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"Hasta La Vista, Funny Guys": Arnold Schwarzenegger's Fictional Voice Misappropriation Lawsuit Against Comedians Imitating His Voice and the Case for a Federal Right of Publicity Statute

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NOTES

"HASTA LA VISTA, FUNNY GUYS": ARNOLD SCHWARZENEGGER'S FICTIONAL VOICE MISAPPROPRIATION LAWSUIT AGAINST COMEDIANS IMITATING HIS VOICE AND THE CASE FOR A FEDERAL RIGHT OF PUBLICITY STATUTE

Blair Joseph Cash*

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I. INTRODUCTION: “YOU’VE BEEN SERVED, BABY”

Imagine that the lights go out in two crowded concert halls. Both crowds erupt with thunderous applause after the announcers introduce comedians Frank Caliendo and Pablo Francisco. After all, flawless impressions are often funnier than the real thing. Both men walk onto their respective stages and launch into their routines completely unprepared for what happens next.

Before Francisco and Caliendo begin their Arnold Schwarzenegger impressions, a different man walks up to each of them, hands them a stack of papers and says in his best Schwarzenegger voice, “You’ve been served, Baby.” Both comedians frantically dial their lawyers.

Governor Schwarzenegger issues a press release the following day. The release states:

I have filed lawsuits against two comedians who have gained a reputation for an impression of something that does not belong to them—my voice. It’s time to bring these funny guys to justice, Terminator-style. There is only one Arnold Schwarzenegger, and I will not have these clowns running around making a mockery of my voice. Let this be a warning to all others who seek to steal my greatness, the essence of my being. Hasta La Vista, funny guys.

The world of stand-up comedy is a competitive and oftentimes cutthroat world in which comedians often scrape by for years performing in dingy, old bars. Accusations of joke-stealing and plagiarism plague some of the profession’s most visible comedians. Under the current regime, a stand-up comedian plays a game of Russian roulette whenever he or she incorporates an impression into a routine.

Caliendo started as a cast member of MADtv and has since become popular for his impressions of John Madden, Sean Connery, former Presidents George W. Bush and Bill Clinton, and Schwarzenegger. Caliendo goes so far as to emphasize how unique Schwarzenegger’s voice is when performing impressions during his routine. Caliendo’s fame has grown so much that he has a standing

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1 FRANK CALIENDO, Arnold’s Diversity, on MAKE THE VOICES STOP (Frank-O-Matic, Inc. 2003); PABLO FRANCISCO, Movie Previews, on KNEE TO THE GROIN (Uproar Entertainment, 1997).
2 This “press release” is not intended to reflect an actual press release, but instead outlines several important issues that could arise in any potential litigation.
3 See, e.g., Mark Shanahan, Funny Coincidence, BOSTON GLOBE, Feb. 17, 2009, at G22 (stating both Carlos Mencia and Dane Cook have often been accused of stealing jokes and routines from other comedians).
4 See CALIENDO, supra note 1 (featuring impressions by Caliendo of numerous prominent public figures).
5 Id.
show at the Monte Carlo in Las Vegas. Importantly, Caliendo's act consists entirely of impressions of famous people, and although he is better-known for other impressions besides his Schwarzenegger impression, he often switches back and forth between various impressions throughout his performances.

Francisco has appeared on numerous Comedy Central specials in addition to serving as a cast member on MADtv, just like Caliendo. Francisco's Schwarzenegger impression pokes fun at Schwarzenegger in the context of a hypothetical movie preview in which Schwarzenegger plays a fictional tortilla stand salesman. During his performance, Francisco never explicitly states that he is impersonating Schwarzenegger's voice, adding to the possibility of confusion.

Comedians like Caliendo and Francisco have become rather famous for life-like Arnold Schwarzenegger impressions. Schwarzenegger's unique Austrian accent has made him the subject of numerous ad hoc impressions on the Internet, aside from impressions performed by professional comedians. But the question arises: when does their mockery leave the world of parody and jest and begin infringing on Schwarzenegger's right of publicity? The right of publicity statute in Schwarzenegger's home state of California allows him to sue for damages as a result of such infringement. However, Caliendo and Francisco are not using Schwarzenegger's actual voice, no matter how realistic their impressions are to the unfamiliar ear. A live studio audience would never confuse either comedian with the real Schwarzenegger, but listeners of an audio recording of the performance might be understandably confused.

Schwarzenegger's grounds for a lawsuit rest on the state-based, common law right of action for the right of publicity. Infringing upon another's right of publicity by using a person's name, likeness, or "other indicia of identity" for purposes of commercial gain subjects the infringer to liability. Since the right's common law inception, different applications of the right in various state...
statutes provide different levels of protection.\textsuperscript{15} Ever since the right of publicity's entrance into the legal world, its jurisprudence has expanded significantly.\textsuperscript{16} Additionally, the right has received increasing amounts of scholarly attention—ranging from proposed legislation to a proposed parody exception for the right of publicity.\textsuperscript{17} Given the pervasive nature of the media and the national visibility of many of today's celebrities, it is easy to understand why scholars are constantly proposing solutions for this legal quandary.

Problems for right of publicity plaintiffs arise because states treat the right differently. Altogether, thirty-one states recognize the right of publicity in some way—eleven solely by statute,\textsuperscript{18} twelve exclusively through the common law, and eight through a combination of the two.\textsuperscript{19} As a result, the subtle differences in the right's jurisprudence are more complex than they appear on the surface.

By using a fictional right of publicity lawsuit filed by Schwarzenegger against comedians Caliendo and Francisco, this Note will explore the benefits and costs of federal legislation on the right of publicity by concluding that the vastly different results arising under the disparate state regimes would be largely eradicated if the right of publicity were protected by a federal statute. In proposing a solution, this Note will look to several of the arguments surrounding the right's creation in addition to the arguments presented in key cases throughout the development of the right of publicity. Analogous doctrines of parody and trademark dilution will also be analyzed in crafting an efficient and uniform solution to the current doctrinal maze. Economic arguments will provide a strong foundation for the sample statute, but moral arguments will also be employed in crafting the statute.
Part II of this Note will explore the case law of the right of publicity and the varying state treatment that the right receives. Part II will also evaluate Schwarzenegger's chances of success against comedians Caliendo and Francisco. Part III will analyze the arguments for and against a federal right of publicity statute by concluding that federal legislation would provide the most fair, efficient, and responsible outcome. It will conclude by giving a detailed explanation of several of the important statutory provisions in the sample statute. Part IV will conclude that in light of the right of publicity's checkered past, carefully crafted and targeted federal legislation presents the most desirable outcome. An Appendix provides sample statutory language aimed at resolving some of the problems presented by the current scheme.

II. BACKGROUND: SETTING THE STAGE

Over fifty years of case law make up the right of publicity as it exists today. While each case carefully interprets only the implications of the right as it exists under the relevant state law, the history of the case law demonstrates several things. First, the right is expanding and now enjoys many of the same privileges as traditional property rights. The voice misappropriation claim is evidence of this expansion. Nonetheless, there is still considerable discord regarding the right's expansion. Second, many states explicitly define the right of publicity by statute with several well-delineated exceptions, while other states rely upon the common law as grounds for the right. Although copyright preemption applies in narrow circumstances, the right of publicity remains a state-based right. Third, the issues raised by voice misappropriation claims and the disparate

20 See, e.g., Laws v. Sony Music Entm't, Inc., 448 F.3d 1134, 1145 (9th Cir. 2006) (arguing that "left to creative legal arguments, the developing right of publicity could easily supplant the copyright scheme"); Jim Henson Prods., Inc. v. John T. Brady & Assoc's., Inc., 867 F. Supp. 175, 188 (S.D.N.Y. 1994) (asserting that the right of publicity protects the commercial value of a public person's identity as a property interest).

21 See Midler, 849 F.2d 460 (finding that where a distinctive voice of a well-known professional actress and singer is intentionally imitated, the owner of the voice may state a valid cause of action).

22 See, e.g., CAL. CIV. CODE § 3344 (2007) (establishing a right of publicity that does not apply to media used in advertising such as newspapers, magazines, radio, and television ads); IND. CODE ANN. § 32-36-1-1 (2002) (protecting literary works, original works of art, and promotional materials from the plaintiff's right to sue for infringement).

23 1 MCCARTHY, supra note 18, § 6.3 (finding twenty states that recognize a common law right of publicity). See, e.g., Martin Luther King, Jr. Ctr. for Soc. Change, Inc., v. Am. Heritage Prods., Inc., 694 F.2d 674, 680 (11th Cir. 1983) (finding Georgia recognizes the right of publicity as distinct from the right of privacy in its common law).

24 See Laws, 448 F.3d 1134 (9th Cir. 2006) (finding plaintiff's voice misappropriation claim against a music producer who held a license of the plaintiff's recording preempted by federal copyright law).
treatment such claims receive under state law pose interesting problems for Schwarzenegger's hypothetical voice misappropriation claim.25

A. HISTORY OF THE CASE LAW

1. Foundation of the Right. Samuel Warren and Louis Brandeis argued for a right of privacy that gave private individuals the right to control public distribution of images of their likeness before the right was ever judicially recognized, presciently proposing substantive limits to the right before such limits ever truly existed in practice.26 Sixty-three years later, the Second Circuit laid the groundwork for the modern-day right of publicity, finding that the right of publicity exists in addition to and separately from the right of privacy.27 By establishing the right as something of pecuniary value, the court emphasized that without a right to one’s likeness, many prominent figures would not be able to reap the benefits of their own hard work.28 The line of cases that followed the Second Circuit’s lead have molded the right of publicity in a number of different ways.

For example, some courts have even found that plaintiffs have valid voice misappropriation claims against defendants who seek to commercially exploit their voice.29 One court found that an entertainer's right of publicity was infringed even though neither his name nor his likeness were used in the infringing material.30

25 For a sampling of statutes that protect voice as an aspect of one’s right of publicity, see, e.g., CAL. CIV. CODE § 3344 (2007); IND. CODE ANN. § 32-36-1-1 (2002). For a sampling of statutes that do not protect one’s voice as part of one’s right of publicity, see, e.g., FLA. STAT. ANN. § 540.08 (2007); TENN. CODE ANN. § 47-25-1103 (2001).
26 Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 213–18 (1890) (limiting the right of privacy in the following ways: (1) no prohibition of publication of matters of public or general interest, (2) no prohibition on privileged communication, (3) requirement of special damages for invasions of privacy by oral publication, (4) termination of the right when the individual publishes the information himself, (5) truth is not a defense, and (6) absence of malice is not a defense).
27 Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).
28 Id.
29 See, e.g., Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1100 (9th Cir. 1992) (finding that singer Tom Waits stated a valid cause of action where a defendant invaded Waits's right to control his own identity “as embodied in his voice”); Midler v. Ford Motor Co., 849 F.2d 460, 463–64 (9th Cir. 1988) (holding that Bette Midler had a valid voice misappropriation claim against a defendant who deliberately imitated her voice for a commercial purpose); Lahr v. Adell Chem. Co., 300 F.2d 256, 259 (1st Cir. 1962) (finding a valid cause of action where a plaintiff's complaint alleges that the value of the defendant’s commercial was enhanced by the defendant’s imitation of the plaintiff’s voice).
2. Justification for the Right. Several courts and commentators have espoused various arguments supporting the right of publicity. The right is partially justified by the belief that people are entitled to the fruits of their labor.\textsuperscript{31} Additionally, protecting the right of publicity incentivizes individuals to undertake socially useful and beneficial activities.\textsuperscript{32} People are more likely to engage in these activities, putting themselves in the public eye at the risk of losing some of their privacy, so long as their identity is protected.\textsuperscript{33}

Commentators argue that giving an individual the right to protect and exploit his or her own persona is an efficient allocation of resources because each individual is best able to maximize his or her economic earning potential.\textsuperscript{34} In a world where professional athletes make more money from endorsement deals than from their team contracts, it would be foolhardy to think that an individual’s persona is not a viable property right.\textsuperscript{35} Penalizing individuals who are able to misappropriate one’s likeness and financially benefit from such misappropriation seeks to insure that defendants do not profit from their own wrongdoing in misappropriating the plaintiff’s likeness.\textsuperscript{36} Commentators argue that protecting and recognizing the right of publicity serves to discourage misappropriation and other illegal activities.\textsuperscript{37}

However, the expansion of the right has drawn the ire of some judges. One judge argued that extending the right “beyond an individual’s name, likeness, achievements, identifying characteristics, or actual performances” allows individuals to remove entire subject matters from the public domain.\textsuperscript{38} The right exists, but the debate will always revolve around the scope and breadth of its protection.

3. Comparison to Other Property Rights. Property rights enjoy certain privileges such as sales rights, bequeathal rights, and inheritance rights.\textsuperscript{39} Other

\textsuperscript{31} See, e.g., Pavesich v. New England Life Ins. Co., 50 S.E. 68, 79 (Ga. 1905) (finding that the “form and features of [a] plaintiff are his own”); Melville B. Nimmer, The Right of Publicity, 19 LAW & CONTEMP. PROBS. 203, 216 (1954) (arguing that if the right of publicity is not recognized by the courts, it will act as a disincentive to build one’s name and reputation); 1 MCCARTHY, supra note 18, § 2:1 (stating that “first principles of justice” support granting individuals rights over their own identities).

\textsuperscript{32} 1 MCCARTHY, supra note 18, § 2:6.

\textsuperscript{33} Id.


\textsuperscript{35} Jim Henson Prods., Inc. v. John T. Brady & Assocs., Inc., 867 F. Supp. 175, 189 (S.D.N.Y. 1994).

\textsuperscript{36} See Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1977) (arguing that a right of publicity claim is strongly supported when the defendant appropriates the activity by which the plaintiff has gained his reputation).

\textsuperscript{37} 1 MCCARTHY, supra note 18, § 2.8.

\textsuperscript{38} Carson v. Here’s Johnny Portable Toilets, Inc., 698 F.2d 831, 837 (6th Cir. 1983) (Kennedy, J., dissenting).

\textsuperscript{39} Eidman v. Martinez, 184 U.S. 578, 581 (1902).
intellectual property rights, such as trademarks, are similarly transferable and assignable.\textsuperscript{40} The Second Circuit, in delineating the right of publicity as something akin to other property rights, also emphasized that without the power to exclude others, establishing the right would provide no value to the holder.\textsuperscript{41} The fact that the baseball player in \textit{Haelan Labs.} signed two contracts, both authorizing the opposite party to use his photograph, is evidence that the right is a profit-making mechanism which allows individuals to capitalize on endorsements and other economic opportunities.\textsuperscript{42}

The Eleventh Circuit acknowledged the right of publicity in Georgia finding “that the right of publicity survives the death of its owner and is inheritable and devisable” even though its owner may not have exploited it for personal or commercial gain during his or her lifetime.\textsuperscript{43} The Second Circuit reached a different conclusion under California law finding that an individual’s right of publicity is not descendent.\textsuperscript{44} The court outlined three possible interpretations for the descendency of the right of publicity.\textsuperscript{45} Still other courts have found that the right of publicity should descend upon death like any other intangible property right would.\textsuperscript{46}

4. Confusion in Application. Stemming from contradictory judgments on similar topics,\textsuperscript{47} there is still substantial confusion as to the right of publicity’s interaction with the established right of privacy.\textsuperscript{48} For example, Rhode Island equates the two rights in protecting “the right to be secure from an appropriation of one’s name or likeness” under the title, “Right to privacy.”\textsuperscript{49}

\textsuperscript{40} See, e.g., 15 U.S.C. § 1060 (2006) (establishing that trademarks are assignable with the good will of the whole business or the portion of the business relevant to the mark).
\textsuperscript{41} \textit{Haelan Labs., Inc. v. Topps Chewing Gum, Inc.}, 202 F.2d 866, 868 (2d Cir. 1953).
\textsuperscript{42} \textit{Id.} at 867–68.
\textsuperscript{43} \textit{Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.}, 694 F.2d 674, 682 (11th Cir. 1983).
\textsuperscript{44} \textit{Groucho Marx Prods., Inc. v. Day & Night Co.}, 689 F.2d 317, 318 (2d Cir. 1982).
\textsuperscript{45} See \textit{id.} at 321 (finding the three descendency options are: (1) heirs of a publicity right holder have no power to stop future appropriation of the deceased’s persona, (2) heirs might have the power to stop certain misappropriations, but not others, and (3) heirs are able to prevent any misappropriation).
\textsuperscript{47} See supra note 46 (addressing the descendency of Elvis Presley’s right of publicity and the Sixth Circuit’s holding in \textit{Memphis Development Foundation}, which is the only court to find Elvis’ right of publicity is not descendent).
\textsuperscript{48} Plaintiffs often assert claims under both rights when bringing a civil suit. See, e.g., \textit{Carson v. Here’s Johnny Portable Toilets, Inc.}, 698 F.2d 831, 834–35 (finding Carson’s privacy claim was irrelevant because he stated a valid right of publicity claim).
The right against the appropriation of one's likeness or name, identified in Prosser's article eventually molded into the right of publicity as it is known today. One court, applying Michigan law, found that even though Michigan had not formally recognized the right of publicity at the time of the decision, state courts would likely recognize the right of publicity due to general recognition of the right. This inconsistent classification led one court to hold that the right is recognizable and deserving of protection, no matter what label the right carries.

Although some courts have struggled to separate the two rights, there are distinctions between them. The right of privacy is designed to prevent the invasion of a person's privacy interests. This right protects, *inter alia*, individuals against appropriation of the individual's name or likeness. Outside of an action alleging an appropriation of one's name or likeness—the essence of a right of publicity action—an action alleging an invasion of privacy may only be brought by the living person whose privacy is invaded in the first instance. The right of privacy is personal, not assignable, and absent a similar alleged privacy invasion, members of an individual's family may not maintain an invasion of privacy action.

By contrast, the right of publicity protects an individual whose "name, likeness, or other indicia of identity" has been misappropriated. This "other indicia of identity" is broader than the narrow "name or likeness" categories encompassed by the right of privacy. It includes characteristics such as a person's voice, a phrase that is commonly identified with a person, and even loosely-related facts that evoke images of the individual's personality.

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50 William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389 (1960) (outlining four distinct types of privacy: (1) an intrusion on plaintiff's solitude, (2) public disclosure about a plaintiff's personal life, (3) painting the plaintiff in a "false light" in the public eye, and (4) an appropriation of the plaintiff's name or likeness for commercial gain).


52 Carson, 698 F.2d at 834 n.1 (1983).


55 Id. § 652C.

56 Id. § 6521.

57 Id. § 6521 cmt. a.


59 See Midler v. Ford Motor Co., 849 F.2d 460, 463–64 (9th Cir. 1988) (finding that a singer's voice was a part of her misappropriated identity).


61 See White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, (9th Cir. 1992) (finding that a robot in a strapless dress with a blonde wig that flipped letters on a game board displayed a cognizable connection to Vanna White).
Furthermore, contrary to the right of privacy, several states protect the descendibility of the right of publicity even after the individual’s death.62

B. VOICE MISAPPROPRIATION

The right of publicity has also commonly included a person’s voice as a valid “indicia of identity.”63 When a professional entertainer known for his combination of pitch, inflection, and other vocal attributes sued to recover damages, the First Circuit found that the entertainer stated a valid cause of action due to the nature of his voice and vocal delivery.64 However, the court emphasized that the uniqueness of the entertainer’s voice was not the sole reason for recovery because a voice does not have to be unique for a consumer to recognize it.65 However common a plaintiff’s voice is, a defendant is prohibited from “stealing his thunder.”66

The court in Midler laid the foundation for the voice misappropriation tort in California,67 requiring plaintiff to meet the following elements: “(1) a voice, that is (2) distinctive and (3) widely known.”68 A voice thus qualifies as a “sufficient indicia of [a] celebrity’s identity.”69 However, while a voice qualifies as proper subject matter under the right of publicity, a person’s voice is not copyrightable since the sounds of a voice are not “fixed” in a tangible medium, as required by federal copyright law.70 Under California law, consideration of a person’s style of vocal delivery, tone, or inflection borders on irrelevant because all that matters is whether the vocal imitation is so accurate that people familiar with the plaintiff believe that the passed-off copy of the plaintiff’s voice actually

62 See, e.g., CAL. CIV. CODE § 3344.1(b) (2007) (protecting the right of publicity as transferable or descendible through valid testamentary instruments); IND. CODE ANN. § 32-36-1-8 (2002) (protecting the right during the individual’s lifetime and for one hundred years after the individual’s death); TENN. CODE ANN. § 47-25-1104 (2001) (granting an exclusive right to individual for his or her lifetime and to the individual’s “executors, heirs, assigns, or devisees” for ten years after the individual’s death).
63 See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995) (finding that a person’s voice is just one example of an individual’s indicia of identity).
64 Lahr v. Adell Chem. Co., 300 F.2d 256 (1st Cir. 1962).
65 Id. at 259.
66 Id.
69 Id. at 1098. See CALIENDO, supra note 1 (Caliendo, in an effort to make fun of Schwarzenegger, admits that Schwarzenegger’s voice is a large part of what makes him a celebrity).
70 17 U.S.C. § 102(a) (2006); see Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988) (finding a voice cannot be copyrighted).
belongs to the plaintiff.\textsuperscript{71} While a live concert audience is unlikely to confuse an on-stage comedian with the real Arnold Schwarzenegger, confusion might arise for listeners of Francisco's audio recording because Francisco's Schwarzenegger imitation does not explicitly state that the voice on the recording is not Schwarzenegger himself.\textsuperscript{72}

The misappropriated voice must also be distinctive.\textsuperscript{73} Recognized by the \textit{Midler} court: "[a] voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested.\textsuperscript{74}" Under this broad interpretation one could argue that a voice need not be overly distinctive in order to meet this element of the \textit{Midler} tort.\textsuperscript{75}

Limiting the previous two elements, a voice must also be widely known in order for a plaintiff to state a valid \textit{Midler} tort.\textsuperscript{76} Answering the question of how widely known, the Ninth Circuit found that a voice must be known to "'a large number of people throughout a relatively large geographic area.'"\textsuperscript{77} In \textit{Waits}, the infringing defendants argued that such a definition was too vague for a jury to effectively rule, but the court was convinced by the strong evidence in the record that Tom Waits was widely known throughout the area.\textsuperscript{78}

C. LEGISLATIVE AUTHORITY V. COMMON LAW

1. Pros and Cons of Common Law Protection. Scholars and courts argue that there are several advantages to common law protection of the right. First, the common law has the capacity to grow and expand in order to remedy certain wrongs without waiting for legislative bodies to act.\textsuperscript{79} This flexibility to respond to changes from the "'fountains of justice'" is one of the reasons why the common law was partially adopted from Britain.\textsuperscript{80} Additionally, and related to the common law's flexibility, Georgia's Supreme Court emphasized that the conservative attitudes of judges wary of legislating from the bench are often blind to innovative legal arguments asserting rights "which the instincts of nature prove to exist."\textsuperscript{81} Finally, a plaintiff should be allowed to make an
argument as to why the law protects against the misappropriation of his right of publicity when faced with statutory silence on the subject.82

However, other courts argue against a common law interpretation of the right of publicity. Having different judges interpret the right without a firm set of guidelines increases the risk that judges will reach different conclusions on similar subject matter.83 Under a common law system, both state courts and federal courts sitting in diversity are left to interpret state law and federal judges lack the same level of familiarity in interpreting state law as state court judges.84 Finally, certain misappropriation claims like the voice misappropriation claim established in Midler, may not have a firm foundation in the statute, thus adding to the right’s uncertain application.85

2. Pros and Cons of Statutory Protection. Still other courts argue in favor of statutory protection of the right of publicity. The prevalence of state right of publicity statutes shows that states are increasingly turning to statutory protection of the right.86 Statutes also provide explicit and predictable limits as to what a right of publicity action must assert.87 For example, a plaintiff asserting a right of publicity action in California must prove that the defendant knowingly used an aspect of the plaintiff’s identity protected by the statute for an advertising or commercial purpose without the plaintiff’s consent.88 Finally, statutes tend to promote uniform application and a federal statute would promote national uniformity by avoiding the difficulties in determining an individual’s rights under the different laws of each state.89

However, other courts argue that there are several shortcomings to statutory protection of the right. First, state legislatures take time to act and the right of publicity is a constantly changing body of law, meaning that a state legislative body might not respond quickly enough to society’s changing needs.90 A state’s

82 See Prudhomme v. Procter & Gamble Co., 800 F. Supp. 390, 395–96 (E.D. La. 1992) (holding that good faith arguments to recognize the right of publicity in the absence of a statutory proclamation affirming or disaffirming the right are enough to survive a motion to dismiss).

83 See supra note 46 and accompanying text.

84 See White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397–99 (9th Cir. 1992) (finding California common law supports the plaintiff’s cause of action even though state courts failed to interpret the right so broadly).

85 Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).


87 See, e.g., Sean D. Whaley, “I’m a Highway Star”: An Outline for a Federal Right of Publicity, 31 HASTINGS COMM. & ENT. J. 257, 259–60 (2009) (arguing that the federal government has constitutional authority to regulate the right of publicity and that due to disparate treatment across the states, both potential appropriators and holders are uncertain as to the right’s reach).

88 CAL. CIV. CODE § 3344(a) (2007).


90 See supra text accompanying note 79.
right of publicity statute could also potentially violate the Dormant Commerce
Clause when applied to advertising that takes place across state lines because the
statute could place a substantial burden on interstate commerce.\textsuperscript{91}

3. Interplay of Statutory and Common Law Recognition. Regarding the interaction
between statutory and common law protection, some states have recognized
both statutory and common law rights of action.\textsuperscript{92} Other states explicitly
recognize only a common law right of publicity.\textsuperscript{93} Illustrating the confusing
interaction between common law and statutory protection of the right, New
York protects the appropriation of a person’s “name, portrait or picture” under
its privacy statute,\textsuperscript{94} but did not recognize a common law right of publicity as
pled in \textit{Stephano v. News Group Publications, Inc.}\textsuperscript{95}

4. Interaction (or Lack Thereof) with Federal Law. The lack of scholarship on
federal copyright preemption of the right of publicity and voice infringement is
not surprising since a person’s voice is not a copyrightable subject matter.\textsuperscript{96} An
infringer is not guilty of copyright infringement for an imitation even if he or
she “deliberately sets out to simulate another’s performance as exactly as
possible.”\textsuperscript{97} Instead, the Copyright Act preserves state common law protection
for works that are not fixed in any tangible medium of expression.\textsuperscript{98} In order
for copyright preemption to apply, two conditions must be present: (1) the
subject matter must be a work fixed in a tangible medium, and (2) the state law
right must be equivalent to the federal right in Section 106.\textsuperscript{99} First, a right of
publicity statute may cover aspects of an individual’s persona, such as one’s
voice, because the sounds of one’s voice are not fixed and unable to be
copyrighted.\textsuperscript{100} Second, as long as a state’s right of publicity action contains

\textsuperscript{91} See, e.g., Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 530 (1959) (finding that even
though a state may have a viable state interest in passing a law, the subsequent burden on
interstate commerce can be so great as to invalidate the law under the Dormant Commerce
Clause).

\textsuperscript{92} California protects the right of publicity both under its statute, \textit{CAL. CIV. CODE} § 3344(a)
(2007), and as established in \textit{Motschenbacher v. R.J. Reynolds Tobacco Co.}, 498 F.2d 821, 825–26 (9th
Cir. 1974) (citing multiple trial and appellate decisions for the proposition that California
courts would recognize and protect the right of publicity). Florida does the same. See, e.g., \textit{FLA. STAT.
ANN.} § 540.08 (2007); \textit{Cason v. Baskin}, 20 So. 2d 243, 252 (Fla. 1945) (finding that a plaintiff
does not need to prove special or pecuniary damages to sustain a cause of action).

(holding that even though Arizona had not recognized the right of publicity by statute, “a
celebrity's interest in his name and likeness is unequaled”); \textit{Martin Luther King, Jr. Ctr. for Soc.
Change, Inc. v. Am. Heritage Prods., Inc.}, 296 S.E.2d 697, 703 (Ga. 1982) (holding that the
unauthorized misappropriation of one's name or likeness is an actionable tort in Georgia).

\textsuperscript{94} \textit{N.Y. CIV. RIGHTS LAW} § 50 (2009).

\textsuperscript{95} \textit{474 N.E.2d} 580, 584 (N.Y. 1984).

\textsuperscript{96} See \textit{supra} note 70 and accompanying text.


\textsuperscript{98} \textit{Id.} at 131, \textit{reprinted at} 5747.


\textsuperscript{100} \textit{Midler v. Ford Motor Co.}, 849 F.2d 460, 462 (9th Cir. 1988).
elements that are different from the elements of copyright infringement, then the right will remain unaffected by copyright preemption. The same applies to the voice misappropriation tort in Midler because a voice is not fixed in a tangible medium of expression.

D. SIMILARITIES AND DIFFERENCES IN STATUTORY PROTECTION

As of this writing, thirty-one states recognize the right of publicity in some form—either statutorily or through the common law. States that protect the right by statute have chosen a variety of ways to outline this protection, but there are several common threads. First, every state with a right of publicity statute protects both name and likeness. Second, of the nineteen states with right of publicity statutes, seventeen have a statutory remedies section, fifteen allow plaintiffs to obtain an injunction against the infringer, and eleven allow for punitive damages. However, there is still considerable discord regarding available remedies, prompting one court to compare the existing law to a "haystack in a hurricane." Differences between the states are numerous. First, states define “person” differently. Some states explicitly define a person as living or dead, some define a person as a “natural person,” and other states further add to the confusion by allowing any person to bring a right of publicity action without

101 H.R. REP. 1476, at 132. The result reached by the Ninth Circuit in Laws v. Sony Music Entertainment, Inc., 448 F.3d 1134, 1145–46 (9th Cir. 2006) does not compel a contrary result because the infringing material used in Laws was a copy of a master recording of the plaintiff’s voice.

102 Midler, 849 F.2d at 462.

103 See 1 McCarthy, supra note 18, §§ 6:3, 6:8.


105 1 McCarthy, supra note 18, § 6:8; see, e.g., Cal. Civ. Code § 3344(a) (2007) (authorizing damages in the amount of the greater of $750 or actual damages suffered); Ind. Code Ann. § 32-36-1-10(1) (2002) (allowing damages in the amount of $1,000 or the amount of actual damages).


107 1 McCarthy, supra note 18, § 6:8; see, e.g., Cal. Civ. Code § 3344(a) (2007) (authorizing an award of punitive damages); Ind. Code Ann. § 32-36-1-10(2) (2002) (holding a defendant infringer liable for punitive or treble damages if the violation is knowing, willful, or intentional).


110 See, e.g., Utah Code Ann. § 45-3-2(4) (1981) (implying that the challenged identity must arguably be that of a living person by defining person as a "natural person"); Ind. Code Ann. § 32-36-1-5 (2002) (defining a person as a "natural person," but implying that a person’s estate may bring a claim because a personality is protected for one hundred years after the personality’s death under Ind. Code Ann. § 32-36-1-8(a) (2002)).
clarifying whether such a person must be alive at the time of the action.111 Some states even include other entities in their definition of a person entitled to bring a statutory right of publicity action.112

Second, in addition to recognizing name and likeness as part of one’s right of publicity, ten states protect one’s voice.113 Surprisingly, only eleven states protect a person’s photograph by statute.114 Indiana protects the widest array of personality interests in an individual’s right of publicity, including a person’s “name, voice, signature, photograph, image, likeness, distinctive appearance, gestures [and] mannerisms.”115

Third, of the nineteen states that statutorily recognize the right, fourteen of those states recognize a postmortem publicity right.116 However, even in the states that purportedly do not recognize a postmortem publicity right, two of those states—Massachusetts and Rhode Island—allow “any person” to bring a right of publicity action without specifying whether that person must be alive at the time of the action.117 Further complicating the issue, even those states that recognize postmortem publicity rights vary greatly as to the duration of the recognition.118 Texas goes so far as to protect an individual’s property right in

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111 See, e.g., MASS. GEN. LAWS ANN. ch. 214, § 3A (1973) (allowing “any person whose name, portrait or picture is used” to bring a right of publicity action (emphasis added)); R.I. GEN. LAWS § 9-1-28.1(a) (1980) (finding that “every person” has a right to bring an action against those who misappropriate their name or likeness without expressly defining a person as living or dead. (emphasis added)).

112 See, e.g., IND. CODE ANN. § 32-36-1-5 (2002) (including partnerships, firms, corporations, and unincorporated associations in the statutory definition of a person); TENN. CODE ANN. § 47-25-1102 (2001) (providing an exhaustive list under the statutory definition of “person” including not-for-profit organizations, educational and religious institutions, and political parties).

113 1 Mccarthy, supra note 18, § 6:8. Compare IND. CODE ANN. § 32-36-1-7(2) (2002) (protecting one’s voice as a part of the right of publicity), with MASS. GEN. LAWS ANN. ch. 214, § 3A (1973) (protecting only one’s “name, portrait or picture” under the right of publicity).


116 See, e.g., IND. CODE ANN. § 32-36-1-18 (2002) (allowing a person who possesses at least one half interest in the deceased personality’s right to bring an action); KY. REV. STAT. ANN. § 391.170 (2010) (recognizing that a right of publicity does not terminate upon death and that the right is protected for fifty years after the personality’s death).

117 See, e.g., MASS. GEN. LAWS ANN. ch. 214, § 3A (1973) (allowing “any person whose name, portrait or picture” is used for commercial purposes without their consent to bring an action); R.I. GEN. LAWS § 9-1-28.1(a) (1980) (stating broadly that “every person in this state shall have . . . (2) the right to be secure from an appropriation of one’s name or likeness”).

118 Compare IND. CODE ANN. § 32-36-1-8 (2002) (forbidding use of a personality’s right of publicity without consent or within one hundred years of the personality’s death, implying that no consent is required one hundred years after the personality’s death), with TENN. CODE ANN. § 47-25-1104 (2001) (protecting the right of publicity for ten years after the death of the individual, but continuing exclusive protection so long as the executor, assignee, heir, or devisee commercially exploits the right).
the use of their “name, voice, signature, photograph, or likeness” only after they have died.119

Fourth, the remedies available to a voice misappropriation plaintiff also vary depending on the jurisdiction and the strength of the claim. Jurisdictions differ as to the amount of statutory damages available to a right of publicity plaintiff,120 while other states have allowed plaintiffs to choose which statutory remedy they want.121 However, a plaintiff’s remedy is inadequate because of the difficulty in measuring actual damages with a concrete dollar amount.122 Although both damages and equitable relief are options for plaintiffs in some jurisdictions,123 plaintiffs could potentially be forced to choose an injunction because of the difficulties associated with measuring damages to an individual’s personality.124 Some jurisdictions even allow a plaintiff to recover treble damages if they can prove that the defendant knowingly used the plaintiff’s name, likeness, or photograph without the plaintiff’s authorization.125

Fifth, there is still great disparity in the statutory damage amounts.126 For example, Florida allows for a “reasonable royalty,” in addition to punitive damages127 while Tennessee allows plaintiffs to recover profits from the infringement that are not calculated as part of the damages.128

Sixth, even the statutory structure in some states is different. Some states protect the right under a “right of privacy” heading,129 others protect it using

120 Compare CAL. CIV. CODE § 3344 (2007) (entitling plaintiffs to damages in the statutory minimum of $750, or actual damages and profits gained by the defendant), with IND. CODE ANN. § 32-36-1-10 (2002) (authorizing minimum damages of $1,000 and impoundment and destruction orders).
121 See, e.g., OHIO REV. CODE ANN. § 2741.07(A)(1)(b) (1999) (allowing a plaintiff to choose statutory damages between $2,500 and $10,000 in lieu of actual damages).
124 See, e.g., Cher v. Forum Int’l, Ctr., 692 F.2d 634, 640 (9th Cir. 1982) (authorizing damages as relief); Grant v. Esquire, Inc., 367 F. Supp. 876, 881 (S.D.N.Y. 1973) (upholding damages as remedy even though the court “had no present suggestion” as to how to measure such damages).
125 See MASS. GEN. LAWS ANN. ch. 214, § 3A (1973); OHIO REV. CODE ANN. § 2741.01(A)(1)(c) (1999); R.I. GEN. LAWS § 9-1-28 (1980).
126 Compare CAL. CIV. CODE § 3344(a) (2007) (allowing minimum statutory damages in the amount of $750), with TEX. PROP. CODE ANN. § 26.013 (2000) (authorizing minimum statutory damages in the amount of $2,500 in addition to profits attributable form unauthorized use, possible exemplary damages, and reasonable attorney’s fees and expenses and court costs incurred in recovery damages).
127 FLA. STAT. ANN. § 540.08(e)(2) (2007).
the "right of publicity" title,130 and Tennessee, for example, protects the right under the broader "Protection of Personal Rights" title.131 Regarding different statutory exceptions, some statutes have explicit exceptions for news media, while others do not protect the media with such an exception.132 Choice of law problems plague the right of publicity as well. For instance, the infringing conduct might occur in one state, the celebrity might die in another state, and the celebrity might assign his or her right of publicity in still a different state.133 In that case, the district court applied New York law to the case and found that New York recognized a descendible right of publicity,134 while the Court of Appeals concluded that California would recognize only a limited descendible right of publicity.135 The Second Circuit then reversed a grant of partial summary judgment by the district court that had previously granted relief to the plaintiffs.136 The Court of Appeals, by applying California's law, changed the substantive outcome of the case based simply on which state's law applied.137

E. PROTECTION FOR STAND-UP COMEDIANS

One might naturally assume that many comedians would attempt to seek protection for their jokes and routines under federal copyright law, but it may not provide the safe haven that many comedians feel they so desperately need.138 Additionally, many comics see registration as an unnecessary impediment that is unlikely to work effectively because a subtle change in a joke's punch line or its delivery changes the joke entirely, and will likely allow an alleged infringer to invoke the fair use defense.139 For practical reasons, many

130 See OHIO REV. CODE ANN. § 2741.01 (1999).
132 Compare FLA. STAT. ANN. § 540.08(c)(4)(a) (2007) (failing to allow a right of publicity action where the use of a name or likeness is part of a bona fide news story and where the name or likeness is not used for advertising purposes), with MASS. GEN. LAWS ANN. ch. 214, § 3A (1973) (containing no news media exception).
133 See, e.g., Groucho Marx Prods., Inc. v. Day and Night Co., 689 F.2d 317, 320 (2d Cir. 1982) (finding that California law governed the plaintiffs' action since the Marx brothers were California residents at the time of their deaths, their wills were probated in California, and they executed contracts assigning their rights to the plaintiffs in California).
134 Id. at 319.
135 Id. at 320.
136 Id. at 323.
137 Id.
138 For instance, a copyright owner cannot institute a civil infringement suit against an alleged infringer until they have completed preregistration or registration of the copyright with the Copyright Office. 17 U.S.C. § 411 (2006).
139 The reproduction of a copyrighted work for the purposes of "criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright." 17 U.S.C.
comedians do not have the resources to pursue drawn-out litigation that might not stand a high chance of success. Enforcing an injunction against all possible infringers is also impractical because of the sheer number of stand-up comedians—all of whom are looking for the next knockout routine. For comedians whose routines include numerous impressions of public figures, the same concerns apply. If, as Oliar and Sprigman suggest, social norms protect stand-up comedians in lieu of current intellectual property schemes, comedians would have to depend largely upon these norms if their impression prompts a public figure to retaliate by filing suit. As a result, stand-up comedians might be rightfully concerned that politicians and other public figures might not follow the same social norms that govern joke-stealing in their profession.

III. ANALYSIS: WHY CONGRESS SHOULD ACT

A. WHY CONTINUE STATE LAW PROTECTION OF THE RIGHT?

In spite of the criticism leveled against the diverse right of publicity regimes across the country, there is still some support for maintaining the status quo. First, since a number of states do not recognize the right of publicity in any way, federal action should not force those states to protect a right they have explicitly chosen not to protect. However, the right of publicity is still relatively new. Beginning with its formal recognition in Haelen Labs, a little more than fifty years ago and continuing today, new cases are still being decided, new

§ 107 (2006). To determine whether a work validly invokes the fair use defense, courts balance four factors:

(1) the purpose and character of the use [of the copyrighted work] ... ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id. Such changes to a joke's delivery or punch-line could possibly invoke the "amount and substantiality" section of the fair use defense. See id. § 107(3).

140 See Dotan Oliar & Christopher Sprigman, There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy, 94 VA. L. REV. 1787, 1799 (2008) (explaining that cost may serve as a barrier to some comics seeking to sue for infringement).

141 See generally id. (arguing that none of the current intellectual property schemes effectively protect stand-up comedians, and suggesting that social norms can serve as a self-regulating mechanism in some instances).

142 Id.

143 Usha Rodrigues, Note, Race to the Stars: A Federalism Argument for Leaving the Right of Publicity in the Hands of the States, 87 VA. L. REV. 1201 (2001) (arguing that the right of publicity should remain in the state legislative realm for federalism reasons).

144 1 McCarthy, supra note 18, § 6:3.

145 See Laws v. Sony Music Entm't, Inc., 448 F.3d 1134, 1145 (9th Cir. 2006) (detailing that based upon the narrow facts of the case, a singer's misappropriation claims were within the subject matter of the Copyright Act because the defendant misappropriated the plaintiff's recording).
statutes are still being promulgated,\textsuperscript{146} and older statutes are still being revised.\textsuperscript{147} The legislative process is inherently slow, and the fact that thirty-one states have already recognized the right of publicity is impressive.\textsuperscript{148} Just because several states have chosen not to recognize the right does not change the fact that there are still valid economic and moral considerations that support a strong interpretation of the right.\textsuperscript{149}

Even though variation amongst the states might suggest that federal legislation is premature, the fact that these states have reached varying conclusions is evidence that federal action is in fact necessary.\textsuperscript{150} As the system currently stands, plaintiffs have an incentive to forum shop and defendants have an incentive to avoid potentially infringing conduct in states where their conduct might be illegal. The changing nature of the right of publicity does not preclude Congress from taking legislative action. Since Congress legislates in other evolving areas such as copyright, patents, and healthcare reform, the “premature action” argument carries little weight.

Another argument supporting the current regime emphasizes that state law experimentation with new and developing rights is beneficial.\textsuperscript{151} By allowing each state to develop, refine, and perfect its interpretation of the right, the argument goes, the best formulation will ultimately emerge. But by allowing some states to protect celebrities and other public figures more stringently than others states, states of lesser protection lose potential business and revenue.\textsuperscript{152} As a result, both plaintiffs and defendants will pick and choose where to conduct business and states without such favorable laws will be denied the benefits of this business.

One proposal by Usha Rodriquez to keep the right of publicity with the states suggests two ways to avoid choice of law problems.\textsuperscript{153} First, citing Richard Cameron Cray,\textsuperscript{154} the author proposes that plaintiffs sue in the state of highest infringement as the next-best alternative to federal legislation.\textsuperscript{155} However, contrary to common practice in civil litigation, this would take the choice of forum out of the plaintiff’s hands. Second, the author proposes that a

\begin{itemize}
  \item \textsuperscript{146} See PA. LAWS 154 (2002) (authorizing a right of publicity action in Pennsylvania).
  \item \textsuperscript{147} See, e.g., CA. STAT. 2480 (2009) (revising the existing statutory language); WA. CH. 62 (2008) (amending Washington’s existing right of publicity statute).
  \item \textsuperscript{148} 1 MCCARTHY, supra note 18, §§ 6:3, 6:8.
  \item \textsuperscript{149} See discussion infra Part III.B.2–3.
  \item \textsuperscript{150} See supra Part II.D.
  \item \textsuperscript{151} DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 85 (1995) (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).
  \item \textsuperscript{152} See Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 288 (2d Cir. 1981) (Mansfield, J., dissenting) (arguing that “it would be rational for . . . courts to adopt a policy enhancing the continued growth” of the music industry in Tennessee).
  \item \textsuperscript{153} Rodriquez, supra note 143, at 1223–25.
  \item \textsuperscript{154} Richard Cameron Cray, Comment, Choice of Law in Right of Publicity, 31 UCLA L. REV. 640 (1984).
  \item \textsuperscript{155} Rodriquez, supra note 143, at 1223.
\end{itemize}
right of publicity lawsuit should be brought in the state of the individual’s domicile. However, this proposal could have the adverse effect of states disproportionately favoring their own citizens. Since celebrities are typically well-known across state lines, a celebrity may be domiciled in one state but sustain the most damage in another state where the celebrity conducts most of his or her business. If domicile is the determinative factor in awarding a plaintiff damages, then these plaintiffs could be unfairly penalized based solely on a factor other than the merits of the claim.

B. THE CASE FOR A FEDERAL RIGHT OF PUBLICITY

1. Inconsistencies Applied to Schwarzenegger’s Claim. Depending on where Schwarzenegger files suit and depending on the claims asserted by Schwarzenegger, his chances of success vary. If Schwarzenegger asserts a voice misappropriation claim under Midler, he might be able to succeed on his claim. Under Midler, a plaintiff alleging voice misappropriation must meet the following elements: “(1) a voice that is, (2) distinctive, and (3) widely known.” The accuracy of the imitation is what matters under California law, while consideration of a person’s style of vocal delivery, tone, or inflection all border on irrelevant. Since both comedians deliberately attempt to imitate Schwarzenegger’s voice and succeed at producing quality imitations, Schwarzenegger may thus satisfy the first element.

The misappropriated voice must also be distinctive. Using this broad interpretation of a voice, one could argue that a voice need not be overly distinctive in order to meet this element of the Midler tort. Given the flexibility of this requirement, Schwarzenegger satisfies this element as well. Even if a court takes a narrow view on how distinctive a voice must be, Schwarzenegger’s unique Austrian accent and dialect certainly enable him to meet the second element of the Midler tort.

Finally, a voice must also be widely-known in order for a plaintiff to state a valid Midler cause of action. Just like the Ninth Circuit in Waits, a court will likely be convinced by the overwhelming evidence that Schwarzenegger is not only a famous movie star, but also a famous politician and public figure.

156 Id. at 1224.
157 Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988). See McPherson, supra note 67, at 43–44 (finding that Midler was the first case to hold that voice misappropriation was a valid right of publicity cause of action).
159 Id. at 1101.
160 Id. at 1100; see Midler, 849 F.2d at 463 (comparing the distinctive nature of a voice to a human face).
161 Waits, 978 F.2d at 1101.
162 See id. at 1100–02 (finding that a voice must be known to “a large number of people throughout a relatively large geographic area”).
Alternatively, if Schwarzenegger brought his claims under California's statute, Schwarzenegger would have to prove that the comedians (1) knowingly used his voice (2) in a commercial manner (3) without his consent.\textsuperscript{163} Furthermore, Schwarzenegger would have to prove that the comedians' use of his voice was "so directly connected" with the commercial aspect of the infringing use that his consent was required.\textsuperscript{164} Caliendo and Francisco know that they are imitating Schwarzenegger's voice in an attempt to sell CDs—satisfying the first two elements. Finally, it does not appear that Schwarzenegger has given permission to the comedians to imitate his voice. Thus, on the face of the statute, Schwarzenegger also has a claim under the California right of publicity statute.

However, if Schwarzenegger sued the comedians under the right of publicity statutes in either Tennessee,\textsuperscript{165} Florida,\textsuperscript{166} Massachusetts,\textsuperscript{167} or Rhode Island,\textsuperscript{168} to name a few, his suit would be dismissed because none of those states recognize a statutory right of publicity in one's voice. If Schwarzenegger sued under Texas's right of publicity statute, his suit would be dismissed because Texas does not allow right of publicity lawsuits while the individual is still alive.\textsuperscript{169} Indiana includes one's voice in its right of publicity statute,\textsuperscript{170} but it imposes several limits. First, the violation must occur in Indiana.\textsuperscript{171} Second, a voice may lawfully be used in theatrical works, television programs, or original works of fine art.\textsuperscript{172} A trial court would have to decide what the statute means by "violation," whether it means that the comedians must perform a show containing the imitation in Indiana or whether it suffices that the comedians sold CDs containing the imitation in Indiana. Depending on whether Caliendo and Francisco are able to graft their performances onto one of excepted categories in the Statute,\textsuperscript{173} Schwarzenegger's claim could fail in Indiana, even though the state protects a personality's voice. These widely contradictory results across various jurisdictions further support federal legislation.

2. Grounds for a Federal Right of Publicity. The constitutional authority for a federal right of publicity statute lies in the Commerce Clause and Congress' authority to regulate activity that substantially affects interstate commerce.\textsuperscript{174}
Assuming that Congress conducts adequate fact-finding and builds a record showing the substantial effects that the right of publicity has on interstate commerce, the statute will likely be a constitutional exercise of legislative authority. Ideally, federal legislative action will correct the shortcomings of the current scheme, effectively protecting individuals’ property rights while simultaneously placing the proper incentives on potential plaintiffs and defendants. The current system is unfair to both plaintiffs and defendants since one factor—plaintiff’s choice of forum—has far-reaching effects on many aspects of the case, including the initial grounds for the lawsuit, protection of limited aspects of the plaintiff’s persona, and the plaintiff’s possible recovery. Furthermore, the lawsuit will be treated differently depending on whether the state protects the right under the common law or by statute. Legislation should also address the differences between celebrities and strictly-private plaintiffs, depending on the emphasis placed on the moral justifications for the right instead of economic justifications. If moral considerations are more important than economic considerations, then the celebrity-private distinction should not matter. If economic considerations prevail, then the financial earning power of celebrities would arguably entitle them to greater protection than strictly-private plaintiffs.

Given the current state of the law, some plaintiffs do not know where their right of publicity is protected, how much of their persona is protected, and in what ways their persona is protected. On a related note, for plaintiffs who successfully win a right of publicity action in one state, nothing in the current system prevents the same defendant from carrying on the same conduct in a different state that does not protect the right to the same extent. As a result, many plaintiffs would be forced to bring alternative actions in multiple states under each state’s respective statutory scheme in order to successfully protect their persona from infringement. Or, plaintiffs would have to seek nationwide injunctions to prevent further misappropriation of their persona.

3. Tools for Drafting the Federal Statute. In protecting the right of publicity on a federal level, several tools are useful to conceptualize what the protection would look like on paper. Economic and moral considerations, themes and limits from Brandeis and Warren’s seminal article, themes from Haelan Labs.

175 See United States v. Morrison, 529 U.S. 598, 615–17 (2000) (finding that a substantial Congressional record, combined with the regulation of economic activity would allow Congress to exercise its Commerce Clause power in regulating activities that substantially affect interstate commerce).

176 For instance, if a plaintiff files suit in Indiana, the plaintiff’s name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, and mannerisms will be protected under IND. CODE ANN. § 32-36-1-7 (2002). However, if a plaintiff files suit in Massachusetts, only the plaintiff’s name, portrait, and picture are protected under MASS. GEN. LAWS ANN. ch. 214, § 3A (1973). These differences dictate a plaintiff’s decision to bring suit and choice of forum if the plaintiff chooses to file suit.

177 See infra Part II.D.
and other prominent cases, and analogous protections from other intellectual property doctrines should all shape a federal right of publicity statute.

a. Economic and Moral Considerations. Economic considerations should guide drafting a right of publicity statute for several reasons. The efficient allocation of scarce resources supports granting an exclusive federal statutory right of publicity to individuals. After all, there is only so much of an individual's persona to go around. Second, statutory language should recognize the incentives that drive individuals who seek to protect their right of publicity. For instance, because professional athletes make millions from endorsements, statutory language should also recognize that the value of an athlete's persona affects his or her actions. Third, courts have consistently recognized that the right of publicity has "pecuniary worth," and any federal statute drafted to protect the right must protect the monetary interest that accompanies the right.

Moral considerations should also guide drafting a right of publicity statute. Arguing from Kantian principles, Alice Haemmerli proposed a federal right of publicity statute aimed at recognizing inherent moral rights. She argues that since the freedom to act necessarily includes certain things that are within a person's control—including one's voice—those things are alienable and belong to one person or another. Related to this freedom, possession of a persona implies that anyone who violates the rights of that persona without consent diminishes the inherent value of that property right. Thus protection against unauthorized use should shape the federal statute.

b. Limits From Brandeis and Warren. Limits outlined by Brandeis and Warren should also provide guidance in drafting a federal right of publicity statute. The statute should not prohibit any matter that is of public or general interest. Without this limit, information about important public topics and other newsworthy matters would be excluded from the public domain. Such a limit might be narrow on paper, but broad in application. For example, comedian imitations of public figures on matters of public interest, like Caliendo’s imitations of Schwarzenegger, should be protected so long as they concern matters that the general public would want to know about. While the general public might be interested in hearing an impersonation of Schwarzenegger relating to his duties as Governor of California, the general public might be less interested in an impersonation of his famous movie quotes.
Nor should the truth of the matter be a defense. Just because a comedian imitator like Caliendo or Francisco might claim that his Schwarzenegger impression is accurate does not deny the fact that he is still infringing upon Schwarzenegger’s persona as portrayed through his voice. Additionally, lack of malice on the part of the infringer should not be a defense. The economic and moral damage done to an individual’s persona by the infringement is still present regardless of whether the infringer acted with an intent to harm. Finally, consent should invalidate a cause of action because it would be contradictory to allow an individual to recover damages for infringement of his right of publicity after he or she has authorized the use.

c. Relevant Themes from Case Law. In addition to the economic incentives from Jim Henson Productions, other cases provide ideas for a federal right of publicity statute. First, the court in Haelan Labs. outlined a “right to grant the exclusive privilege of publishing” one’s image or likeness, showing that one’s right of publicity is alienable. Not only is the right alienable and valuable to its owner, it is also protected against misappropriation and commercial misuse.

States have an interest in protecting people from these harms based on the right of individuals to capture the reward from their own hard work and endeavors. An individual’s interest in his own persona should therefore be protected because of its inherent commercial value to the owner. Naturally, a personality’s commercial value will vary depending upon the personality. Regarding Schwarzenegger’s voice infringement lawsuit, protecting an individual’s voice, especially when the individual’s reputation is as closely tied to his voice as Schwarzenegger’s, is a vital part of the right of publicity.

d. Other Intellectual Property Doctrines. Relevant themes from other intellectual property doctrines provide ample tools for a federal right of

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186 Warren & Brandeis, supra note 26, at 218.
187 Id.
188 Id.
See supra Part III.B.3.a.
190 Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).
191 See id. As to alienability, “A much stronger argument can be made for alienability of an economic interest, such as the right of publicity, than of a personal ‘right to be left alone.’” INTELLECTUAL PROPERTY: CASES AND MATERIALS 1025 (Margreth Barrett ed., West Group, 2d ed. 2001).
193 See Cheatham v. Paisano Publ’ns, Inc., 891 F. Supp. 381, 386 (W.D. Ky. 1995) (finding that commercial value is “established by proof of (1) the distinctiveness of the identity and by (2) the degree of recognition of the person among those receiving the publicity”).
194 See Midler v. Ford Motor Co., 849 F.2d 460, 463 (1988) (emphasizing that “a voice is as distinctive and personal as a face” and thus worthy of protection in a right of publicity action).
The parody doctrine provides a strong argument to protect parodists in their efforts to parody an individual's right of publicity. The celebrity may not argue that he or she is unfairly harmed by the parodist because the celebrity did not create his or her fame alone. Unlike other areas of intellectual property rights, a person's fame is not wholly contributable to the individual's efforts since fame grows out of interest from the general public. An individual's right of publicity grows or shrinks based upon factors other than the sweat of the individual's brow, whereas the parodist labors to tweak and perfect his or her parody. Protecting the parodist from a federal right of publicity statute is consistent with the values underlying the rights existence.

The trademark dilution doctrine also provides useful tools to draft a federal right of publicity statute. Providing a dilution action to right of publicity plaintiffs captures harm not completely captured in a misappropriation action. By imposing limits similar to those in the FTDA, Congress could provide an alternative right of publicity action without complicating pleading requirements. To protect plaintiffs from infringement of their publicity rights, some scholars have suggested applying these factors to right of publicity actions.

C. EXPLANATION OF THE SAMPLE STATUTE

As outlined by the discussion of the differences in state law treatment of the right of publicity, the purpose of any federal right of publicity statute should be aimed at protecting the right while ensuring that protection is uniform. Since uniformity is one of the chief goals, the sample statute expressly preempts any laws to the contrary, federal or state.

Section 101 provides judges with guidelines as to the purpose of the statute. Section 101 also emphasizes that the existence and protection of the right is not contingent on whether the personality exploited the right during his or her lifetime. If the existence of the right were contingent upon such exploitation, it would force people to exploit their personalities for financial gain during their lifetimes.

Section 102 of the sample statute contains definitions from both the Indiana and Tennessee state statutes. For an individual to maintain a right of publicity

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195 Pemberton, supra note 17, at 107.
196 See id. at 106 (arguing that parodists work to cultivate their talents like other celebrities and deserve to benefit from that labor).
197 Id. at 107.
198 The Federal Trademark Dilution Act (FTDA) protects trademark plaintiffs by ensuring that plaintiffs meet three requirements: (1) a famous mark, (2) commercial use and (3) likelihood of causing dilution. 15 U.S.C. § 1125(c) (2006).
200 See supra Part II.D.
action, the protected aspect of their personality must have “commercial value.”201 By limiting protection only to aspects of a personality’s identity that have commercial value, the statute will limit the number of frivolous misappropriation actions. On a related note, the “commercial purpose” definition also limits a personality’s right of action.202 Therefore, a plaintiff alleging an infringement must prove that the defendant misappropriated an aspect of the plaintiff’s identity for a commercial purpose.

The right protected by the statute is “freely assignable, transferable, and does not expire upon the individual’s death.”203 This assignability and transferability reflect the principle in Haelan Labs.204 However, to resolve discrepancies in current state treatment regarding descendibility, the sample statute protects the right during the individual’s lifetime, plus the lifetime of the initial “successor-in-interest.”205 Thus, there is a uniform standard to protect the right and after the initial “devisee’s” death, privileges surrounding the right pass into the public domain. This standard adds predictability to the system by allowing rights to pass into the public domain at a definite moment in time following the death of the initial devisee.

Regarding remedies, the statute provides the typical remedies provided by other state statutes: statutory damages, actual damages, treble damages, injunctions, and reasonable attorney’s fees.206

The statute also provides an alternative cause of action not found in any current state statute—dilution.207 Based on the FTDA requirements,208 a plaintiff bringing a right of publicity dilution action must meet three requirements. First, the personality must meet the requisite degree of fame.209 This “fame” requirement serves as a limiting principle, allowing a smaller class of individuals to bring successful dilution actions. Second, the personality must be misappropriated for a commercial purpose. An individual cannot claim any harm if the infringer has not improperly benefited in some way. Third, the personality’s value must suffer actual dilution. Without a tangible “harm” requirement, an individual has not suffered a wrong correctible by law. The statute measures harm in two ways: blurring and tarnishment.210 By allowing dilution actions, the statute hopes to punish infringing defendants who act in ways that diminish a personality’s economic value, but not in the classical way as seen in right of publicity cases.

201 See infra APPENDIX, Section 102(B).
202 See infra APPENDIX, Section 102(A).
203 See infra APPENDIX, Section 104(A).
205 See infra APPENDIX, Section 104(C).
206 See infra APPENDIX, Section 105.
207 See infra APPENDIX, Section 106.
208 See infra text accompanying notes 198–99.
210 See infra APPENDIX, Section 106(C).
In addition to the limited length of the right of publicity previously discussed, there are several other limits in the statute. First, only certain individuals who are well-known and derive a substantial amount of revenue from marketing their personality are allowed to bring an action under the statute.\textsuperscript{211} To reflect the statute's federal nature, an individual must reach a level of national fame, in addition to a level of fame in his or her state of domicile or in the state of the alleged infringement. By allowing the individual to qualify in his or her state of domicile or in the state of alleged infringement, the statute seeks to ascertain the places where the individual has suffered the most damage to his or her reputation. The question of how "well-known" is a question for the fact-finder, much in the same way as the court in \textit{Waits} analyzed the matter in the context of a voice infringement claim.\textsuperscript{212} While the numbers in the sample statute appear arbitrary, fact-finding by Congress would assuredly provide concrete numbers designed to reflect the statute's purpose.

Also, getting back to the right of publicity's roots, limits from Brandeis and Warren's article are included in the statute. There is no prohibition on matters that concern the public interest—allowing political commentary, social commentary, and other socially useful dialogue to remain untouched by right of publicity actions.\textsuperscript{213} Additionally, an infringer may not use truth or lack of malice as defenses to a right of publicity action.\textsuperscript{214} If an infringer harms the commercial value of a personality, the truth of the infringing material does not eradicate the lost commercial value to the individual. Even if a defendant unknowingly infringes an individual's right of publicity, the damage to the commercial value of that personality is still present. Furthermore, consent by the individual invalidates that individual's cause of action.\textsuperscript{215} The statute would certainly operate in a contradictory manner if it allowed an individual to license use of his or her personality, benefit financially from that license, and then sue for damages based on use of that license.

Parodies are also allowed under the statute, based on the same labor theory that justifies protecting the right of publicity in the first instance.\textsuperscript{216} Just like individuals deserve protection for their right of publicity based on the effort and labor that goes into cultivating their personality, the parodist deserves similar protection for a work of parody. Since parodies often take on a life of their own, separate from the original subject, the parody exception to right of publicity actions is justified.

\begin{footnotes}
\item[211] See infra APPENDIX, Section 107(B).
\item[212] See \textit{Waits v. Frito-Lay, Inc.}, 978 F.2d 1093, 1102 (9th Cir. 1992) (finding strong evidence in the record that singer Tom Waits was well-known in California).
\item[213] See infra APPENDIX, Section 107(C).
\item[214] See infra APPENDIX, Section 107(D).
\item[215] See infra APPENDIX, Section 107(E).
\item[216] See infra APPENDIX, Section 107(F).
\end{footnotes}
IV. CONCLUSION: A BRAVE NEW WORLD

The need for federal legislative action regarding the right of publicity may be summarized by the following quote from Brandeis and Warren’s article: “That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection.”217 The uneven application of the current state-law-based right of publicity system makes it nearly impossible for plaintiffs and defendants to predict accurately the effects of their actions and plan accordingly. Changing technology makes misappropriation of property—both intellectual and real—more prevalent and the protection of such property rights must be augmented occasionally to reflect the enhanced threat to their security. A federal right of publicity statute would not immediately cure every ill in the current system, but it would lay a foundation designed to reflect these technological changes in society.

Stand-up comedians like Frank Caliendo and Pablo Francisco walk a fine line between original and infringing with their impressions. Each impressionist risks possible legal action every time he or she imitates the voice of a well-known celebrity in a performance. Talented impressionists find themselves in a catch-22. The better the impression, the more fame the comedian garners for their imitation. However, the better the impression, the more likely it is that the owner of the voice can sustain a viable voice infringement action against the comedian.

A new federal statute would signify a shift in the right of publicity’s jurisprudence. If carefully drafted, the statute could change the ways businesses seek endorsements and comedians perform stand-up routines. It remains to be seen whether Schwarzenegger would be successful under the sample statute provided in the APPENDIX. My guess is that he would be able to sustain such an action, but he would have to prove each of the necessary elements in order to succeed: commercial purpose, commercial value, damages, and dilution, should he choose to pursue a dilution claim. The comedians’ lawyers would likely argue that the commercial value of Schwarzenegger’s personality is in no way harmed by the impressions of two comedians who only include their Schwarzenegger impressions as a minor part of their acts. They might even go so far as to argue that their impressions actually increase Schwarzenegger’s fame.

The viability of Schwarzenegger’s action in California and the fact that he would not be able to assert a successful action in other states shows that the right of publicity doctrine in its current form is ineffective. Such inequitable application must be remedied in order to effectively protect the right for individuals now and in the future.

217 Warren & Brandeis, supra note 26, at 193.
APPENDIX: SAMPLE STATUTE

Section 101: Legislative Purpose

A. Every person has an inherent property right in his or her right of publicity. This right is not dependent upon whether or not the individual exploited the right during his or her lifetime.

B. The intent of this section is to make the recognition of the right uniform throughout the nation in order to eliminate disparities or differences in the right's recognition.

C. This section expressly preempts any law, federal or state, in conflict with the provisions of this section.

D. Both economic and moral considerations support protecting an individual's right of publicity.

E. Congress finds that illegal infringement upon individuals' rights of publicity substantially affects interstate commerce.

F. Thus, this section applies to infringing acts or events that substantially affect interstate commerce.

Section 102: Definitions

A. Commercial Purpose: As used in this chapter, "commercial purpose" means the use of an aspect of a personality's right of publicity as follows:218

1. On or in connection with a product, merchandise, goods, services, or commercial activities;
2. For advertising or soliciting purchases of products, merchandise, goods, services, or for promoting commercial activities;
3. For the purpose of fundraising—either for profit or not-for-profit.

B. Commercial Value: As used in this chapter, "commercial value" is established by proof of:219

1. The distinctiveness of the personality, and,
2. The degree of recognition of the personality among other personalities.

219 See Cheatham v. Paisano Publ'ns, Inc., 891 F. Supp. 381, 386 (W.D. Ky. 1995) (finding that commercial value is "established by proof of (1) the distinctiveness of the identity and by (2) the degree of recognition of the person among those receiving the publicity").
C. Gestures: As used in this chapter, “gestures” means any motion of the body or limbs that is readily identifiable as belonging to or attributed to that person.

D. Image: As used in this section, “image” means things including, but not limited to, a picture, portrait, likeness, photograph, or photographic reproduction.220

E. Likeness: As used in this chapter, “likeness” means the use of an image of an individual for commercial purposes.221

F. Name: As used in this chapter, “name” means the actual or assumed name of a living or deceased natural person that is intended to identify the person.222

G. Person: As used within this chapter, “person” means any person—alive or deceased—a partnership, a firm, a corporation, an unincorporated association, or any other business organization whose affiliation is sufficiently connected to one distinguishable personality.223

H. Photograph: As used in this chapter, “photograph” means any photograph, photographic reproduction, still or moving, videotape, or live television transmission of the individual that readily identifies the individual.224

I. Personality: As used in this chapter, “personality” means a living or deceased natural person whose:
   1. Name;
   2. Voice;
   3. Signature;
   4. Photograph;
   5. Image;
   6. Likeness;
   7. Distinctive Appearance;
   8. Gestures; and/or,
   9. Mannerisms

   have commercial value, regardless of whether or not the person used or authorized use of those aspects of their persona during their lifetime.225

220 Haemmerli, supra note 17, at 489.
223 See id. § 32-36-1-5 (defining “person” absent the language regarding a business organization's affiliation).
J. Right of Publicity defined: As used in this chapter, “right of publicity” means a personality’s property interest in their own:
1. Name;
2. Voice;
3. Signature;
4. Photograph;
5. Image;
6. Likeness;
7. Distinctive Appearance;
8. Gestures; or
9. Mannerisms.226

K. Devisee means one or more executors, heirs, assignees, or legatees that holds lawful title to an individual’s right of publicity.

Section 103: Liability: Any person who infringes upon a person’s right of publicity for a commercial purpose without the consent of the personality or the personality’s devisee shall be liable in a civil action.

Section 104: Characteristics of the Right:

A. Assignability: An individual’s right of publicity is freely assignable, transferable, and licensable, and does not expire upon the individual’s death. The rights may be transferred in any of the following ways:
1. Contract;
2. License;
3. Gift;
4. Trust;
5. Testamentary document;
6. Through operation of a state’s intestacy statute.

B. Upon Death: After the death of an individual, the individual’s right of publicity transfers to the personality’s devisee. This transfer shall occur according to the individual’s testamentary documents, if present, or, if the individual dies intestate, the intestacy statute of the personality’s residence at the time of his or her death.

C. Protection After Death: The right is descendible and capable of protection by the initial devisee during the initial devisee’s

226 Id. § 32-36-1-7.
lifetime. The exclusive right terminates upon the death of the initial devisee.

D. The right of publicity has commercial value, although the extent of such value differs depending on the personality.

Section 105: Remedies

A. Damages: A person who violates this section may be liable for the following:
   1. Damages in the amount of:
      a. $1000; or
      b. actual damages, including profits from unauthorized use; whichever is greater;
   2. Treble or punitive damages, after proving statutory or actual damages, if the personality can show that the violation of this section was knowing, willful or intentional.
   3. Proving damages from unauthorized use: The plaintiff must show what percentage of the infringer's gross revenue was attributable to the unauthorized use.

B. Injunctions: In addition to money damages, the holder of a publicity right may be entitled to a temporary or permanent injunction against the infringing use.

C. Attorney’s fees: The court may award reasonably incurred attorney’s fees, costs, and expenses to a party successful under this section.

Section 106: Dilution: A person whose right of publicity has been infringed may also have an alternative cause of action to capture the value of the dilution of the person's right of publicity as a result of the infringer's actions. To bring a dilution action, a plaintiff must meet several requirements:

A. The personality must meet the requisite degree of fame. The personality's fame shall be determined by examining:
   1. The duration, extent, and geographic reach of advertising and publicity of the personality, whether advertised or publicized by the owner of the personality or third parties;
   2. The amount, volume, and geographic reach of advertising and extent of sales of goods or services

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227 Id. § 32-36-1-10.
offered by the persona or in relation to the personality; and,

3. The extent of actual recognition of the personality.

B. The personality must be misappropriated for a commercial purpose.

C. The personality's value must suffer actual dilution. A personality may prove one of two types of dilution:

1. "Blurring": Blurring is measured by an association arising from the similarity between a component of a personality and a famous personality that impairs the distinctiveness or commercial value of the famous personality. Blurring will be determined by a consideration of the following factors:
   a. Degree of similarity between the element of the alleged infringing personality and the element of the famous personality;
   b. The degree of inherent or acquired distinctiveness of the famous personality;
   c. The extent to which the owner of the famous personality is engaging in substantially exclusive use of the personality;
   d. The degree of recognition of the famous personality;
   e. Whether the alleged infringer of the personality intended to create an association with the famous personality; and,
   f. Any actual association between the personality and the famous personality.

2. "Tarnishment": Tarnishment is measured by an association arising from the similarity between a personality, or element thereof, and a famous personality that harms the reputation or commercial value of the famous personality.

Section 107: Limits to the Right

A. Length of the Right: A person may not use any aspect of a personality's right of publicity, without their authorization, during the personality's lifetime plus the life of the initial devisee of the personality’s right of publicity.

B. Limited to Certain Types of Personalities: Only certain widely-known personalities qualify for protection under this
chapter. In order to qualify for protection, a personality must:

1. Generate enough revenue so as to fall into the top fifty percent (50%) of personalities nationally, and,
   a. The top thirty-three percent (33%) of personalities in the personality's state of domicile; or,
   b. The top thirty-three percent (33%) of personalities in the state of alleged infringement;

2. Be “widely-known” throughout the country. This is a question of fact for the fact-finder.

C. There shall be no prohibition on matter that is of public or general interest.229

D. An infringer may not:230
   1. Use the truth of the matter as a defense; or
   2. Use the lack of malice as a defense.

E. Consent invalidates a cause of action.231

F. Parodies: A personality or the holder of a right of publicity may not bring a cause of action against an individual for the performance of a parody.

229 Warren & Brandeis, supra note 26, at 214.
230 Id. at 218.
231 Id.