

SHARE HIS DREAM: A FAIR USE STANDARD FOR HISTORICO-POLITICAL FIGURES' RIGHTS OF PUBLICITY[♦]

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INTRODUCTION

On August 28, 2011, exactly forty-eight years after Dr. Martin Luther King Jr.'s iconic "I Have a Dream" speech, the completed national memorial was to be dedicated to Dr. King in Washington, D.C.¹ However, with the impending threat of Hurricane Irene barreling up the Atlantic coast, organizers were forced to postpone the dedication, thereby depriving the event of some of its historically-significant symbolism.²

Meanwhile, a different kind of storm surrounding Dr. King's intellectual property rights had been brewing, and threatened to cloud the legacy of Dr. King himself. Indeed, a series of legal battles, disputes, and controversial decisions have unfolded between and amongst Dr. King's heirs. From preventing the sale of plastic busts³ and demanding payment for merchandise depicting Dr. King and President Barack Obama together,⁴ to challenging the unauthorized use of footage of Dr. King's landmark "I Have a Dream" speech,⁵ Dr. King's heirs have fervently sought to keep close tabs on the intellectual property in his estate. More alarmingly, the King family charged \$800,000 for the right to use Dr. King's words and likeness for *his* Washington, D.C. memorial.⁶ Furthermore, the King family has battled one another in the courtroom for the profitable rights to Dr. King's intellectual property, including ownership of Dr. King's personal archive of papers⁷ which certain members of the King family had threatened to sell privately to entertainer-activist Harry Belafonte.⁸ Thus, rather than championing Dr. King's legacy through perpetuating and disseminating both his image and the socially-beneficial ideas associated with it, Dr. King's heirs have seemingly been more preoccupied with generating profits.⁹ Consequently, the broad protection afforded to Dr. King's estate—particularly of the right of publicity—has proven a formidable barrier to the free flow of

¹ Brett Zongker, *New Oct. Date Set for MLK Memorial Dedication*, MEMPHIS DAILY NEWS, Sep. 13, 2011, <http://www.memphisdailynews.com/editorial/Article.aspx?id=61878>.

² *Id.*

³ *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982).

⁴ *King Family Seeks to Cash in on MLK, Obama Items*, USA TODAY, Nov. 13, 2008, http://www.usatoday.com/news/politics/2008-11-13-mlk-obama_N.htm.

⁵ *See Estate of Martin Luther King, Jr., Inc., v. CBS, Inc.*, 194 F.3d 1211 (11th Cir. 1999).

⁶ *Family of Dr. King Charged Group Building His Monument*, N.Y. TIMES April 17, 2009, <http://www.nytimes.com/2009/04/18/us/18king.html?scp=2&sq=martin%20luther%20king%20jr.%20memorial%20and%20king%20family&st=cse>.

⁷ Steve Visser, *King Siblings to Meet in Court*, ATLANTA J.-CONST., October 12, 2009, <http://www.ajc.com/news/atlanta/king-family-squabble-lands-159511.html>. This suit was eventually settled. *See* Ernie Suggs, *King Siblings Reach Settlement*, ATLANTA J.-CONST., October 13, 2009, <http://www.ajc.com/news/atlanta/king-siblings-reach-settlement-161333.html>.

⁸ Shaila Dewan, *The Deal That Let Atlanta Retain Dr. King's Papers*, N.Y. TIMES, June 27, 2006, <http://www.nytimes.com/2006/06/27/us/27king.html>.

⁹ *Id.*

information, ideas, and expression, thereby standing in tension with First Amendment precepts.¹⁰

In order to create a more vibrant public domain, protecting the private rights of historico-political figures¹¹ like Dr. King while accounting for the overwhelming public interest in disseminating socially beneficial ideas into the marketplace, courts and legislatures should recognize a modified, standard-based fair use defense in cases involving a historico-political figure's right of publicity.

This Note will explore the policy motivations and implications behind adopting and recognizing a modified fair use exception for unauthorized uses of historico-political figures' rights of publicity. Part I provides background information on the right of publicity, including its history, and the classes of individuals generally protected under the right.¹² Part II argues that the stated justifications for the right of publicity break down when considering the right of historico-political figures such as Dr. Martin Luther King Jr. Part III emphasizes that the right of publicity's grant of exclusive rights conflicts with First Amendment principles and restricts the breadth of the public domain. Part IV discusses previous attempts to balance the right of publicity with First Amendment interests, and concludes that each is insufficient to properly accomplish those ends for historico-political figures. Part V highlights stark similarities between the right of publicity and both trademark and copyright law. Given these similarities, this section proceeds to argue that a fair use standard can be derived from analogous provisions in both bodies of law, and used by defendants in cases involving unauthorized uses of historico-political figures' rights of publicity. Lastly, Part VI concludes by formulating a historico-political figure fair use standard for right of publicity cases aimed at ensuring the highest public benefit while balancing against private losses.

I. RIGHT OF PUBLICITY BACKGROUND

The Restatement (Third) of Unfair Competition defines the right of

¹⁰ See Randall T.E. Coyne, *Toward a Modified Fair Use Defense in Right of Publicity Cases*, 29 WM. & MARY L. REV. 781 (1988) (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("The Supreme Court embraced 'the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences'").

¹¹ The term, "historico-political figure," will be used to describe a deceased individual who—by his or her ideas, beliefs, actions, and/or policies—had deep involvement in affecting political and social thought in the United States. A historico-political figure belongs to a category of individuals distinct from those who most frequently invoke their rights of publicity: famous celebrities, entertainers, and professional athletes. See *infra* note 19.

¹² Unlike much of the right of publicity scholarship, I will not discuss whether or not there should be a right of publicity or whether it should be a descendible property right. See, e.g., 1 J. THOMAS MCCARTHY, *RIGHTS OF PUBLICITY AND PRIVACY* § 1:40 (Thomson Reuters 2d ed. 2011); Michael Decker, *Goodbye, Norma Jean: Marilyn Monroe and the Right of Publicity's Transformation at Death*, 27 CARDOZO ARTS & ENT. L.J. 243 (2009); David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71 (2005). Instead, I will proceed on the assumption that such rights do exist.

publicity as the right to redress “appropriat[ion of] 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.”¹³ A state-created¹⁴ “personality right,” the right of publicity is now recognized in the majority of states¹⁵ in some form or another—whether by statute¹⁶ or by common law.¹⁷ Though the right protects the public at-large,¹⁸ it is predominantly invoked by famous individuals and their heirs—both of whom stand to profit from substantial investments in the individual’s persona or “celebrity.”¹⁹ But, as with most bodies of law, to understand the right of publicity, one must first understand its history.

A. History

The right of publicity originated out of another personality right: the right of privacy.²⁰ Defined as “the right to be let alone,”²¹ a broad right of privacy was adopted into law, owing largely to Samuel D. Warren and Louis D. Brandeis’ seminal article, “The Right to Privacy.”²² Specifically, Warren and Brandeis emphasized the need for the law to protect one’s reputation and emotions as against the world, stating, “the principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.”²³

¹³ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

¹⁴ No federal right of publicity exists, and the Supreme Court has only once rendered a decision addressing and approving of the right of publicity. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977). However, there have been “call[s] for the introduction of legislation in the United States Congress which creates a federally preemptive right of publicity.” *See, e.g., Board Resolutions: U.S. Federal Right of Publicity*, INT’L TRADEMARK ASS’N, <http://www.inta.org/Advocacy/Pages/USFederalRightofPublicity.aspx> (last visited Oct. 12, 2011).

¹⁵ MCCARTHY, *supra* note 12, § 6:1 (“As there is no federal right of publicity, more than half of the states in the union have either codified their own version of a publicity right, or their courts have recognized a common law right of publicity.”).

¹⁶ David Leichtman et al., *Transformative Use Comes of Age in Right of Publicity Litigation*, 4 NO. 1 LANDSLIDE 28, 30 (2011) (Nineteen states have codified the right of publicity or similar rights, including: California; Florida; Illinois; Indiana; Kentucky; Massachusetts; Nebraska; Nevada; New York; Ohio; Oklahoma; Pennsylvania; Rhode Island; Tennessee; Texas; Utah; Virginia; Washington and Wisconsin).

¹⁷ MCCARTHY, *supra* note 12, § 6:3 (“The states in which courts have recognized a common law right of publicity are: Alabama; Arizona; California; Connecticut; Florida; Georgia; Hawaii; Illinois; Kentucky; Michigan; Minnesota; Missouri; New Hampshire; New Jersey; Ohio; Pennsylvania; South Carolina; Texas; Utah; West Virginia; Wisconsin.”).

¹⁸ *Id.* § 1:3 (“[The right of publicity] is a right inherent to everyone to control the commercial use of identity and persona and recover in court damages and the commercial value of an unpermitted taking.”).

¹⁹ *See generally* David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies*, 25 CARDOZO ARTS & ENT. L.J. 913 (2008).

²⁰ MCCARTHY, *supra* note 12, § 1:7 (“The right of publicity grew to fruition as an offshoot of the law of torts category of ‘privacy.’”).

²¹ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

²² *Id.*

²³ *Id.* at 213.

Even as legislatures and courts began recognizing the right of privacy, there existed pressure not only to protect people's dignity, but also people's wallets (or purses)—particularly those of celebrities.²⁴ Indeed, many believed that the right of privacy “[was] not adequate to meet the demands of the second half of the twentieth century [and beyond], particularly with respect to the advertising, motion picture, television, and radio industries.”²⁵

In New York, this pressure arose largely due to an unfavorable 1902 Court of Appeals decision²⁶ in which the court held that a woman claiming a violation of her right to privacy could not recover damages for the unauthorized use of her likeness in a commercial advertisement.²⁷ Subsequently, the New York legislature responded by passing the first right to privacy statutes in the nation—Civil Rights Law §§ 50²⁸ and 51,²⁹ “making it both a misdemeanor and a tort to use the name, portrait, or picture of any person for ‘advertising purposes or for the purposes of trade’ without written consent.”³⁰ Though this statute, when construed broadly, allowed plaintiffs to recover for unauthorized use of their personas in advertisements, courts declined to apply it beyond situations involving harm to one's dignity.³¹

Decades after the New York privacy statutes were enacted, the right of publicity was officially coined and given credence in the law. Indeed, in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,³² the Court ruled in favor of the plaintiff corporation to which a baseball player had granted the exclusive right to use his image for bubble gum sales. By releasing a product bearing the player's image in connection with a different brand of bubble gum, the court determined that the defendant violated the player's “right to publicity” vis à vis the plaintiff.³³ Hence, Judge Jerome Frank embraced the economic

²⁴ MCCARTHY, *supra* note 12, § 1:7:

[Celebrities] began to appear in court to complain that their identity was used in advertising without their permission. Their complaint sounded out of tune with the concept of ‘privacy.’ Their complaint was not that they wanted no one to commercialize their identity, but rather that they wanted the right to control when, where and how their identity was so used. Their real complaint was damage to their ‘pocketbook,’ not to their ‘psyche.’

²⁵ Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954); *see also* Tan, *supra* note 19. *But see* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960) (discussing a publicity-like right as falling under one of four separate torts which comprise the right of privacy).

²⁶ *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902).

²⁷ Barbara Singer, *The Right of Publicity: Star Vehicle or Shooting Star?*, 10 CARDOZO ARTS & ENT. L.J. 1, 8–9 (1991).

²⁸ N.Y. CIVIL RIGHTS LAW § 50 (McKinney 1909).

²⁹ *Id.* at § 51.

³⁰ MCCARTHY, *supra* note 12, § 1:16.

³¹ Singer, *supra* note 27, at 10–12.

³² *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

³³ *Id.* at 868 (“We think that, in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made ‘in gross’ . . .”).

protections of a right of publicity afforded to celebrities' personas declaring, "it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains, and subways."³⁴ While Judge Frank alluded to the right of publicity as being a "property-like" right that could be assignable, he stopped short of declaring it a full-blown property right.³⁵

Following *Haelan*, Melville B. Nimmer explicitly endorsed Judge Frank's recognition of the right of publicity³⁶ and became "the first to define the parameters of this right."³⁷ However, unlike the *Haelan* Court, Nimmer believed that "[t]he right of publicity must be recognized as a property (not a personal) right, and as such capable of assignment and subsequent enforcement by the assignee."³⁸ Logically extending³⁹ Nimmer's formulation of the right of publicity as a property right, Harold R. Gordon declared:

Recognition of property rights in this area also clarifies the rights of a personal representative and next of kin of deceased persons. If any individual, public figure or not, possesses a property right in such intangibles as his name and likeness, these rights do not pass into the public domain after death, but rather, accrue to the deceased's estate for the benefit of his next of kin.⁴⁰

In light of these (and other)⁴¹ judicial and scholarly developments, courts and legislatures increasingly⁴² began to ascribe to the idea of

³⁴ *Id.*

³⁵ See *id.* ("Whether it be labelled [sic] a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth.").

³⁶ See Nimmer, *supra* note 25, at 215–16:

It is an unquestioned fact that the use of a prominent person's name, photograph or likeness (*i.e.*, his publicity values) in advertising a product or in attracting an audience is of great pecuniary value . . . Yet . . . persons who have long and laboriously nurtured the fruit of publicity values may be deprived of them, unless judicial recognition is given to what is here referred to as the right of publicity . . . the right of each person to control and profit from the publicity values which he has created or purchased.

³⁷ MCCARTHY, *supra* note 12, § 1:26.

³⁸ Nimmer, *supra* note 25, at 216.

³⁹ See Westfall & Landau, *supra* note 12, at 82-83.

⁴⁰ Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553, 612–13 (1960).

⁴¹ See Michael Sloan, *Too Famous for the Right of Publicity: ETW Corp. and the Trend Towards Diminished Protection for Top Celebrities*, 22 CARDOZO ARTS & ENT. L.J. 903, 911 (2005) ("Amidst growing attention, the United States Supreme Court heard its first (and only) right of publicity case, [*Zacchini v. Scripps-Howard Broadcasting, Co.*, 433 U.S. 562 (1977)] . . . [where the] Court upheld the performer's common law right of publicity claim . . .").

⁴² New York still does not hold the right of publicity to be a property right—instead, it is merely held to be a personal right possessed only by the celebrity. See *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp.2d 309, 314 (S.D.N.Y. 2007) ("New York law does not recognize any common law right of publicity and limits its statutory publicity rights to living

creating a descendible,⁴³ assignable property right known as the “right of publicity,” aimed at compensating famous persons for unauthorized uses of the personas into which they invested great time, labor, and money.⁴⁴ Thus, in jurisdictions recognizing a descendible or postmortem right of publicity,⁴⁵ a person’s publicity rights could be freely controlled by that person’s heirs.

B. *Persons Protected*

Despite the right of publicity’s generally applicable scope of protection,⁴⁶ since its inception, the right has been almost exclusively “asserted by or on behalf of professional athletes, comedians, actors and actresses, and other entertainers”⁴⁷ as a “valuable weapon for combating unscrupulous advertising tactics.”⁴⁸ Both living and deceased celebrities are most often the center of right of publicity disputes (and legal victories)⁴⁹ because businesses have the most to gain by using recognizable celebrities’ identities for advertisements and merchandise, and conversely, celebrities stand the most to lose from an unauthorized use of their own identities.⁵⁰ Further, celebrities (and celebrities’ heirs) are much more likely to establish infringement since they can easily

persons.”)

⁴³ See Westfall & Landau, *supra* note 12, at 83 (“Today, the question of the descendibility of publicity rights is essentially settled. Either by common law or statute, the vast majority of states that have recognized publicity rights allow them to be asserted after the death of the celebrity . . .”).

⁴⁴ See generally MCCARTHY, *supra* note 12, § 6.

⁴⁵ States which recognize a descendible or portmortem right of publicity have statutorily limited the duration of such rights. These states include: California (70 years); Florida (40 years); Illinois (50 years); Indiana (100 years); Kentucky (50 years); Nevada (50 years); Ohio (60 years); Oklahoma (100 years); Tennessee (10 years after death, but can continue in perpetuity contingent on use); Virginia (20 years); Texas (50 years); Washington (75 years). See Leichtman et al., *supra* note 16, Figure 2. Moreover, “[d]escendibility of the right of publicity at common law is recognized in *Nature’s Way Products, Inc. v. Nature-Pharma, Inc.*, 736 F. Supp. 245 (D.Utah 1990) (Utah law); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J.1981) (New Jersey law); *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*, 250 Ga. 135, 296 S.E.2d 697 (1982) [(Georgia law)].” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. h (1995).

⁴⁶ See MCCARTHY, *supra* note 12 § 1:3.

⁴⁷ *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 700 (Ga. 1982).

⁴⁸ Singer, *supra* note 27, at 6. “The right of publicity plays a crucial role in permitting the celebrity to capitalize on the spotlight that he has earned.” *Id.* at 49.

⁴⁹ See Jennifer L. Carpenter, *Internet Publication: The Case for an Expanded Right of Publicity for Non-Celebrities*, 6 VA. J.L. & TECH. 3, 17 (2001) (“Whereas celebrities regularly prevail in litigation challenging the appropriation of their identities, non-celebrities have much more difficulty showing that the commercial value of their identity has been exploited.”).

⁵⁰ Accord J. Thomas McCarthy, *The Spring 1995 Horace S. Manges Lecture – The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 134 (1995) (“[M]ost of the case law concerns celebrities because usually, only a celebrity’s right of publicity is worth enough to justify expensive litigation and appeals.”); see also Nimmer *supra* note 25, at 216 (indicating that “the right usually becomes important only when the plaintiff (or potential plaintiff) has achieved in some degree a celebrated status”). See generally Tan, *supra* note 19.

show the requisite element of “identifiability.”⁵¹ For example, in two companion cases, *Factors Etc., Inc. v. Creative Card Co.*,⁵² and *Factors Etc., Inc. v. Pro Arts, Inc.*,⁵³ heirs of music legend Elvis Presley “sought to prevent third parties from making unlicensed post-mortem use of Presley’s name and likeness.”⁵⁴ The Court ruled in favor of Presley’s estate, noting that publicity rights “inhered in and was exercised by Elvis Presley in his lifetime, that it was assignable by him and was so assigned, that it survived his death and was capable of further assignment.”⁵⁵ Years later, the famous late-night talk show host Johnny Carson prevailed on his right of publicity claim against a portable toilet company that had appropriated Carson’s identity in its business name.⁵⁶ More recently, reality television star Kim Kardashian sued Gap Inc. and its subsidiary, Old Navy, alleging infringement of her common law and statutory rights of publicity for using a Kardashian look-alike in an Old Navy Brand television advertisement.⁵⁷ Additionally, movie stars George Clooney and Julia Roberts jointly filed a lawsuit against two audiovisual technology companies for the unauthorized use of the actors’ names and likenesses in commercial advertisements.⁵⁸

Notably, in addition to protecting the personas of star athletes, prominent musicians, and television and movie stars—those celebrities who commonly expend great resources to increase their identities’ value or “goodwill”⁵⁹—the right of publicity also affords protections to political figures, living or deceased.⁶⁰ The decision to enforce a political figure’s right of publicity is notable because “traditionally, politicians [do] not directly endorse commercial products.”⁶¹ Nevertheless, in *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*,⁶² the Georgia Supreme Court held that Dr. Martin Luther King, Jr. had a postmortem right of publicity that had been violated when a company advertised and marketed plastic

⁵¹ See McCarthy, *supra* note 50, at 135.

⁵² *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977).

⁵³ *Factors Etc., Inc. v. Pro Arts, Inc.*, 444 F. Supp. 288 (S.D.N.Y. 1977).

⁵⁴ Singer, *supra* note 27, at 17.

⁵⁵ 444 F. Supp. at 282.

⁵⁶ *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

⁵⁷ See *Kim Kardashian Sues Old Navy*, TELEGRAPH, Aug. 11, 2011, <http://www.telegraph.co.uk/news/celebritynews/8694804/Kim-Kardashian-sues-Old-Navy.html>. The parties have since settled. See Eriq Gardner, *Kim Kardashian Settles Lawsuit Over Look-Alike in Old Navy Ad (Exclusive)*, THE HOLLYWOOD REPORTER, Aug. 29, 2012, <http://www.hollywoodreporter.com/thr-esq/kim-kardashian-settles-lawsuit-look-alike-old-navy-gap-366522>.

⁵⁸ See Matthew Belloni, *George Clooney, Julia Roberts Sue to Enforce Intellectual Property Rights (Exclusive)*, THE HOLLYWOOD REPORTER, May 1, 2012, <http://www.hollywoodreporter.com/thr-esq/george-clooney-julia-roberts-sue-318636>.

⁵⁹ Tan, *supra* note 19, at 915.

⁶⁰ See *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982).

⁶¹ MCCARTHY, *supra* note 12, § 4:2.

⁶² 296 S.E.2d 697.

busts depicting Dr. King.⁶³ Thus, the Court recognized that Dr. King held a right of publicity even though he had not commercially exploited his identity during his lifetime, stating:

[t]hat this opportunity was not appealing to him does not mean that others have the right to use his name and likeness in ways he himself chose not to do. Nor does it strip his family and estate of the right of control, preserve and extend his status and memory and to prevent unauthorized exploitation thereof by others.⁶⁴

Consequently, Dr. King—a famous political figure who was primarily motivated by spreading his transcendent ideas as a leader in the Civil Rights Movement, and whose persona continues to serve as a harbinger of those ideas—could now have his persona economically exploited by his heirs.

II. JUSTIFICATIONS FOR THE RIGHT OF PUBLICITY

Having set forth the right of publicity's history and the persons protected under the right, it behooves us to explore the various justifications for the right of publicity advanced by courts, legislatures, and scholars. The justifications can be separated into two broad categories: moral and economic.⁶⁵ Identifying the theoretical foundations behind the right of publicity will serve to highlight that while strong support exists for recognizing an exclusive, alienable right of publicity for certain classes of individuals, other individuals' rights of publicity (those of historico-political figures) rest on less stable footing, and thus, may be outweighed by countervailing policy considerations.

A. Moral Justifications

Bearing similarity to those justifications in support of the right of privacy, the moral justifications for the right of publicity are based on a Kantian⁶⁶ notion of personal autonomy.⁶⁷ Specifically, this “theory of identity protection incorporates the important insight that some forms of

⁶³ See *id.* at 703 (stating, “[w]e know of no reason why a public figure prominent in religion and civil rights should be entitled to less protection than an [entertainer] . . .”).

⁶⁴ *Id.* at 706.

⁶⁵ See Carpenter, *supra* note 49, at 11 (“Scholars and courts have isolated four primary policy justifications for the right of publicity: providing incentives for creativity, allowing those who achieve notoriety to enjoy the fruits of their own labor, guarding against consumer deception, and preventing unjust enrichment.”).

⁶⁶ See Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 414–18 (1999) (citations omitted):

The fundamental nature of the individual as an autonomous and moral being is articulated by Kant in his treatment of human will and freedom. Freedom is an innate right, the ‘one sole and original right that belongs to every human being by virtue of his humanity,’ and it comprises ‘the attribute of a human being’s being his own master’ . . . [I]n a Kantian system, property is inseparably associated with one’s ‘personhood’ because property grows out of freedom and freedom is essential to personhood.

⁶⁷ See *id.* at 421 (“The right to control the use of one’s image or other objectification of identity is a property right based directly on freedom, autonomy, or personality.”).

property are more essential to personhood than others, and that property in persona . . . deserves a particular form of protection in our legal system.”⁶⁸ Notably, such justifications have been advanced in many European nations⁶⁹ where a publicity-like right is recognized. For example, Germany adopts a Kantian outlook on the right to control one’s identity, but—unlike many U.S. jurisdictions⁷⁰—does not view the right to be an intellectual property right.⁷¹ Indeed, “[s]trongly based as it is on the Kantian theory of individual autonomy and freedom, the [German] personality right constitutes a personal right, integral to the self, which cannot be alienated.”⁷²

Professor Mark P. McKenna has conceptualized a variation on the Kantian autonomy justification for the right of publicity, arguing that the right allows an individual to exercise her rights of “autonomous self-definition.”⁷³ In other words, because advertisements and other uses of one’s identity communicate messages as to an individual’s endorsement and beliefs, an individual should be entitled to control the use of her identity.⁷⁴ McKenna expounds:

If the overall picture of an individual’s character is made up of the messages conveyed by her associational decisions, then unauthorized use of her identity interferes with her autonomy because the third party takes at least partial control over the meaning associated with her. The individual, of course, will uniquely bear any costs attendant to the altered meaning of her identity.⁷⁵

As such, a celebrity can invoke the right of publicity to prevent an undesirable association with a message or an idea.⁷⁶ For instance, in

⁶⁸ Ellen S. Bass, *A Right in Search of a Coherent Rationale—Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights*, 42 U.S.F. L. REV. 799, 803 (2008).

⁶⁹ See generally Anna Emelie Helling, *Protection of “Persona” in the EU and in the US: A Comparative Analysis*, LLM THESES AND ESSAYS (Dec. 2, 2005), http://digitalcommons.law.uga.edu/stu_llm/45.

⁷⁰ See Bass, *supra* note 68, at 828.

⁷¹ *Id.*

⁷² *Id.* at 828–29.

⁷³ Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225 (2005).

⁷⁴ *Id.* at 279 (“[B]ecause an individual bears uniquely any costs attendant to the meaning of her identity, she has an important interest in controlling uses of her identity that affect her ability to author that meaning.”).

⁷⁵ *Id.* at 282.

⁷⁶ It is noteworthy that McKenna’s conception of the right of autonomous self-definition also serves as a basis for justifying a descendible, post-mortem right of publicity in one’s heirs. Unquestionably, one’s reputation and persona survives long beyond death, and thus, can potentially be harmed by undesirable uses of one’s identity. Recognizing a descendible right of publicity allows one’s relatives—presumptively acting in the best interests of the deceased individual’s reputation—to control which messages will be associated with the deceased individual. *But see* Decker, *supra* note 12, at 266–67 (citations omitted):

In Kant’s philosophy the soul is immortal, and thus a Kantian might argue that the soul could be interfered with after death. But freedom and immortality act on different planes of Kant’s philosophy: while ‘freedom is a necessary presupposition of action

2008, “singer, songwriter and liberal activist Jackson Browne”⁷⁷ filed suit against Arizona Senator and (then) Republican Presidential candidate John McCain for unauthorized use of Browne’s popular song “Running on Empty” during McCain’s campaign advertisements.⁷⁸ Clearly, aside from the fact that Browne had not been compensated for the use,⁷⁹ that Browne was being associated with a message that he did not condone (and indeed, opposed) served as an impetus for exercising his right of publicity.

B. *Economic Justifications*

In the United States, the economic justifications have generally been the most predominant and accepted, viewing “the right of publicity as a solely pecuniary interest in the exploitation of identity . . . grounded in Lockean labor theory.”⁸⁰ These rationales can be separated into interrelated subcategories: the Lockean Natural Rights Labor Theory and Unjust Enrichment and the Incentive-Based Theory.

1. Lockean Natural Rights Labor Theory and Unjust Enrichment

At its core, “[t]he Lockean natural rights labor theory focuses on an individual’s moral entitlement to own the objects that have been mixed with (or are the fruits of) his labor”⁸¹ The idea of possessing the intellectual property which is one’s right to publicity logically flows from Locke’s philosophy:

Though the earth, and all inferior creatures be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.⁸²

Indeed, Nimmer echoed this thinking in his famous article advocating recognition of the right of publicity.⁸³ In discussing an individual’s

according to a law of reason,’ immortality’s sole purpose is that it allows ‘rational action to be directed at the attainment of the highest good.’ An immortal soul, then does not justify a postmortem right of publicity.

⁷⁷ Martha Neil, *Jackson Browne Sues John McCain Over Song Use in Campaign Advertising*, ABA JOURNAL (Aug. 14, 2008 5:42 PM), http://www.abajournal.com/news/article/jackson_browne_sues_john_mccain_over_song_use_in_campaign_advertising/.

⁷⁸ *Id.*

⁷⁹ That Browne’s song was used without permission was also allegedly a copyright infringement. *See id.*

⁸⁰ Haemmerli, *supra* note 66, at 386–88.

⁸¹ Bass, *supra* note 68, at 813.

⁸² JOHN LOCKE, TWO TREATISES ON GOVERNMENT 209 (J. Whiston ed., 1821) (emphasis omitted).

⁸³ *See* Nimmer, *supra* note 25, at 216 (stating that “persons who have long and laboriously nurtured the fruit of publicity values may be deprived of them, unless judicial recognition is given

right to possess and control one's own publicity, Nimmer noted that "in most instances a person achieves publicity values of substantial pecuniary worth only after he has expended considerable time, effort, skill, and even money."⁸⁴ It is noteworthy that although Nimmer endorsed the Lockean belief that all men are entitled to the "fruits of his labors," he clarified that this should not be the case if "important countervailing public policy considerations [exist]."⁸⁵

Conversely, because the Natural Rights Labor Theory places ownership of the right of publicity in the hands of its source, this theory militates against unjust enrichment—third parties profiting off of an individual's identity without permission. Hence, Professor Harry Kalven writes:

The rationale for [the right of publicity] . . . is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay.⁸⁶

Thus, in light of the substantial labor, skill, time, and finances expended in order to cultivate one's persona, it would be unfair to let a third party off the hook and thereby incentivize similar identity misappropriations. Similarly, it has been argued that the descendibility of the right of publicity should exist to prevent the unjust enrichment of third parties:

There is no reason why, upon a celebrity's death, advertisers should receive a windfall in the form of freedom to use with impunity the name or likeness of the deceased celebrity who may have worked his or her entire life to attain celebrity status. The financial benefits of that labor should go to the celebrity's heirs.⁸⁷

Moreover, preventing unjust enrichment also helps preserve incentives to invest both human and economic capital in one's own persona. Given these considerations, it is no wonder that unjust enrichment has become a popular judicial theory.⁸⁸

to . . . the right of each person to control and profit from the publicity values which he has created or purchased"); *see also* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977) (noting that "this act is the product of petitioner's own talents and energy, the end result of much time, effort, and expense"); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (concluding that "a celebrity has a legitimate proprietary interest in his public personality . . . That identity, embodied in his name, likeness . . . and other personal characteristics, is the fruit of his labors and is a type of property.").

⁸⁴ Nimmer, *supra* note 25, at 216; *see also* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 182–196 (1993). *But see* Tan, *supra* note 19 (arguing that a celebrity's individual contributions are just one part of a "celebrity trinity," which also includes contributions by the audience and by directors).

⁸⁵ *See* Nimmer, *supra* note 25, at 216.

⁸⁶ Harry Kalven, Jr., *Privacy in Tort Law – Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966).

⁸⁷ *Lugosi v. Universal Pictures*, 25 Cal.3d 813, 846 (1979) (Bird, C. J., dissenting) (internal quotations and citations omitted).

⁸⁸ *See* Bass, *supra* note 68, at 817.

2. Incentive-Based Theory

As a corollary to the Lockean labor theory, an incentive-based theory has been advanced in support of the right of publicity.⁸⁹ Under this rationale—much like patents and copyrights⁹⁰—an exclusive grant of a right of publicity creates economic incentives to bolster one’s public identity and persona. Stated simply, “providing legal protection for the economic value in one’s identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition”⁹¹ The U.S. Supreme Court explicitly embraced this theory in its first and only decision (to date) to address the right of publicity, *Zacchini v. Scripps-Howard Broadcasting Co.*⁹² There, the Court ruled in favor of a “human cannonball” act performer whose entire performance was filmed and later aired on a television news program—both without the performer’s permission.⁹³ Indeed, in light of the Court’s finding that “[t]he broadcast of a film of petitioner’s entire act pose[d] a substantial threat to the economic value of that performance,”⁹⁴ the Court justified its holding, declaring:

[the] decision to protect petitioner’s right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides *an economic incentive for him to make the investment* required to produce a performance of interest to the public.⁹⁵

This rationale is further supported when considering that the decision to make the right of publicity both alienable and descendible serves to supplement the incentive to invest in one’s right of publicity. The right

⁸⁹ See *id.* at 815–18.

⁹⁰ See U.S. CONST. art. I, § 8, cl. 8. (granting Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”); see also *Mazer v. Stein*, 347 U.S. 201, 219 (1954):

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

⁹¹ *Lugosi*, 25 Cal.3d at 840 (Bird, C. J., dissenting).

⁹² *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

⁹³ *Id.*

⁹⁴ *Id.* at 575.

⁹⁵ *Id.* at 576 (emphasis added). But see MCCARTHY, *supra* note 12, § 1:7:

What exactly is it that a right of publicity seeks to encourage and reward? Some appear to argue that the focus should be upon incentive to create a commercially licensable persona and identity. Such a narrow view leads one to conclusions such as that a scientist or politician should not have a right of publicity because such a person is not motivated by the advantages of “commercial” success in the narrow sense of being able to prosper by licensing one’s identity for commercial use. This seems much too narrow a focus. Rather the activities which are to be encouraged by a right of publicity are socially enriching actions which bring one’s identity into a public eye as a necessary consequence of success in one’s profession.

of publicity's "value often cannot be reaped if the individual may not transfer all or part of that interest to another for development. Indeed, an exclusive grant of publicity rights may be required before an attempt to use or promote that person's likeness will be undertaken."⁹⁶ In the case of descendibility, the right of publicity becomes much more marketable to licensees if one is assured that such a license will not terminate upon death.⁹⁷

C. A Right of Publicity for Historico-Political Figures is Weakly Justified, at Best

Today, while few challenge the general justifications that support recognizing a right of publicity for star athletes, actors, and musicians, these rationales provide less stable footing for a right of publicity for historico-political figures such as Dr. Martin Luther King, Jr. Given this discrepancy, there should be a legal mechanism tailored to historico-political figures that will better account for competing policy considerations.

1. Moral Justifications Provide Little Support

While the Kantian autonomy theory justifies a right of publicity in a living political figure, it does not justify a right of publicity in a historico-political figure.⁹⁸ In other words, concerns about protecting the rights of a human being's autonomy and freedom seem to lose merit once a political figure has passed away.⁹⁹ Indeed, because the analogue of the right of publicity in Europe¹⁰⁰ draws from Kantian philosophy to create a personal right, the claim to this right—by definition—terminates upon death.

Similarly, an argument in favor of a need to protect one's right to "autonomous self-definition" loses force upon one's death since that right can no longer be exercised, and because reputation generally tends to be of greater importance to those who are alive.¹⁰¹ However, to a historico-political figure like Dr. Martin Luther King Jr.—whose ideas and message are entwined with his persona—protecting the right of publicity *can* serve a purpose.¹⁰² Specifically, "[u]nder a descendible

⁹⁶ *Lugosi*, 25 Cal.3d at 845 (Bird, C. J., dissenting).

⁹⁷ *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 705 (Ga. 1982) (explaining that "[i]f the right of publicity dies with the celebrity, the economic value of the right of publicity during life would be diminished because the celebrity's untimely death would seriously impair, if not destroy, the value of the right of continued commercial use").

⁹⁸ See Decker, *supra* note 12, at 267.

⁹⁹ "[A] Kantian theory of personal autonomy, which provides a workable justification for the right of publicity for the living, nevertheless fails to justify a postmortem right of publicity . . . because the subject's freedom can no longer be invaded after death . . ." *Id.*

¹⁰⁰ Helling, *supra* note 69.

¹⁰¹ See Decker, *supra* note 12, at 266.

¹⁰² See *supra* note 76 and accompanying text.

right of publicity, the legatee becomes the arbiter of what constitutes interference with the persona.”¹⁰³ As an arbiter, the legatee can police against interference with the persona by selectively exercising the inherited right of publicity. Hence, in light of potential interests in preserving the name, legacy, or message associated with a historico-political figure, the role of the right of publicity is not completely obviated.¹⁰⁴ Instead, the scope of the right can be tailored to allow those vested with the deceased’s publicity right to achieve such a purpose.

2. Economic Justifications are Largely Illusory

Especially in the consumer culture we live in today,¹⁰⁵ for prominent celebrities and professional athletes—already earning income from sizable performance contracts—the potential right of publicity-enabled marketing and endorsement opportunities for financial gain provide substantial incentives to invest in and cultivate one’s public persona.¹⁰⁶ However, a historico-political figure like Dr. King was utterly uninfluenced by economic incentives.¹⁰⁷ Indeed, Dr. King’s incentive for stepping (and being thrust) into the public eye was to spread his message to help spur social change.¹⁰⁸ Dr. King expressed this sentiment when he revealingly stated, “make a *career* of humanity – and you will make a greater person of yourself, a greater nation of your country, and a finer world to live in.”¹⁰⁹ With this in mind, the desired “fruit” of Dr. King’s labor was not economic success or even fame—instead it was the intangible benefit of spearheading the Civil Rights Movement. Because a historico-political figure’s work product has merely incidental economic value, it seems that the unjust enrichment justification—while providing strong support for entertainers’ rights of publicity—is weaker as applied to historico-political figures similarly situated to Dr. King.¹¹⁰ Given the shaky

¹⁰³ See Decker, *supra* note 12, at 267.

¹⁰⁴ Though, it should be noted that Decker cautions against giving control over the right of publicity to heirs who may be less likely—in the presence of economic incentives—to prevent interference with, and exploitation of one’s persona in ways which would run counter to the deceased’s wishes. See *id.* at 267–68. Accordingly, Decker concludes, “[a] descendible right of publicity *would not* advance the objective that underlies a right of publicity, namely, the protection of a persona from damaging interference.” *Id.* at 267 (emphasis added).

¹⁰⁵ See Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1 (1997).

¹⁰⁶ See *supra* notes 80–97.

¹⁰⁷ By contrast, entertainers such as Michael Jackson are primarily motivated by profits—even if they subsequently champion a cause subsequent to attaining fame.

¹⁰⁸ Curiously, the Georgia Supreme Court in *Martin Luther King, Jr. Center for Social Change* instead credited Dr. King’s status as a minister as being the reason he did not profit off of his publicity. See *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 706 (Ga. 1982).

¹⁰⁹ *Dr. Martin Luther King, Jr.: A Career of Humanity*, LEADERSHIP CONFERENCE, <http://www.civilrights.org/resources/mlk/> (last visited Oct. 30, 2011) (emphasis added).

¹¹⁰ Still, it seems sensible for the law to make one’s heirs the beneficiaries of a historico-political figure’s resultant economic benefits associated with one’s identity rather than allowing these potentially-valuable rights to fall in the hands of commercial bystanders. See *generally* Hollis R.

theoretical foundation upon which the right of publicity in historico-political figures sits, the right should in some cases give way to competing policy considerations where an entertainer's right might not.

Nevertheless, the Georgia Supreme Court has stated that a descendible, inheritable right of publicity still holds despite an individual's failure to use one's identity for commercial purposes during one's lifetime.¹¹¹ Similarly, commentators have endorsed that Court's decision, arguing:

[P]olitical figures have worked hard to build a public image, irrespective of the fact that they have not entered the political arena for the purpose of achieving marketable fame. To deny protection to a political figure simply because he has chosen to involve himself in politics is unfair, especially in cases similar to the King case in which the public figure sought notoriety not for himself but for his cause and became famous in the process.¹¹²

I do not contest this conclusion regarding a black and white, "use it or lose it" theory of the right of publicity with regard to inter vivos commercial exploitation. However, particularly in view of competing First Amendment interests and principles, there is every reason to consider this theory a factor in determining whether an actionable appropriation of one's identity has occurred. Indeed, a figure who steps into the public eye not to generate a profit, but rather to spread a social or political message, holds a persona which is of high value in public discourse.

Surely, it could be argued that it would be unfair to allow Michael Jackson's family to reap the economic benefits of his right of publicity, while—under certain circumstances—denying Dr. King's family such benefits merely because Dr. King's legacy in the Civil Rights Movement had a far more substantial effect on American society and political thought than did Jackson's songs.¹¹³ Indeed, Eileen R. Rielly has asserted that "it [is] desirable to allow the heirs of a political figure to control the use of his image after his death . . . [because as] a property right [the right of publicity] should not enjoy less protection in the hands of a political figure than those of an entertainer."¹¹⁴ But the trouble with this argument is that it overlooks the existence of policy-oriented instances in which one class of intellectual property owners *does* enjoy less protection in its intellectual property rights than does

Towns, *'Tasteful' Marketing of MLK: Heirs Agree to License the Words, Image of Martin Luther King Jr.*, ATLANTA J.-CONST., Feb. 4, 1996, at G6.

¹¹¹ See 296 S.E.2d at 706.

¹¹² See Eileen R. Rielly, *The Right of Publicity for Political Figures: Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products*, 46 U. PITT. L. REV. 1161, 1182–83 (1985).

¹¹³ This, of course, is not meant to trivialize Mr. Jackson's own contributions, but rather to draw a parallel between a deceased, iconic entertainer and a deceased, iconic political figure.

¹¹⁴ Rielly, *supra* note 112, at 1183.

another class.¹¹⁵ In so doing, Rielly fails to take adequate account of competing First Amendment policy considerations, which are more strongly implicated in a case involving a historico-political figure than in a case involving an entertainer. While Rielly *does* contemplate that a defendant can simply raise a First Amendment defense,¹¹⁶ as will be shown in Part IV, neither judicially-created tests, nor statutorily-defined exceptions sufficiently address the issue.¹¹⁷

III. THE RIGHT OF PUBLICITY, THE FIRST AMENDMENT, AND THE PUBLIC DOMAIN

An inherent tension exists between the right of publicity and the First Amendment. This tension has both served as the foundation for much criticism of the existence right of publicity, and helped generate much commentary regarding how to limit the right of publicity's effect on First Amendment rights and policies.¹¹⁸ Specifically, the right of publicity conflicts with the First Amendment¹¹⁹ by deterring communication of, and inhibiting public access to expression and information making use of a famous person's identity.¹²⁰ For instance, the Georgia Supreme Court's decision in *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.*,¹²¹ denied the marketing of expressive material which appropriated Dr.

¹¹⁵ For example, while in the Copyright Law of the United States (Title 17), the Record Rental Amendment of 1984 codified § 109(b) as an exception to the 'first-sale doctrine' endorsed by § 109(a), this exception applies to owners of copyrights in phonorecords, but not to copyright owners of audiovisual works. This differential application in the Copyright Act stems from the fact that the former works are generally subject to iterative consumption patterns, while the latter works are not. See David H. Horowitz, *The Record Rental Amendment of 1984: A Case Study in the Effort to Adapt Copyright Law to New Technology*, 12 COLUM.-VLA J.L. & ARTS 31, 48-49 (1987); accord Justin Hughes, Copyright Law Lecture (Oct. 31, 2011) (notes on file with author); see also WCVB-TV v. Boston Athletic Ass'n, 926 F.2d 42, 45 (1st Cir. 1991) ("Just how, when and where the law should protect investments in 'intangible' benefits or goods is a matter that legislators typically debate, embodying the results in specific statutes, or that common law courts, carefully weighing relevant competing interests, gradually work out over time.").

¹¹⁶ Rielly, *supra* note 112, at 1183.

¹¹⁷ "[D]ecisions relating to the right [of publicity have] caused a growing tension between the right and the First Amendment freedom of expression and the use of one's identity for commercial purposes, leaving courts to adopt and apply . . . inadequate standards or [refuse] to address the issue at all." Andrew Koo, *Right of Publicity: The Right of Publicity Fair Use Doctrine – Adopting a Better Standard*, 4 BUFF. INTELL. PROP. L.J. 1, 4 (2006).

¹¹⁸ See, e.g., Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003).

¹¹⁹ See Coyne, *supra* note 10, at 788 (explaining, "freedom of speech embraces two complementary and correlative components: a right to communicate information and a right to receive communication.").

¹²⁰ See Tina J. Ham, *The Right of Publicity: Finding a Balance in the Fair Use Doctrine—Hoffman v. Capital Cities/ABC, Inc.*, 36 U.C. DAVIS L. REV. 543, 556 (2003); see also Rielly, *supra* note 112, at 1179 (noting, "[f]irst amendment [sic] concerns are prominent in cases involving deceased celebrities because of the desire that the images of these celebrities become part of our national heritage."). These concerns are especially prominent in states with more robust postmortem or descendible rights of publicity which are longer in duration. See *supra* note 45 and accompanying text.

¹²¹ 296 S.E.2d 697 (Ga. 1982).

King's unlicensed name and likeness:

Creating a bust of Martin Luther King, Jr. seems at least as much part of the sculptor's self-expression as [symbolic speech]; and it is at least as valuable to its consumers (who will display it proudly on the mantelpiece to express their support for King) as a jacket with a short slogan [protesting the draft]¹²² would be.¹²³

The sole reason why marketing these busts could be challenged was because of the monopoly over Dr. King's identity that the descendible right of publicity granted to his family members. Thus, as many argue, "celebrities' exclusive rights [of publicity] diminish both the public's right to a rich public domain and the free speech rights of commercial speakers."¹²⁴

The tension between the First Amendment and the right of publicity was most notably highlighted in *Zacchini v. Scripps-Howard Broadcasting Co.*¹²⁵ There, the Supreme Court considered the defendant news broadcaster's argument that the First Amendment's protections for the news and matters of public interest shielded it from liability for appropriating the plaintiff entertainer's right of publicity by broadcasting the entertainer's entire performance during its news broadcast.¹²⁶ Despite the defendant's First Amendment assertions, the Court concluded that the entertainer's pecuniary interest in the performance trumped the asserted First Amendment defense, noting that "neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized."¹²⁷ On the other hand, the dissent contended short shrift was given to the First Amendment analysis, thus altering the outcome of the case:

Rather than begin with a quantitative analysis of the performer's behavior . . . we should direct initial attention to the actions of the news media . . . When a film is used, as here, for a routine portion of a regular news program, I would hold that the First Amendment protects the station from a 'right of publicity' or 'appropriation' suit, absent a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private or commercial exploitation.¹²⁸

Moreover, the dissent aptly indicated that placing a price-tag on any

¹²² See *Cohen v. California*, 403 U.S. 15 (1971).

¹²³ Volokh, *supra* note 118, at 910.

¹²⁴ Ham, *supra* note 120, at 561.

¹²⁵ 433 U.S. 562 (1977).

¹²⁶ See *id.* at 578 ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news.").

¹²⁷ *Id.*

¹²⁸ *Id.* at 581 (Powell, J., dissenting).

celebrity's rights creates a chilling effect¹²⁹ on future speech in that people will be less likely to use a famous figure's likeness if one believes liability could potentially result.

Conflicts with the First Amendment, and limitations on the public domain are particularly troublesome when a historico-political figure's right of publicity impedes the free flow and exchange of ideas—either by enabling demands for potentially-unwarranted licensing fees,¹³⁰ or the ability to prevent licensing altogether.¹³¹ The following passage is instructive for illuminating the deleterious effects of restricting access to a historico-political figure's right of publicity:

A rich public domain serves an important function in cultural and societal development. It provides resources for authors, creators, [and] artists . . . with which to produce new works. In essence, the public domain allows creators to engage in derivative works, and the richer the public domain, the more resources for the public. To that end, celebrities play an important role because their names, images, and personas form parts of these resources.¹³²

Knowing the value of a vibrant public domain, the consequences of depleting it of its “resources” are clear: both expression and access to expression are squelched. Because of the contributions Dr. King made to American and indeed, world history and thought, depictions of his identity are synonymous with his ideas regarding civil rights and equality. Thus, granting an insufficiently checked, private monopoly over Dr. King's persona is akin to granting control over social expression.¹³³

Though courts have attempted to articulate standards that intend to address the First Amendment right of publicity tension by striking a balance between public and private rights, these standards do not

¹²⁹ See *id.* at 580–81 (Powell, J., dissenting) (noting, “[t]he Court's holding that the station's ordinary news report may give rise to substantial liability has disturbing implications, for the decision could lead to a degree of media self-censorship . . . The public is then the loser.”).

¹³⁰ See Towns, *supra* note 110.

¹³¹ Volokh, *supra* note 118, at 924 n.88:

Like other property rights, the right of publicity lets the owner leave his property unexploited. The Martin Luther King, Jr. estate, for instance, did not authorize the production of Martin Luther King memorabilia until 1996, nearly fifteen years after it managed to stop others from producing Martin Luther King, Jr. busts.

¹³² Ham, *supra* note 120, at 577.

¹³³ See Madow, *supra* note 84, at 128 (internal quotations and citations omitted):

[C]elebrities are the leading players in our Public Drama. We tell tales, both tall and cautionary, about them. We monitor their comings and goings, their missteps and heartbreaks. We copy their mannerisms, their styles, their modes of conversation and of consumption. Whether or not celebrities are the chief agents of moral change in the United States, they certainly are widely used—far more than are institutionally anchored elites—to *symbolize* individual aspirations, group identities, and cultural values. Their images are thus important expressive and communicative resources: the peculiar, yet familiar idiom in which we conduct a fair portion of our cultural business and everyday conversation.

effectively account for cases involving a historico-political figure.

IV. NOTABLE ATTEMPTS TO BALANCE THE RIGHT OF PUBLICITY AGAINST THE FIRST AMENDMENT

While it is true that “[t]he principle [sic] aim of all intellectual property law is to balance the exclusive rights of creators and the public’s need to access the protected [properties],”¹³⁴ courts have been unable to develop reliable standards which would accommodate First Amendment principles while allowing a historico-political figure’s heirs to receive economic benefits, where appropriate. Part of the problem is that “[d]espite limitations on other intellectual property rights, the right of publicity exists [in some jurisdictions] without any statutory limitations.”¹³⁵ For example, Kentucky’s right of publicity statute only places a limit on the duration of the postmortem right, rather than limiting the right from applying to uses which might further First Amendment aims.¹³⁶ Similarly, the Massachusetts statute appears only to limit the publicity right owner from interfering with the copyrights held in portraits by artists and/or photographers.¹³⁷ Thus, in creating right of publicity statutes that lack meaningful limitations to serve the public interest in a vibrant public domain,¹³⁸ legislatures have left courts with little guidance on how to strike a proper balance between public and private interests.

In the absence of statutory limitations on the right of publicity, courts have utilized several standards in cases implicating First Amendment considerations, including the commercial versus noncommercial speech doctrine; the predominant purpose test; and the transformative use test. In the first three subsections to follow, each standard will be outlined, and its shortcomings explained, in turn. However, in the remaining subsection, it will be explained that even where right of publicity statutes *do* seek to limit a party’s ability to invoke the right of publicity, many statutes still fail to finely calibrate the balance of the public and private interests implicated. Thus, one must look for a more suitable standard to address these complex issues implicated by the right of publicity.

A. *Commercial versus Noncommercial Speech*

Some courts have resorted to using the commercial speech doctrine¹³⁹ to confront the right of publicity’s inconsistencies with the

¹³⁴ Ham, *supra* note 120, at 560.

¹³⁵ *Id.* at 565.

¹³⁶ See KY. REV. STAT. ANN. § 391.170 (West 2011).

¹³⁷ See MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2011).

¹³⁸ See, e.g., R.I. GEN. LAWS ANN. § 9-1-28 (West 2011); UTAH CODE ANN. § 45-3-1 (West 2011); VA. CODE ANN. § 8.01-40 (West 2011).

¹³⁹ This doctrine represents the U.S. Supreme Court’s “view that the First Amendment entitles

First Amendment,¹⁴⁰ “den[ying] plaintiffs’ rights of publicity claims if the use constituted noncommercial speech,”¹⁴¹ and awarding damages for uses which constituted commercial speech.¹⁴² Commercial speech and noncommercial speech can be best thought of as existing on a spectrum in which cases are clear at their extremes.¹⁴³ However, towards the middle of the spectrum, the answer is much murkier because “[t]he distinction between commercial speech that sells and noncommercial speech that informs is no longer clear.”¹⁴⁴

While the doctrine can be an effective means of separating actionable right of publicity claims from non-actionable ones, more often than not, courts place too much emphasis on the commerciality of the speech and lose sight of its expressive nature. For example, in *Zacchini v. Scripps-Howard Broadcasting, Co.*,¹⁴⁵ the Court viewed the broadcast of a performer’s “human cannonball” act to be a wrongful commercial appropriation of the performer’s identity even though the broadcast was part of a news report. As Sean D. Whaley states, “courts would likely favorably weigh the individual property rights against the constitutional right of commercial speech when faced with such balancing.”¹⁴⁶ Consequently, the right to use a historico-political figure’s identity to convey expressive material is placed in private hands, though such rights arguably belong in the public domain.¹⁴⁷

B. *Predominant Purpose*

As the name indicates, the predominant purpose test probes into whether the principal purpose of an appropriation of one’s identity is commercial or whether the appropriation is expressive. Specifically,

[i]f a product is being sold that predominantly exploits the commercial value of an individual’s identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some “expressive” content in it that might qualify as “speech” in other circumstances. If, on the other hand, the predominant purpose of the product is to make an

commercial speech to a lower level of constitutional protection than noncommercial speech.”
Ham, *supra* note 120, at 557.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 556 (“Commercial speech is defined as something that proposes a commercial transaction.”).

¹⁴³ For example, material in a history textbook discussing Dr. Martin Luther King Jr.’s contributions to the Civil Rights Movement would be both noncommercial and nonactionable. On the other hand, a third party’s appropriation of a product called, “Dr. Martin Luther King Jr.’s Dream Cereal” would be commercial and actionable.

¹⁴⁴ Ham, *supra* note 120, at 558.

¹⁴⁵ 433 U.S. 562 (1977).

¹⁴⁶ Sean D. Whaley, “*I’m a Highway Star*”: An Outline for a Federal Right of Publicity, 31 HASTINGS COMM. & ENT. L.J. 257, 279 (2009).

¹⁴⁷ See *supra* note 123.

expressive comment on or about a celebrity, the expressive values could be given greater weight.¹⁴⁸

The Supreme Court of Missouri applied this test in *Doe v. TCI Cablevision* where a former hockey player, Anthony “Tony” Twist, sought redress for violation of his right of publicity where the comic book series, *Spawn*, featured a fictional villain also named “Tony Twist.”¹⁴⁹ Declaring the appropriation to be predominantly for commercial purposes, the court ruled in Twist’s favor despite the presence of accompanying expressive material.¹⁵⁰

This test does a better job than the commercial speech doctrine of looking into the content of the speech communicated using one’s identity; but like the commercial speech doctrine, it may not be of guidance to courts in the “close” cases. Moreover, this test is not tailored so as to give people notice of how expressive a commercial use of a celebrity identity must be.

C. Transformative Use

Looking to copyright law’s fair use jurisprudence for guidance, courts have recently inquired into whether an unauthorized use of one’s identity is “transformative.”¹⁵¹ Under this analysis, a court scrutinizes the ‘purpose and character of the use’¹⁵² “to determine whether the new work ‘adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.’”¹⁵³ In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,¹⁵⁴ the California Supreme Court became the first to import and apply this test.¹⁵⁵

In *Saderup*, the publicity rights holder of “The Three Stooges” sought monetary and injunctive relief against an artist who created a drawing of the “Stooges” and subsequently sold lithographs and silk-screened t-shirts derived from his drawing.¹⁵⁶ The trial court recognized the expressive nature of the artist’s drawings, declaring, “[they] were

¹⁴⁸ *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (en banc) (internal quotations and citations omitted).

¹⁴⁹ *See id.*

¹⁵⁰ *See id.* at 374 (“[T]he use and identity of Twist’s name has become predominantly a ploy to sell comic books and related products rather than an artistic or literary expression, and under these circumstances, free speech must give way to the right of publicity.”).

¹⁵¹ *See Koo, supra* note 117, at 13.

¹⁵² *See infra* note 194. The “purpose and character of the use” makes up the first factor in the Copyright Act’s fair use defense, but the Supreme Court of California was quick to conclude, “that a wholesale importation of the fair use doctrine . . . would not be advisable.” *Comedy III Prod’ns, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 807 (Cal. 2001).

¹⁵³ *Koo, supra* note 117, at 13 (citations omitted).

¹⁵⁴ 21 P.3d 797.

¹⁵⁵ *Leichtman et al., supra* note 16, at 32.

¹⁵⁶ *See Saderup*, 21 P.3d at 800–02.

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entitled to First Amendment protection,”¹⁵⁷ since they were not used to endorse or advertise a product.¹⁵⁸ However, the California Supreme Court reversed, articulating a different position:

[A]rtistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.¹⁵⁹

In other words, the court concluded that the Stooges’ likenesses were not merely “one of the ‘raw materials’ from which [the artist’s] work [was] synthesized,”¹⁶⁰ but rather were “the very sum and substance of the work.”¹⁶¹ Since the work was not transformative, the California Supreme Court determined that the plaintiff’s right of publicity had indeed been violated.

By contrast, in *ETW Corp. v. Jireh Publ’g., Inc.*,¹⁶² the Sixth Circuit applied the transformative use test to deny a plaintiff’s right of publicity claim on First Amendment grounds. In that case, Eldrick “Tiger” Woods’ licensing agent sued a publisher for creating and selling prints of an unauthorized painting commemorating Woods’ victory at the 1997 Masters Golf Tournament in Augusta, Georgia.¹⁶³ Specifically, the painting depicts Woods in multiple poses at the Augusta National Golf Course, against the backdrop of several golf legends (including, Arnold Palmer, Jack Nicklaus, Sam Snead, Ben Hogan, Walter Hagen, and Bobby Jones) watching over Woods’ performance.¹⁶⁴ While the licensing agent alleged that the use of Woods’ likeness was a violation of his right of publicity, the Court concluded that the “work consist[ed] of much more than a mere literal likeness of Woods.”¹⁶⁵ Indeed, the “work [was transformative in that it] convey[ed] the message that Woods himself will someday join [the] revered group,”¹⁶⁶ the pantheon of golfers depicted in the painting. Thus, the Court recognized that the First Amendment value in the painting outweighed Woods’ private interests, stating, “[a] piece of art that portrays a historic sporting event communicates and celebrates the value our culture attaches to such events. It would be ironic indeed if

¹⁵⁷ Leichtman et al., *supra* note 16, at 32.

¹⁵⁸ *See id.*

¹⁵⁹ *Saderup*, 21 P.3d at 808.

¹⁶⁰ *Id.* at 809.

¹⁶¹ *Id.* (clarifying further, “[w]e ask, in other words, whether a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness.”).

¹⁶² 332 F.3d 915 (6th Cir. 2003).

¹⁶³ *See id.* at 918.

¹⁶⁴ *See id.*

¹⁶⁵ *Id.* at 936.

¹⁶⁶ *Id.*

the presence of the image of the victorious athlete would deny the work First Amendment protection.”¹⁶⁷

While the transformative use test is a sensible standard for artwork depicting entertainers and athletes, it makes little sense only to require “transformativeness” in cases involving a historico-political figure’s right of publicity since the depiction of such a figure is often not to communicate something “new,” but rather to facilitate the communication of existing ideas. Moreover, unlike its copyright analogue, transformativeness is inexplicably made out to be a determinative element of a fair use, rather than a consideration under one factor of a multi-factor standard.¹⁶⁸ Omitting other factors from the analysis risks excluding too many permissible uses of a figure’s identity from the public domain—especially because “[s]cholars . . . believe that the ambiguity of the ‘transformative’ test will create a chilling effect on the creation of future artistic works involving well-known celebrities and athletes.”¹⁶⁹

D. Statutory Limitations

In some jurisdictions, legislatures have commendably incorporated language into each state’s respective right of publicity statute, intending to remedy the right of publicity’s conflict with First Amendment-promoted political expression. Notably, Pennsylvania’s right of publicity statute protects uses in communications media when the uses are a part of an expressive work.¹⁷⁰ Moreover, Tennessee’s right of publicity statute contains a fair use exception limiting the scope of an individual’s rights where “the use of a name, photograph, or likeness is in connection with any news, public affairs, or sports broadcast or account.”¹⁷¹ Thus, the Tennessee statute would allow historico-political figures’ likenesses to be part of the public domain in certain limited circumstances. Similarly, a handful of other states have varying statutory language exempting users of figures’ personas from liability when the use involves “newsworthy” events and other matters relating to the public interest.¹⁷²

Though these provisions likely reach their intended results of preventing a waning of the public domain, and facilitating communication, there still remains plenty of room for improvement.

¹⁶⁷ *Id.*

¹⁶⁸ See generally *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 575–77 (1994).

¹⁶⁹ *Koo*, *supra* note 117, at 16–17.

¹⁷⁰ PA. CONS. STAT. ANN. § 8316(e)(2)(iii) (West 2011).

¹⁷¹ TENN. CODE ANN. § 47-25-1107 (West 2011).

¹⁷² See, e.g., FLA. STAT. ANN. § 540.08(4)(a) (West 2007); 765 ILL. COMP. STAT. ANN. 1075/35 (West 2011); NEV. REV. STAT. ANN. § 597.790(2)(c) (West 2011); IND. CODE ANN. §§ 32-36-1-1(c)(1)(B), 32-36-1-1(c)(3) (West 2011); OHIO REV. CODE ANN. § 2741.02(D)(1) (West 2011); WASH. REV. CODE ANN. § 63.60.070(1) (West 2011); TEX. PROP. CODE ANN. § 26.012(a)(3) (West 2011); 42 PA. CONS. STAT. ANN. § 8316 (West 2011).

Indeed, the difficulty of many of these provisions is that courts may construe them either very broadly or very narrowly, and little guidance exists regarding how courts should apply these statutes.¹⁷³ Additionally, these statutes may potentially serve as improper models to states which have not yet codified a statutory right of publicity. As such, these provisions offer an insufficient solution to balance the public and private interests involved. A more workable, flexible standard is needed and can be derived by looking to other areas of the law.

V. TRADEMARK AND COPYRIGHT LAW PARALLELS

In search of a more suitable standard to address the complex issues posed by recognizing a descendible right of publicity for historico-political figures, it is instructive to look to the right of publicity's intellectual property cousins: trademark and copyright. Notably, commentators have previously analogized the right of publicity to trademark and copyright, similarly attempting to reconcile competing public and private interests.¹⁷⁴ However, these attempts have been geared towards the "typical" right of publicity case involving celebrity entertainers, and consequently do not reach a proper balance in weighing the First Amendment considerations against the weaker justifications supporting historico-political figures' rights of publicity. As will be explained, because the right of publicity bears similarities to both trademark and copyright law—which have their own fair use standards aimed at cultivating the public domain—a modified fair use standard can be tailored to claw back public domain-enhancing resources from private control.

A. Trademark Law

In terms of the general characteristics and protections afforded by the right of publicity, a keen resemblance to trademark law exists. A first cut at the similarities between trademark¹⁷⁵ and the right of publicity shows that "[b]oth laws are concerned . . . with the protection of names in the context of commercial uses."¹⁷⁶ A company's trademark is similar to a celebrity's identity in that both have goodwill

¹⁷³ On the one hand, almost *anything* can be determined to be of public interest, thereby depriving private individuals of any benefit associated with the right of publicity. But on the other hand, such exemptions may be strictly limited to news reports and may ultimately be detrimental to the public domain.

¹⁷⁴ See, e.g., Ham, *supra* note 120; Koo, *supra* note 117; Coyne, *supra* note 10.

¹⁷⁵ The Federal Trademark Act (Lanham Act) defines a "trademark" as follows: "any word, name, symbol, or device, or any combination thereof-- (1) used by a person, or (2) which a person has a bona fide intention to use in commerce . . . to identify and distinguish his or her goods" 15 U.S.C. § 1127 (2011).

¹⁷⁶ Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn From Trademark Law*, 58 STAN. L. REV. 1161, 1190 (2006).

(economic¹⁷⁷ or reputational) associated with it.¹⁷⁸ Hence, Professors Stacy L. Dogan and Mark A. Lemley have noted, “[t]he speech-restrictive implications of a right to prevent someone else from talking about you should be obvious. They parallel the concerns with giving a company the right to prevent someone else from speaking about it.”¹⁷⁹

Moreover, a trademark—much like a celebrity persona—has the power to communicate a great deal of information, thus facilitating public expression. Accordingly, the Lanham Act has codified a fair use defense¹⁸⁰ targeted at fulfilling these communication-oriented interests¹⁸¹ while maintaining protection for company’s trademarks.¹⁸² As Professor Uche U. Ewelukwa states, “[t]he fair use defense is one of the safeguards purposely inserted in the Lanham Act to prevent commercial monopolization of language.”¹⁸³ Analogously, a fair use defense for historico-political figures’ rights of publicity can be devised to prevent monopolization of identity—an important resource or symbol in expressing and accessing socially-valuable ideas.¹⁸⁴

B. Copyright Law

If the right of publicity’s characteristics strongly parallel those of trademark law, its policy considerations bear an even greater similarity to those of copyright law. Empowered by the Constitution,¹⁸⁵ Congress enacted “the federal Copyright Act [granting] exclusive rights¹⁸⁶ to

¹⁷⁷ See Tan, *supra* note 19, at 915 (stating, “[g]enerally, celebrity actors and athletes lead the field of personalities who enjoy a substantive economic value and goodwill in the market - much like a trademark.”).

¹⁷⁸ See Dogan & Lemley, *supra* note 176:

Trademark law is designed to protect the integrity of a mark’s meaning by preventing uses of the mark that confuse consumers or, for famous marks, uses that interfere with consumers’ mental association between mark and good. That goal also seems a legitimate justification for the right of publicity. If people are misled by the use of a celebrity name or likeness, both they and the celebrity are injured.

¹⁷⁹ *Id.* at 1218.

¹⁸⁰ The Lanham Act specifies it shall be a defense:

[t]hat the use of the name, term, or device charged to be an infringement is a use, otherwise than as a mark, of the party’s individual name in his own business, . . . or of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party, or their geographic origin

15 U.S.C. § 1115(b)(4) (2011).

¹⁸¹ See Uche U. Ewelukwa, *Comparative Trademark Law: Fair Use Defense in the United States and Europe—The Changing Landscape of Trademark Law*, 13 WIDENER L. REV. 97, 110 (2006) (“The justification for the fair use defense is found in the public interest in allowing competitors to make free use of the English language to describe their goods.”) (internal quotations and citations omitted).

¹⁸² See *id.* at 129 (“The fair use doctrine . . . mark[s] the outer boundary of the trademark monopoly and strike[s] a balance between the hardships to a competitor in hampering the use of an appropriate word and those to the owner.”).

¹⁸³ *Id.*

¹⁸⁴ See *supra* note 132.

¹⁸⁵ *Supra* note 90.

¹⁸⁶ See Coyne, *supra* note 10, at 814 (“If copyright grants exclusive rights in creative works, the right of publicity grants exclusive rights in personal attributes. Just as copyright gives authors a monopoly in their creative expressions, the right of publicity grants individuals a monopoly in

original works of authorship.”¹⁸⁷ As is the case with the right of publicity, the grant of exclusive rights is meant to “provide incentive for creative endeavor[.]”¹⁸⁸ “thereby guaranteeing the dissemination of information to the public.”¹⁸⁹ But, here too, a legally recognized monopoly over original works can run counter to First Amendment principles because, “a grant of copyright by definition restricts [the free flow of information and ideas].”¹⁹⁰ Moreover, since most creative works are not novel but rather build on preexisting works,¹⁹¹ at first blush it seems as if the Copyright Act, in granting exclusive rights, paradoxically undermines its own goals.¹⁹² However, copyright law accounts for this issue with mechanisms designed to recalibrate the balance between private and public rights.

Among copyright’s most prominent First Amendment-accommodating, and public domain-enriching mechanisms¹⁹³ is the statutory fair use doctrine codified in the Copyright Act.¹⁹⁴ Indeed, “predicated on the author’s implied consent to ‘reasonable and customary’ use when he released his work for public consumption,”¹⁹⁵ “[t]he fair use defense . . . permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle

their personae.”).

¹⁸⁷ Ham, *supra* note 120, at 561.

¹⁸⁸ Coyne, *supra* note 10, at 812; *see also* Edward L. Carter, *Harmonization of Copyright Law in Response to Technological Change: Lessons from Europe about Fair Use and Free Expression*, 30 U. LA VERNE L. REV. 312, 317 (2009) (“Statutory copyright law granted authors a limited monopoly as an incentive for the creation of works that would benefit society.”). Of course, as previously discussed, exceptional figures like Dr. Martin Luther King, Jr. are not primarily motivated by economic incentives but rather by the desire for social change.

¹⁸⁹ Ham, *supra* note 120, at 561.

¹⁹⁰ Coyne, *supra* note 10, at 813.

¹⁹¹ *See* Ham, *supra* note 120, at 561; *see also* *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 575 (1994) (“[i]n literature, in science and in art, there are, and can be, few if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.”) (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (No. 4,436) (CCD Mass. 1845)).

¹⁹² *See* *Campbell*, 510 U.S. at 561–62 (“Exclusive rights . . . both ensure and jeopardize copyright law’s purpose. It ensures this goal by protecting the creativity and investment of the copyright holder . . . [Yet,] the grant of exclusive rights may stifle others’ creativity by preventing access to preexisting works”).

¹⁹³ *See id.*; Coyne, *supra* note 10; Koo, *supra* note 117.

¹⁹⁴ 17 U.S.C. § 107 (2011):

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (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.

¹⁹⁵ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 (1985).

the very creativity which that law is designed to foster.”¹⁹⁶ As commentators point out, the check on exclusive rights afforded by the fair use doctrine serves a vital function for discourse and progress in our society. “By providing a limited privilege in others to use an author’s work, fair use serves as an accommodation of competing copyright and first amendment [sic] interests so as to preserve a marketplace of ideas.”¹⁹⁷ Thus, even where copyrighted material is used by an unauthorized third party, the fair use doctrine generally precludes a court from imposing liability on a defendant where certain public interests would be served by its use.¹⁹⁸

Upon examination of the fair use elements the statute directs courts to balance, it is noteworthy that even where a third party’s use of copyrighted material is appropriated in another work created for commercial purposes, courts may still find a fair use.¹⁹⁹ Instead, “[t]he language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character.”²⁰⁰ As the *Campbell* Court described, a commercial work is not a presumptively unfair use because if “commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship and research, since these activities are generally conducted for profit in this country.”²⁰¹ Consequently, much more material is within the public’s reach to be used and consumed.

Since the policy implications involved in copyright law closely mirror the right of publicity’s own policy implications—particularly as applied to historico-political figures—the copyright fair use standard helps provide a significant degree of guidance on how one might create a right of publicity fair use doctrine for historico-political figures. Like its copyright counterpart, a fair use defense for historico-political figures’ rights of publicity would encourage a free flow of ideas through the marketplace.

¹⁹⁶ *Campbell*, 510 U.S. at 577 (internal citations and quotation marks omitted).

¹⁹⁷ Stephen S. Morrill, *Harper & Row, Publishers v. Nation Enterprises: Emasculating the Fair Use Accommodation of Competing Copyright and First Amendment Interests*, 79 NW. U.L. REV. 587, 611 (1984).

¹⁹⁸ See Coyne, *supra* note 10, at 815 (“The copyright doctrine of fair use permits infringements of otherwise protected works when necessary to further the greater public interest in the development of art, science and industry.”) (internal citations and quotation marks omitted); see also *Harper & Row*, 471 U.S. at 589 (“[C]ourts must resist the tendency to reject the fair use defense on the basis of their feeling that an author of history has been deprived of the full value of his or her labor.”).

¹⁹⁹ See, e.g., *Campbell*, 510 U.S. at 584 (“[T]he mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.”).

²⁰⁰ *Id.*

²⁰¹ *Id.* (internal citations and quotation marks omitted).

VI. A MODIFIED FAIR USE STANDARD

Given the striking similarities that the right of publicity shares with copyright and trademark law, a fair use defense can be exported and adapted to the right of publicity to accomplish the important ends of enriching the public domain while providing heirs a limited right to receive compensation for the use of their historico-political ancestors' right of publicity. Under this Note's formulation, the fair use standard for historico-political figures would ideally²⁰² be a federal doctrine to ensure uniformity and address First Amendment considerations fully. Though such a federal doctrine may not be preemptive—because a federal right of publicity may not itself be preemptive²⁰³—were this fair use defense incorporated into federal law, “[it may] guide both state and federal courts on how to deal with future issues regarding [historico-political figures'] publicity rights.”²⁰⁴ Even if the right of publicity remains exclusive to state law, this fair use standard should serve as a model for all states that recognize the right.

Specifically, the standard would follow three factors derived from Copyright and Trademark's fair use doctrines: (1) the purpose and character of the use, including whether such use is of an expressive nature and/or is for educational purposes; (2) the nature of the figure's persona; and (3) the extent to which the figure profited from publicity during his/her lifetime and the effect of the use upon the potential market for, or value of the figure's persona. Taken together, these factors will provide a workable standard for courts to apply on a case-by-case basis in order to determine which uses of a persona constitute a redressable violation of the right of publicity, and which uses belong in the public domain.

A. Factor 1: The Purpose and Character of the Use

The first factor draws heavily on the language of the Copyright Act's first fair use factor.²⁰⁵ However, unlike the Copyright Act, there is no inquiry into whether the use is commercial in nature because a plaintiff cannot establish a prima facie case for violation of one's right of publicity without proving commerciality. Instead, the inquiry here into the purpose and character of the use will be focused on the type of commercial use in which the figure's likeness appears.

In general, the analysis of the first factor adopts a similar approach to the Restatement (Third) of Unfair Competition.²⁰⁶ For those

²⁰² Should a Federal Right of Publicity statute ever be enacted, this fair use standard should be incorporated in the act.

²⁰³ See Whaley, *supra* note 146, at 259.

²⁰⁴ *Id.* at 260.

²⁰⁵ See 17 U.S.C. § 107 (1).

²⁰⁶ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47, cmt. c (1995):

[I]f the name or likeness is used solely to attract attention to a work that is not related

instances where a figure's likeness is used for advertisement or endorsement purposes,²⁰⁷ the first factor should weigh against a finding of a fair use. This consideration not only recognizes an inherited right of autonomous self-definition²⁰⁸ that heirs may utilize to preserve a deceased figure's message and reputation, but also militates against third parties' unjust enrichment. On the other hand, the first factor will weigh in favor of a fair use where the figure's persona is used "for purposes [including, but not limited to] criticism, comment, news reporting, teaching . . . scholarship, or research . . ." ²⁰⁹ Given the social value and public interest in having access to—as in trademark law²¹⁰—historico-political figures' likenesses as a common "language," purposes weighing in favor of a fair use may include those works that express or facilitate expression of ideas associated with the figure. Moreover, under this factor, transformativeness may also be considered as weighing in favor of a fair use. Accordingly, similar to *ETW Corp. v. Jireh Publ'g., Inc.*,²¹¹ commercial prints of a painting depicting Dr. King during his "I Have a Dream" speech, accompanied by a scene of President Barack Obama at his 2008 Presidential Inauguration might be considered a transformative use of Dr. King's likeness. In the same vein, a t-shirt depicting President Obama and Dr. King standing beside each other might be transformative as well.²¹²

B. Factor 2: The Nature of the Figure's Persona

The second factor is meant to identify those historically significant figures' personas that are practically synonymous with the ideas the figures championed during their lives. In essence, this factor filters out those figures, the use of whose personas is important use to the public in disseminating ideas. Since the aim of this fair use defense is to facilitate expression and cultivate the public domain by making historico-political figures' personas more accessible, this is the most significant factor in the analysis. In assessing this factor, courts may look at whether the figure was primarily involved with and had significant contributions to political and social thought or whether, on

to the identified person, the use may be subject to liability for a use of the other's identity in advertising . . . Similarly, if a photograph of the plaintiff is included in the defendant's publication merely for the purpose of appropriating the plaintiff's commercial value as a model rather than as part of a news or other communicative use, the defendant may be subject to liability for a merchandising use of the plaintiff's identity.

²⁰⁷ This would include the earlier example, "Dr. Martin Luther King Jr.'s Dream Cereal." See *supra* note 143.

²⁰⁸ See McKenna, *supra* note 73.

²⁰⁹ See 17 U.S.C. § 107.

²¹⁰ See Ewelukwa, *supra* note 181.

²¹¹ 332 F.3d 915 (6th Cir. 2003).

²¹² See *supra* note 4.

the other hand, the figure had only an incidental political impact.²¹³ Because some individuals like Dr. King were primarily motivated to cause political and social change without regard to economic benefits, this factor's analysis may bleed into that of the third factor. Lastly, it is worth noting that, in keeping with free speech principles, the assessment is made without regard to the content of the ideas or speech itself.²¹⁴

C. Factor 3: Lifetime Exploitation and Effect on the Market

Like the fourth factor of the Copyright Act's fair use doctrine, this economics-grounded factor should be one of the weightier considerations for or against a finding of fair use. This factor is tailored to recognize that there are certain prominent historico-political figures for whom the right of publicity is less strongly justified than for a celebrity athlete or entertainer. Thus, this factor will weigh in favor of a fair use where a figure whose predominant purpose in stepping into the public eye was to achieve the non-economic ends of disseminating his or her message rather than generating a profit.²¹⁵ To reiterate, while such an inquiry conflicts at least partially with the Georgia Supreme Court's ruling in *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.*,²¹⁶ it is sensible to take greater account of lifetime exploitation in view of First Amendment principles.²¹⁷ In general, a figure who has attained great fame through spreading his or her ideas without regard to financial gain is an exceptional person whom we may fairly presume would value the further discussion and free dissemination of those ideas more than the potential a price-tag on the effective communication of those ideas. Nevertheless, alongside the inquiry into lifetime exploitation, this factor still takes account of the incidental economic interest to which the

²¹³ For example, during his life, Michael Jackson recorded songs such as "Black or White" which promoted racial equality. Nevertheless, Jackson was primarily an entertainer, and this would weigh in favor of an unfair use of his likeness.

²¹⁴ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting):

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. *Id.*

²¹⁵ However, in order to reward one's heirs for their own contributions, this factor would weigh less heavily in favor of a fair use if a historico-political figure posthumously achieved fame by virtue of one's heirs aggressively promoting and advertising that figure's message.

²¹⁶ 296 S.E.2d 697 (Ga. 1982).

²¹⁷ See Volokh, *supra* note 118, at 906.

historico-political figure's heirs should be entitled. At a minimum, this language serves to remind courts that a historico-political figure's right of publicity should not be eviscerated, and that in the appropriate cases, licensing the right should entitle the right-holder to generate revenue.

CONCLUSION

The right of publicity is a formidable, profitable, and strongly-justified right for celebrity entertainers and their heirs to invoke. However, when placed in the hands of historico-political figures' heirs—such as those of Dr. Martin Luther King Jr.'s—the right of publicity loses much of its underlying policy rationales. Moreover, granting a private monopoly over a historico-political figure's right of publicity is particularly troubling in light of competing First Amendment interests in the free flow of information and ideas, and a vibrant public domain. To help strike a proper balance between these conflicting public and private interests, a standard-based fair use defense derived from other areas of intellectual property law should be adopted.

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* Notes Editor, *Cardozo Arts & Ent. L.J.* (2012–13). J.D. Candidate 2013, Benjamin N. Cardozo School of Law. B.A., Political Science, Honors in the Liberal Arts and Distinction in the Major, University of Wisconsin-Madison (2010). Special thanks to Professor Marci A. Hamilton for her guidance and inspiration, to Jeremy Schachter ('12) for his input and feedback, and to the entire Cardozo Arts & Entertainment Law Journal Board and Staff for their collegiality and professionalism. To my family: I would neither be where I am today, nor will I be where I am tomorrow without your unwavering love, support, and senses of humor. IN MEMORIAM: Kermit Bloomgarden—who ignited my fascination with the entertainment industry; Blanche and Dr. Albert Willner—who served as models of generosity, decency, and humanity. © 2012 Joshua Bloomgarden.