MAY 2023

DEVOTED TO LEADERS IN THE INTELLECTUAL PROPERTY AND ENTERTAINMENT COMMUNITY

VOLUME 43 • NUMBER 5

THE Licensing Journal®

Edited by Gregory J. Battersby and Charles W. Grimes

Wolters Kluwer

The Right of Publicity in the Age of Technology, Social Media, and Heightened Cultural Exchange

Toni-Ann Hines

Toni-Ann Hines is a practicing attorney in the field of Mergers & Acquisitions. Ms. Hines graduated from Howard University in 2018 with a degree in Psychology and from Wake Forest University School of Law in 2022. She would like to thank Suzette, Michael, Evelyn, and Seon for their constant love, support, and guidance, and Maliyah for always being her editor before and throughout law school. She would also like to thank Dean Simone Rose for opening her eyes to the world of Intellectual Property Law and her former Journal for believing in this piece.

The Wake Forest Journal of Business & Intellectual Property Law is the original source of publication for this article.

I. Introduction

Imagine you are a rising social media star. You create a video using a catchy phrase that immediately takes off. The phrase gains national, even global, attention and everyone begins using it. Now, let us say a company uses your image and your phrase without your consent to increase its relatability with the public. The company does not reach out to you to offer compensation, however, and when you reach out to them seeking some sort of acknowledgment, they state that you have no rights to your image or phrase because you are not famous, your catchphrase is not distinctive enough to serve as a trademark, and your catchphrase lacks sufficient expression to be copyrightable. Further, the company explains that it can use your phrase because of its First Amendment right to free speech. How does this hypothetical play out if you are white? Does the situation unfold differently if you are a person of color?

The United States' history of cultural appropriation suggests a different outcome based on race for the above hypothetical. The appropriation of people of color's likeness and distinguishing characteristics has become somewhat routine for many companies' marketing strategies.[1] Either a company takes some form of expression that has been popularized by a certain culture and uses that expression without mention of the people,[2] or the company may outright use the creation of an individual without giving credit to that person.[3] In any case, appropriating one's culture for economic gain has only compounded with the rise of technology and social media.[4]

While intellectual property rights such as trademark, copyright, and patent registration exist, the right of publicity exists without the need for registration.[5] While many states protect the right of publicity, there is no federal legislation that aims to protect individuals whose likeness has been misappropriated.[6] Therefore, in the event of a person's right of publicity being violated, they would have to bring suit in each state where the violation occurred.[7] This places individuals, especially people of color, with limited resources in an unfortunate situation. In order to mitigate the consequences of potentially needing to file suit in each state where one's right of publicity has been violated, a federal right of publicity would allow an individual to obtain judgment in a single federal court which would be enforceable in federal courts across the country.

This article contends that there is an emerging need for federal law to recognize the right of publicity, particularly considering this country's history of cultural theft among people of color. A federal right of publicity would provide access for individuals to enforce their rights on a national level against companies who use their likeness for commercial value. Part II examines the right of publicity and its evolution, and explores the history of cultural appropriation and its economic effects on artists. Then it discusses the various forms of expression that have become popularized and commodified on social media.

Part III argues for the creation of a federal right of publicity that would provide individuals with nationwide rights and enforcement in their likenesses and

related characteristics. This section further explains how a federal right of publicity can serve as a "gap filler" and provide protection when an individual's identifying characteristics fail to qualify for either federal trademark or copyright protection. Part III then outlines why structuring the right of publicity as a property right rather than a privacy right makes it a perfect addition to the Lanham Act, the Federal Trademark statute. Part III then examines defenses to a federal right of publicity that should be included in the federal statute. Lastly, this section explores how enforcing a federal right of publicity might look for a person of color and how it may motivate third parties to negotiate licenses rather than face a right of publicity claim in federal court.

II. Background

A. The Right of Publicity

The right of publicity has a complicated origin story. The first part of its development stems from an 1890 Harvard Law Review Article in which Justices Brandeis and Warren coined the term "right to privacy."[8] In *The Right to Privacy*, the aforementioned justices attempted to envision a new legal theory that would protect the private individual from society's gaze.[9] They stated that recent inventions warranted the development of the law to secure the individual his or her right "to be let alone."[10] The Justices provide a list of categories the right to privacy would cover, such as "preventing one's public portraiture," or the "reproduction of a woman's face, form, and actions to suit a gross and depraved imagination."[11] Justices Brandeis and Warren emphasize the right to privacy as part of a more general right to one's personality by referencing Lord Cottenham: "A man 'is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his.'"[12]

Further, the Justices noted instances where courts refused injunctions against the publication of private letters with the justification that they were not the sort of property which were protected and had no value.[13] Although other courts did not follow that decision, the Justices found it important to note that the publishing of someone's personal catalog would deny them the right to profit and would essentially be wrong.[14] Frustrated that the protection of future profits was not a right, Justices Brandeis and Warren aimed to create a space for doing just that.[15]

Eventually, the right of publicity was born in 1953 when the Second Circuit adopted the theory in the seminal case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[16] In *Haelan Labs*, there was a contract dispute regarding the exclusive rights of baseball players' photographs in connection with gum sales for Haelan Laboratories, Inc. and Topps Chewing Gum Inc.[17] Topps argued that "a man has no legal interest in the publication of his picture other than his right of privacy."[18] The Court rejected that argument and stated that "in addition to and independent of that right to privacy, a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture."[19] The Court further stated that the right would yield money if it could be made the subject of an exclusive grant which barred other advertisers from using their pictures.[20]

The right of publicity was then further applied in *Zacchini v. Scripps-Howard Broadcasting* when the Supreme Court held that a human cannonball entertainer's interest in not wanting his entire performance to be televised outweighed the broadcaster's First and Fourteenth Amendment defenses. It reasoned that "an economic incentive for him to make the investment required to produce a performance of interest to the public."[21] Even though the performer's act was only approximately fifteen seconds long, the court nevertheless chose to protect his publicity right.[22]

Finally, the right of publicity is recited not only as a subset of privacy in the Restatement (Second) of Torts,[23] but also on its own in the Restatement (Third) of Unfair Competition.[24] Section 652 of the Restatement of Torts includes intrusion upon seclusion, appropriation of name or likeness, publicity given to private life, and publicity placing a person in a false light.[25] It is there, in § 652(C), that the right of publicity has its bearing in tort law. It states that "one who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."[26] In contrast, § 46 of the Restatement of Unfair Competition states that "one who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate."[27] Both restatement provisions bear resemblance to the Justices' reasoning on the wrongs of stealing potential profit from an individual as well as the Second Circuit's recognition of the right of publicity in *Haelan Labs*.

However, the issue is that while the right of publicity has its roots in privacy, the modern view is to consider it an intellectual property right with the likes of trademarks, copyrights, and patents.[28] The Supreme Court solidified that view in *Zacchini* when it held that a "state's interest in permitting a

'right of publicity' is in protecting the proprietary interest of the individual in his act" to "encourag[e the production of] . . . entertainment" in a way "analogous to the goals of patent and copyright law."[29] Indeed, even the comments of § 652(C) create some confusion on the applicability of the appropriation of name or likeness. "[T]he right created by it is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect it."[30] On the other hand, some believe that the right of publicity should be kept as a privacy right rather than its evolution into a property right, arguing that the shift has turned the right of publicity into a "monster."[31]

Nevertheless, this fear has not prevented the courts, and many state legislators, from categorizing it as such. For example, the Eleventh Circuit in *Acme Labs Operation Co.* stated that the right of publicity was an intangible personal property right.[32] Even law office websites break them into two separate categories stating that the right of publicity protects an individual's property right in his or her persona.[33] Thus, classifying the right of publicity as a property right and further, as an intellectual property right, makes sense in terms of statutory, judicial, and intuitive interpretation. However, while there is a trend to classify it as a property right, some states, like New York, still enforce it under the right of privacy.[34] Unfortunately, this classification presents an issue when determining damages.[35] As McCarthy states in *The Rights of Publicity and Privacy*, "while injury to feelings or dignity might be measured by 'general damages,' proof of damages for invasion of a right of publicity require[s] evidence of the commercial value of the 'appropriated publicity.'"[36] The split between privacy and property will mean that each right of publicity case will reach different outcomes depending on the jurisdiction in which the alleged violation occurs.

Because there is no federal right of publicity, when federal courts have decided on cases dealing with the issue, they have only been able to apply whichever state law is applicable.[37] For instance, the Second Circuit applied New York's right of publicity in deciding *Haelan Labs*.[38] Further, each state may choose whether to protect the right via statute, common law, or both.[39] In the Ninth Circuit case of *White v. Samsung*, Vanna White brought suit against Samsung for depicting her likeness in one of their commercials without her consent.[40]

> The ad depicted a robot, dressed in a wig, gown, and jewelry which [was] selected to resemble White's hair and dress. The robot was posed next to a game board which is instantly recognizable as the Wheel of Fortune game show set, in a stance for which White is famous.[41]

Although there was no use of her image, name, or likeness, under the California statute, the Court applied the broader common law view presented in *Midler v. Ford Motor Co.* and *Carson v. Here's Johnny Portable Toilets, Inc.*[42] The Courts in those cases reasoned that "if the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used."[43] The *White* Court held that the right of publicity should go beyond name and likeness to the appropriation of one's identity and further that "the right of publicity does not require that appropriations of identity be accomplished through particular means to be actionable."[44]

The evolution of the right of publicity is not uniform across all states which creates numerous issues when considering the manner in which information disseminates today. Further, social media has created a national audience, so it is reasonable to suppose that a right of publicity claim in New York may have some bearing in California. Such tension provided a basis for the creation of the Lanham Act to provide for a national system of trademark registration and protection of owners of a federally registered mark.[45] Consistent enforcement of nationwide rights limits the potential for unequal remedies. This is especially important when considering the breadth of "likeness" categorized by each state. While New York's statute covers name, portrait, picture, or voice, Indiana's covers name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms.[46]

Additionally, after adding social media into the mix, the application of the right of publicity becomes increasingly complicated. In *Fraley v. Facebook* and *Perkins v. LinkedIn*, users of the social media sites alleged a violation of their rights of publicity for the use of their names and photographs for targeted advertisements.[47] While the courts ruled in favor of the plaintiffs, Facebook's response was to simply change the Statement of Rights and Responsibilities.[48] While the policy change might reduce the amount of claims that can be brought against the site itself, it does not affect any third-party individuals or companies who seek to misappropriate the individual's identity. Thus, a federal publicity right may not protect against the Facebooks of the world who can merely change their policies—it would simply protect against misappropriation by third parties.

B. Cultural Appropriation

Communities of color have been dealing with cultural theft for decades.[49] "Cultural appropriation is the unacknowledged or inappropriate adoption of the customs, practices, ideas, etc. of one people or society by members of another and typically more dominant people or society."[50] In other words, cultural appropriation is the commodification of some part of an ethnic group's culture without the rightful acknowledgment of that group. Often, cultural appropriation happens when something is deemed inappropriate or less than for the original culture but is then reimagined as 'cool' for the dominant culture.[51] For example, braids and locs in Black culture have historically been viewed as unkept and unprofessional.[52] In fact, hair discrimination even necessitated legislation to right its wrongs on Black populations.[53] In February 2015, Black artist Zendaya received disgusting criticism for wearing faux locs on the red carpet.[54] However, those same critics praised Kylie Jenner, a white woman, for wearing locs, calling them "edgy."[55] The issue here is that a Black woman received vitriol for wearing a hairstyle that is historically linked to her culture, race, and ethnicity, while a white woman received praise for doing the exact same thing. Cultural appropriation has an oppressive way of giving credit to a person or group of people for doing something that the original group has done for years, especially when that original group is ridiculed for it rather than praised.

Cultural appropriation often has a mental and emotional impact on the community being appropriated.[56] For instance, communities of color often see their culture wiped out over generations to then witness cultural garb and headdresses being used for Halloween costumes and derogatory themes being used for team names and logos.[57] It is not only seen in customs like clothing and hair but also in professional settings such as the arts.[58] Many of the mainstream genres that have traditionally been considered "white" have their roots in the Black community.[59] For example, Frankie Knuckles and Derrick May are the artists who brought club beats to the forefront; Big Mama Thornton first performed "Hound Dog" and is known among many spheres as the mother of Rock n' Roll; and country music has its share of unsung Black collaborators who helped great country artists become famous.[60] Indeed, while artists who performed the blues, jazz, and gospel had their music labeled as "race records," many white artists went on to cover Black songs on air for a majority white audience.[61] This further whitewashed their art and decreased the possibility of receiving profits from their creations.

As previously stated, cultural appropriation is not only harmful in terms of psychological, mental, and emotional well-being, but it's also harmful in terms of profit. Cultural and economic appropriation often go hand in hand. When white artists were asked to record Black music by industry executives who stole those sounds that negatively impacted the pockets of Black artists and in turn their families.[62] Viet Thanh Nguyen emphasized this point by drawing parallels of economic appropriation to a history of colonization, exploitation, and inequality.[63] The United States has an ugly past of profiting from the forced labor of Black people. White people own the record companies, concert venues, and even the radio stations that ultimately exploit Black musicians while continuing to promote white talent.[64] Thus, the impact of cultural appropriation is more than just the theft of culture, but also the theft of profits.

i. Cultural Appropriation on Social Media

Cultural appropriation plays out in an interesting manner on social media. Newer generations know the warning "once it's out there, there's no going back" about online postings.[65] Many people, like Kayla Lewis-Newman, probably wish that weren't the case, as she was a victim of her own publicity being used for someone else's economic gain.[66] Before there was TikTok, a social media platform that has captivated millions, there was Vine, a similar video-uploading app and website.[67] Vine had a similar setup as TikTok with its short videos and constant loops, except Vine had a time limit of about six to seven seconds.[68] Thus, creators had a maximum of seven seconds to peak the user's interest. One video that did just that came from a young Black girl, Kayla Lewis-Newman.[69] In the video, Lewis states "eyebrows on fleek" in reference to a job well done on her makeup.[70] "On fleek" immediately took off as one of the many catchy lines to come from Vine.[71] Artists such as PnB Rock, Cardi B, and Offset titled their songs after the phrase[72] and beauty brands were using Lewis' phrase on their social media sites.[73] Even large corporations, such as iHop, Denny's, and Sour Patch Kids were using her phrase.[74] Lewis' case illustrates how large corporations take a phrase created by a Black woman and made popular by the Black community and use it for economic gain while Lewis received no recognition or compensation.[75] This may not have been an offensive form of cultural appropriation, but it is certainly a form of 'economic appropriation' that played out on social media for the public to see.

If users search "on fleek" today, Lewis's name comes up as the creator.[76] However, there is no

going back and paying her for a phrase that was sure to have generated millions for those companies. Applying for trademark registration for her phrase could have been an option if she was able to prove that she used "on fleek" in connection with her make-up services.[77] Unfortunately, that route is no longer available because the phrase is so common that the potential for attaining secondary meaning, or "distinctiveness" in relation to her business is unlikely.[78] Additionally, Lewis would have had to be properly informed about the routes for trademark registration. Because Lewis' video was shared so much on social media, with even popstar Ariana Grande creating a singing parody of it,[79] the phrase could have been considered a part of Lewis's persona, triggering the right of publicity. Whether Lewis's phrase would have reached the level needed to elicit her identity or persona is unclear. However, if there were a federal right of publicity on the books when she went viral, it could be argued that even the option of enforcing her rights would have pushed her in the direction to build her brand and capitalize off the momentum.

C. Social Media and Beyond

With the rise of social media, along came new ways for non-celebrities to gain popularity, and even commercial value. People may gain popularity through their comedic talent, musical talent, artistic talent, and even makeup or fashion sense.[80] Others gain recognition through videos they post which contain notable phrases, dances, or reactions.[81] One thing all these modes of publicity have in common is the ability to personally market the creator, which is something companies take a special interest in.[82] Unfortunately, if a person does not initially set out to create a brand around their personality, many of their creations go unnoticed, or even copied.

Using the standard set forth by the Ninth Circuit in *White v. Samsung*, the exploitation and appropriation of someone's identity or persona regardless of *how* its violated is enough to trigger the right of publicity.[83] For example, Brittany Broski, deemed "Kombucha Girl," created a TikTok video of her trying kombucha for the first time and it went viral because of her reaction. If a company recreated this video with someone else, but the person expressed the same reactions as Broski, this would be a clear violation.[84] The company recreating the video would be explicitly copying the mannerisms that Broski displayed in the video which are now linked to her identity and protected by the right of publicity. Since Broski's creation has no mark to be trademarked, nor anything to be copyrighted, she would have stronger protection against others copying her work under a federal right of publicity rather than the current state of the law.

i. Fortnite Dances

Dances that gain popularity on or off social media also provide the potential for commercial value. In theory, the creators of the dances gain recognition for them along with the opportunity to profit from the recreation of the dances. Unfortunately, when dances gain popularity, not only does the chance of the dance being stolen increase, but the likelihood of copyright protections also decreases.

On the other hand, a phrase has the potential for trademark protection if it is used in commerce and has proven to be distinctive.[85] A popular dance on the other hand, while the original creation of someone, most likely will not rise to the level of technicality necessary for copyright protections. Choreographic works are copyrightable, but, § 805.5(B) of the Compendium of U.S. Copyright Practices states that "social dances or simple routines do not constitute copyrightable subject matter."[86] Unfortunately, the Macarena, the Hokey Pokey, and the Cabbage Patch will never be copyrighted. It then goes on to state that "they cannot be registered, even if they contain a substantial amount of original, creative expression."[87] This leaves dancers whose original and creative moves gain notoriety only one viable option for commercial protection: the right of publicity.

This issue between dances remaining in the public domain and being claimed as an individual's creation has recently come into play with celebrities and Epic Games, the creator of the popular video game, Fortnite.[88] BlocBoy JB, 2 Milly, and Alfonso Ribeiro are all claiming Epic Games has copied, or stolen, their dances for its Fortnite adaptation.[89] BlocBoy's 'Shoot,' 2 Milly's 'Milly Rock,' and Alfonso's 'Carlton Dance' all have similar, if not identical, renditions in the popular video game.[90] The first two dances were both created and popularized along with songs that the rappers made.[91] The last was made popular by Alfonso's portrayal of 'Carlton' in the television show *The Fresh Prince of Belair*.[92] All three artists have alleged copyright infringement for the usage of the dances.[93] Alfonso's copyright application failed with the U.S. Copyright Office[94] and 2 Milly dropped his suit after the U.S. Supreme Court ruled that copyright infringement suits could not be filed until after there was a ruling on the registration.[95]

As previously stated, the ability to copyright dances is a difficult hurdle to clear. Dances must

be more than basic and include unique and intricate details that reach a level of choreography. If any short dance sequence were allowed copyright protection that could lead to the stifling of creative adaptations of old works.[96] While copyrighting these dance moves might be a stretch, a right of publicity claim may be able to survive if those dances can be linked to the creator's identity. The right of publicity would create some sort of protection for these individuals where copyright protection falls short. It is especially warranted in the case of Epic Games, where the company receives profit from selling these dances to its players, rather than recreating it so anyone can use it.[97]

ii. Learning From Past Mistakes

Durell Smylie, a young Black man from Louisiana, learned from the unfortunate situations of Lewis and other creators whose videos went viral without recognition or compensation, and he attempted to reach a different outcome.[98] Smylie created a promotional video for his car salesman position in which he improvised the phrase "where the money resides."[99] After posting the video, Smylie could be seen across all platforms performing his freestyle.[100] Artists such as Megan Thee Stallion, Saweetie, Ryan Destiny and more were all using the phrase on their social media accounts.[101] Movie and television stars like Niecy Nash and Taraji P. Henson reached out to Smylie, and BET posted him on their account.[102]

Smylie stated that he immediately thought of trademarking the phrase after seeing the reactions his video gained.[103] Smylie was aware of the benefits of owning his creation and made a decision to seek those rights. Additionally, because he used his phrase in conjunction with his employment, he had a basis for trademark protection under the commerce requirement.[104] Smylie even ended up being a part of TikTok's first Super Bowl tailgate in which he used his phrase in a promotional video.[105] Unfortunately, not everyone will think to register for a trademark in the off chance something they create goes viral. That does not mean that their persona and, by extension, any characteristics associated with them should remain unprotected. A federal right of publicity would create a bridge for the protection of one's creations if they were part of the person's identity. Without it, many creations would fail to meet the threshold for trademark or copyright protections leaving creators open to theft. A federal right of publicity would also help to limit the amount of third parties who profit off others' likenesses.

III. Analysis

A. Having a Federal Right of Publicity provides uniform nationwide protection of the commercial value of one's likeness and surrounding characteristics.

A federal right of publicity would ensure that individuals, regardless of their state of residence, will have the value of their commercial "likeness" protected. Having a nationwide platform of protection would both deter corporations and brands from using others' likeness for profit, and it would allow individuals to commercially benefit from their likeness in whichever way they choose. A federal right of publicity would also provide uniformity across all states instead of having different requirements and protections in each state, as well as the potential to provide protections for those states which do not have one at all. For example, in a situation where an individual is domiciled in one state and a corporation is in another state, there is no applicable federal law if the corporation is using the individual's creation. Rather, there is only confusion about which states' law to apply. At minimum, a federal right of publicity would protect the most basic parts of someone's distinctive likeness without limiting a state from choosing to offer more broad publicity protection.

Further, the right of publicity could be enforced just as federal claims for trademarks are. For instance, a trademark claim may be brought in state court if the alleged infringement only occurs in the state.[106] This would mean enforcement of the ruling only applies to that state. Conversely, it can be brought in federal courts and the court's ruling would lead to nationwide enforcement based on that single judgment.[107] A similar scheme in the publicity context would allow individuals to seek out one judgment that could be enforced elsewhere instead of having to bring a right of publicity suit in every state, causing an unneeded financial burden. Just as brands prefer federal trademark registration, but may still opt into state registration, the right of publicity can work the same way on a state and federal level.

Further, a federal right of publicity would protect vulnerable communities, such as people of color, who may not have the requisite sophistication to safeguard their works through other means of intellectual property law. Also, some categories, such as simple dances, may fall outside the realm of both trademark and copyright. As previously stated, if a phrase is not used in connection with goods or services, it will not pass the commerce test for trademark registration.

Likewise, social dances are not afforded copyright protections. A federal right of publicity provides the gap filler in cases where more specific requirements for other intellectual property routes bar the creator from adequate protection. If the phrase or the dance would be a clear and distinctive representation of the person's identity, they would have some legal basis for enforcement. A publicity right has the potential to even the playing field concerning economic development in the United States. Over a 30-year period, while trademarks applications have increased among all races, trademark applications filed for communities of color relative to their proportion of the U.S. population remain underrepresented.[108] So, even though there may be an increase in businesses owned by people of color, any brand development is at risk if not fully protected.

A federal right of publicity could mirror the federal trademark act as seen in § 1125 of the Lanham Act.[109] Some states' laws, like Washington, present the right of publicity as a positive right.[110] However, adding in separate provisions like § 1125 guarantees a negative right as a protection against misappropriation.[111] For example, Washington's statute states: "Every individual or personality, as the case may be, has a property right in the use of his or her name, voice, signature, photograph, or likeness."[112] Furthermore, § 1125 of the Lanham Act states:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—is likely to [. . .] deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person [. . .] shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.[113]

Combining the protections of the Lanham Act, with a state right of publicity law like Washington's, plus extra categories from Indiana's statute, a hypothetical federal right of publicity that incorporates current media creations could look like this:

> Every individual or personality has a property right in the use of his or her name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms including but not limited to phrases, videos, and dances. Any person who uses in commerce any name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms, or any false or misleading appropriation of such which is likely to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods or services by another person shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.[114]

B. Classifying the right of publicity as a property right rather than a privacy right allows for more control by the owner.

With the creation of a federal right of publicity to encourage uniformity comes a problem that must be addressed: how should the right of publicity be classified – privacy or property? The evolution of the right comes from a privacy basis in which an individual has a right against an invasion of privacy, and in turn, inappropriate commercial gain for another person. While Justices Brandeis and Warren made valuable points in determining that one has the right to be left alone, a privacy right plays more into a negative right rather than a positive one. Property rights, on the other hand, give an individual more positive rights and with that comes the freedom to exercise the right as they choose.

Returning to Washington's law, it further states that such right shall be freely transferable, assignable, and licensable, the property right does not expire upon the death of the individual and the right exists whether or not it was commercially exploited by the individual or the personality during the individual's or the personality's lifetime.[115] As discussed previously, because there is a trend to classify the right of publicity as intellectual property, the most rational solution would be to classify it as a property right, which many states already do.

One important aspect of classifying the right as a property right is the transferability of those rights, even upon death. In *Paisley Park Enters., Inc. v. Boxill*, Plaintiffs alleged as one of their counts the violation of Prince Roger Nelson's ("Prince") right of publicity by Defendants posting unreleased records that were owned by the estate.[116] Defendants claimed that there could be no violation of the right because under Minnesota law, the right of publicity did not survive the creator's death.[117] At the time of the suit, Minnesota law had not addressed whether the right

survived after a person's death.[118] However, the Court relied on the decision in *In re Estate of Reynolds* which concluded that the right of publicity is more akin to a property right rather than a privacy right and as such is freely assignable and descendible.[119] That decision aligned with the majority approach from the Sixth, Eighth, Tenth, and Eleventh Circuits.[120] The *Paisley* court also used two of the Eight's Circuit's rationales in coming to their conclusion.[121] First, the Court in *Ventura v. Titan Sports, Inc.* reasoned that the right of publicity was a tool to protect one's individual commercial value rather than their solitude and made more sense characterized as a property right.[122] Secondly, the Court in *Lake v. Wal-Mart Stores, Inc.* went one step further by claiming that even a right of privacy is an extension of a property right by "protecting an individual's property and person."[123] With those two cases laying the groundwork, it was quite simple for the *Paisley* court to recognize that an individual's right of publicity is enforceable by their estate as a property right.

A small, but possibly important aspect of the Minnesota right of publicity statute and the proposed federal law is the descendible right for someone whose likeness was never exploited for commercial value to begin with.[124] One may question why someone who never needed the right of publicity protection in their lifetime would need it after death, but as an example, Arizona's right of publicity statute is specifically tailored for the military.[125] In the unfortunate event of a soldier's death, a non-descendible right of publicity would allow anyone to use the soldier's name, portrait, or picture. A descendible right gives the families of soldiers the right to control the likeness as set forth in the statute. Again, in niche situations such as those mentioned above, the right of publicity protects aspects of one's identity which fail to qualify for federal trademark or copyright protection.

Categorizing the right of publicity as a privacy right also creates issues concerning enforcement. First, as exemplified in *Fraley v. Facebook*, even when a right of publicity claim is successfully brought against a social media site, all the site has to do is change its terms to benefit the company.[126] If the right of publicity were to be enforced as a privacy right, it would be much harder to claim appropriation of one's identity when the individual would have consented to use the site in order to publicize their persona. This is not to say that an individual's identity can be misappropriated by third-party individuals and companies simply because they decided to post it on the Internet. However, in terms of control, it is more logical to classify someone's identifying characteristics as something they own. Just as an author controls his or her works and decides how they are published through copyright protections, an individual with a distinctive persona should be able to control how it is used by others. Nonetheless, social media creates additional issues when discerning how one's privacy can be protected if the creator choses to disperse their personal characteristics online.

Secondly, claiming publicity as intellectual property provides a basis for enforcement. One simple solution would be to add a publicity right to the Lanham Act as a carve-out in § 1125(a). The statute would have to specify that the publicity right can only be used in conjunction with one's distinctive identity, and that it should not be confused with trademarks, but the existence of federal intellectual property rights provides a framework. On the other hand, there is currently no federal privacy right that seeks to protect what the right of publicity aims to safeguard. Although the Constitution guarantees the right to privacy as a penumbra of the enumerated amendments,[127] this is a separate issue. It would be much simpler to amend the Lanham Act and add in a section for the right of publicity, rather than create an entirely new federal right of privacy. Moreover, creating a new federal right would be especially difficult when many different federal acts protecting a variety of privacy rights in connection with data already exist.[128]

C. A federal right of publicity is not overreaching because enough protections already exist.

The arguments against a federal right of publicity, while reasonable, are not warranted. Opponents of the right of publicity argue that it threatens the First Amendment.[129] Others may assert that the right should be left up to the states to regulate. However, First Amendment defenses, which will be detailed in the following section, only emphasize that a federal right of publicity will do no harm unless there is an inappropriate use of someone's likeness for commercial value. Yet, the argument against a property right being disallowed by the Supreme Court falls short when it can be regulated through interstate commerce, just like federal trademark and copyright law.

i. Free Speech and Fair Use

Assuming a defendant will claim the First Amendment as a defense to right of publicity claims, they would argue that they have the right to disseminate information freely due to freedom of speech, especially if there was no clear use of name, portrait, or image. The court would then have to weigh the plaintiff's interest in protecting his or her likeness and

the interest in not infringing on the First Amendment rights of the defendant.[130] Despite the broadcaster raising First Amendment concerns in *Zacchini*, the Supreme Court held that broadcasting Mr. Zacchini's entire canon act on the news was not justifiable under the First Amendment when the news report could have simply used highlights.[131] The Court reasoned that Mr. Zacchini had an interest in protecting his identifying characteristics, especially when he had an economic interest in producing a performance for the public.[132] Therefore, a federal right will not impact one's freedom of speech because there are already protections set in place to ensure that does not happen.

First, the Transformative Use Test originally introduced by the California Supreme Court in *Comedy III Productions, Inc. v. Gary Saderup, Inc.* provides one way to decide whether the use of a person's likeness is misappropriation or simply fair use.[133] The Court asked whether the "product containing a celebrity's lines [was] so transformed that it [became] primarily the defendant's own expression rather than the celebrity's likeness."[134] The court was not interested in the subjective usage, but rather how much the creative elements predominated the work.[135] If an individual or corporation alters a person's likeness to the point that there is clear quantitative transformation, there would not even be a need for a right of publicity claim because the likeness would be so skewed that the suit would not stand. Conversely, if someone were to simply copy the image of someone else for commercial value that would rightly warrant a suit.

Second, the Relatedness Test, as recited in the Restatement Third of Unfair Competition, allows the use of a person's name or image in a work that is "related to the person."[136] This protection is mostly used for publication, broadcast, plays, movies, etc.[137] For example, news anchors who relay a story to the public about someone or comedians who use a person's name in their routine are simply using their likeness as an editorial outlet.[138] Again, the right of publicity does not intend to punish those who use others' distinctive likeness in everyday activities as long as they are reasonable and do not exploit the entirety of someone's identity, like with Mr. Zacchini. Even though a comedian is using an individual's identity as a part of their routine which is commercial in nature, the comedian would not likely be using the individual as their main attraction. The point of a comedy show is not to copy the other person's identity for commercial gain, but rather to use a part of their identity as one part of their own distinctive artistic rendition.

Third, the Predominant Test, first proposed by a legal commentator and first employed by the Missouri Supreme Court, states that a product being sold that predominantly exploits the commercial value of an individual's identity should be held to violate the right of publicity and not be protected by the First Amendment.[139] While this may be easier to prove for celebrities, this test may prove to be a challenge for non-celebrities to overcome. However, as previously explained, there are various First Amendment protections already in place to work alongside a federal right of publicity.

ii. State Law

The Commerce Clause gives Congress the power to regulate commerce among the several states.[140] While strict intrastate commerce is regulated by each state, any local commerce that affects the "continuous current" of interstate commerce, can be regulated by Congress.[141] Federal trademark law developed out of the need to protect consumers against false and deceptive products by allowing owners to identify and distinguish their goods from others.[142] Hence, while there is state trademark law, both the state and federal governments have a common interest in protecting consumers and protecting against unfair competition.[143] Likewise, the right of publicity is a subset of unfair competition that the federal government should have an interest in safeguarding and should regulate. The fact that the right of publicity has been left up to the states so far, does not restrict it from enacting a statute of its own. Because federal trademark law relies on the usage of interstate commerce,[144] the federal right of publicity could work the same. Social media certainly has an impact on interstate commerce and accordingly, there would be a basis for federal regulation.[145] So, a federal right of publicity can coexist with state rights and protect an individual located in states where there is no state right of publicity. With the federal creation of the right, many states might even decide to enact a statute of their own to ensure that the things they want to be protected are set in place. Even with the least restrictions, the federal right of publicity produces some rights for individuals who would otherwise have none.

D. Enforcing the federal right of publicity will motivate companies to work with creators rather than stealing from them.

As stated above, the federal right of publicity will not and should not infringe upon an individual or

corporation's first amendment rights. No one envisions Lewis going after every single person who uses the term 'on fleek,' nor does Alfonso Ribeiro want to go after comedians who use the dance to make fun of him. However, when companies use Lewis' phrase as an advertising tool, and Epic Games charges people for the dance emote, there should be some expectation of compensation.[146]

Ribeiro's dance was dubbed "The Carlton" after he first showcased it on the popular television show, *The Fresh Prince of Belair*.[147] It was named after the character Ribeiro played. In 2014, Ribeiro starred on *Dancing with the Stars* and performed the Carlton.[148] A few years later, in 2018, Ribeiro brought suit against Epic Games for using the dance in its game, Fortnite.[149] Ribeiro sought to copyright the dance but was unsuccessful.[150] Although Ribeiro's dance may not be copyrightable due to the longstanding notion that social dances should remain in the public sphere, he should have a viable claim for the misappropriation of his likeness. "The Carlton" dance is undeniably a distinctive extension of Ribeiro's identity, as it was made popular by a character he played and was highly awaited by the judges of *Dancing with the Stars*.[151] If the reasoning applied in *White v. Samsung* (where a robot is dressed like Vanna White and placed in front of a Wheel) were to apply to Ribeiro's case (where a game's character is performing the dance created and made popular by Ribeiro), Epic Games would have a hard time justifying their misappropriation. Also, seeing that the video game is played by gamers worldwide, a federal right of publicity may be the only avenue Ribeiro has to protect and enforce his rights.

The federal publicity right would also allow protection for unique attributes that have entered the public sphere. Lewis may no longer have the ability to trademark 'on fleek' like Durell Smylie did with "where the money resides" because of how long the phrase has been in use, but with a federal right of publicity, she could potentially argue that her likeness was being appropriated if a company were to use it in any commercials or on any packaging. Further, if Smylie had not applied for trademark registration for his phrase, or even if the application had been denied, a federal right would supply the ability to protect him from any company's rendition of his freestyle and phrase, especially if the person performing were to copy the same mannerisms and speech cadence as Smylie.

Creation of the federal publicity right would disincentivize companies from attempting to copy the distinctive characteristics of a person, and instead, those companies might opt into licensing agreements with creators whose personas they seek to use. Enforcing the federal right of publicity would therefore ensure that these companies fairly compensate individuals from whom they, and accordingly, companies can avoid multiple lawsuits.

IV. Conclusion

A federal right of publicity is necessary to create uniformity in this area and to provide people—particularly people of color—with nationwide "intellectual property" rights that protect distinctive aspects of their image and other identifying characteristics. A federal right of publicity is especially needed by people of color since they are often the victims of cultural appropriation and typically lack the resources to simultaneously initiate multiple right of publicity claims in the various states in which injury occurs. As such, people of color would benefit from a federal right of publicity framework that allows a single judgment to be enforced in any federal court across the country. Finally, a federal right of publicity provides a "gap filler" for those identifying characteristics such as phrases and simple dances that might fail to qualify for either federal trademark or copyright protection. Since the right of publicity protects distinctive individual characteristics the way trademarks protect distinctive source identifiers, the federal right of publicity should be added to the federal trademark statute's unfair competition provisions contained in Section 1125(a) of the Lanham Act.

1. Le'Shae Robinson, *Cultural Appropriation, Stereotyping, and Racism in Digital Advertising*, Campaign Monitor, *https://www.campaignmonitor.com/blog/email-marketing/2020/07/cultural-appropriation-stereotyping-racism-in-digital-advertising/*(last visited Mar. 5, 2021).
2. *Id.*
3. *Id.*
4. Esther Bell, *Is social media normalizing cultural appropriation?*, Daily Dot (Jan. 27, 2021, 7:45 a.m.), *https://www.dailydot.com/unclick/social-media-normalizes-cultural-appropriation-instagram-hippie-buddha/*.
5. *Trademark, Patent, or Copyright*, United States Patent and Trademark Office, *https://www.uspto.gov/trademarks/basics/trademark-patent-or-copyright* (last visited Nov. 11, 2022).
6. *Statutes & Interactive Map*, Right of Publicity, *https://rightofpublicity.com/statutes* (last visited Nov. 11, 2022).
7. *Subject Matter Jurisdiction: Should I File in Federal or State Court?*, NOLO, *https://www.nolo.com/legal-encyclopedia/subject-matter-jurisdiction-state-federal-29884.html* (last visited Nov. 11, 2022).
8. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 5, 193, 193 (1890).
9. *Id.* at 213.
10. *Id.* at 195.
11. *Id.* at 213–214.
12. *Id* at 205.
13. *Id.* at 203.
14. *Id.* at 204.
15. *Id.* at 206.
16. Haelan Labs., Inc. v. Topps Chewing Gum, Inc. 202 F.2d 866, 868 (2d Cir. 1953).
17. *Id.* at 867.

18. *Id.* at 868.
19. *Id.*
20. *Id.*
21. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 575–576 (1977).
22. *Id.* at 576.
23. RESTATEMENT (SECOND) OF TORTS § 652 (AM. L. INST. 1977).
24. RESTATEMENT (THIRD) OF UNFAIR COMPETITION: RIGHT OF PUBLICITY § 46 (AM. L. INST. 1995).
25. RESTATEMENT (SECOND) OF TORTS § 652 (AM. L. INST. 1977).
26. *Id.* at § 652(C).
27. RESTATEMENT (THIRD) OF UNFAIR COMPETITION: RIGHT OF PUBLICITY § 46 (AM. L. INST. 1995).
28. 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:1 (5th ed. 2017).
29. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 572–573 (1977).
30. RESTATEMENT (SECOND) OF TORTS § 652(C) (AM. L. INST. 1977).
31. JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 7 (2018).
32. *See* Acme Circus Operating Co. v. Kuperstock, 711 F.2d 1538 (1983).
33. *Right to Privacy & Right of Publicity*, CAESAR RIVISE, *https://www.caesar.law/practices/right-to-privacy-right-of-publicity/#:~:text=The%20Right%20To%20Privacy%20is,individual%20to%20be%20left%20alone.&text=The%20Right%20Of%20Publicity%20gives,in%20his%20or%20her%20persona* (last visited Nov. 11, 2022).
34. N.Y. CIV. RIGHTS LAW § 50 (2022).
35. 1 J. THOMAS MCCARTHY AND ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:30 (2D ED. 2020).
36. *Id.*
37. *Id.* at §1:2.
38. Haelan Labs., Inc. v. Topps Chewing Gum, Inc. 202 F.2d 866, 867 (2d Cir. 1953).
39. MCCARTHY *supra* note 35, §1:2.
40. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1396 (9th Cir. 1992).
41. *Id.* at 1396.
42. *Id.* at 1398.
43. *Id.*
44. *Id.* at 1398.
45. 15 U.S.C. §§ 1051–1072.
46. IND. CODE tit. 32, § 32-36-1-1.
47. Daniel Garrie, *CyberLife: Social Media, Right-of-Publicity and Consenting to Terms of Service*, LAW AND FORENSICS (July 19, 2017), *https://www.lawandforensics.com/cyberlife-social-media-right-of-publicity-and-consenting-to-terms-of-service-2/*.
48. *Id.*
49. George Chesterton, *Cultural Appropriation: everything is culture and it's all appropriated,* GQ MAGAZINE (September 1, 2020), *https://www.gq-magazine.co.uk/article/the-trouble-with-cultural-appropriation*.
50. *Cultural Appropriation*, PBS, *https://bento.cdn.pbs.org/hostedbento-prod/filer_public/whatihear/9-Cultural_Approp-Viewing_Guide.pdf* (last visited Nov. 11. 2022).
51. Nadra Kareem Nittle, *A Guide to Understanding and Avoiding Cultural Appropriations*, THOUGHT CO., (February 4, 2021) *https://www.thoughtco.com/cultural-appropriation-and-why-iits-wrong-2834561*.
52. Maya Allen, *22 Corporate Women Share What Wearing Their Natural Hair to Work Means*, BYRDIE (Feb. 24, 2020), *https://www.byrdie.com/natural-hair-in-corporate-america*.
53. Nicquel Terry Ellis & Charisse Jones, *Banning ethnic hairstyles 'upholds this notion of white supremacy.' States pass laws to stop natural hair discrimination*, USA TODAY (Oct. 14, 2019, 2:20 p.m.), *https://www.usatoday.com/story/news/nation/2019/10/14/black-hair-laws-passed-stop-natural-hair-discrimination-across-us/3850402002/*.
54. PBS, *supra* n.50.
55. *Id*.
56. *Cultural Appropriation: Dr. Hall Discusses the Negative Psychological Impact of Appropriation*, PSYCH2GO (June 18, 2017), *https://psych2go.net/cultural-appropriation-dr-hall-discusses-negative-psychological-impact-appropriation/*.
57. Leila Fadel, *Cultural Appropriation, A Perennial Issue on Halloween*, NPR (Oct. 29, 2019), *https://www.npr.org/2019/10/29/773615928/cultural-appropriation-a-perennial-issue-on-halloween*.
58. *Id.*; *See* Nastia Voynovskaya, *Setting the Record Straight on American Music's Black Roots*, KQED (Jan. 22, 2020), *https://www.kqed.org/arts/13873204/setting-the-record-straight-on-american-musics-black-roots*.
59. Voynovskava, *supra* n.58.
60. *Id*.
61. *Id.*
62. *Id*.
63. Viet Thanh Nguyen, *Arguments over the appropriation of culture have deep roots,* LO ANGELE TIME (Sep. 26, 2016, 10:00 a.m.), *https://www.latimes.com/books/jacketcopy/la-ca-jc-appropriation-culture-20160926-snapstory.html*.
64. *Id.*
65. Constance Grady, *How "on fleek" went from a 16-year-old's Vine to the Denny's Twitter account*, VOX (Mar. 28, 2017, 10:40 a.m.), *https://www.vox.com/culture/2017/3/28/14777408/on-fleek-kayla-lewis-ihop-dennys-vine-twitter-cultural-appropriation*.
66. *Id*.
67. Charles Tumiotto Jackson, *Why is TikTok Better Than Vine?*, BETTERMARKETING (Feb. 21, 2020), *https://bettermarketing.pub/why-is-tiktok-better-than-vine-b33ce1cf3367*.
68. *Id.*
69. Grady, *supra* n.65.
70. *Id.*
71. Grady, *supra* n.65.
72. CARDI B, ON FLEEK (KSR Group 2016); OFFSET, ON FLEEK FT. QUAVO (Quality Control Music/MoTown Records 2019); PNB ROCK, FLEEK (New Lane Ent. 2015).
73. Grady, *supra* n.65.
74. *Id.*
75. *Id.*
76. *Id*.
77. To apply for trademark registration, one must prove that the mark is used, or will be used in commerce. *See* 15 U.S.C. § 1127.
78. A trademark must have secondary meaning, also known as distinctiveness, to be registrable. The secondary meaning must be related to the goods or services being offered. For instance, "Like a good neighbor" elicits "State Farm is there" by the public. *See* U.S.C. § 1052(f).
79. Grady, *supra* n.65.
80. *The 15 Biggest YouTube Channels Right Now*, THILLIST ENTERTAINMENT (Jan. 12, 2021, 1:32 p.m.), *https://www.thrillist.com/entertainment/nation/top-youtube-channels-most-popular-youtubers*.
81. Rebecca Jennings, *How "kombucha girl" revolutionized internet fame*, VOX (Aug. 25, 2020, 9:00 a.m.), *https://www.vox.com/the-goods/2020/8/25/21399317/brittany-broski-kombucha-tiktok-tomlinson*.
82. *See* Michael Laroche, et al., *To Be or Not to Be in Social Media: How Brand Loyalty is Affected by Social Media?*, 33 INT'L J. INFO. MGMT. 76 (2012).
83. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992).
84. Jennings, *supra* n.81.
85. Abercrombie & Fitch Co. v. Hunting World 537 F.2d 4, 10 (2nd Cir. 1976).
86. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 101, 805.5(b) (3d ed. 2021).
87. *Id.*
88. Taylor Hatmaker, *How Fortnite's dance moves sparked new lawsuits against Epic Games*, TECHCRUNCH, (Dec. 18, 2018, 5:11 p.m.) *https://techcrunch.com/2018/12/18/fortnite-dances-epic-sued/*.
89. *Id.*
90. Julia Alexander, *BlocBoy JB sues Epic Games over popular 'Shoot' dance emote*, THE VERGE (Jan. 23, 2019, 4:41 p.m.) *https://www.theverge.com/2019/1/23/18194912/blocboy-jb-fortnite-sues-epic-games-shoot-dance-emote-backpack-kid-2-milly*.
91. *Id.*
92. Adi Robertson, *The 'Carlton dance' couldn't be copyrighted for a Fortnite lawsuit*, THE VERGE (Feb. 15, 2019, 11:26 a.m.), *https://www.theverge.com/2019/2/15/18226180/copyright-office-alfonso-ribeiro-carlton-fresh-prince-dance-rejected-fortnite-nba-2k-lawsuit*.
93. Julia Alexander, *BlocBoy JB sues Epic Games over popular 'Shoot' dance emote*, THE VERGE (Jan. 23, 2019, 4:41 p.m.) *https://www.theverge.com/2019/1/23/18194912/blocboy-jb-fortnite-sues-epic-games-shoot-dance-emote-backpack-kid-2-milly*.
94. Robertson, *supra* n.92.
95. Jordan Crucchiola, *Alfonso Ribeiro Shimmies Away From Fortnite Lawsuit Over Carlton Dance*, VULTURE (Mar. 8, 2019), *https://www.vulture.com/2019/03/alfonso-ribeiro-fortnite-lawsuit-carlton-dance.html*.
96. Adi Robertson, *Epic claims it's not really copying rapper 2 Milly's dance in Fortnite*, THE VERGE (Feb. 12, 2019, 4:52 p.m.), *https://www.theverge.com/2019/2/12/18222339/epic-fortnite-lawsuit-terrence-ferguson-2-milly-rock-swipe-it*.
97. Daniel Mackrell, *How to dance and unlock others emotes in Fortnite*, METRO UK (Feb. 1, 2018, 5:09 p.m.), *https://metro.co.uk/2018/02/01/dance-others-emotes-fortnite-7276749/#:~:text=If%20you%20want%20to%20unlock,through%20the%20Fortnite%20Battle%20Pass*.
98. *See* Karla Rodriguez, *'I'm Going to Get Paid': Durell Smylie on the Rise of 'Where the Money Reside'*, COMPLEX (Dec. 30, 2020), *https://www.complex.com/pop-culture/2020/12/durell-smylie-where-the-money-reside-viral-interview/where-the-money-reside-origin*.
99. *Id*.
100. Kelsey Garcia, *"The Joy Business": For Black Content Creators, Credit Is Long Overdue*, POPSUGAR (Feb. 26, 2021), *https://www.popsugar.com/entertainment/black-content-creators-deserve-credit-48186589*.
101. *Id.*

102.*Id.*
103.*Id.*
104.See *id*; Brooklyn White, *Meet Durell Smylie, The Salesman Behind "Where the Money Reside,"* GIRLSUNITED (Dec. 23, 2020), *https://girlsunited.essence.com/article/durell-smylie-interview/*; *Application Filing Basis*, USPTO (Mar. 31, 2021, 12:00 p.m.), *https://www.uspto.gov/trademarks/basics/application-fi ling-basis#:~:text=To register your trademark%2C you,you fi rst used it anywhere*.
105.Bria Gremillion, *Baton Rouge viral sensation to appear in Super Bowl TikTok tailgate*, WAFB9 (Feb. 7, 2021, 12:02 p.m.), *https://www.wafb.com/2021/02/06/baton-rouge-viral-sensation-appear-super-bowl-tiktok-tailgate/.*; Wherethemoneyreside, *Where the Money Reside NFL Super Bowl Tailgate Commercial #Wherethemoneyreside*, YOUTUBE (Feb. 7, 2021), *https://www.youtube.com/watch?v=B7fHycf7QD0*.
106.*See,* Marc C Levy, Jennifer R Ashton & Russell C Pangborn, *Litigation Procedures and Strategies: United States*, WORLD TRADEMARK REVIEW (Dec. 21, 2017), *https://www.worldtrademarkreview.com/global-guide/trademark-litigation/2018/article/litigation-procedures-and-strategies-united-states*.
107.15 U.S.C. § 1125.
108.W. Michael Schuster, Miriam Marcowitz-Bitton, Deborah R. Gerhardt, *An Empirical Study of Gender and Race in Trademark Prosecution*, 94 S. CAL. L. REV. 1407, 1441 (2020).
109.*See* 15 U.S.C. § 1125.
110.*See* RCW 63.60.010.
111.Manuel Velasquez et al., *Rights*, MARKKULA CENTER FOR APPLIED ETHICS (Aug. 8, 2014), *https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/rights/*.
112.REVISED CODE OF WASH. ch. 63.60.
113.15 U.S.C. § 1125(a)(1).
114.15 U.S.C. § 1125(a)(1).; IND. CODE tit. 32, § 32-36-1-1(c)(1); REVISED CODE OF WASH. ch. 63.60.010.
115.REVISED CODE OF WASH. ch. 63.60.030.
116.Paisley Park Enters. v. Boxill, 299 F. Supp. 3d 1074 (D. Minn. 2017).
117.*Id.* at 1082.
118.*Id*.
119.*Id.* at 1083.
120.*Id.*
121.*See id.* at 1083, 1084.
122.Ventura v. Titan Sports, Inc., 65 F.3d 725, 730 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 1268 (1996).
123.Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 234 (Minn. 1998).
124.Paisley Park Enters., 299 F. Supp. 3d at 1084.
125.ARIZ. REV. STAT § 12-761 (2007).
126.*See* Fraley v. Facebook, Inc., 966 F. Supp. 2d 939, 940 (N.D. Cal. 2013).
127.*Privacy*, CORNELL LAW SCHOOL: LEGAL INFORMATION INSTITUTE, *https://www.law.cornell.edu/wex/Privacy* (last visited Nov. 11, 2022).
128.*Personal Information*, CORNELL LAW SCHOOL: LEGAL INFORMATION INSTITUTE, *https://www.law.cornell.edu/wex/personal_information#:~:text=6501%2D6506).,The%20Privacy%20Act%20of%201974%20(5%20U.S.C.,be%20informed%20of%20any%20disclosures* (last visited Nov 11, 2022).
129.JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 1 (2018).
130.Robert C. Post & Jennifer E. Rothman, The First Amendment and the Right(s) of Publicity, 130 YALE L.J. 86, 86 (2020).
131.Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 575–576 (1977).
132.*Id.*
133.Kent R. Raygor and Valerie E. Alter, *Fair Use and the Right of Publicity: A Search for a More Balanced Approach*, MEDIA LAW RESOURCE CENTER (Dec. 2008), *https://www.sheppardmullin.com/media/publication/664_Right%20Of%20Publicity%20Articles.pdf*.
134.*Id.*
135.*Id.*
136.*Id.*
137.*Id.* at 119.
138.WatchMojo.com, *Top 10 Hilarious Celebrity Impressions Done by Comedians*, YOUTUBE (May 23, 2020), *https://www.youtube.com/watch?v=HRCX8DO5hGI*.
139.Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003).
140.U.S. CONST. art. I, § 8, cl. 3.
141.Swift & Co. v. United States, 196 U.S. 375, 398–400 (1905).
142.*Overview of Trademark Law*, HARVARD LAW SCHOOL, *https://cyber.harvard.edu/metaschool/fisher/domain/tm.htm* (last visited Mar. 5, 2021).
143.*Why Are Intellectual Property Rights Important?*, GLOB. INNOVATION POL'Y CTR. (Dec. 28, 2009), *https://www.theglobalipcenter.com/why-are-intellectual-property-rights-important/*.
144.*Trademark*, CORNELL L. SCH.: LEGAL INFO. INST., *https://www.law.cornell.edu/wex/trademark* (last visited Oct. 28, 2022).
145.Nina I. Brown & Jonathan Peters, *Say This, Not That: Government Regulation and Control of Social Media*, 68 SYRACUSE L. REV. 521, 531–32 (2018).
146.Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, 28 COMMC'NS LAW. 2 (2011).
147.Elizabeth A. Harris, *Carlton Dance Not Eligible for Copyright, Government Says*, N.Y. TIMES (Feb. 15, 2019), *https://www.nytimes.com/2019/02/15/arts/dance/carlton-dance.html*.
148.Dan Good, *Alfonso Ribeiro Performed 'The Carlton' on 'Dancing With the Stars'*, ABC NEWS (Oct. 7, 2014, 2:11 a.m.), *https://abcnews.go.com/Entertainment/alfonso-ribeiro-performed-carlton-dancing-stars-finally/story?id=26009685*.
149.Complaint, *Ribeiro v. Epic Games, Inc.*, 2:18-cv-10412 (Cent. D. Cal. 2019).
150.Robertson, *supra* n.93.
151.Good, *supra* n.147.