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THE RIGHT OF PUBLICITY FOR NORTH CAROLINA: FOCUSED ON THE IDENTITY-HOLDER, PRIVACY-BASED AND LIMITED ALIENABILITY

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I. INTRODUCTION

The right of publicity is a relatively new legal concept that has been defined in a variety of ways. J. Thomas McCarthy provides one definition of the right of publicity that it is the "inherent right of every human being to control the commercial use of his or her identity."[1] McCarthy's definition has an emphasis on "commercial use." Others view the right of publicity as the right to control how your identity—image, likeness, name, and voice—is shared with the world through all forms of media.[2] Put another way, it is the right to "stop others from using our identities . . . without permission."[3] No matter how the right of publicity may be defined or described, it traces back to the right of privacy. Through the later part of the 19th century and first half of the 20th century, legal scholars and courts first established a right to privacy and then increasingly wrestled with the scope of that right. The right of publicity emerged as the courts and legal scholars tried to distinguish between the right to privacy and the right of publicity.

While the work of distinguishing publicity from privacy was begun almost hundred years ago, the process has been messy and is not yet complete. There is no settled opinion on whether the right of publicity should be based on property rights or personal privacy rights. The confusion continues on other unsettled but important issues such as alienability of the right, treatment of celebrities versus non-celebrities, and post-mortem rights. The confusion "takes place against the backdrop of a theoretically inconsistent and unpredictable legal landscape."[4]

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1. J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2016).
2. Noa Dreymann, *John Doe's Right of Publicity,* 32 Berkley Tech. L. J. 674 (2017).
3. Jennifer Rothman, *The Right of Publicity: Privacy Reimagined For A Public World* (2018).
4. Joshua L. Simmons & Miranda D. Means, *Split Personality: Constructing a Coherent Right of Publicity Statute*, 10 Landslide 37 (2018).

North Carolina does not acknowledge a distinct right of publicity. North Carolina is surprisingly silent while the majority of states have recognized some form of the right of publicity.[5] North Carolina, however, does recognize a privacy-based appropriation tort.[6] The appropriation tort allows for a plaintiff to seek recovery in instances of misappropriation. While the appropriation tort permits an individual—typically a non-celebrity—to claim damages tied to embarrassment or humiliation, it does not address the issues related to alienability, post-mortem rights, commercialization, and other 21st-century issues (e.g., social media).

This paper will first explore the origin of the right of publicity as it evolved from the notion of privacy. The paper will then review how several states have responded to the right of publicity, including North Carolina's approach. Once the major trends have been understood and the historical foundation has been laid, contemporary problems (social media, manipulated images, and other publicity issues) will be explored to arrive at recommended solutions for North Carolina. The recommended solutions will address the needs of the celebrity seeking economic protection and the non-celebrity seeking dignitary protection.

II. BACKGROUND

A. PRIVACY GIVES BIRTH TO PUBLICITY

"Once you've lost your privacy, you realize you've lost an extremely valuable thing."

- Billy Graham

North Carolina's famous son, the evangelist Billy Graham, was not a legal scholar but he understood the concept of privacy, that it could be lost and that it had value. To understand the legal history of the rights of privacy and publicity, it is necessary to go back in time before Billy Graham.

In 1890, twenty-eight years before Billy Graham was born, Samuel Warren and Louis Brandeis wrote *The Right of Privacy* for the Harvard Law Review.[7] This seminal work first traced the evolution of law from its earliest days when the law gave remedy "only for physical interference with life and

5. William M. Bryner & Samantha Hayes Barber, Right of Publicity Laws: North Carolina, Practical Law State Q&A 3-520-2888 1 (WL 2017).

6. *Id.* at 2.

7. Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193 (1890).

property."[8] Warren and Brandeis described the law's evolution to more modern notions of battery, freedom, and right to property.[9] Warren and Brandeis then settled into the purpose of their article which was identifying and defining the right of privacy, the "right to be let alone."[10] In a prophetic statement that points to the current issues of privacy and publicity from social media and tabloid journalists, they wrote that "[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"[11] With their Harvard Law Review article, Warren and Brandeis gave birth to the legal concept of privacy.

Twelve years after the Warren and Brandeis article, the New York Court of Appeals in *Roberson v. Rochester Folding Box Co.* ruled against a woman who sued for having her picture used without her permission to advertise a product.[12] The divided court did not recognize the existence of the common law right to privacy.[13] Though the Court of Appeals had apparently not read the 1890 Harvard Law Review or at least been persuaded by it, the New York Legislature acted quickly to overturn the ruling and passed a statute making it a misdemeanor and a tort to use the name, portrait or picture of a person for advertising without their written permission.[14] This statute was one of the early instances of legislating a right to privacy and, in the process, hinting at the right to publicity. Though it was considered a privacy law and not right of publicity, it was specifically about the control of one's image and laid a foundation for things to come.

The first half of the 20th century was marked with several cases clarifying the right of privacy and the emerging new right of publicity. To many scholars, the case that solidified the right of publicity was *Haelan Laboratories v. Topps Chewing Gum* in 1953.[15] Ironically, the case was not about an individual controlling or protecting her identity from unwanted commercial use, it was a "battle between two gum manufacturers that were fighting over control of baseball players' names and pictures on trading cards."[16] The rights of the ball player on the card (their identity: image, name, likeness) was not at issue. The case was principally about the economic property interests of Haelan and Topps. Haelan ultimately prevailed in their suit and, in a twist of fate,

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 195.
12. Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902).
13. *Id.* at 443.
14. N.Y. Sess. Laws, Ch. 132, §§ 1-2 (1903) (amended as N.Y. Civ. Rights Law, §§ 50-51 (1921).
15. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).
16. Rothman, *supra* note 3, at 45.

was later acquired by Topps.[17] The actual outcome was not as important as the fact that the case recognized a right of publicity that was transferable in large part because the parties made the case about property rights and contracts.[18] At this point, the balance shifted from a right "rooted in the individual ('identity-holder') into a powerful intellectual property right, external to the person, that can be sold or taken by a non-identity-holding "publicity holder."[19]

Just after the Haelan case was decided, Melville Nimmer published *The Right of Publicity*.[20] As a lawyer for Paramount Pictures, Nimmer argued on behalf of his employer to allow for greater Studio control of its actors.[21] Nimmer pushed against the non-assignability of privacy rights[22] and for the creation of the right of publicity that was property based and exclusively assignable.[23] In his conclusion, Nimmer inserts the following lengthy excerpt from *Haelan*:

> We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture . . . This right may be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ballplayers), far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money through authorizing advertisements, popularizing their countenances . . . This right of publicity would usually yield no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.[24]

The effect of Nimmer's position was to enlarge the interest of the publicity-holder (whether it be a movie studio or baseball card manufacturer) over the interests of the identity-holder. In asserting publicity rights, Nimmer was further distancing the basis of the right from protecting the privacy of the individual.

The United States Supreme Court reinforced the right of publicity as an intellectual property right in *Zacchini v. Scripps-Howard* that effectively reinforced the property-based logic of the right and—if it is a property—its assignability.[25] That case involved a human cannonball, Mr. Hugo Zacchini,

17. *Id*. at 63.
18. *Id*. at 64.
19. *Id*. at 7.
20. Melville B. Nimmer, *The Right of Publicity*, 19 Law & Contemp. Problems, 203 (1954).
21. Rothman, *supra* note 3, at 69.
22. Nimmer, *supra* note 21, at 209.
23. *Id*.
24. Haelan Laboratories, 202 F.2d at 868.
25. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

who enjoined Scripps-Howard from broadcasting the entirety of his flight on the evening news.[26] The Court concluded that Mr. Zacchini had a right of publicity for his act based on the same rights as those afforded patents and copyrights (intellectual property).[27] The case was ultimately remanded, settled in state court for a relatively small amount, and both sides claimed victory.[28] The effect of the Court's position was to expand the right of publicity as intellectual property having all the hallmarks of copyrights and trademarks (economic value and transferability) and, in the process, further narrow the individual's right of privacy.

The trajectory of *Haelan*, Nimmer's article and *Zacchini* was to create greater separation between privacy and publicity. The publicity-holder was often emboldened at the expense of the identity-holder. Additionally, commercial use of the right seemed to be the main focus of judicial and scholarly attention. Non-commercial and non-celebrity interests were often not recognized and that inclination continued as states developed statutory guidelines.

B. HOW (SOME) STATES APPROACH THE RIGHT OF PUBLICITY

"I've been getting some bad publicity—but you've got to expect that."
- Elvis Presley

As the courts wrestled with the right of publicity, states responded with differing statutes. For those states with right of publicity statutes in place, the responses range from California on one end (property-based right of publicity statute with post-mortem rights extending for seventy years) to New York on the other end (right of privacy statute with no post-mortem rights).[29] For a complete listing of how all the states have addressed the right of publicity, the most up-to-date sources are Jonathan Faber's *rightofpublicity.com* and Jennifer Rothman's website, *rightofpublicityroadmap.com*.[30] Currently, there are twenty-two states with a right of publicity statute and roughly the same number recognizing a post-mortem right. North Carolina is not one of those states. For comparison, two states close to North Carolina, Tennessee and Georgia, have taken slightly different approaches to the right of publicity.

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26. *Id*.
27. *Id*.
28. Rothman, *supra* note 3, at 80.
29. Cal. Civ. Code § 3344.1 (2019), N.Y. Civ. R. § 50 (Consol. 2019).
30. Rothman's Roadmap to the Road to Publicity, https://www.rightofpublicityroadmap.com/ (last visited May 14, 2019).

In Tennessee, the state has the Personal Rights Protection Act[31] (a statutory right of publicity) as well as common law recognition. In its statute, the Tennessee legislature described the right of publicity and its scope:

> The individual rights . . . constitute property rights and are freely assignable and licensable, and do not expire upon the death of the individual so protected, whether or not such rights were commercially exploited by the individual during the individual's lifetime, but shall be descendible to the executors, assigns, heirs, or devisees of the individual so protected by this part.[32]

In addition to the statute, Tennessee has a common law recognition that was best explored in *Tennessee ex rel. Elvis Presley Int'l Mem. Found. v. Crowell*.[33] Elvis Presley had no lack of publicity in his life (good and bad, see quote above) and it continued after his death. This case involved two nonprofit corporations who were using Elvis's name and likeness to sell merchandise after his death.[34] The plaintiff claimed unfair competition by the defendant and sought to prevent the defendant from using Elvis's name.[35] The Presley estate intervened on behalf of the defendant.[36] The estate asserted that it had not given the plaintiff permission to use the Presley name but had instead given it to the defendant.[37] The Tennessee Court of Appeals, after tracing the history of the right to publicity and recounting other disputes involving Elvis memorabilia, stated that:

> Today there is little dispute that a celebrity's right of publicity has economic value. Courts now agree that while a celebrity is alive, the right of publicity takes on many attributes of personal property. It can be possessed and controlled to the exclusion of others. Its economic benefits can be realized and enjoyed. It can also be the subject of a contract and can be assigned to others.[38]

In applying this view of the right of publicity (e.g., economic value, personal property, contract-like), the court concluded that "Elvis Presley's right of publicity survived his death and remains enforceable by his estate and those holding licenses from the estate."[39] The court's conclusion—applying common law analysis—is consistent with Tennessee's statute.

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31. Tenn Code § 47-25-1101 (2014).
32. Tenn. Code Ann. § 47-25-1103(b) (2014).
33. Tenn ex rel. Elvis Presley Intern. Mem'l Found. v. Crowell, 733 S.W.2d 89 (Tenn. Ct. App. 1987).
34. *Id*. at 91.
35. *Id*.
36. *Id*.
37. *Id*.
38. *Id*. at 97.
39. *Id*. at 99.

While Tennessee has both common law and statutory recognition of the right of publicity, Georgia has only a common law recognition that was discussed in *Martin Luther King, Jr., Center for Social Change v. American Heritage Products* from 1982.[40] In this Georgia case, the defendant sought permission from the Martin Luther King, Jr., Center for Social Change (the plaintiff) to manufacture statuettes of Dr. King and, in turn, provide a small contribution to the Center.[41] The plaintiff refused to grant permission and filed for an injunction to prevent the production of the statuettes.[42] In resolving the dispute, the Georgia Supreme Court concluded: (1) the right to publicity was distinct from the right of privacy in that "while private citizens have the right to privacy, but public figures have a similar right of publicity"[43]; (2) the right of publicity survived the death of its owner and was thereby inheritable and devisable due, in large part, to the "value of continued commercial use"[44]; and (3) the owner did not have to commercially exploit the right for it to survive his death.[45] In short, the court answered that the right of publicity was distinct from the right of privacy,[46] that it does survive the owner making it devisable[47] and that it does not have to have been exploited during the owner's lifetime to be devisable.[48] In the end, Dr. King's estate was able to prohibit the sale of the statuettes made in his image. Interestingly, in a concurring opinion, Justice Weltner wrote that though he agreed with the result, he disagreed "most decidedly with the substantive portion of the majority opinion, for reason that it generates more unsettling questions than it resolves."[49] Justice Weltner insisted that the plaintiff's claim could be established under a right of privacy and not under a "new thing, now called a 'right to publicity.'"[50] His concern was rooted in the right's clash with free speech and where the lines would be drawn to distinguish a protected right of publicity from protected expression. Justice Weltner wrote:

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40. Martin Luther King, Jr., Ctr. for Soc. Change, v. Am. Heritage Prods., Inc., 250 Ga. 135 (Ga. 1982).

41. *Id*. at 136.

42. *Id*.

43. *Id*. at 143.

44. *Id*. at 145.

45. *Id*. at 137.

46. *Id*. at 138. (Quoting from 122 Ga. at 196 (50 SE at 70). "If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy, and this is no new idea in Georgia law.")

47. *Id*. at 145-146. ("If 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. . . .[T]he trend since the early common law has been to recognize survivability, notwithstanding the legal problems with may thereby arise.")

48. *Id*. at 147.

49. *Id*. at 148.

50. *Id*.

> [I]n creating this new "right of publicity," we have created an open-ended and ill-defined force which jeopardizes a right of unquestioned authenticity—free speech. . . . But the majority says that the fabrication and commercial distribution of a likeness of Dr. King is not "speech," thereby removing the inquiry from the ambit of First Amendment or Free Speech inquiries. To this conclusion I most vigorously dissent."[51]

Justice Weltner saw the birth of publicity out of privacy and pushed back on its growing scope. He saw it as a threat to the First Amendment; an accusation that will be explored further in the following section.

In contrast to Tennessee, Georgia and many other states, North Carolina is remarkably silent on the issue of right of publicity, having no statute recognizing the right and only two significant cases addressing the common law right of privacy: *Flake v. Greensboro News Co.* and *Barr v. S. Bell Tel. & Tel. Co.*[52]

Flake, decided in 1938, is the older of the two cases. Nancy Flake filed an action against the Greensboro News Company for damages as a result of publishing her photo without her consent. The newspaper mistakenly used Ms. Flake's photo in a bathing suit instead of using a photo of Sally Payne, the leading lady of a traveling vaudeville show, to advertise a local bakery.[53] The Supreme Court of North Carolina dismissed Ms. Flake's libel claim but upheld her claim for the unauthorized use of her picture thereby validating her right to privacy.[54] Ms. Flake was able to recover $6,500.[55]

In *Barr v S. Bell Tel. & Tel. Co*., decided thirty-four years later in 1972, the North Carolina Court of Appeals held that a plaintiff's right to privacy was violated when the local telephone company used his name and someone else's picture in an advertisement in their phonebook.[56] The plaintiff had consented to the use of his name and picture but the phone company accidentally used the wrong picture. Justice Brock wrote: "defendant had gone beyond the plaintiff's consent and thereby had invaded plaintiff's right of privacy. Such a finding by the jury entitle plaintiff to . . . nominal damages . . . ."[57]

Flake from 1938 and *Barr* from 1972 are the only two cases that addressed North Carolina's view on the right of privacy or the unrecognized right of publicity. However, the North Carolina Legislature considered providing statutory guidance in 2009 with proposed House Bill (HB) 327.[58] Its stated

51. *Id*. at 150.
52. BRYER, *supra* note 5, at 2.
53. Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938).
54. *Id*. at 793, 195 S.E. at 64 .
55. *Id*. at 784, 195 S.E. at 59.
56. Barr v. S. Bell Tel. Co. & Tel. Co., 13 N.C. App. 388, 185 S.E.2d 714 (1972).
57. *Id*. at 393, 185 S.E. at 718.
58. H.B. 327, 2009 Gen. Assemb., Reg. Sess. (N.C. 2009).

purpose was to "prohibit the unauthorized use of an individual's right to publicity for commercial purposes and to provide an enforcement of that right."[59] The proposed bill explicitly defined the right of publicity as a property right having a commercial purpose, the attributes covered by the right (including an individual's name, voice, image, likeness, and distinctive appearance) and various methods of transfer and conveyance (including contract, license, gift, testamentary document and intestate succession).[60] The bill also created exceptions for consent and limited immunity for owners whose media (including newspapers, radio, billboards, and magazines) were used to violate the right of publicity but without their knowledge of the unauthorized use.[61] Additionally, the bill would have created a registry in which the right of publicity for any deceased individual would have to be registered.[62] Finally, the bill set a seventy-year limit on the post-mortem right and established the remedy as the greater of $1,000 or actual damages resulting from unauthorized use.[63]

HB 327 had a short life. It was filed on February 2, 2009, and then moved to the Judiciary Committee four days later where it died.[64] Jonathan Faber, a legal scholar and advocate for the right of publicity, documented his concerns about the proposed bill and his conclusion that it was good that it did not pass.[65] Faber expressed two concerns about HB 327: (1) the registry created by HB 327[66] and (2) the influence of industry lobbying efforts, especially the Motion Picture Association of America (MPAA) and video gaming industry who have tried to influence similar bills in other state legislatures.[67]

North Carolina's proposed registry required that "any person claiming to be a successor interest to the right of publicity . . . shall register that claim . . . [for] a fee of five dollars ($5.00)."[68] At the time, legislative reports estimated that the registry would annually generate $15 of revenue against an initial set-up cost of $45,050.[69] In response, Faber commented: "For the burden and expense required of the Secretary of State's office relative to its nominal benefits and almost unavoidable drawbacks, I question whether a registry is worth the bother at all."[70]

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59. *Id*.
60. *Id*.
61. *Id*.
62. *Id*.
63. *Id*.
64. 2009 Bill Tracking NC HB 327, LexisNexis.
65. Jonathan Faber, *Lessons Learned: Legislative Right of Publicity Efforts Throughout U.S. Could Be Instructive for North Carolina's Legislature*, THE FRONT ROW 4, 6 (June 2013), www.ncbar.org.
66. *Id*. at 4.
67. *Id*. at 5.
68. N.C. H.B. 327, 2009 Gen. Assemb., Reg. Sess. (2009).
69. 2009 Legis. Bill Hist. N.C. H.B. 327.
70. Faber, *supra* note 65, at 4.

Faber's second concern—the more significant of the two—is related to lobbyists' influence on the bill. Faber had seen lobbyists in other states create exceptions for movie licensing and video gaming but that influence seems to have been less consequential in the proposed North Carolina bill.[71] However, counter to Faber's concern, HB 327 lists exceptions when "consent for use of another's right of publicity shall not be required" that includes "audiovisual work other than a video game."[72] So, at least in this instance, North Carolina legislators acknowledged the need to obtain an individual's consent to have their identity (name, image, likeness, distinctive appearance) used in a video game.

III. PROBLEM

"All publicity is good, except for the obituary."
- Brendan Behan

The previous section began with Warren and Brandeis developing the legal concept of the right to privacy. Through the 20th-century, that right evolved into a right of publicity that tended to create a separation of the "identity-holder" from the "publicity-holder." The right of publicity grew such that it was typically considered a property right that was freely alienable (descendable, transferable and surviving post-mortem). In many states, the right of publicity gained statutory protection. However, as the right of publicity became more established, it was not without some problems. As Justice Weltner was quoted earlier, it can be an "open-ended, ill-defined force which jeopardizes a right of unquestioned authenticity—free speech."[73] With apologies to Brendan Behan, not all publicity is good. This section explores problems associated with the right of publicity including free speech, alienability, exploitation, digital resurrection, and social media.

With respect to free speech, Justice Weltner pointed out how an expansive right of publicity could trample free speech.[74] In his passionate concurring opinion that reads more like a dissent, Justice Weltner describes a child who wins $25 for an essay on the life of Dr. King and he asks: if this is financial gain and if the court's definition of the right of publicity holds, must the child

71. *Id*. at 5.
72. N.C. H.B. 327, 2009 Gen. Assemb., Reg. Sess. (2009).
73. Martin Luther King, Jr., Ctr. for Soc. Change, 250 Ga. 135 at 150.
74. *Id*.

account for his prize to the estate of Dr. King?[75] As Weltner lists more hypotheticals he highlights the concern that the right of publicity is getting so expansive that it will stifle expression. He writes:

> Obviously, the answers will . . . vary, and properly so, because the circumstances posited are vastly different. The dividing line, however, cannot be fixed upon the presence or absence of "financial gain." Rather it must be grounded in the community's judgment of what . . . is unconscionable. Were it otherwise, this "right of publicity," fully extended would eliminate scholarly research, historical analysis, and public comment, because food and shelter, and the financial gain it takes to provide them, are still essentials of human existence. . . . [N]o newspaper might identify any person or any incident of his life without accounting to him for violation of his "right to publicity." . . . [N]o author might refer to any event wherein his reference is identifiable to any individual (or his heirs!) without accounting for his royalties.[76]

While Justice Weltner's concern may at times seem overblown, the point is valid in the discussion of the scope of free speech (First Amendment protection and expressive speech) against the reach of the right of publicity.

Jennifer Rothman points out that "[t]he right of publicity got off track when it transformed from a personal right, rooted in the individual person (the 'identity-holder'), into a powerful intellectual property right, external to the person, that can be sold to or taken by a non-identity 'publicity-holder.'"[77] In other words, what started as a personal privacy right by Warren and Brandeis grew into a commercial property right that could be managed, sold or devised to heirs. The push by celebrities and corporate interests for the commercialized property right of the publicity holder resulted in no small part from scholars like the Paramount Pictures' lawyer Melville Nimmer and cases involving the estates of Dr. King and Elvis Presley. Movie studios and the estates of deceased celebrities and public figures had much to gain economically in an expansive right of publicity.

Separating the identity-holder from the publicity-holder could lead to exploitation, particularly with the deceased. Disney "digitally resurrected" Peter Cushing, who died in 1994, for the role of Grand Moff Tarkin in the movie Rogue One, released in late 2016.[78] In Peter Cushing's case, Disney obtained permission to use Cushing's likeness from his estate.[79] Because Cushing died

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75. *Id*. 151.
76. *Id*. at 151-152.
77. Rothman, *supra* note 3, at 7.
78. Adam Epstein, *"Rogue One: A Star Wars Story" features a computer-generated character more controversial than Jar Jar Binks*, December 20, 2016, Quartz.
79. *Id*.

without "issue" (no descendants), he bequeathed his entire estate to his faithful former secretary, Joyce Broughton.[80] She granted permission for the use of his likeness but she admitted that she was "taken aback emotionally" when she saw her friend of thirty-five years (who had been dead twenty-two years) on the big screen.[81] Ms. Broughton did what she had the right to do and she was conflicted with the result.

In another instance of figuratively resurrecting the dead for commercial purposes, Robyn Astaire, widow of famous singer-dancer Fred Astaire and manager of his intellectual property, permitted his image to be used in a Dirt Devil vacuum cleaner commercial.[82] Fred Astaire's daughter from his first marriage was not pleased but she was unable to stop it.[83] She stated that "after [Fred's] wonderful career, he was sold to the devil."[84] In the aftermath of those commercials that were shown during Super Bowl XXXI (1997),[85] lines were quickly drawn. On one side, the widow and her supporters trumpeted the post-mortem right of publicity to control Astaire's image and receive substantial licensing fees in the process. On the other side were those who saw an overzealous manager exploiting an intellectual property right to make money on a famous dead person while stifling free expression. Though one could debate the fees that Robyn Astaire charged to use Fred Astaire's image, the California Civil Code supported her actions as it defended the broad property rights of a freely alienable and descendible right of publicity.[86]

Dr. King's estate's protection of his image discussed in the previous section is similar to Robyn Astaire's protection of her husband's image and likeness. In both situations, the publicity-holder is managing the image and likeness of a deceased famous person. It may be debated how well or fairly they are doing it but, for the estate of Dr. King, the Georgia Supreme Court supported it and, for Robyn Astaire, the California Civil Code allowed it. A post-mortem right of publicity has gained a strong foothold in many jurisdictions (currently eighteen states recognize post-mortem right of publicity).[87] However, the post-mortem right has its problems when considering the zealousness of the estate, the threat to free expression, the desires of the deceased,

80. Kristopher Tapley & Peter Debruge, *'Rogue One': What Peter Cushing's Digital Resurrection Means for the Industry*, Variety (Dec. 16, 2016), https://variety.com/2016/film/news/rogue-one-peter-cushing-digital-resurrection-cgi-1201943759/.

81. *Id*.

82. Irene Lacher, *Fred Is Her Co-Pilot*, L.A. Times (Aug. 17, 1997), https://www.latimes.com/archives/la-xpm-1997-aug-17-ca-23118-story.html.

83. *Id*.

84. *Id*.

85. Kara Kovalchik, *8 Dead Celebrities Brought Back to Life to Sell Stuff*, Mental Floss (Apr. 30, 2018), http://mentalfloss.com/article/20659/dead-celebrities-brought-back-sell-stuff.

86. Cal. Civil Code §3344.1 (2017).

87. Simmons, *supra* note 4.

and the temptation or incentive to commercialize the deceased's identity (name, image, likeness) for monetary gain.

The Dr. King, Peter Cushing and Fred Astaire examples focus on three deceased celebrities or public figures. Through the second half of the 20th century, concern for the celebrity or public figure—dead or alive—was the focus of the right of publicity. However, 21st century technology makes it remarkably easy to modify and create digital images in the likeness of anyone, celebrity or not. Sarah Howes, Director and Counselor of Government Affairs and Public Policy at SAG-AFTRA,[88] writes, "There are technologies out there that can insert female actors' faces into nonconsensual fake porn and manipulate video and radio content to literally put words in the mouths of anyone, including actors, news broadcasters and politicians."[89] Technology that is easily available on numerous social media sites can be used on anyone: an actor, a neighbor, a friend or a foe. In a real sense, we can all become exploited "celebrities" whether we want to be or not. There is a need to protect one's name, image and likeness in life and in death, whether celebrity or not.

Returning to Rothman's comment that the right of publicity "got off track" when the "identity-holder" was separated from the "publicity-holder."[90] This derailing occurred when the right of publicity split from the right of privacy in the mid-1950's as previously discussed in the Background section (e.g., Nimmer, *Haelan*, and *Zucchini*). The protections of the right of privacy were judged too "small and narrow"[91] so the right of publicity grew through statute and case law. The challenge for the states and the courts in this new century is to determine the best solution for balancing the rights of all: celebrities, non-celebrities, heirs, the individual (the "identity-holder"), the entity wanting the use of a name, image, or likeness (the "publicity-holder") and the general public.

There are a variety of rights and interests at issue. Sarah Howes describes her view of those rights and issues and the need for balance in the following:

> Publicity rights (along with privacy and false endorsement laws) have long stopped despicable or unjust uses of someone's image in commercials, advertisements, or on products. And, in modern history, publicity rights have

88. SAG-AFRTA is the Screen Actor's Guild - American Federation of Television and Radio Actors. *See* SAG-AFTA, https://www.sagaftra.org/home (last visited May 7, 2019).

89. Sarah Howes, *The Future of Digital Actors & Musicians, Ripped Off Merchandise, Economic Justice for All, and the Fake News & Porn We Should All Be Appalled By*, MEDIUM (Feb. 23, 2018) https://medium.com/@MadamHowesy/the-future-of-digital-actors-musicians-ripped-off-merchandise-branding-economic-justice-for-3d922c68819e.

90. Rothman, *supra* note 3, at 7.

91. *Id.* at 5.

> been justly used in court to protect the digital avatars of musicians and athletes in video games. This case law is going to be critical for professional performers, now that dead actors are appearing in movies.
>
> Unfortunately, statutes need to modernize if we are really going to prevent new technology from changing the rules of the entertainment business, or let's be honest, a civil society. Currently, inadequate state statutes either do not protect people after death and/or they give companies and internet trolls a free, absolute pass to use a likeness in any type of expressive "audiovisual work" imaginable, including, but not limited to, the production of fake acting, fake singing, fake porn, and fake news.
>
> To be clear, the First Amendment needs to be balanced, to a varying degree, depending on what kind of "fake" we are talking about. Certainly there will be legitimate reasons to create fake acting without consent (such as a biopic about the actor), whereas there will *never* be legitimate reason to create fake porn.[92]

Sarah Howes, as an attorney for SAG-AFTRA, is inclined to support a robust right of publicity that protects actors and professional performers. She wants to protect the artist from unfair usage of their image or likeness. In that sense, she has correctly diagnosed a current problem and advocates for improved state statutes. Additionally, she acknowledges the need to balance First Amendment rights (though it seems like an afterthought) with strengthened publicity rights. She, like many others, is furthering the trend that considers publicity to be an alienable property right to be commercialized. The next section will address a solution for the state of North Carolina that takes publicity back to its roots in privacy and limits its alienability.

IV. SOLUTION

"The way forward for the right of publicity is by reclaiming its past."[93]
- Jennifer Rothman

As has been demonstrated in the previous sections, North Carolina has limited case law connected to the right of publicity and no related statute. HB 327 did not survive the legislative process. This leaves the public and the courts in North Carolina unprepared to address 21st century issues of (mis)appropriating the name, image, or likeness of an individual (celebrity or not) for commercial use (or not) and the rights of heirs after the individual has died. Silence is not a good solution.

92. Howes, *supra* note 89.
93. Rothman, *supra* note 3, at 181.

This section will outline a framework for rethinking the right of publicity. It will provide the foundation on which the legislature can create an appropriate statute that protects the individual, allows for free expression and provides reasonable post-mortem rights to heirs. The recommended solution for North Carolina is a right of publicity statute that has the following three features:

(1) privacy-based, not property based
(2) narrowly focused scope (e.g., name, voice, image)
(3) limited alienability

With respect to the right of publicity being based in privacy rather than property, it is instructive to recall how it all started. Warren and Brandeis described in 1890 the right of privacy in their Harvard Law Review article as a protection against the unauthorized use of a person's photograph.[94] This was an instance of empowering a person—identifying the legal right—to control how their image was to be shared with the world. Warren and Brandeis articulated that legal right not as a property right but as right to "peace of mind."[95] This historic grounding of the right of publicity in privacy is essential in preserving the non-economic interests of the involved parties. The historic trend following Warren and Brandeis has been to apply the right of privacy for non-economic (dignitary, emotional, and reputational injuries) but then apply the right of publicity for economic damages.[96] This distinction is unnecessary as Rothman writes:

> A serious interrogation of the purported justifications for the right of publicity suggests that the right makes the most sense when integrated with the right of privacy, rather than when aligned with its purported cousins, copyright and patent law. The most compelling justifications for a right of publicity are the same ones that justify the right of privacy—the promotion and protection of individual dignity, personhood and liberty, and the recovery of (and prevention of) economic and emotional injuries to the individual.[97]

As Rothman notes, the right of publicity—from its beginning—was intertwined with the right of privacy. Because they are intertwined, the right of publicity should protect both an individual's dignity and the individual's ability to recover from economic harm. There need not be separate claims: one for the celebrity to protect an economic interest based on their right of publicity and another for the non-celebrity to protect their dignity based on a misappropriation. The right of publicity applies to all, not just celebrities.

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94. Warren, *supra* note 7, at 195.
95. *Id*. at 200-201. "But where the value of the publication is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent publication at all, it is difficult to regard the right as one of property, in the common acceptance of that term."
96. Rothman, *supra* note 3, at 110.
97. Rothman, *supra* note 3, at 112.

Being based on privacy, the right of publicity will protect against dignitary or emotional harm just as it protects the commercial value of a person's image or reputation.

With respect to the scope of the right of publicity, a review of proposed HB 327 (2009) is helpful. The doomed bill listed the "attributes of an individual that serves to identify that individual"[98] and, in so doing, it provided an appropriately narrow scope for what is protected by the right of publicity. The list included the following attributes: name, voice, signature, photograph, image, portrait, likeness, and distinctive appearance.[99] A North Carolina right of publicity statute should retain this similarly narrow focus.

With respect to alienability, the North Carolina statute should be limited. Limiting the alienability of the right of publicity (limiting the ability to transfer the right to others, either through a will or a contract) will reduce the likelihood of abuse and exploitation though it will not completely eliminate the possibility. The following three approaches should be incorporated into a North Carolina right of publicity statute to appropriately constrain alienability and reduce the risk of abuse:

(1) Allow for the licensing of the right of publicity but with time limits. In the case of minors, for example, the parents could negotiate a licensing agreement for their celebrity-child but it would expire when the child became eighteen years old.

(2) Prevent corporate entities from acquiring the publicity rights of an individual, living or dead. A corporate entity could acquire a license from the individual or the estate but for only a limited time.

(3) Ensure that any post-mortem rights of publicity descend only to the estate or recognized heirs. The estate or the heirs will then have a post-mortem right of publicity for a limited time of fifty years after which the right expires and becomes public domain. (In HB 327 that ultimately failed, North Carolina set the limit at seventy years.[100] In other states, the time period ranges from ten years in Tennessee[101] to hundred years in Oklahoma.[102] Fifty years seems a reasonable time period for, as Smith writes, "such an approach would safeguard both the commercial and privacy interests of the decedent's immediate family for a reasonable amount of time, but not unduly starve the public domain."[103])

This suggested approach differs from the proposed HB 327 and from William Smith's recommendation in *Saving Face: Adopting A Right to Publicity*

98. N.C. H.B. 327, 2009 Gen. Assemb., Reg. Sess. (2009).
99. *Id.*
100. *Id.*
101. Tenn. Code § 47-25-1104 (2014).
102. Okla. Stat. tit. 12 § 1448 (1986).
103. Smith, *supra* note 101, at 2104.

To Protect North Carolinians In An Increasingly Digital World.[104] HB 327 and Smith both provided a provision to allow for free descendibility and transferability (i.e., alienability). Smith writes that "such a provision would allow the right [to] be freely assignable during life and descendible upon death . . . allow[ing] those interested in commercialization of their images to do so freely."[105] The danger of such free alienability is that it opens the door to exploitation or abuse. A parent could sell the publicity rights of their child-celebrity. A corporate entity who purchased an individual's right of publicity through contract or an individual who received the right of publicity through a will or intestate succession could likewise exploit that right. Moreover, there are certain rights such as life and liberty that are inalienable and are therefore not transferable or descendible.[106] While the right of publicity may not be inalienable in the same sense as life and liberty, it is a personal right based in privacy that should be protected from abuse. Accordingly, alienation should be carefully and thoughtfully constrained.

Lastly, as North Carolina needs a right of publicity statute, a new name or descriptor of that right may be needed that appropriately resets the balance between publicity and privacy in the 21st century. To this point, the concept of the right of publicity has tended to emphasize its commercial value, broad transferability, basis in property law, and use by celebrities or public figures. A suggested new name for the legal right is "right of the identity-holder," rather than "right of publicity." The benefit of using a new term is that it creates the opportunity to clarify the legal concept: moving it from property-based to privacy-based; moving it from freely transferable to limited transferability; and moving it from a right mainly used by public figures to a right that applies to everyone.

V. CONCLUSION

The right of publicity grew out of the right of privacy and it typically covers the right of a person to control the commercial use of their identity. Through the 20th century, the right of publicity primarily grew into a protection of the economic value of the identity that was based on property rights

104. William K. Smith, *Saving Face: Adopting A Right to Publicity To Protect North Carolinians In An Increasingly Digital World*, 92 N.C. L. Rev. 2065 (2014).

105. *Id.* at 2103.

106. Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 Georgetown L.J. 185, 209 (2012) (Rothman writes: "Fundamental rights have long been deemed inalienable. In fact, such rights are often defined by this feature and simply termed 'inalienable rights.' The United States Constitution expressly protects the rights of life, liberty and property and the freedoms of speech, religion, and association. Each of these rights, among others, is inalienable and cannot be given away or sold by the rights holder. These rights are personal to the holder and do not survive the holder's death.").

and was intended primarily for celebrities. North Carolina currently has no statute defining or protecting the right of publicity.

As we move into the 21st century, it is essential that North Carolina create a statute that protects the use and prevents the misuse of an individual's identity. This statute for the right of publicity, or perhaps better named the right of the identity-holder, would be privacy-based, narrowly focused in scope, with limited alienability and clearly applicable to everyone.