to reflect negatively on the viability of false advertising and privacy claims.

We argue below that the task of developing useful standards for determining when publicity rights should yield to copyright requires deeper analysis of the underlying policies than most of the decisions have undertaken thus far. Whether the analysis ultimately is framed in terms of § 301 or in terms of broader principles of conflict preemption, we demonstrate below that preemption (as well as the First Amendment analysis) can be integrated into a workable, coherent whole—one which, however, to date has largely eluded the courts.

III. Integrating the Right of Publicity with the First Amendment

Contemporary First Amendment law provides three guideposts that inform our analysis of state publicity rights. The first is that content-based regulations of noncommercial speech normally are subject to strict scrutiny, meaning that the restriction matter “even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen in to the public domain”).

must serve a compelling state interest and be narrowly tailored to achieve that end.\textsuperscript{154} Content-neutral regulations, by contrast, are subject to intermediate scrutiny.\textsuperscript{155} The

\textsuperscript{154} See United States v. Playboy Enter. Group, Inc., 529 U.S. 803, 813 (2000). As exceptions to this principle, strict scrutiny may be unwarranted when the speech at issue is unprotected, or the government discriminates among subclasses of unprotected speech, or when government acts in a capacity other than as a regulator (such as when subsidizing speech or excluding speakers from a nonpublic forum on viewpoint-neutral subject-matter grounds). See Davenport v. Washington Educ. Ass’n, 551 U.S. 177, 189 (2008). None of these exceptions appear on point in the present context. See also infra notes 168-74 and accompanying text (discussing Neil Richards’s argument that regulation of certain other forms of speech is subject only to minimal constitutional scrutiny).

\textsuperscript{155} See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (stating that “‘content-neutral’ time, place, and manner regulations” satisfy intermediate scrutiny “so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication”); Turner Broad. Co. v. FCC, 512 U.S. 622, 662 (1994) (stating that a content-neutral regulation that imposes an incidental burden on speech satisfies intermediate scrutiny if “it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest”) (quoting O’Brien v. United States, 391 U.S. 367, 377 (1968)). The enforcement of laws of general applicability, such as the enforcement of a fire code that results in the shutting
second guidepost is that content-based regulations (as the name suggests) regulate on the basis of content, whereas content-neutral regulations are “justified without reference to the content of the regulated speech.”\textsuperscript{156} Third, restrictions on commercial speech are also subject to a form of intermediate scrutiny, even when these restrictions are content-based. More precisely, the state may ban false commercial speech altogether; it may regulate truthful commercial speech only if the regulation satisfies an important governmental


interest, directly advances that government interest, and is narrowly tailored to achieve that interest.\textsuperscript{157}

In this Part, we make three corresponding claims derived from these guideposts: first, that the right of publicity is a form of content-based, rather than content-neutral, regulation; second, that applications of the right of publicity in the context of commercial speech typically satisfy intermediate scrutiny and therefore are not problematic from a First Amendment perspective; and third, that applications of the right of publicity in the context of noncommercial speech generally do not satisfy strict scrutiny and therefore are unconstitutional, outside a narrow range of cases analogous to \textit{Zacchini}.

\textbf{A. The Right of Publicity Regulates Speech on the Basis of Content}

Our argument that the right of publicity is a form of content-based regulation rests on two premises. The first is that the right of publicity regulates words, sounds, and visual images that clearly qualify as “speech.”\textsuperscript{158} The second is that, because the right of publicity regulates the “use” of such speech “for purposes of trade” does not transform the right into a mere regulation of speech-related conduct. To be sure, in \textit{Bartnicki v. Vopper}, 532 U.S. 514, 526-27 & n.10 (2001), the Supreme Court distinguished the regulation of speech-related conduct (such as the use of intercepted communications to prepare a competing product, to trade in securities, or to prepare for labor negotiations) from the


\textsuperscript{158} See, \textit{e.g.}, Nat’l Endowment for Arts v. Finley, 524 U.S. 569, 602 (1998) (stating that the First Amendment protection extends to, among other things, music, pictures, motion pictures, paintings, drawings, and dramatic works). The fact that the right of publicity regulates the “use” of such speech “for purposes of trade” does not transform the right into a mere regulation of speech-related conduct. To be sure, in \textit{Bartnicki v. Vopper}, 532 U.S. 514, 526-27 & n.10 (2001), the Supreme Court distinguished the regulation of speech-related conduct (such as the use of intercepted communications to prepare a competing product, to trade in securities, or to prepare for labor negotiations) from the
publicity cannot be “justified without reference to the content of the speech,” it is content-based, not content-neutral. The entire point of the right of publicity, after all, is to forbid (or extract financial compensation for) certain speech acts on the basis of content. As such, the right of publicity is no less a form of content-based regulation than are, say, laws banning the use of newsracks that distribute commercial handbills or prohibiting regulation of the disclosure or publication of the speech itself. Any attempt to characterize the right of publicity as merely a regulation of conduct, however, would prove too much. If government regulation of the use of words, sounds, or images in advertising or on merchandise could be characterized as merely a form of conduct regulation, the regulation of commercial speech would almost always amount to conduct regulation. The Court’s commercial speech jurisprudence nevertheless characterizes the regulation of commercial speech as a form of speech, not conduct, regulation. See Bolger v. Young Drug Prods. Co., 463 U.S. 60, 65 (1983). Logically, to the extent the right of publicity regulates commercial or noncommercial speech, it too is a form of speech, not conduct, regulation. See F. Jay Dougherty, All the World’s a Stooge: The “Transformativeness” Test for Analyzing a Right Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art, 27 COLUM. J. L. & ARTS 1, 58 (2003) (noting that “[i]f the act of disseminating speech constitutes the kind of conduct unrelated to expression that is subject to O’Brien scrutiny . . . the distinction at the heart of the case becomes meaningless”).

159 Bartnicki, 532 U.S. at 526.

160 See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993). Laws that only incidentally impact speech by targeting certain of its secondary effects may be
flag burning as a form of political protest. Some observers nevertheless have tried to subject only to intermediate scrutiny. See Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-50 (1986) (upholding zoning law restricting adult-oriented businesses to certain locations, purportedly to confine secondary effects such as prostitution). Like the newsrack ban at issue in Discovery Network, however, the right of publicity’s ban on names and likenesses is an intended, not incidental, effect. See Discovery Network, 507 U.S. at 430 (distinguishing Renton); see also Dougherty, supra note 158, at 60; Eugene Volokh, Freedom of Speech and Intellectual Property: Some Thoughts After Eldred, Bartnicki, and 33 Liquormart, 40 Hous. L. Rev. 697, 705-06 (2003) (noting that Renton has been applied exclusively in the context of adult-oriented businesses).

See United States v. Eichman, 496 U.S. 310, 315-16 (1990); Texas v. Johnson, 491 U.S. 397, 411-12 (1989). See also Dougherty, supra note 158, at 46-47 (arguing that publicity rights are content-based because they “‘single[ ] out income derived from expressive activity . . . and [are] directed only at works with a specific content’”) (quoting Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)); Volokh, supra note 160, at 707-08 (arguing that publicity rights are content-based because, inter alia, the “news/fiction/entertainment exception” to these rights is itself content-based) (citations omitted). To be sure, flag burning laws arguably target viewpoint as well as content. Some supporters of publicity laws might view this as an important distinction, citing Davenport v. Washington Education Ass’n, 551 U.S. 177, 188 (2008), for the proposition that content discrimination is subject to strict scrutiny only because it “‘raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.’” In other contexts, however, the Court has
classify publicity laws as content neutral (or otherwise deserving of deference) by characterizing them as a form of “property” regulation, but the argument is specious. To be sure, the First Amendment generally does not guarantee a speaker a right to use another person’s property to express the speaker’s point of view. Publicity rights, however (unlike land, personal effects, or even more conventional forms of intellectual property such as copyrights and patents) are still a relatively new species of property; referred to viewpoint discrimination as “an egregious form of content discrimination,” Rosenberger v. Rectors and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995), and both content and viewpoint discrimination ordinarily are subject to strict scrutiny. See, e.g., id.; Consolidated Edison Co. v. Public Service Comm’n, 447 U.S. 530, 541 (1980) (stating that content-based regulations, even if viewpoint-neutral, “may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest”). In any event, many applications of the right of publicity arguably do discriminate on the basis of viewpoint. See Dougherty, supra note 158, at 47 (arguing that, to the extent Comedy III’s “transformative use” doctrine disfavors literal depictions of celebrities’ images, it discriminates on the basis of viewpoint).

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163 See, e.g., Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 570 (1972) (holding that a privately owned shopping center has a right to prohibit the distribution of political handbills on its property).
surely the states cannot insulate private parties from First Amendment challenges simply by conferring new property rights in expression that traditionally has resided in the public domain.\textsuperscript{164} An alternative approach might start from the premise that copyright law

\textsuperscript{164} See Dougherty, \textit{supra} note 158, at 53-57; Volokh, \textit{supra} note 160, at 913. Moreover, the mere fact that states on occasion have chosen to confer rights in other forms of information, such as trade secrets and “hot news,” hardly demonstrates that state-created intellectual property rights are immune from First Amendment scrutiny. The enforcement of trade secret rights, for example, normally raises no First Amendment problems because, among other things, neither party seeks the public disclosure of the subject information, and because the defendant is often subject to voluntary contract or common-law duties of nondisclosure. See Pamela Samuelson, \textit{Principles for Resolving Conflicts Between Trade Secrets and the First Amendment}, 58 HASTINGS L.J. 777, 780-88 (2006). When these conditions are not present, however, the enforcement of trade secret rights has proven much more problematic and may itself be justified only in circumstances analogous to \textit{Zacchini}. See Samuelson, \textit{supra} note 168, at 811-13 & n.212 (collecting cases); \textit{but see} Copy Control Ass’n v. Bunner, 75 P.3d 1, 18 (Cal. 2003) (holding that a preliminary injunction against the disclosure of an alleged trade secret was not a prior restraint of speech). Similarly, the “hot news” doctrine provides protection of very brief duration and may be necessary to protect investments in news gathering. See Int’l News Service v. Associated Press, 248 U.S. 215 (1918); Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir.1997) (applying the “hot news” doctrine to the transmission of “real-time” NBA game scores and statistics). Even so, some commentators have argued that the doctrine rests on weak constitutional foundations, \textit{see}
(according to some analyses) is content-neutral and then extrapolate that publicity rights, because of some perceived affinity to copyright rights, must be content-neutral as well. The characterization of copyright as content-neutral, however, is based on several factors—including copyright’s presumed role in encouraging the creation and publication of information, and the fact that the Constitution authorizes federal copyright laws—that are less relevant, or not relevant at all, to the right of publicity. As Jay Dougherty notes, for example, although the right of publicity is sometimes justified in terms of its incentive effects, those “incentives are not aimed at the creation of works of expression.”

Moreover, strictly speaking the existence of incentive effects should have nothing to do with the characterization of regulation as content-based or content-neutral; neither should the fact that the Constitution specifically authorizes copyright legislation, though this is a

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Note, Nothing But Internet, 110 HARV. L. REV. 1143, 1155-60 (1997), and most courts have construed it narrowly.

165 See Neil Weinstock Netanel, Locating Copyright within the First Amendment Skein, 54 STAN. L. REV. 1, 49-54 (2001). Netanel also notes that the Supreme Court has accorded only intermediate scrutiny to federal statutes restricting the copying of designs found on U.S. currency and according exclusive rights in the word OLYMPICS to the U.S. Olympic Committee. See id. at 51-54 (citing Regan v. Time, Inc., 468 U.S. 641 (1984), and San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522 (1987)).

166 Dougherty, supra note 158, at 51. Dougherty also notes that the narrowness in scope of the statutes in Regan and San Francisco Arts & Athletics do not provide robust support for characterizing publicity rights as content-neutral. See id. at 52.
clear distinguishing point with respect to the right of publicity. In any event, to the extent the characterization of copyright as content-neutral is driven more by the desired end of not subjecting copyright rights to strict scrutiny than by straightforward application of the definition of content neutrality, it provides no rationale for similarly departing from the standard definition of content neutrality in the context of publicity rights.  

A more sophisticated challenge to the claim that publicity laws should be classified as content-based and thus warrant heightened scrutiny might proceed from Neil Richards’s argument for why data privacy laws (in particular, laws restricting private entities from disclosing consumers’ personal information) should not be evaluated under strict scrutiny. As Richards notes, a wide variety of laws regulate “‘speech’ within the

167 See Netanel, supra note 165, at 37 (noting that copyright’s “constitutional pedigree” may be a factor distinguishing the constitutionality of copyright from that of the right of publicity); Diane Leenheer Zimmerman, Competing Perspectives and Divergent Analyses Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made The Pants Too Long!, 10 DEPAUL-LCA J. ART & ENT. L. 283, 292-93 (2000).  

168 See Neil M. Richards, Reconciling Data Privacy and the First Amendment, 52 UCLA L. REV. 1149 (2005). By “data privacy laws,” Richards means laws such as the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, which forbids educational institutions from disclosing certain information concerning students. See id. at 1167-68.  

In a roughly similar vein, David Anderson has argued that courts have applied a variety of First Amendment models to different “communications torts.” See David A.
Anderson, *Tortious Speech*, 47 WASH. & LEE L. REV. 71 (1990). Most famously, the Supreme Court has held that public figure plaintiffs asserting claims for defamation must prove actual malice and satisfy a variety of other requirements. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Curtis Publ. Co. v. Butts, 388 U.S. 130 (1976). In addition, the Court has applied the actual malice standard to claims for false light invasion of privacy involving matters of public interest, *see Cantrell v. Forest City Publ. Co.*, 419 U.S. 245, 249 (1974); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967); and to claims by public figures for intentional infliction of emotional distress, *see Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988), despite the absence of a logical connection between falsity and any of the elements of this tort. *See Anderson, supra*, at 81-82. In the context of a newspaper’s public disclosures of private facts, by contrast, the Court has applied a balancing approach that requires the plaintiff to prove that the regulation at issue is narrowly tailored to achieve a state interest “of the highest order.” *See Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989); *see also Bartnicki*, 532 U.S. at 526-35 (holding that a statute forbidding the innocent disclosure of information of public concern obtained by another from illegal wiretaps was an unconstitutional regulation of pure speech); Anderson, *supra*, at 90 (stating that “the Florida Star decision seems to leave little vitality in the tort of disclosure of private facts”). In yet other contexts, courts have largely avoided consideration of possible First Amendment problems, as noted in the text above. *See Anderson, supra*, at 102 (discussing tortious interference with contract). Ultimately, though, while Anderson is critical of the balancing approach that courts actually apply with respect to some communications torts, *see id.* at 90-97, he argues that the balancing model “does ask some questions that are pertinent in a more general way:
common dictionary or lay understanding of the term” without raising serious First Amendment problems; among these are laws criminalizing conspiracy, threats, and solicitation, as well as speech regulation “in the context of securities, antitrust, labor organizing, copyrights, trademarks, sexual harassment, the regulation of doctors, lawyers, and other professionals, and vast amounts of evidence and torts law.” In Richards’s view, rather than arbitrarily classifying these regulations as not involving speech, a more productive framework would focus first on the “scope” question (is the speech at issue the sort of speech the regulation of which should trigger some form of heightened scrutiny), and second on the “level of protection” question (i.e., what specific level of scrutiny, from strict to intermediate to rational basis, is appropriate for the speech regulation at issue). In Richards’s formulation, data privacy laws that restrict the flow of non-newsworthy information should receive only rational basis review, because these laws are more in the nature of commercial regulation—like, say, antitrust and securities laws, or rules such as the attorney-client privilege that forbid the disclosure of confidential information.

what are the interests served by the tort in question, and what is its impact on speech interests?” Id. at 101-02.


170 See id. at 1170-72.

171 See id. at 1204-07.
Even if one accepts Richards’s framework for evaluating data privacy laws, however, it hardly follows that right of publicity laws are merely a form of commercial regulation meriting only rational basis scrutiny. To be sure, many right of publicity claims involve commercial speech (e.g., advertising), and therefore (as we discuss below) usually should withstand First Amendment challenge under established commercial speech doctrine. Right of publicity claims that do not involve commercial speech, however—claims involving expressive works such as magazines and movies, for example, as well as expressive merchandise such as posters and tee shirts—cannot blithely be equated with commercial regulation. A depiction of the Three Stooges on a tee shirt expresses the publisher’s or purchaser’s values, interests, or beliefs in a way that the disclosure of personal data in violation of FERPA (e.g., that Joe College received a C in freshman calculus) does not. As we shall see, this insight does not necessarily mean

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172 Note that Richards’s classification of copyright and trademark laws as meriting at most only rational basis scrutiny is not necessarily accurate. See, e.g., Golan v. Holder, 611 F. Supp. 2d 1165 (D. Colo. 2009) (applying intermediate scrutiny to strike down law restoring terminated copyrights to qualifying foreign authors); William McGeveran, Rethinking Trademark Fair Use, 94 IOWA L. REV. 49, 100-03 (2008) (discussing cases applying First Amendment law as a constraint on trademark rights).

173 See infra notes 200-12 and accompanying text.

174 Of course, the revelation that Joe College received a C in calculus might be newsworthy if, say, Joe is a candidate for public office. Richards argues, however, that the general applicability of data privacy laws nevertheless should immunize these laws from serious First Amendment challenge. See Richards, supra note 168, at 1204. Right
that the First Amendment precludes all right of publicity claims involving noncommercial speech. It does mean, however, that the state interest must be adequate to overcome the First Amendment challenge and narrowly tailored to achieve its goal. Only a relatively small number of claims that impinge upon defendants’ interests in freely expressing their values, interests, and beliefs, we shall argue, can satisfy this standard.


In its 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Supreme Court for the first time extended First Amendment protection to commercial speech. Commercial speech nevertheless is entitled only to a

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of publicity laws are generally applicable as well, at least in states that confer these rights upon everyone regardless of the commercial value of their identities. As Richards notes, however, laws that have a “significant impact upon expressive activity on matters of public concern” are not (like the “ordinary nondisclosure rules that permeate American law”) really laws of general applicability, and thus deserve either intermediate or strict scrutiny, depending on the circumstances. *See id.* at 1206. In our view, right of publicity laws that do not involve commercial speech generally do carry with them the risk of significantly impacting expressive activities on matters of public concern, and therefore cannot be saved merely by reference to some formal general applicability.


176 In holding that commercial speech is entitled to some degree of First Amendment protection, the Court cited the place of commercial speech in the marketplace of ideas, as well as its status as a matter of public interest (at times even more vital than political
lesser (albeit “substantial”) degree of First Amendment protection than is noncommercial speech.\textsuperscript{177} Two principal issues arise in connection with the distinction between commercial and noncommercial speech: first, defining what commercial speech is; and second, deciding what sorts of state regulations are permissible under the applicable standard of intermediate scrutiny. As discussed below, many (though hardly all) applications of the right of publicity involve commercial speech; when this is so, the exercise of publicity rights is generally consistent with the First Amendment.

As for the first issue, in \textit{Virginia Pharmacy} the Court defined commercial speech as speech that “does no more than propose a commercial transaction.”\textsuperscript{178} Typical debate). \textit{See id.} at 760-64. At the same time, the Court recognized that commercial speech has qualities that make it more susceptible to state regulation; the very reason underlying constitutional protection of commercial speech is to provide accurate information to a consumer about a proposed commercial transaction. \textit{See id.} at 760. Hence, to the extent a regulation seeks to either prevent misleading or deceptive commercial speech, or to provide more information, it is likely to pass a constitutional muster. \textit{See id.} at 781. Moreover, commercial speech is more heavily regulated than other kinds of speech because it is “objective” and “more easily verified,” and it is more "hardy" than other types of speech in that it is less likely to be chilled by regulation. \textit{Id.} at 777.

\textsuperscript{177} \textit{See id.} at 761.

\textsuperscript{178} \textit{Id.} at 762. In \textit{Central Hudson}, 447 U.S. at 561, the Court cited \textit{Virginia Pharmacy} for the proposition that commercial speech is “expression related solely to the economic interests of the speaker and its audience.” The Court arguably has shied away from this
examples of purely commercial speech include product advertisements. Subsequent case law has further developed the meaning of the term, though without providing a comprehensive definition, to assist in characterizing speech that combines commercial and noncommercial components. In *Bolger v. Young Drug Products Corp.*, for example, the Court held that informational pamphlets discussing contraceptives in general and the defendant’s products in particular constituted purely commercial speech, based on a combination of three factors: (1) the pamphlets were conceded to be advertisements; (2) they referred to a specific product; and (3) the defendant manufacturer had an economic motivation for distributing them. The Court stressed that each of those three factors, taken by itself, was insufficient to render a pamphlet purely commercial speech; but it reasoned that “the combination of all these characteristics” strongly supported the conclusion that the pamphlets were purely commercial.


181 See id. at 68.
commercial in nature, even though they also discussed important public issues, such as
family planning.\textsuperscript{182}

Numerous other cases have had to grapple with the “difficult task” of
distinguishing between “purely commercial ventures and protected distribution of written
materials.”\textsuperscript{183} In \textit{Schamburg v. Citizens for a Better Environment},\textsuperscript{184} for example, the
Court stated that when a transaction “does more than inform private economic decisions
and is not primarily concerned with providing information about the characteristics and
costs of goods and services,” it is not treated as purely commercial speech.\textsuperscript{185} Applying
this standard, the Court invalidated a local ordinance requiring charitable solicitors to
apply 75\% of all funds solicited for charitable purposes; the Court rejected the argument
that charitable solicitation constituted purely commercial speech, akin to a business
proposition, characterizing it instead as “characteristically intertwined with information
and perhaps persuasive speech seeking support for particular causes or for particular
views on economic, political, or social issues.”\textsuperscript{186} Similarly, in \textit{Riley v. National
Federation of the Blind of North Carolina},\textsuperscript{187} the Court invalidated a state law requiring

\begin{footnotesize}
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\item Id. at 68 (“A company has the full panoply of protections available to its direct
comments on public issues, so there is no reason for providing similar constitutional
protections when such statements are made in the context of commercial transactions”).
\item Schamburg v. Citizens for a Better Envir., 444 U.S. 620, 630 (1980).
\item 444 U.S. 620, 630 (1980).
\item Id. at 632.
\item Id.
\item 487 U.S. 781 (1988).
\end{enumerate}
\end{footnotesize}
professional solicitors to disclose to potential donors the percentage of charitable collections during the previous twelve months that were actually turned over to charity.\textsuperscript{188}

The Court rejected an argument that the statute regulated only purely commercial speech because it related solely to the profits of a professional fundraiser, reasoning instead that charitable solicitation speech does not retain its commercial character if “it is inextricably intertwined with otherwise fully protected speech.”\textsuperscript{189} Although the meaning of “inextricably intertwined” can sometimes appear rather subjective,\textsuperscript{190} in general Bolger’s

\textsuperscript{188}See id. at 798.

\textsuperscript{189}Id. at 796; see also id. (stating that “where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression”).

\textsuperscript{190}See, e.g., Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 475 (1989) (holding that there was “nothing whatever inextricable” about the noncommercial aspects of product demonstrations conducted in campus dorms); United States v. Schiff, 379 F.3d 621, 629 (9th Cir. 2004) (holding that a book advocating the belief that federal income taxes are illegitimate constituted pure commercial speech, because it also promoted the authors’ “line of tax avoidance products and services” and the authors’ political views were not inextricably intertwined with the commercial message); Ad World, Inc. v. Township of Doylestown, 672 F.2d 1136 (10th Cir. 1982) (holding that a 16-page tabloid including extensive advertisements and only a few pages of consumer and community information deserved full First Amendment protection because it was not limited to purely commercial advertising).
three-part test, coupled with Riley’s statement that the level of the First Amendment scrutiny is determined by “the nature of the speech taken as a whole,” has provided lower courts with a relatively straightforward way of deciding whether the speech at issue is purely commercial, even if, on first glance, it contains traditional noncommercial elements.

As for the second issue, to balance the First Amendment interests in the context of commercial speech, the Supreme Court in Central Hudson Gas & Electric Corp. v. Public Service Commission developed a four-part test that inquires: (1) whether the speech is misleading (or promotes illegal transactions); (2) whether the regulation serves an important government interest; (3) whether the regulation directly advances the government interest; and (4) whether the regulation is narrowly tailored to achieve its goals and does not restrict more speech than necessary. In relation to the first factor, if the speech at issue is false or misleading (or concerns illegal transactions), the state can

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191 Id. at 796.

192 See, e.g., United States v. Wenger, 427 F.3d 840, 847 (10th Cir. 2005) (holding that radio program and newsletter providing investment advice constituted purely commercial speech, where it referenced a specific product, was motivated by defendant’s economic interests, and “in the end” was nothing but an advertisement).


194 See id. at 565.
ban it altogether. If, on the other hand, the speech at issue is truthful commercial speech, inquiry then proceeds to the other three factors. With respect to the second factor, courts consider a wide array of government interests to be sufficiently important to warrant restrictions on purely commercial speech. In *Fox*, for example, the Court held that the state interests in promoting education, safety, and security, and in preventing the commercial exploitation of students, were sufficiently important to support the university’s ban against holding “Tupperware parties” in campus dormitories. As for the third and fourth factors, the Court has explained that *Central Hudson* does not require that a government regulation be the least-restrictive means of serving the government’s interest at issue; rather, all that is required is “a reasonable fit” between the regulation and the government interest involved. In connection with this inquiry, courts likely will

197 See id. at 475. The Court, however, remanded the case to the district court to determine whether the university regulation at issue provided a “reasonable fit” to serve those important objectives. See id. at 486.
198 See *City of Cincinnati*, 507 U.S. at 416 (striking down city’s ban on newsracks, because the city failed “to establish a ‘reasonable fit’ between its legitimate interests in safety and esthetics” and its selective prohibition of newsracks as the means to serve those interests); Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (rejecting the least-restrictive-means test and ruling that the state has to show “a
consider whether enjoining the allegedly improper use would keep ample alternative means of communicating a speaker’s message.\textsuperscript{199}

Applying these principles to the right of publicity is often relatively straightforward. To the extent a defendant engages in the unauthorized use of a person’s name or likeness in commercial advertising (as in \textit{Pavesich}), judicial enforcement of a right of publicity claim would almost certainly withstand First Amendment challenge under \textit{Central Hudson}. As noted above, to the extent an advertisement constitutes false commercial speech, by falsely expressing or implying the subject’s endorsement, the state may ban it altogether.\textsuperscript{200} But even in the absence of an actionable false endorsement claim, the state interests underlying the right of publicity would probably qualify as reasonable fit” between its legitimate interest and the proposed commercial speech regulation).

\textsuperscript{199} \textit{See} Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 562 (2001) (striking down state regulations of outdoors advertising of tobacco, because they would constitute “a nearly complete ban” on truthful communication of information about smokeless tobacco to adult consumers).

\textsuperscript{200} \textit{See supra} text accompanying note 195. To prevail on a claim for false endorsement under Lanham Act § 43(a)(1)(A), 15 U.S.C. § 1125(a)(1)(A), a plaintiff must prove (1) imitation of a distinctive attribute of a celebrity’s identity (2) in connection with goods or services, or any container for goods, (3) defendant’s use is in interstate commerce, and (4) is likely to cause confusion, among a substantial portion of the relevant class of purchasers, regarding the celebrity’s endorsement of the goods or services. \textit{See} Downing v. Abercrombie & Fitch, 265 F.3d 994, 1007-08 (9th Cir. 2001).
sufficiently important to support application of the right of publicity in the context of advertising. As we discussed above, a wide variety of state interests have been proposed as supporting the right of publicity, including protecting privacy and autonomy; rewarding the individual’s investment of labor or personality in developing a recognizable performing style; and encouraging people to invest in developing unique performing styles or in efficiently managing their fame.  

Although reasonable minds may differ in their assessment of how persuasive these justifications are, these rationales probably are sufficiently “important” to withstand intermediate scrutiny. In other contexts, courts have found privacy justifications to be “important” governmental interests; and the state interest in compensating celebrities and others for commercial value of their likeness is arguably no less important than the state interest in preventing commercial exploitation of students in *Fox*. Indeed, governments frequently offer “rewards” for various activities deemed beneficial, and provide encouragement for the performing arts, sports, and entertainment. Furthermore, in most cases the invocation of

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201 See *supra* text accompanying notes 37-44.

202 See, e.g., Hill v. Colorado, 530 U.S. 703, 715-17 (2000) (upholding a statute prohibiting speakers from approaching unwilling listeners near entrance to health care facilities, given the state’s important interests in protecting peoples’ privacy and their “right to be let alone”); Fraternal Order of Police v. Stenehjem, 431 F.3d 591, 597 (8th Cir. 2005) (upholding a statute prohibiting professional charitable telephone solicitation of “do not call” list registrants, based on the state’s “significant” interest in protecting registrants’ privacy).

203 See *Fox*, 492 U.S. at 475.
the right of publicity probably would be viewed as directly advancing one or more of these (and perhaps other) interests, and as reflecting a reasonable fit between end and means.\textsuperscript{204} Enjoining the use of an individual’s name or likeness normally would leave other alternatives, including consensual uses of other persons’ names or likenesses, for communicating the speaker’s message.\textsuperscript{205} On this analysis, most applications of the right of publicity in the context of commercial speech would pass constitutional muster.\textsuperscript{206}

\textsuperscript{204} At the same time, the state interest cannot be wholly speculative. \textit{See} Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001) (stating that the state’s “burden is not satisfied by mere speculation or conjecture,” but that the Court sometimes has permitted litigants to justify speech restrictions “by reference to studies and anecdotes pertaining to different locales altogether,” and even in some instances by appeals to “history, consensus, and ‘simple common sense’”) (citations omitted). In particular, the state interest in encouraging people to invest in developing unique performing styles might seem weak, given the likely minimal incentive impact of the right of publicity. \textit{See, e.g.}, LANDES \& POSNER, \textit{supra} note 41, at 223. But the other rationales, including labor and encouraging investment in the management of one’s celebrity, while unpersuasive to many, are more difficult to reject out of hand.

\textsuperscript{205} \textit{But see} Volokh, \textit{supra} note 160, at 711-12 (arguing that there sometimes are no reasonable alternatives).

\textsuperscript{206} One possible difficulty may arise from cases in which the use at issue is partly commercial and partly noncommercial in nature, with \textit{Hoffman}, 255 F.3d 1180 (9th Cir. 2001), being a paradigm example. As discussed above, in \textit{Hoffman} the Ninth Circuit held that a magazine article featuring digitally altered images from famous films deserved
One possible critique of the preceding discussion is that it places too much weight on the distinction between commercial and noncommercial speech. In the view of some commentators\(^\text{207}\) (and some members of the Supreme Court)\(^\text{208}\) the distinction is full First Amendment protection because its focus was not on promoting a sale of a specific product, but rather on providing a “visual and verbal editorial comment on classic films and famous actors.” Id. at 1185. Similarly, in Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 906-07 (9th Cir. 2002), the same court ruled that a song titled “Barbie Girl” that lampooned Mattel’s famous doll was entitled to full First Amendment protection, even though it contained elements of commercial speech, i.e. the record company used Barbie’s name to sell copies of the song. The Court explained that the focus of the song was to comment humorously on the cultural values Barbie represented. Under Riley, the Hoffman court’s focus on the work as a whole, and its stated principle that speech inextricably combining commercial and noncommercial elements should be viewed as noncommercial, both appear correct. See Hoffman, 255 F.3d at 1185-86. Uses that not are purely commercial speech, then, are entitled to full-blown First Amendment protection subject only to exceptions consistent with our reading of Zacchini, as we discuss below.

\(^\text{207}\) For a useful summary of scholarly and judicial critiques of the commercial speech doctrine, see Jennifer E. Rothman, Initial Interest Confusion: Standing at the Crossroads of Trademark Law, 27 CARDOZO L. REV. 105, 151-53 & nn. 189, 190 (2005); see also Alex Kozinski & Stuart Banner, Who’s Afraid of Commercial Speech?, 76 VA. L. REV. 627 (1990). For a more skeptical view of the extension of First Amendment protection to commercial speech, see Richards, supra note 170, at 1219-20 (arguing that the extension
untenable, both because commercial speech is (for many people) just as or more important than noncommercial speech and because the distinction between commercial and noncommercial speech can be difficult to discern. In addition, although a majority of the Supreme Court has yet to overrule the commercial speech doctrine, recent cases have reflected much less deference to state regulations that curtail commercial speech. “opened the door to the resuscitation of _Lochner_-style economic rights,” but that nevertheless “[t]he line between economic and political rights has persisted”).

208 _See_ Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554-55 (2001) (noting that five members of the Court have at times expressed dissatisfaction with _Central Hudson_). Justice Thomas has been the most forceful in expressing the view that the regulation of truthful commercial speech should be subject to strict scrutiny. _See id._ at 572 (Thomas, J., concurring).


210 _See, e.g.,_ Lorillard, 533 U.S. at 574-75 & n.2 (Thomas, J., concurring) (referring to the “malleability” of the four-step test and doubting the coherence of distinguishing commercial from noncommercial speech).

211 _See, e.g.,_ Lorillard, 533 U.S. at 556-67 (holding that state law prohibiting the advertising of tobacco products within 1,000 feet of schools and playgrounds was more extensive than necessary to attain the goal of limiting underage use, in violation of _Central Hudson_’s fourth step, and that regulation requiring indoor point of sale ads to be placed at least five feet from the floor failed both the third and fourth steps); _44 Liquormart, Inc. v. Rhode Island_, 517 U.S. 484 (1996) (holding that a state law
To the extent that distinction plays an important role in our analysis, therefore, it may not seem to be adding much clarity and predictability to this body of law.

Although a defense of the commercial speech doctrine is beyond the scope of the present Article, four observations convince us that the analysis above remains viable. First, and most obviously, whatever the future path of the law as it relates to commercial speech, the commercial speech doctrine still exists unless and until a Supreme Court majority decides otherwise. Second, to the extent that recent cases interpret the doctrine narrowly—or that future cases eliminate it altogether—the implication should be that fewer, not more, right of publicity cases will survive challenge. In particular, it is difficult to perceive how the state interest in providing an economic incentive for persons to invest in or manage their fame could provide a compelling rationale for a content-based restriction on core First Amendment speech. Although one or more of the other rationales (privacy, autonomy, false endorsement) might provide a sufficient rationale in some cases, applications that rest predominantly or exclusively on the economic rationales would seem all the more tenuous once the distinction between commercial and noncommercial speech is eliminated. Third, although the distinction between commercial and noncommercial speech is indeed sometimes fuzzy, as suggested above the vast majority of right of publicity cases should be relatively clear-cut. Cases

prohibiting the truthful advertising of retail liquor prices was unconstitutional); Lyris

Barnett Lidsky, Nobody’s Fools: The Rational Audience as First Amendment Ideal, Univ. of Fla. Legal Studies Research Paper No.2009-19 (Jan. 2009), available at http://ssrn.com/abstract=1365979, at 29-31 (stating that “the modern trend, even in commercial speech cases, is to give more credit to the targets of commercial speech”).
involving the use of celebrities’ identities in advertising typically will be commercial speech, and cases involving the use in other contexts (e.g., expressive works and merchandise, as well as the advertising incidental thereto) will not. Fourth, the distinction between commercial and noncommercial speech remains important in demarcating the scope of liability in other bodies of unfair competition law, including trademarks and false advertising. No standard will eliminate all hard cases, but the commercial/noncommercial distinction should be serviceable enough for a large swatch of real-world publicity cases.

C. Subject to Some Exceptions, Application of the Right of Publicity in the Context of Noncommercial Speech Does Not Satisfy Heightened Scrutiny.

As noted above, for the state to restrict noncommercial speech on the basis of its content requires that the restriction serve a compelling state interest and be narrowly tailored to achieve that end. In this section, we argue that in most contexts involving noncommercial speech, the right of publicity does not promote a compelling state interest. We therefore propose a narrow reading of Zacchini that, in the context of noncommercial speech, limits the right to cases in which the defendant has appropriated the plaintiff’s entertainment, modeling, or spokesperson services in a substantial manner.

Historically, the range of state interests the Supreme Court has found sufficiently compelling to restrict noncommercial expression has been quite limited. Typical

212 See, e.g., Mattel, 296 F.3d at 906-07 (trademark dilution); Fashion Boutique, Inc. v. Fendi U.S.A., Inc., 314 F.3d 48, 56-57 (2d Cir. 2002) (false advertising and product disparagement).

examples include governmental interests in safeguarding national security and preventing a risk of imminent physical harm.\textsuperscript{214} Governmental interests that fall short of seeking to prevent physical harms (for example, that seek to prevent psychological harms to minors) have been held insufficiently compelling to justify restrictions on speech.\textsuperscript{215} Governmental interests in preventing so-called “reactive harms,” injuries caused by emotional or intellectual responses to the content of the speech, traditionally have been found insufficiently compelling as well.\textsuperscript{216} Furthermore, whether a restriction is narrowly tailored depends upon the “fit” between the scope of the restriction and the interests that it seeks to serve.\textsuperscript{217} A content-based restriction must use the “least restrictive means” to further the articulated interest and actually advance that interest.\textsuperscript{218} Even the interest in


\textsuperscript{215} See Video Software Dealers Ass’n v. Schwarzenegger, 556 F.3d 950, 967 (9th Cir. 2009) (affirming an order permanently enjoining enforcement of a state law that imposed restrictions and labeling requirements on the sale of violent video games to minors).

\textsuperscript{216} See Cohen v. California, 403 U.S. 15, 26 (1971) (holding unconstitutional the conviction of a defendant for wearing a jacket bearing the phrase “Fuck the Draft” in a Los Angeles courthouse); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988) (holding that a crude parody depicting the Reverend Jerry Falwell as an incestuous drunk was protected under the First Amendment because, even though outrageous, it constituted core noncommercial speech).

\textsuperscript{217} \textit{City of Cincinnati}, 507 U.S. at 430-31.

preventing imminent physical harm often falls short on this ground, because the regulation at issue is not “narrowly tailored” to advance that interest.\textsuperscript{219}

Viewed in this light, the exercise of publicity rights in connection with noncommercial speech would appear quite difficult to sustain. Suppose, for example, that some state’s law considered the unauthorized use of a person’s name in an expressive work (such as a biography) to constitute a use for purposes of trade in violation of the right of publicity. Enjoining publication of the biography in order to vindicate the plaintiff’s publicity right surely would violate the First Amendment. For reasons presented in the preceding sections, the speech at issue would be noncommercial and the regulation would be content-based;\textsuperscript{220} it is difficult to perceive how any of the purported state interests, with the possible (though on these facts, doubtful) exception of privacy,\textsuperscript{221}

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\item \textsuperscript{219} See Doe v. Mukasey, 549 F.3d 861, 880-81 (2d Cir. 2008) (enjoining enforcement of the Patriot Act provisions concerning the government’s requests for records from Internet providers because, in the absence of a statutory provision for judicial review, they were not narrowly tailored to serve the compelling government interest in ensuring national security).
\item \textsuperscript{220} See supra Parts IIIA, B.
\item \textsuperscript{221} Privacy-based claims--like defamation and intentional infliction of emotional suffering--are subject to heightened constitutional scrutiny at least when the plaintiff is a public figure or the matter is of public concern. See Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967); Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988). And in some circumstances, privacy is clearly not a sufficiently compelling interest to sustain a content-based regulation. See, e.g., Cooper v. Dillon, 403 F.3d 1208, 1218 (11th Cir. 2004).
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would be sufficiently compelling; and injunctive relief would not be the least restrictive means for serving any such interest. Fortunately, however, the right of publicity as set forth in the Restatement and as applied in most states deflects these First Amendment problems by defining this type of use, and other uses in connection with expressive works, as (ordinarily) not “for purposes of trade” and thus nonactionable.

Problems nevertheless arise because some applications of the right of publicity do involve content-based restrictions on noncommercial speech. As discussed above, Zacchini involved noncommercial speech (a news broadcast) and thus apparently stands for the proposition that in some circumstances the right of publicity can withstand a free speech challenge even in the context of noncommercial speech. To be sure, Zacchini was decided in 1977 and thus pre-dated the development of clear analytical distinctions between content-based and content-neutral regulations; and the majority never mentioned the appropriate level of scrutiny to be applied. Nevertheless, the Court mentioned as possible state interests supporting the right of publicity “preventing unjust enrichment by the theft of good will” and conferring “an economic incentive . . . to make the investment

222 See, e.g., Doe, 549 F.3d at 880-81.

223 See supra Part IIB.

224 See Netanel, supra note 165, at 53 n.212 (noting these points).
required to produce a performance of interest to the public."  

Although the Court’s invocation of these rationales might lead one to conclude that publicity claims involving noncommercial speech generally survive First Amendment challenge, we resist this interpretation for several reasons.

First, for reasons discussed in Part III.A, we reject the argument that the mere characterization of Zacchini’s interest as a state-sanctioned “property” interest can insulate his claim from serious First Amendment scrutiny. Second, it seems clear from the preceding analysis that the state interests in preventing unjust enrichment and providing an economic incentive to invest in developing performances would be woefully insufficient to justify applications of the right of publicity that intruded upon publication of, say, an unauthorized biography. Important as these state interests may be, they surely cannot suffice to enable states (as a general matter) to regulate the content of literary or other art forms. The interests the Court mentioned, as well as the others that are

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225 See Zacchini, 433 U.S. at 576. See also id. at 573 (referring to the state interest in “protecting the proprietary interest of the individual in his act in part to encourage such entertainment,” an interest “closely analogous to the goals of patent and copyright law”). The state interest in vindicating the plaintiff’s autonomy interest (to decide for himself when, or if, to market those services, and for how much) also was arguably at stake; indeed, it may have been the strongest rationale.

226 See supra notes 162-64 and accompanying text.

227 For First Amendment purposes, there are no meaningful distinctions between literary and other art forms. See infra note 243 and accompanying text. Putting aside likely preemption problems, it is also hard to imagine a state law conferring exclusive rights in,
sometimes mentioned as supporting publicity rights, therefore might have sufficed on the specific facts of Zacchini, but nothing in Zacchini itself suggests that its result would extend far beyond the specific facts at issue. In many ways Zacchini presented the most sympathetic case imaginable for extending the right of publicity to noncommercial speech: as the Court noted several times, the defendant broadcast Zacchini’s entire, actual performance,\(^{228}\) thus (possibly) depriving him of the ability to make a living from future live performances.\(^{229}\) Moreover, Zacchini sought only damages, not injunctive relief.\(^{230}\)

A narrow reading of Zacchini also would be consistent with much, though not all, of existing publicity doctrine. It might, for example, permit the right of publicity plaintiff to prevail in a case in which the defendant has appropriated the plaintiff’s services not only as an entertainer (as in Zacchini itself) but also (as recommended by the Restatement of Unfair Competition) as a model, spokesperson, or other attention-grabber. Consider, for example, a case patterned after Comedy III but involving the unauthorized use of a living professional model’s image on tee shirts; or a case patterned after Parks, involving say, facts or ideas (beyond what the law of idea submission and the hot news doctrine permits, see supra note 164) surviving a First Amendment challenge, even if the state interests in preventing unjust enrichment or providing incentives were invoked in their support.

\(^{228}\) See id. at 569, 575-76.

\(^{229}\) See id. at 576 (stating that defendant’s conduct “goes to the heart of petitioner’s ability to earn a living as an entertainer”).

\(^{230}\) See id. at 565, 573-74, 578.
the unauthorized use of a celebrity’s name to call attention to an unrelated expressive work. Assuming that Zacchini remains good law, the extension of Zacchini to cases of this type should be constitutionally permissible as well, for several reasons. For one thing, it is difficult to perceive any meaningful basis for distinguishing these cases from Zacchini. In all three, the defendant has appropriated the plaintiff’s services, and while the specific type of service (circus performer, model, or attention-grabber) differs from case to case there appears to be nothing inherent in the nature of the services themselves to justify disparate results. Moreover, notwithstanding Zacchini’s invocation of labor and incentive theories (which, as we have seen, are overly broad to justify most content-based regulations of noncommercial speech), all three cases arguably can find support in the state’s interest in providing individuals with a means of securing their interest in autonomous self-definition. A reading of Zacchini that limits the rule in that case to circumstances in which the defendant has taken the plaintiff’s ability to decide when, and for whom, to provide services as a performer, model, or spokesperson thus provides a rationale for distinguishing Zacchini from lawful expressive uses. By contrast, a person whose name or image is used, or whose life story is retold, in literary works or motion pictures may suffer hurt feelings but no actionable loss of autonomy.231 Although the way we live our lives may provide fodder for others’ instruction or entertainment, absent

231 Put another way, someone who capitalizes on my fame by reporting about me is, in a sense, taking a free ride off of my fame. But he is not preventing me from being who I am; and he is not forcing me to dance, sing, act, or pitch products against my will. See McKenna, supra note 39, at 293.
actionable defamation or invasion of privacy we cannot prevent the mere portrayal of our lives in books or film without seriously encroaching upon authors’ freedom of speech.

In short, Zacchini and, by extension, the modeling and spokesperson cases, arguably can be fit within mainstream First Amendment case law by recognizing as compelling the state interest in protecting service providers’ personal autonomy to determine when and for whom to provide their services. Two other state interests also might suffice, in an appropriate case, to sustain publicity rights as applied to noncommercial speech. The first is privacy. As long as conventional invasion of privacy claims remain viable under current First Amendment law (though subject to stringent requirements when the matter at issue is of public concern), there is no particular reason to think that publicity claims that are grounded in the protection of personal privacy would run afoul of the First Amendment. Second, some unauthorized uses

232 See supra note 221.

233 For example, in Lake v. Wal-Mart, Inc., 582 N.W.2d 231 (Minn. 1998), a Wal-Mart employee allegedly circulated a nude photograph which the plaintiffs had taken to Wal-Mart for development. The plaintiffs’ interest in not having their modeling services appropriated might, we suppose, be implicated in such a case despite the fact that the plaintiffs were not professional models; but it would be more straightforward in such a case simply to invoke (as the court did) the plaintiffs’ interest in personal privacy. (Despite the right of publicity’s genesis in privacy law, however, these types of cases today appear to be a relatively small percentage of litigated publicity cases.) By contrast, the privacy interest might not be strong in a case in which the plaintiff is a professional model for the type of photographs at issue, but the autonomy interest would.
might not be purely commercial speech but might nevertheless implicate actionable (implicit) false endorsement; for example, a doll or poster portraying a famous living person might lead consumers to believe (erroneously) that the living person endorses the product. On the assumption that the First Amendment would permit unfair competition law to provide the person depicted with a cause of action for false endorsement on these facts, there is no obvious reason why the right of publicity could not do so as well, though protection would appear largely to duplicate existing claims under the Lanham Act. Of course, it’s possible that the assumption is wrong and that false endorsement claims of this type do violate the First Amendment. The portrayals at issue are probably best characterized as noncommercial speech, after all, because they do not consist of advertising or refer to specific products; and no Supreme Court case to date clearly supports a First Amendment exception in this context. Even so, along the lines

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234 See supra note 200 (setting forth the elements of a false endorsement claim).

235 See Comedy III, 21 P.3d at 802 (recognizing that the Stooges tee shirts were not commercial speech).

236 See Lisa Ramsey, Increasing First Amendment Scrutiny of Trademark Law, 61 SMU L. Rev. 381, 400-04, 412-14, 424-25, 442-46 (2008) (arguing that, while “courts have generally not applied strict scrutiny analysis to trademark laws regulating noncommercial speech,” they should do so; and questioning whether eliminating confusion as to sponsorship, as opposed to source, would be a compelling state interest); see also Mark A. Lemley & Mark P. McKenna, Irrelevant Confusion (May 21, 2009), available at http://ssrn.com/abstract=1407793 (doubting whether confusion as to sponsorship or affiliation often results in confusion that impairs consumer decisionmaking).
adopted in *Hoffman* a false endorsement rationale as applied to noncommercial speech might survive strict scrutiny at least in cases in which the celebrity plaintiff is able to prove actual malice.\(^{237}\)

Significantly, though, all of these applications of the right of publicity can be viewed as relatively narrow exceptions to a general principle that the First Amendment trumps the right of publicity in cases involving noncommercial speech. This interpretation would be consistent with the Restatement’s characterization of *Zacchini* as “extraordinary” and its cautioning against extending the *Zacchini* principle so as to

\(^{237}\) See supra notes 86-89 and accompanying text (discussing *Hoffman*). Of course, even in the context of celebrity plaintiffs, courts should be cautious about too readily inferring false endorsement merely because the plaintiff is named or depicted in an expressive work. First, if the defendant’s use has artistic relevance, some courts may require the plaintiff to show that “the public interest in avoiding confusion outweighs the public interest in free expression,” i.e., “the public interest in free expression should prevail if the use of the celebrity’s image has artistic relevance, unless it is used in such a way that it explicitly misleads as to the source of the work.” *ETW Corp. v. Jireh Pub.*, Inc., 332 F.3d 915, 928 (6th Cir. 2003). Second, according to some courts, the defendant’s use may be a lawful “nominative use” of the plaintiff’s attribute, but only if (1) the plaintiff is not readily identifiable without the use of the attribute; (2) only so much of the attribute is used as is reasonably necessary to identify the plaintiff; and (3) the defendant has done nothing that would, in conjunction with the image, suggest sponsorship or endorsement by the plaintiff. *See, e.g.*, *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1151-55 (9th Cir. 2002).
prevent unauthorized imitation performances.\textsuperscript{238} Just as importantly, however—and contrary to the Restatement’s suggested approach—a narrow reading of Zacchini would not enable publicity rights to interfere with the marketing of “expressive merchandise” unless that marketing amounts to an appropriation of personal services, invades a protected privacy interest, or (possibly) amounts to actionable false endorsement. Merely marketing a poster depicting a drawing of a living celebrity might not be actionable under this rule, for example, though we can imagine there will be some unavoidably difficult cases.\textsuperscript{239} In addition, none of the three rationales we have specified would normally have much strength with respect to deceased celebrities. As a general rule, privacy interests terminate at death,\textsuperscript{240} as would false endorsement claims absent

\textsuperscript{238}See RUC § 47 cmt. c.

\textsuperscript{239}It seems doubtful that the Tiger Woods poster at issue in ETW, 332 F.3d 915, amounted to an appropriation of Woods’s modeling services, for example; but what if the subject depicted in a poster is an entertainment professional whose looks are part of the job description?

\textsuperscript{240}See, e.g., New Era Publications Int’l, AsP v. Henry Holt & Co., 695 F. Supp. 1493, 1505 (S.D.N.Y. 1988) (“The death of the subject is generally understood to terminate a privacy interest”), aff’d, 873 F.2d 576 (2d Cir. 1989); 1 McCarthy, supra note 15, § 9:1, at 381 (stating that “[b]oth the commentators and the cases unanimously support” the rule that privacy rights terminate at death). The Restatement of Torts agrees that privacy interests as such terminate at death, but carves out an exception for publicity rights. See Restatement (Second) of Torts § 652I cmt. b (1977). The exception, however, appears due to the fact that the Restatement views publicity rights as being based not only
evidence that consumers perceive the endorsement to have been made premortem.\textsuperscript{241} To the extent the interest in autonomous self-definition is akin to a privacy or dignitary interest,\textsuperscript{242} it too would (we believe) normally terminate at death. Even more in privacy but also in unjust enrichment (i.e., as a form of property). \textit{See id.} To the extent privacy interests \textit{alone} are at issue, the majority rule is that those interests terminate at death. As we discuss below, however, there is one limited way to circumvent this restriction. \textit{See infra} notes 329-32 and accompanying text.

\textsuperscript{241} \textit{See} 1 J. THOMAS McCARTHY, McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:15, at 28-28 (4\textsuperscript{th} ed. 2009) (raising, but not answering, the question whether “use of the identity of a deceased person” would constitute actionable false endorsement, if consumers think that the “product was endorsed by the person while alive”).

\textsuperscript{242} Some authorities use the term “autonomy privacy” to refer to the individual interest in making certain intimate decisions (such as marriage, sexual relations, and reproduction) without interference. \textit{See, e.g.}, Hill v. NCAA, 865 P.2d 633, 654 (Cal. 1994). \textit{See also} RUC § 46 cmt. c (“Like the right of privacy, the right of publicity protects an individual’s interest in personal dignity and autonomy”). Zacchini’s noneconomic interest in not having his performance broadcast without his consent may not be of the same gravity as some of these other (sometimes constitutionally based) autonomy interests, but to the extent it shares a common grounding in the recognition of individual self-definition it would appear to be in the nature of a personal interest, terminable at death. Analogously, the reputational interest at issue in defamation actions also terminates at death. \textit{See, e.g.}, \textsc{Restatement (Second) of Torts} § 560 (1977).
importantly, our proposed rule would leave no room for conditions such as transformativeness to be incorporated into the analysis. Pictorial representations, after all, are speech;\(^{243}\) speech does not lose its First Amendment value merely because it is embodied on tee-shirts;\(^{244}\) and neither does it lose its value merely because it depicts rather than transforms the original. Of course, if our critique of the transformativeness standard is correct, then even weaker speech-protective standards, such as the “predominant purpose” standard adopted in *Doe*, cannot provide an adequate rationale for enjoining noncommercial speech.\(^{245}\)

\(^{243}\) See, e.g., *Finley*, 524 U.S. at 602; *Mastrovincenzo* v. City of New York, 435 F.3d 78, 85 (2d Cir. 2006) (stating that “paintings, photographs, prints and sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection”) (quoting *Bery* v. City of New York, 97 F.3d 689, 696 (2d Cir. 1996)).

\(^{244}\) See *Cohen*, 403 U.S. at 26; *Mastrovincenzo*, 435 F.3d at 96.

\(^{245}\) One might plausibly ask whether, in light of our critique above and in light of subsequent cases such as *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001), *Zacchini* remains good law even if narrowly construed. In *Bartnicki*, the Supreme Court held that the First Amendment precluded the application of federal and state laws prohibiting the disclosure of illegally intercepted communications by a person who knows or should know that the communications have been illegally intercepted, where the defendants did not participate in the interception and the communications at issue involved a matter of public concern. *See id.* at 525-35. Although it is possible that a future Court might conclude that *Bartnicki* overrules *Zacchini* to the extent that communication of Zacchini’s performance
Finally, even when the exercise of publicity rights would arguably vindicate a state interest in privacy, autonomy, or truthful marketing, the mere presence of such an interest does not necessarily carry the day. Presumably, the defendant’s interest in critique or commentary on a matter of public concern could trump the plaintiff’s publicity rights in an appropriate case. Moreover, even if the right of publicity can apply with

(and similar performances) are matters of public concern, the two cases might be distinguishable in light of the “unusual public concern” (threats against school board officials) that arguably was at issue in *Bartnicki*. See *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring). In any event, as stated in the Introduction our purpose here is to map out the existing legal parameters, as we see them; we hesitate to presume that *Bartnicki* overrules *Zacchini* sub silentio. See *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996) (following the principle that lower courts should not presume that a Supreme Court precedent has been overruled until the Supreme Court expressly overrules it), rev'd on other grounds, 522 U.S. 3 (1997).

246 See Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 Tul. L. Rev. 836, 928-29 (1983) (proposing that, in a hypothetical case involving the marketing of dolls and postcards portraying First Lady Nancy Reagan “robed in ermine and crowned in diamonds,” the First Amendment would shield the defendant from liability to the extent the depiction “is intended to convey criticism of her style”). Presumably, the extent to which a use is “newsworthy” or involves a matter of “public concern” could matter as well in determining whether the state interest in privacy, autonomy, or preventing deceptive marketing trumps the First Amendment. Arguably, the Supreme Court would accord more weight to the
respect to noncommercial speech, it is hardly clear that First Amendment law permits any penalty more onerous than monetary damages. As noted above, in Zacchini the plaintiff sought only a damages award.\textsuperscript{247} In addition, an award of damages would be a less restrictive alternative than an injunction and thus more likely to pass muster under the First Amendment; this consideration might be particularly acute when the plaintiff is the owner of a deceased person’s right of publicity. On the other hand, in cases in which the false endorsement rationale for the right of publicity is at issue, injunctive relief may be necessary to dispel the likelihood of confusion that the plaintiff has endorsed the defendant’s product.\textsuperscript{248} In any event, assuming that the eBay test\textsuperscript{249} for determining newsworthiness or “public concern” nature of the use today than at the time it decided Zacchini. Compare id. at 858 (noting that Zacchini had conceded the newsworthiness of his act) with Bartnicki, 532 U.S. at 525-35 (holding that wiretapping laws could not forbid the disclosure of innocently acquired communications of public concern).

\textsuperscript{247} See Zacchini, 433 U.S. at 565, 573-74, 578; see also Tory v. Cochrane, 544 U.S. 734, 737-38 (2005) (vacating injunction against defamatory picketing, in light of defamed party’s death). Of course, even the imposition of monetary liability may exert some chilling effect on defendants’ free speech rights.

\textsuperscript{248} This assumes that some cases involving noncommercial speech nevertheless could implicate the false endorsement rationale.

\textsuperscript{249} eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392 (2006) (requiring plaintiff to show irreparable harm, no adequate remedy at law, that the balance of hardships favors the plaintiff, and that the public interest would not be disserved by the entry of injunctive relief).
whether to grant injunctive relief in patent cases applies here, as it arguably does to other intellectual property disputes, a court may be on firm ground in denying injunctive relief at least in some cases even when the publicity plaintiff prevails on liability.

To sum up, we have argued that, with respect to the right of publicity, (1) cases involving purely commercial speech generally do not pose an obstacle to the exercise of the right of publicity, under *Central Hudson*; (2) cases involving noncommercial speech do pose a potential conflict with the First Amendment, which may be overcome when the countervailing state interest is sufficiently compelling; and (3) in general the only interests that can be sufficiently compelling are the interests in privacy, autonomy, and (possibly) preventing deceptive advertising. With these principles in mind, we turn next to the limitations imposed by copyright, and then to the integration of our First Amendment and copyright analysis.

**IV. Integrating the Right of Publicity with Copyright Preemption**

Focusing on the state interests in support of the right of publicity also helps to clarify the circumstances under which federal copyright law preempts the exercise of state publicity rights. As discussed above, the text of Copyright Act § 301, standing alone, is ambiguous; and while cases such as *Goldstein* and *Bonito Boats* suggest that federal copyright law preempts state laws that substantially interfere with the federal copyright or patent scheme, neither provides clear guidance concerning what a substantial

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250 *See, e.g.*, Christopher Phelps & Assocs., LLC v. Galloway, 492 F.3d 532, 543 (4th Cir. 2007) (copyrights); Paulsson Geophysical Servs. v. Sigmar, 529 F.3d 303, 312-13 (5th Cir. 2008) (per curiam) (noting the question whether *eBay* applies to trademark disputes).
interference is.\textsuperscript{251} The legislative history of § 301, however, provides some limited assistance in understanding what types of claims Congress views as compatible with federal copyright rights. As noted above, that history indicates that, as a general matter, Congress did not intend to preempt state privacy laws or laws targeting deceptive advertising.\textsuperscript{252} Copyright therefore would not appear to present an obstacle to state privacy laws that, for example, interfere with an author’s ability to distribute or publicly perform works that disclose private facts, despite the possible existence of federal copyright protection in the works at issue;\textsuperscript{253} nor would it preempt laws that interfere with an author’s ability to distribute or publicly perform works embodying false advertising, notwithstanding the existence of federal copyright protection in such advertising.\textsuperscript{254}

\textsuperscript{251} See supra notes 96-114 and accompanying text.

\textsuperscript{252} See supra notes 149-53 and accompanying text.

\textsuperscript{253} There appears to be no basis in contemporary copyright law for denying the author of such a work a copyright interest. By way of analogy, the prevailing view is that copyright subsists in works that are legally obscene, see Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 856, 862 (5\textsuperscript{th} Cir. 1979), despite the fact that such works lack First Amendment protection and therefore may be banned. These principles suggest that, as a general matter, works that violate state privacy laws may enjoy federal copyright protection, but also that federal copyright law does not preempt those laws from impairing the copyright owner’s ability to exploit the work.

\textsuperscript{254} See Belcher v. Tarbox, 486 F.2d 1087, 1088 (9\textsuperscript{th} Cir. 1973); 1 NIMMER & NIMMER, supra note 113, § 2.17, at 2-199. There is some authority to the contrary, see Stone & McCarrick v. Dugan Piano Co., 220 F. 837, 841-43 (5\textsuperscript{th} Cir. 1913); but even if these
the extent the exercise of state publicity rights is adequately grounded in the perceived need to protect privacy or to prevent deceptive marketing, then, copyright law should not preempt that application. Cases such as Pavesich,\textsuperscript{255} in which the existence of publicity rights can be justified on the basis of privacy alone, would appear to be safe from copyright preemption. But privacy alone might not justify the exercise of publicity rights in a case in which the plaintiff is a celebrity; nor would it normally provide any basis for the assertion of publicity rights on the part of deceased persons, such as the Three Stooges. On the other hand, the state interest in preventing deceptive marketing might provide an adequate justification in cases in which the right of publicity protects the public against harm flowing from false endorsement. In this type of case, however, the right of publicity is largely duplicative of protection afforded under the Lanham Act;\textsuperscript{256} and, as with privacy-based claims, it might not provide an adequate rationale for conferring publicity rights upon deceased persons.\textsuperscript{257}

The question therefore remains whether federal copyright law preempts state publicity rights when the state interest in support of those rights is something other than the protection of privacy or the prevention of fraud. In attempting to answer this question, a good place to start is by delineating the copyright interest, if any, belonging to a person whose name, image, or indicia of identity are captured in a (potentially

\textsuperscript{255} See supra text accompanying notes 18-20.

\textsuperscript{256} See supra note 200.

\textsuperscript{257} See supra note 241 and accompanying text.
Copyright initially vests in the author of a work and thereafter may be assigned or licensed as the author sees fit. If a work is made by an employee within the scope of her employment, or falls within one of nine categories of specially created works (including works commissioned as part of a motion picture), it is defined as a work made for hire, and the employer or hiring party is deemed to be the “author” in whom copyright initially vests. For works other than works made for hire, the Copyright Act does not define the term “author.” Case law occasionally provides some guidance, however, suggesting that an author is a person who “superintends” or is the “master mind” of the work. In addition, a non-work for hire created by two or

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258 Under federal copyright law, works of authorship include literary works (works consisting of words, numbers, or other symbols); dramatic works; musical works; sound recordings; motion pictures and other audiovisual works; pictorial, graphic, and sculptural works, including works of photography; choreographic works; and architectural works. See 17 U.S.C. §§ 101, 103(a). Federal copyright protection subsists in an original work of authorship, fixed in a tangible medium of expression, from the moment of creation, and terminates 70 years from the death of the author or, in the case of a work made for hire, 95 years from the date of publication. See id. §§ 302(a), (c).


260 See id. § 201(d).

261 See id. §§ 101 (definition of work made for hire), 201(b).

more persons may qualify as a joint work, which each joint author may exploit as she sees fit, subject to a duty to account to the others for any resulting profit.\footnote{263}

From these propositions, several principles relevant to preemption may emerge. The first, and most obvious, is that a person has no claim to a copyright interest in a work of authorship merely because her name appears in that work. Including someone’s name in a work of authorship has no bearing on the question of who superintended the creation of the work. (Moreover, personal names standing alone would be too short to qualify as copyrightable subject matter.\footnote{264} A work of authorship therefore would not qualify as a derivative work merely because it refers to one of us, for example, by name.) Taking the analysis a small step further, the mere fact that someone is described or discussed (not just named) in a literary work would not confer authorship status on that person. A biography (as opposed to an autobiography) of Paris Hilton would not convert Ms. Hilton into an author of the work (though she might have a copyright interest in any works of hers, such as e-mail or personal interviews, that are quoted in the book.) Similarly, the fact that a singer has come to be identified with a particular song she performs (but did not compose) would not make her an author of the song, and the fact that an actor is identified with a particular stage role (e.g., Yul Brynner as the King of Siam) in a dramatic work created by another would not render the actor a joint author of the play.

\footnote{263}{See, e.g., Thomson v. Larson, 147 F.3d 195, 199 (2d Cir. 1998).}

\footnote{264}{See 37 C.F.R. § 202.1(a) (stating that “[w]ords and short phrases such as names” are not subject to copyright protection).}
The inclusion of a person’s indicia of identity in a visual work (such as a motion picture, a photograph, or a painting) or in a sound recording can, but does not necessarily, raise more complex questions of authorship. As a general matter the author of a photograph (or painting) is the photographer (or painter), or the person directing the photographer or painter, and not the person or persons depicted in the work. (Of course, if the work is a self-portrait, the author and the subject are one.) As for sound recordings, the analysis is somewhat less clear. Some commentary suggests that the performers (singers and musicians) could be deemed joint authors, along with the recording engineer or producer, of a recording that captures their performance. Other commentary expresses the view that, like motion pictures, sound recordings can (and often do) qualify as works made for hire, on the theory that sound recordings are a type of

265 See Aalmuhammed, 202 F.3d at 1233-34; 1 NIMMER & NIMMER, supra note 113, § 2.08[E][1], at 2-129 to -130 (citing Landau v. Cosmetic & Reconstructive Surg. Ctr., 158 F.R.D. 117, 119 (N.D. Ill. 1994). If the work were a work made for hire, the author would be the employer or commissioning party rather than the individual artist. See 17 U.S.C. §§ 101 (definition of work made for hire), 201(b); Thomas F. Cotter & Angela M. Mirabole, Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art, 10 UCLA ENTERT. L. REV. 97, 105-07 (2003).

266 See Lindsay, 1999 WL at *4-5.

267 See 1 NIMMER & NIMMER, supra note 113, §§ 2.10[A][2][a], at 2-176 to -177; 2.10[A][3], at 2-178.2(1); 5.03[B][2][a], at 5-50.

268 See id. §§ 2.10[A][3][b], at 2-178 to 178.1; 2.10[A][3], at 2-178.2(1); 5.03[B][2][a], at 5-50.
collective work. But there is little case law on point, and up till now the issue has been largely immaterial because the typical contract for the production of a sound recording requires the performers to assign their copyright interest, if any, to the producer. In theory, similar issues could arise with respect to actors’ performances captured in motion pictures, but because movies typically are works for hire under U.S. law, the exclusive author of a motion picture is almost always the company that produces the work.

With the preceding framework in mind, consider some hypothetical cases to test whether the vesting of publicity rights in a performer’s indicia of identity would “substantially interfere” with the system of rights envisioned by the federal copyright scheme. First, suppose that a famous actor enjoys wearing ROLEX watches. Without the actor’s consent, a photographer snaps a picture of the actor wearing his ROLEX watch while dining at a public place such as a restaurant; the photographer thereafter authorizes the maker of ROLEX watches to include the photo in an ad campaign; and the

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269 See id. § 5.03[B][2][a], at 5-47 (reviewing competing views on this point).

270 The issue might come to the fore beginning in the year 2013, when the first transfers of copyright interests effected after January 1, 1978, become subject to termination, but only if the works are issue are not works for hire. See 17 U.S.C. § 203. See also 1 Nimmer & Nimmer, supra note 113, § 5.03[B][2][a], at 5-43 to -45 (discussing the controversy over Congress’s inclusion, in 1999, of sound recordings within the list of specially commissioned works that could qualify as works for hire, and its subsequent deletion of sound recordings from the list less than one year later).

271 See 17 U.S.C. § 101 (definition of work made for hire); 1 Nimmer & Nimmer, supra note 113, § 5.03[B][2][a], at 5-52.
actor files suit for violation of his right of publicity. Although the actor’s assertion of a publicity claim would interfere with the photographer’s ability to exploit her rights under copyright law, we do not think that copyright should preempt the actor’s claim. To be sure, the actor’s interest in privacy, in this context, may be weak; there is no deception if the ad truthfully states that the actor wears a ROLEX watch; and there is nothing in the text or history of § 301 that necessarily precludes preemption. But there is nothing in that text or history that affirmatively compels preemption either, and the autonomy rationale sketched out in Part III would suggest that the actor’s interest in not being made an unwitting spokesperson for ROLEX watches outweighs the photographer’s interest in marketing the photo. More generally, if this reasoning is correct, other right of publicity claims premised on the unauthorized use of a person’s image in a work that consists of purely commercial speech should overcome copyright preemption challenges.

Second, consider a case involving precisely the same facts, except that the photo appears in a conventional form of noncommercial speech such as a magazine article about the actor. As discussed in Part III.C above, this type of use does not violate the right of publicity as expounded in the Restatement; moreover, mainstream First Amendment jurisprudence almost certainly would prevent a state from validating the exercise of publicity rights in such a case. Resolution of the copyright preemption issue therefore might not seem to matter much, but for what it’s worth we think that copyright too should preclude the exercise of publicity rights on these facts. Although it is conceivable that the states have some nontrivial interest in rewarding photographic

272 See supra Part IIIC.

273 See supra text accompanying notes 220-23.
subjects for having expended labor or personality as reflected in their visual images (or in encouraging them to invest their resources in developing careers, or in managing their fame, as photographic subjects), permitting the states to promote these interests when doing so would interfere with copyright owners’ ability to exploit their photographic works in noncommercial contexts would disturb whatever balance Congress is understood to have struck in according copyright protection to photographers as opposed to models. Putting photographers at the mercy of their subjects virtually anytime they decided to publish newsworthy photographs, in other words, in order to vindicate state interests that mirror the federal interests at the heart of federal copyright protection would effectively establish a body of competing norms at odds with the federal copyright scheme. Moreover, if our reasoning with respect to the noncommercial use of photographs is correct, its logic should extend as well to cases involving other media, such as motion pictures and sound recordings.

As in the example involving commercial speech, however, a different outcome might be appropriate if the subject’s exercise of publicity rights would vindicate a cognizable state interest in protecting privacy or autonomy, or in preventing deceptive marketing. For example, in some contexts a person who did not consent to being filmed or recorded (or who had no reasonable expectation that the film or recording would be made public) might have an actionable publicity claim, notwithstanding the

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274 For an overview of the many purposes that copyright might, in theory, serve, see, e.g., Thomas F. Cotter, Memes and Copyright, 80 TUL. L. REV. 331, 360-82 (2005).

275 Though of course there could be countervailing privacy interests at stake in some cases. See infra text accompanying note 276.
noncommercial nature of, and the existence of federal copyright rights in, the resulting work of authorship. For example, in *Michaels v. Internet Entertainment Group, Inc.*[^276] privacy considerations alone might have justified the court in enjoining the distribution of a famous couple’s sex tape (even if the distributor could have demonstrated ownership of the copyright in the tape), as long as the tape was intended for the couple’s private consumption only. Similarly, the state interest in autonomy might justify not only *Zacchini* but also cases in which the publicity violation is premised upon the unauthorized use of a person’s name to call attention to an unrelated work[^277]. To justify interfering with copyright rights, however, the purported intrusion upon privacy or autonomy should be real and substantial, not just possible or imaginary; and neither privacy nor autonomy interests normally would appear to justify extending publicity rights beyond the plaintiff’s death[^278]. Furthermore, as noted above, one might extrapolate


[^277]: *See supra* Part IIIC. Depending on the facts, these latter cases also might derive some justification from the state’s interest in preventing deceptive advertising, to the extent consumers wrongly would have concluded that the use of the subject’s name implied endorsement.

[^278]: As noted above, the Court in *Zacchini* repeatedly referred to the fact that the defendant broadcast the plaintiff’s performance *in its entirety*, *see Zacchini*, 433 U.S. at 569, 575-76, thus potentially depriving him of *any* market for his services; and that Zacchini sought only an award of damages, not an injunction, *see id.* at 565, 573-74, 578. *See RUC § 47 cmt. c* (stating that “[w]hen the defendant’s appropriation consists . . . of an actual performance by the plaintiff, the greater likelihood of commercial injury to the
from Zacchini the principle that the state interest in protecting personal autonomy can provide a sufficient justification for assertions of the right of publicity in cases involving the unauthorized reproduction of modeling photographs in noncommercial contexts. But our analysis provides no basis for extending the right of publicity to cases involving the mere imitation of a performer’s style in the context of a noncommercial work. The staging of a Beatles-style concert circa 1964, after all, does not appropriate any actual services of the Beatles; and the use of publicity rights to capture subject matter (style) that federal copyright law allocates to the public domain goes far beyond the rationale of plaintiff and the reduced public interest in permitting the use may justify relief in extraordinary circumstances,” and that “[s]ince the personal and proprietary interests underlying the right of publicity diminish after death, more substantial appropriations may be permissible after the death of the identified person”) (emphasis added); id. illus. 7, 8. Finally, Zacchini’s act itself conceivably could be viewed as a work of authorship in which state common-law copyright may subsist, even after the 1976 Copyright Act. See 17 U.S.C. § 301(b) (preserving state common law copyright in unfixed works); see also Dogan & Lemley, supra note 42, at 1187 (attributing this insight to Professor Paul Goldstein).

279 See supra text accompanying note 238; see also RUC § 47 cmt. c (stating that “[i]n cases of imitation, the public interest in competition and in avoiding the monopolization of successful styles, together with the interest in the production of new works including parody and satire, will ordinarily outweigh any adverse effect on the plaintiff’s market,” absent proof of false endorsement or copyright infringement).
Zacchini and threatens to interfere with the exploitation of federal copyright rights—in this instance, a playwright’s right to stage a dramatic work about the Beatles.

A more challenging case from the standpoint of copyright policy might be one in which the copyright owner seeks to exploit her copyright in a work in which commercial and noncommercial motivations are intertwined. Falling into this category would be uses such as the marketing of apparel or other merchandise that reproduces copyrighted photographs or paintings of real persons (such as in Comedy III,\textsuperscript{280} ETW,\textsuperscript{281} and recent disputes involving the Estate of Marilyn Monroe\textsuperscript{282}); or, as in Wendt,\textsuperscript{283} cases in which the owner of copyright in a motion picture and its accompanying fictional characters authorizes the creation of derivative works allegedly resembling those characters. If our analysis in Part III is correct, however, the question whether copyright preempts the exercise of publicity rights in cases like these is not urgent, because the First Amendment precludes them in any event. This may be just as well, because the question whether copyright law alone preempts these applications of the right of publicity is, we think, genuinely difficult. On the one hand, it may be that copyright is no less protective of

\textsuperscript{280} 21 P.3d 797 (Cal. 2001).

\textsuperscript{281} 332 F.3d 915 (6th Cir. 2003).


\textsuperscript{283} 197 F.3d 1284, 1285-89 (9th Cir. 1999) (Kozinski, J., dissenting from denial of rehearing en banc).
core First Amendment speech than is the First Amendment itself, in which case these applications of the right of publicity—and any other applications that are vulnerable to First Amendment challenge—necessarily also are preempted. On the other hand, but for the First Amendment elephant in the room, it is much less obvious that these types of uses (unlike the uses in the preceding set of hypotheticals) present a substantial interference with the federal copyright scheme. Artists and photographers could still market their copyrighted drawings and photos in more conventional noncommercial formats, and the producer of *Cheers* could authorize a remake of the tv series with different actors.\(^\text{284}\) Absent clear guidance on what constitutes a substantial interference for purposes of preemption—an expected loss of profits (and if so, by how much), a loss of artistic control, or what have you—it seems entirely unclear whether copyright law should preempt claims of this type. How should a court weigh the state interest in protecting performers from having their indicia of identity used partly to pitch products and partly for core speech purposes? The inability to weigh these interests in any principled fashion, however, may suggest the wisdom of resolving such cases for defendants, on First Amendment grounds.

\(^{284}\) *But see Wendt*, 197 F.3d at 1286-87 (Kozinski, J., dissenting from denial of rehearing en banc) (disputing the above statement). We’re not convinced, however, that remaking the series with different actors necessarily would be actionable under the logic of *Wendt*. The cases arguably are distinguishable insofar as the robots were designed to resemble the actors who played the roles in the original series.
Also challenging, but more readily susceptible of resolution, are cases such as
Midler\textsuperscript{285} and Waits\textsuperscript{286}, in which the defendants engaged in conduct—the making of
soundalike recordings—that the Copyright Act affirmatively permits users to do.\textsuperscript{287} In a
sense, allowing the performers at issue to use state publicity laws to forbid that which
federal copyright law expressly permits might seem to create a substantial interference
with the federal scheme. Both cases, however, implicate the state interests in preventing
deceptive marketing (to the extent consumers might have inferred that the performer was
endorsing the product)\textsuperscript{288} and thus in personal autonomy as well (given that neither
performer voluntarily participated in product endorsements \textit{at all}).\textsuperscript{289} Moreover, the

\textsuperscript{285} 849 F.2d 460 (9\textsuperscript{th} Cir. 1988).
\textsuperscript{286} 978 F.2d 1093 (9\textsuperscript{th} Cir. 1992).
\textsuperscript{287} \textit{See} 17 U.S.C. \textsection 114(b) (stating that “[t]he exclusive rights of the owner of copyright
in a sound recording under [Copyright Act \textsection\textsection 106(1) and (2)] do not extend to the
making or duplication of another sound recording that consists entirely of an independent
fixation of other sounds, even though such sounds imitate or simulate those in the
copyrighted sound recording”).
\textsuperscript{288} \textit{See} Waits, 978 F.2d at 1106-11. The court in \textit{Midler} did not mention a Lanham Act
false endorsement claim, but on the authority of the later-decided \textit{Waits} case it appears
that Bette Midler could have alleged such a claim; there was ample evidence of actual
confusion. \textit{See} Midler, 849 F.2d at 461-62.
\textsuperscript{289} \textit{See} Waits, 978 F.2d at 1097; \textit{Midler}, 849 F.2d at 461-62. Because both cases also
involved commercial speech, our analysis suggests that the First Amendment would pose
no obstacle to the assertion of publicity rights either.
Copyright Act only defines soundalikes as noninfringing works; it does not, literally, state that other bodies of law cannot regulate soundalikes. On the other hand, our analysis suggests that copyright would preempt a performer from enjoining the distribution of a nondeceptive, noncommercial soundalike recording of a Midler or Waits performance; *a fortiori*, it would preempt a performer from enjoining the distribution of another performer’s rendition of the first performer’s alleged “signature song.” Our analysis also might result in the preemption of Vanna White’s claim against Samsung, to the extent that case can be characterized as hinging on Samsung’s merely *evoking the idea* of Vanna White, as opposed to its using her likeness. To be sure, the majority in *White* also concluded that there was a genuine issue of material fact whether Samsung’s ad constituted actionable false endorsement; but we question that holding as well, in light of other case law endorsing the “nominative use” defense. Absent a valid false endorsement claim, the personal autonomy rationale (in this context) collapses too, leaving as the possible state interests only the labor, personality, or incentive

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290 *See* *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970).

291 In his opinion dissenting from the denial of rehearing en banc, Judge Kozinski repeatedly characterized the majority as according White an exclusive right to uses that merely “evoke” her identity. *See* *White v. Samsung Elecs. Am.*, 989 F.2d 1512, 1514-15 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc). *See also* Rothman, *supra* note 115, at 222-25 (arguing that copyright preempts the exercise of state publicity rights that protect ideas, as opposed to expression).

292 *See supra* note 237 (discussing the nominative use defense).
justifications. Although these interests in general may suffice to avoid preemption in
cases involving commercial speech (which the ad in *White* probably was), none of them
seems particularly strong on the actual facts of *White*: would future Vannas be tempted
to slack off if Samsung’s depiction of a robot wearing an evening gown were lawful?
Moreover, unlike Congress’s failure to accord federal copyright protection to sound
recordings pre-1972 (at issue in *Goldstein*), the relegation of *ideas* to the public domain is
hardly reflective of congressional disinterest but is, rather, a fundamental principle of
federal copyright law.\(^\text{293}\)

\(^{293}\) See 17 U.S.C. § 102(b); see also *Feist Publ’ns, Inc. v. Rural Telephone Serv. Co.*, Inc., 499 U.S. 340, 347 (1991) (holding that the Constitution requires that copyrighted
works, unlike facts, be original). A related point is that courts should exercise care in
determining whether a use of something other than a name or likeness constitutes an
actionable use of “indicia of identity.” The Restatement suggests that a number of factors
are relevant in deciding whether a use is “sufficient to identify the person whose identity
the defendant is alleged to have appropriated,” including “the nature and extent of the
identifying characteristics used by the defendant, the defendant's intent, the fame of the
plaintiff, evidence of actual identification made by third persons, and surveys or other
evidence indicating the perceptions of the audience.” *RUC* § 46 cmt. d. These factors
are similar to the factors courts use in trademark cases to determine whether a
noninherently distinctive word or symbol has acquired secondary meaning. *See id.* § 13
cmt. e. A court that departs from this framework by according rights in highly attenuated
indicia of identity risks conferring rights in “ideas.” As long as courts limit themselves to
the Restatement/secondary meaning criteria, however, we do not think that copyright law
A final set of issues centers on the question of whether a use should be considered “unauthorized” or “without consent” for purposes of the preemption analysis. To illustrate what we mean, suppose that the subject has agreed that her image or performance may be used in an ad campaign or in a movie; but that the use the defendant makes exceeds the scope of permission granted. These hypothetical facts track the allegations in cases such as Toney (where the plaintiff claimed that she consented to the use of her photo in an ad campaign for a limited time only),294 Laws (where the plaintiff claimed that she consented only to the use of her recorded voice for certain purposes and not others),295 and perhaps even in Fleet (where the claims might be construed as asserting that the actors’ consent to appear in the film was contingent on their being paid).296 Assuming the truth of these allegations, one might reasonably characterize the defendant’s use in all three cases as unauthorized as well as “for purposes of trade.”297

necessarily preempts the recognition of publicity rights in indicia of identity beyond names or likenesses. To hold otherwise would call into question state trademark laws that confer trademark status on descriptive words and symbols that have acquired secondary meaning; we doubt that Congress intended this result.

294 See Toney, 406 F.3d at 907, 910.

295 See Laws, 448 F.3d at 1136.

296 See Fleet, 58 Cal. Rptr. 2d at 647.

297 In Toney, the use was for purposes of trade because it involved an advertisement. See Toney, 406 F.3d at 910. In Laws and Fleet, the use involved an expressive work but could be characterized as an appropriation of the plaintiffs’ performing services, as in Zacchini. See Laws, 448 F.3d at 1140-41; Fleet, 58 Cal. Rptr. 2d at 647.
Nevertheless, we think that if the plaintiff authorized the type of use at issue, the court should deem the use “authorized” for purposes of the right of publicity and terminate any further inquiry; as we shall explain, to do otherwise poses too great a risk of unduly chilling the exercise of copyright rights and thus of running afoul of conflict preemption. The need to avoid a conflict with copyright law, in other words, should drive the initial analysis of whether the use is “authorized” for purposes of the right of publicity.298

To understand our argument, consider again the hypothetical case in which the plaintiff alleges (1) that she consented to the use of her image, but only subject to certain conditions, and (2) that the defendant’s use (though authorized by the copyright owner) violates the plaintiff’s right of publicity due to the nonoccurrence of the relevant condition. In such a case, the plaintiff (presumably) would have a breach of contract claim against the copyright owner. To provide the plaintiff with a right of publicity claim valid against the world would only marginally serve the interests of the plaintiff (and of the state), in terms of protecting her autonomy or promoting other cognizable interests. To be sure, that benefit may be more substantial in some cases than in others; there may be instances in which the initial copyright owner cannot be found or has no assets to satisfy a judgment.299 But the plaintiff will not be completely without recourse in the

298 Our position here therefore mirrors that of David Nimmer, see 1 NIMMER & NIMMER, supra note 113, § 1.01[B][3][b][iv][I], though we have tried to anchor the result within our overall analytical framework.

299 Similar considerations provide a theoretical basis for torts such as interference with contractual relations, see Richard A. Posner, Common-Law Economic Torts: An Economic and Legal Analysis, 48 ARIZ. L. REV. 735, 745 (2006), as well as (more
typical case. On the negative side, providing the plaintiff with a publicity claim that is valid against the world risks imposing a chilling effect on the exercise of copyright rights. A person whom the initial copyright owner permits to use the work (or who uses it without consent but subject to a valid copyright privilege\(^\text{300}\)) would have to assure himself first that all material conditions as set forth in that contract have occurred. This might not appear too onerous a burden in a case such as *Toney*, where (presumably) a party planning to distribute the advertisement would want a copy of Toney’s release beforehand, if only to make sure that Toney at least consented to the type of use at issue. Moreover, a copyright licensee or assignee could require the initial copyright owner to provide indemnity against any subsequent right of publicity violation. But the risk is more apparent in a case such as *Laws* or *Fleet*, in which the licensee or assignee of copyright in an expressive work would have to assure itself of compliance with every generally) for various forms of “indirect” liability in intellectual property law and in general tort law. See Roger D. Blair & Thomas F. Cotter, Intellectual Property: Economic and Legal Dimensions of Rights and Remedies 134 (2005).

\(^{300}\) Such as fair use, see 17 U.S.C. § 107; first sale, see id. § 109(a), (c); or the privilege of make soundalike recordings, see id. §114(b). The applicability of these defenses to publicity claims is not always clear. See, e.g., Cardtoons, L.C. v. Major League Baseball Players Ass’n, 95 F.3d 959, 970 (10th Cir. 1996) (holding that the fair use defense did not apply to publicity claims under Oklahoma law); Comedy III, 21 P.3d at 807-08 (similar); Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1447-49 (11th Cir. 1998) (holding that first-sale doctrine applied); supra text accompanying notes 303-08 (discussing soundalikes).
material condition with respect to every performance as captured in the work, or else risk incurring a judgment that the licensee or assignee has appropriated those performances without consent. (What if, for example, there are one hundred performers who contribute to a given work, and each one could plausibly claim that her consent to the public exhibition of the work was contingent on conditions x, y, and z being satisfied?) Put another way, the meaning of “consent” in this context determines who will bear the cost of monitoring compliance with the contract between the subject and the initial copyright owner. Although it may not be asking too much to require the copyright licensee or assignee to ensure that the type of use is one to which the subject consented (and any other rule would eviscerate even cases such as Pavesich301), it may be asking too much to require the licensee or assignee to ensure compliance with all of the remaining terms and conditions for every exploitation of copyright rights. Granting subjects and performers the right potentially to hold up the exploitation of works of authorship in cases such as Laws and Fleet, in other words, poses too great a risk of chilling the exercise of copyright rights, with little corresponding benefit.302 For this reason, we propose below that, in

301 50 S.E. 68 (Ga. 1905). Perhaps this wouldn’t be such a bad result, but as we have noted throughout our purpose in this article is not to dismantle the right of publicity, but rather to reconcile it, to the extent possible, with existing First Amendment and copyright principles.

302 Concededly, Toney appears to be more of a sympathetic plaintiff than Fleet or Laws in some respects, because the use at issue in Toney was clearly commercial speech. But once the term “use for purposes of trade” is defined to include not only uses for advertising and on merchandise but also at least some unauthorized appropriations of
implementing our analysis, courts first ask whether the use at issue is of the type to which the plaintiff consented. If the answer is yes, the plaintiff should be relegated to her claim for breach of contract only; the right of publicity claim is preempted.

V. A Three-Step Test for Screening Out Invalid Publicity Claims

Having presented our analysis of the constraints the First Amendment and copyright law place upon the exercise of publicity rights, we can now propose a test for screening out publicity claims that are invalid in light of those constraints. Our three-part test integrates the analysis presented in the preceding two Parts, and thus provides a practical means for reducing the likelihood that any relevant consideration is overlooked. Only claims that survive all three steps would be actionable.

Step One asks whether the defendant’s use of the plaintiff’s name, likeness, or other indicia of identity is consensual, under the analysis provided above in Part IV. If the answer is yes—the plaintiff consented to the type of use at issue—the inquiry need go no further. Allowing the claim to proceed would contravene the requirement that actionable use must be unauthorized and would give rise to copyright preemption.

modeling or entertainment services, it’s not clear how to protect Toney’s interest in preventing uses that exceed the scope of her permission without conferring similar protection upon Fleet and Laws too; and the chilling effects in the latter instances are not in accord with any copyright policy that one should ascribe to Congress absent evidence that Congress so intended. Alternatively, if Zacchini were overruled and publicity claims could only be asserted in cases involving commercial speech, perhaps a more plaintiff-friendly stand might be appropriate in a case like Toney.

303 See, e.g., RUC § 46.
problems, for the reasons discussed above. Step One therefore would eliminate the
claims at issue in Laws, Fleet, and Toney. If the use at issue was nonconsensual, however, inquiry would proceed to Step Two.

Step Two asks whether the use is “for purposes of trade” as defined in the Restatement; if the answer to this question is no, inquiry would come to an end and the court would enter judgment for the defendant. The rationale here is not the Restatement is infallible (as we shall see), but rather that its definition of “purposes of trade” provides a useful means for screening out claims that would fall by the wayside under our First Amendment and copyright preemption analysis. In other words, by characterizing as not “for purposes of trade” most uses of names, likenesses, and indicia of identity in “news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses,” this step eliminates a large number of claims that otherwise would present First Amendment and copyright preemption problems. It would not eliminate uses in advertising or on merchandise, however, or uses that amount to the wholesale appropriation of another’s entertainment, modeling, or spokesperson services. Thus, if the answer to Step Two’s question is affirmative, inquiry must proceed on to the final, third step of the analysis.

Step Three inquires whether the defendant’s First Amendment interest outweighs the state interest underlying the exercise of publicity rights at issue. If our conclusion in Part III that publicity rights are a form of content-based regulation is correct, the

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304 See supra text accompanying notes 294-302.
305 RUC § 47.
306 See supra Parts IIIB-C, IV.
resolution of Step Three will depend in large part on whether the use at issue comprises commercial or noncommercial speech. If the use comprises commercial speech, application of the right of publicity probably passes muster under *Central Hudson*, and the plaintiff should prevail.\(^{307}\) Moreover, since most of these applications of publicity rights would appear to involve uses in advertising, there should be no reason to conduct any additional copyright preemption analysis; the First Amendment and copyright analyses converge.\(^{308}\) Alternatively, if the use at issue comprises noncommercial speech, our analysis in Part III suggests that the exercise of publicity rights would be valid only if, *inter alia*, the plaintiff can plausibly rely on a state interest in protecting privacy (as in *Lake*) or autonomy (as in *Zacchini* and, arguably, in other cases involving the wholesale appropriation of performing, modeling, or spokesperson services), or in preventing deceptive marketing.\(^{309}\) Absent one or more of these state interests, the First Amendment should preclude the exercise of publicity rights; if one or more of these interests is present, on the other hand, copyright preemption again should not be at issue.\(^{310}\) Significantly, application of this step would not *necessarily* preclude a living celebrity from exercising publicity rights with respect to expressive merchandise, to the extent there might be a plausible autonomy or deceptive marketing interest at stake. Those

\(^{307}\) *See supra* Part IIIB.

\(^{308}\) *See supra* text accompanying note 272.

\(^{309}\) *See supra* Part IIIC.

\(^{310}\) *See supra* notes 273-79 and accompanying text.
interests, however, ordinarily would be unavailing if asserted on behalf of deceased celebrities; in such cases, publicity rights typically should not survive challenge.\(^{311}\)

In summary, application of these three steps integrates the First Amendment and copyright preemption principles delineated above, in a manner that should enable courts to avoid omitting any relevant consideration. In addition, application of these three steps may enable courts to make many of the relevant determinations at an early stage of litigation, thus reducing the risk of chilling defendants’ lawful exercise of First Amendment rights. In this regard, Step One’s inquiry into whether the plaintiff authorized the type of use at issue, and Step Two’s inquiry into whether the use is “for purposes of trade,” often should lend themselves to summary disposition. As for Step Three, inquiry into whether speech is commercial or noncommercial, and whether the state interest at issue meets the applicable level of First Amendment scrutiny, will ordinarily be questions of law for the court alone.\(^{312}\) Whether the use at issue comprises a wholesale appropriation of another’s services, on the other hand, may be a contested issue of fact in some cases;\(^{313}\) and other issues, such as whether a given defendant bears responsibility for the use, or whether the use involves protectable indicia of identity at all, may also present factual questions. In some cases, therefore, courts may need to adapt the three-step framework to allow for resolution of certain matters by the trier of fact, prior to proceeding to another step. As a general matter, however, the application of

\(^{311}\) See supra notes 240-42 and accompanying text.


\(^{313}\) See, e.g., Parks, 329 F.3d at 460-61.
these steps should be useful in structuring analysis in a relatively certain and predictable manner, so as to avoid both First Amendment and copyright preemption pitfalls.

VI. Applying the Framework to Some Illustrative Examples

The preceding Parts set forth our analysis of how several well-known cases should have been decided. As described above, Step One would eliminate claims such as those at issue in Laws, Fleet, and Toney. Step Two would eliminate most claims involving use in connection with expressive works. Step Three would eliminate few if any claims involving commercial speech (though White may be a counterexample), but it would eliminate many claims involving noncommercial speech, such as those at issue in Comedy III and Doe. In this Part, we apply the three-step inquiry to the real and hypothetical cases presented in the Introduction.

Our first example involved uses of a person’s performance or image as captured in a copyrightable work of authorship, where the performer or subject voluntarily participated in the making of the work. Under the analysis presented above, whether these uses are lawful will depend initially on whether the use is of the type to which the performer or subject consented. Applying this standard here, Jackson Browne may have a valid claim against the Republican National Committee insofar as he did not consent to use of his performance for (political or other) advertising. Proceeding to Step Two, whether the use at issue qualifies as a use “for purposes of trade” is less clear, although there is some authority holding that the unauthorized use of a trademark for political

\[314\] See supra notes 1-2 and accompanying text.
purposes is unlawful when it gives rise to a likelihood of confusion as to sponsorship.315 If the use is for purposes of trade, then it may be unlawful, notwithstanding its use in connection with political speech, to the extent it sows confusion that Browne supported the McCain campaign (assuming, that is, that false endorsement claims as applied to noncommercial speech can survive strict scrutiny). As for the James Brown case, if Brown consented to having his image captured in the photographs at issue, Step One would preclude any claim unless the photos are being used for a nonauthorized purpose (such as advertising unrelated merchandise). Merely licensing the photos for their intended purpose (e.g., admiration of James Brown), however, would fall within the scope of Brown’s authorization and the claim would fail under Step One. If it were necessary to proceed further, though, inquiry would focus on whether the use was for purposes of trade and, if so, whether it involved commercial speech.316

315 See United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc., 128 F.3d 86, 90-93 (2d Cir. 1997) (holding that use of similar names for political organizations was likely to cause confusion, in violation of the Lanham Act); cf. MasterCard Int’l Inc. v. Nader 2000 Primary Comm., No. 00 Civ. 6068 (GBD), 2004 WL 434404, at *6-9 (S.D.N.Y. 2004) (holding that Nader campaign ad imitating certain MasterCard service marks was a noncommercial use and therefore not in violation of federal antidilution law).

316 Merely displaying the photos for the purpose of selling or licensing them should not be deemed a use for purposes of trade. See RUC § 47 (stating that “use ‘for purposes of trade’ does not ordinarily include the use of a person’s identity in . . . entertainment . . . or in advertising that is incidental to such uses”).
Our second example alluded to the controversy over Ty Inc.’s marketing of “Sweet Sasha” and “Marvelous Malia” dolls. Assuming that the dolls recognizably embody the Obama children’s identity, the use was nonconsensual, thus satisfying Step One. Second, the use would probably be for purposes of trade, because dolls are merchandise, thus satisfying Step Two. Step Three nevertheless would likely preclude a publicity claim. Because the dolls (like merchandise generally) probably do not qualify as commercial speech, our proposed First Amendment test would permit the claim to go forward only if the use implicates a plausible state interest in privacy, autonomy, or preventing deceptive marketing. On the facts, however, a viable privacy interest seems doubtful, because the president’s children probably qualify as (perhaps involuntary) public figures. An autonomy interest might be plausible if the dolls closely resembled

317 See supra notes 6-7 and accompanying text.

318 The dolls do not closely resemble the children’s facial features. See Sara Olkon, ‘Marvelous Malia’ and ‘Sweet Sasha’ Dolls Are Not the Obama Girls, Ty Says, CHICAGO TRIB., Jan. 22, 2009, available at http://www.chicagotribune.com/news/nationworld/chitag-girlzjan22,0,5205363.story. But the dolls share the children’s first names; are African-American; one is slightly bigger than the other, suggesting a slight age difference between them; the children themselves are famous; and the timing of the product launch suggests that Ty was trying to capitalize on the children’s fame. All of these factors suggest that the children’s identity is recognizably embodied in the dolls. See RUC § 46 cmt. d.

319 See Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (stating that “it may be possible for someone to become a public figure through no purposeful action of his own,
the children, because then the use might be cast as an appropriation of their modeling services; but the dolls do not closely replicate the children’s facial features.\textsuperscript{320} It is conceivable, however (though hardly inevitable), that the children might have a viable claim for false endorsement, in which case (and in which case only) their publicity claim might succeed as well. Analysis therefore would focus on whether consumers would be deceived into believing that the children or their parents endorsed the product.

The resolution of our third example\textsuperscript{321} should be apparent in light of Parts III and IV. Consistent with the Restatement’s suggested approach, merely presenting an imitation of another’s performance in the course of a dramatic work should not violate the right of publicity. Despite the unauthorized nature of the use (Step One), the use is not for purposes of trade as defined above and thus fails under Step Two. Example Three is also similar in form to cases such as \textit{Wendt},\textsuperscript{322} where despite the actors’ lack of consent the use of the sculptural works should not be considered “for purposes of trade” unless the instances of truly involuntary public figures must be exceedingly rare’’); Hatfill v. N.Y. Times Co., 532 F.3d 312, 318 n.3 (4th Cir. 2008).

\textsuperscript{320} See supra Part IIIC. A doll that is designed to replicate a living person’s features, on the other hand, might run afoul of the right of publicity under our framework. Moreover, if a defendant were to add a famous person’s name to a generic doll, this conduct might amount to an unauthorized use of a person’s name as a spokesperson or attention-grabber; but this is probably not an apt characterization of Ty’s conduct with respect to the Sasha and Malia dolls.

\textsuperscript{321} See supra notes 8-9 and accompanying text.

\textsuperscript{322} 125 F.3d 806 (9th Cir. 1997).
those works so closely resemble the actors themselves as to constitute an arguable appropriation of modeling services. A variation would arise in recent cases in which professional athletes have objected to the use of their names and uncopyrightable performance statistics in fantasy sports games.\textsuperscript{323} Although these uses pass both Step One (because the use is nonconsensual) and possibly Step Two (because the games are a form of merchandise),\textsuperscript{324} the use of players’ name is noncommercial speech and (along the lines of the Obama children example) should be overcome only if the unauthorized use gives rise to a viable claim of false endorsement.

Our final example, based on \textit{Toffoloni},\textsuperscript{325} presents perhaps the most difficult fact pattern by which to test our framework. Many people, we suspect, would be sympathetic


\textsuperscript{324} The code embodying a computer game would qualify as a literary work for copyright purposes. \textit{See} 17 U.S.C. § 101. But even if games generally qualify as merchandise, and thus satisfy Step Two, a publicity claim probably would be precluded under Step Three as discussed above.

\textsuperscript{325} ___ F.3d ___, 2009 WL 1793180 (11th Cir. 2009).
to the plaintiff’s quest to prevent Hustler from capitalizing on the plaintiff’s daughter’s sensational death by publishing 20-year-old nude photos that the daughter herself thought had been destroyed. Does our framework accommodate these sympathies, or does it leave the plaintiff without a remedy? Step One asks whether the subject agreed to the type of use at issue; assuming that the answer to this question is no (and there was evidence that she did not), the next step is to determine whether the use was “for purposes of trade” as defined by the Restatement. Here, the answer arguably is yes, despite the fact that the use consisted of publishing the photos in a magazine, to the extent that the use can be characterized as the wholesale appropriation of Ms. Benoit’s modeling services. The final step then is to ask whether the defendant’s First Amendment interest outweighs the plaintiff’s interest in privacy, autonomy, or preventing deceptive marketing. Here the analysis, at first blush, would seem to weigh in favor of the defendant: as we have noted above, a decedent’s interest in privacy and autonomy normally terminates at death, and there is no obvious reason to conclude that consumers would believe, on the basis of Hustler’s postmortem publication that Benoit

326 See id. at *1 (recounting allegation that Benoit asked the photographer to destroy the photographs and believed he had done so).

327 In this regard, the court cited Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc., 296 S.E.2d 697 (Ga. 1982) (holding that plaintiff could assert a claim based on defendant’s marketing of plastic busts depicting Dr. King), see Toffoloni, 2009 WL 1793180, at *6, but that case justifies the right of publicity both on privacy and economic grounds. See King, 296 S.E.2d at 704-05.
endorsed Hustler.\textsuperscript{328} Moreover, the economic and other interests that arguably underlie some applications of the right of publicity would not suffice, given that (1) the publication consists of noncommercial speech with respect to which these types of interests (we argued above) can rarely if ever be compelling, and (2) the plaintiff’s motivation for filing suit is (understandably) to suppress the publication of the photos, rather than to maximize the profits flowing from their exploitation.

\textit{Toffoloni} nevertheless may be defensible on two grounds. First, if the photos meet the legal definition of obscenity, their publication lacks any First Amendment protection and the balancing would favor the plaintiff (even if the economic and other interests favoring the plaintiff’s case are weak). Given the inherent difficulty of proving obscenity, however, and without having reviewed the photographs ourselves, we would not as a general rule place much confidence in prevailing on this theory. More promising, perhaps, is the possibility that a postmortem privacy interest might be sufficiently weighty on these facts to overcome the defendant’s interest in publication. As noted above, the bulk of authority holds that privacy interests terminate at death—and by analogy, we think that autonomy interests generally would too.\textsuperscript{329} Given the disfavored status of postmortem privacy rights in U.S. law, we would be reluctant to

\textsuperscript{328} See Kournikova v. General Media Comms., 278 F. Supp. 2d 1111, 1128 (C.D. Cal. 2003) (holding that plaintiff failed to state a false endorsement claim based on magazine’s false assertion that photos depicted plaintiff); see also supra text accompanying note 243 (questioning whether false endorsement claims can be brought on behalf of a decedent).

\textsuperscript{329} See supra note 240-42 and accompanying text.
assume, as the Eleventh Circuit did, that laws conferring privacy rights upon decedents necessarily reflect a state interest strong enough to overcome a First Amendment challenge. *Toffoloni* nevertheless still may be salvageable when viewed as an extension of case law conferring upon a decedent’s *family members* the right to sue for invasions of relational privacy or intentional infliction of emotional distress.\textsuperscript{330} To date, most of the cases in which family members have succeeded in asserting these claims (or in fending off efforts to force government to disclose information about their decedents) have involved gruesome photos or recordings of dying persons’ voices.\textsuperscript{331} Whether the family’s relational privacy interest can suffice to undergird a right of publicity claim, as in *Toffoloni*, and whether that interest extends not only to gruesome but to sexually explicit subject matter, are difficult questions. There is an obvious slippery slope in conferring upon family members a right to censor sensitive information about their loved ones, and cases upholding relational privacy interests have generally referred to the successful invocation of those interests as “rare.”\textsuperscript{332} *Toffoloni* nonetheless might represent only a modest expansion of existing principles to a highly unusual fact pattern. To the


\textsuperscript{331} See Calvert, *supra* note 330 (discussing the case law as of 2005).

\textsuperscript{332} See id. at 161 & n.190 (citing Tyne v. Time Warner Co. LLP, 336 F.3d 1286, 1292-93 (11th Cir. 2002)).
extent our framework is otherwise sound, analysis along these lines would be necessary
to accommodate—and just might succeed in accommodating—the Toffoloni result.

VII. Conclusion

We have argued that, in many cases involving publicity rights, courts have paid
too little attention to underlying First Amendment and copyright preemption issues; that a
proper regard for these issues would result in the dismissal of a greater number of
publicity cases, particularly those involving noncommercial speech; that a small number
of claims involving noncommercial speech nevertheless may remain viable under
Zacchini; and that the relevant inquiry would be simplified if courts were to recognize
that the First Amendment and preemption analyses largely converge upon the same
results. To be sure, our proposed framework would not eliminate the need to make
difficult decisions in close cases; but it would provide greater certainty and predictability,
as well as a principled basis for resolving those cases. And while our framework assumes
the continued viability of Zacchini and of the distinction between commercial and
noncommercial speech, future case law that modifies these aspects of the constitutional
landscape would result in relatively simple modifications to our framework as well. To
the extent that noncommercial speech is someday accorded the same level of protection
as commercial speech, or that Zacchini is overruled, the relevant state interests that would
support applications of publicity rights would be limited, perhaps, to privacy or the
prevention of deceptive marketing. In the event of such developments, the convergence
we now perceive between copyright preemption and the First Amendment would fall
away to some degree, and First Amendment constraints would predominate.
Along the way, we have highlighted the importance of identifying the state interests at issue in specific cases involving publicity rights. We are cautiously optimistic that courts will be willing to engage in serious “interest analysis,” particularly as other bodies of law have come to require inquiry into whether publicity rights advance privacy or other interests. Our analysis also leaves open the possibility that a uniform federal statute designed to avoid constitutional conflict and to explicitly preempt state counterparts would be preferable to the current patchwork system. These issues, as well as others, provide a fertile ground for further research.

For example, because the Communications Decency Act does not preempt laws “pertaining to intellectual property,” 47 USC § 230(e), courts have begun to consider whether publicity rights may be fairly characterized as laws “pertaining to intellectual property.” See, e.g., Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 302-04 (D.N.H. 2008) (holding that right of publicity laws pertain to intellectual property, but that other privacy-based claims such as intrusion upon seclusion do not); cf. Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1119 (9th Cir.) (holding that § 230(e) immunizes only federal intellectual property laws), cert. denied, 128 S. Ct. 709 (2007).

Creating a uniform federal framework for reconciling the First Amendment interests with the interests protected by publicity rights may address concerns by some commentators that a balancing approach—no matter how precisely articulated—cannot avoid subjectivity in application. See, e.g., Anderson, supra note 168, at 91. At the same time, there may be disadvantages to creating a federal publicity right, such as limiting the development of state tort law and potentially obliterating publicity rights recognized in some states and not others (e.g., postmortem publicity rights).