

And the Two Shall Become One: Conceptualizing the Right of Publicity as the Nexus of Trademark and Copyright Law

ABSTRACT

The right of publicity, which bars the unauthorized commercial use of a celebrity’s likeness, has become increasingly important in recent years. As generative artificial intelligence (AI) threatens to replace singers’ voices and actors’ appearances on screen, people are increasingly looking to the right of publicity to protect entertainers from exploitation.

Defining the right of publicity, however, is notoriously difficult. Since the right overlaps with both trademark and copyright law, circuit courts are currently split over whether to apply the trademark-based Rogers test or the copyright-based transformative use test.

This Note, in addressing this split, proposes a legal framework under which all right of publicity cases can be evaluated uniformly. The central point is that the right of publicity does not function as only a trademark or only a copyright, but as a combination of both. In identifying the two distinct harms associated with the right of publicity, this Note proposes a solution—called the “dual harm approach”—that combines both sides of the circuit split instead of choosing one over the other. By tying the right of publicity to existing trademark and copyright doctrine, this approach will enable judges to evaluate publicity rights claims with familiar concepts instead of starting from scratch.

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The right of publicity is a common law tort that bars the unauthorized appropriation of one's identity.¹ Although everyone technically has a right of publicity, most right of publicity cases involve a celebrity suing a defendant for putting her name or face on a commercial product—like a T-shirt or song title—without her approval.²

However, judicial definitions of the right of publicity have been “notoriously incoherent and inconsistent.”³ Because someone can depict a celebrity's likeness in many ways and for many reasons, courts have disagreed over what types of conduct are tortious.⁴ Over the past few decades, courts have clashed over the right of publicity in cases involving video games, T-shirts, rap songs, movie titles, and more.⁵ As a result of these inconsistencies, the tort today has a “jagged and unpredictable reach” that chills users who want to use celebrity likenesses in their creative works.⁶

1. RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977).

2. See, e.g., *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 801 (Cal. 2001); *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1176 (9th Cir. 2015); *Rogers v. Grimaldi*, 875 F.2d 994, 997 (2d Cir. 1989).

3. Jennifer E. Rothman & Robert C. Post, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 89 (2020).

4. *Id.* at 90.

5. *Id.* at 91.

6. See *id.*

One prominent disagreement among the circuits is whether to apply the “*Rogers* test” or the “transformative use test” when evaluating right of publicity claims.⁷ While the trademark-based *Rogers* test was one of the earliest tests for publicity right claims and has been affirmed by the US Court of Appeals for the Second and Sixth Circuits,⁸ the Third and Ninth Circuits have rejected it in favor of the copyright-centric transformative use test.⁹

This Note analyzes the legal grounding for the right of publicity and puts forward a framework to resolve this disagreement between the circuits. Part I analyzes the current circuit split on the right of publicity, specifically between the *Rogers* test and the transformative use test. Part II compares the right of publicity to trademarks and copyrights, and proposes a “dual harm approach” to evaluate the right of publicity under both trademark and copyright principles. Part III applies the dual harm approach to past precedents as well as emerging topics like generative AI and a federal right of publicity.

I. EXAMINING THE CURRENT CIRCUIT SPLIT ON THE RIGHT OF PUBLICITY

A. *The Supreme Court’s Precedent in Zacchini*

The right of publicity is a right to profit off one’s own likeness,¹⁰ and it was first recognized by the United States Supreme Court in *Zacchini v. Scripps-Howard Broad. Co.* in 1977.¹¹ In *Zacchini*, the plaintiff (*Zacchini*) was an entertainer who was famous for his signature “human cannonball” performances.¹² *Zacchini* performed his act in a fenced-off area for paying attendees, so when a reporter filmed and broadcast his performance without his consent, he sued the reporter for violating his publicity rights.¹³ In holding for *Zacchini*, the Court explained that *Zacchini* had a “right to the publicity value of his performance.”¹⁴ This justification, the Court made clear, was about an unfair sense of profit rather than privacy or defamation: “[p]etitioner

7. Compare *Rogers*, 875 F.2d at 1004 with *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271 (9th Cir. 2013).

8. *Rogers*, 875 F.2d at 1004; *Parks v. LaFace Recs.*, 329 F.3d 437, 450 (6th Cir. 2003).

9. *In re NCAA*, 724 F.3d at 1271, 1282; *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 158 (3d Cir. 2013).

10. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977).

11. *Id.* at 565.

12. *Id.* at 563.

13. *Id.* at 563–64.

14. *Id.* at 565.

does not seek to enjoin the broadcast of his performance,” it noted, “he simply wants to be paid for it.”¹⁵ Thus, while the right of publicity originally came from the right to privacy,¹⁶ it eventually became a means of protecting celebrities’ abilities to profit from their own public personas.¹⁷

Zacchini’s affirmation of the right to profit, however, created conflicts with defendants’ rights to free speech.¹⁸ As people continued to incorporate celebrity likenesses into works of art, they would argue that their free speech rights under the First Amendment defended them from right of publicity claims.¹⁹ After *Zacchini*, circuit courts began to develop tests to balance the right of publicity with the First Amendment.²⁰ Of the balancing tests that have been put forth, the *Rogers* test and the transformative use test have emerged as two prominent but competing frameworks.²¹

B. The Rogers Test

In *Rogers v. Grimaldi*, the Second Circuit articulated one of the earliest tests for balancing free speech rights with the right of publicity.²² In that case, the defendant had created a film—named *Ginger and Fred*—that told the story of two fictional cabaret performers who became famous by imitating Ginger Rogers and Fred Astaire.²³ Ginger Rogers sued the filmmaker, arguing that the movie profited off her popularity without compensating her.²⁴ In weighing the defendant’s free speech rights against Ginger Rogers’s publicity rights, the court created a two-pronged test to balance the two interests.²⁵ Under this test, a defendant’s artistic freedom to reference a celebrity will prevail over that celebrity’s right of publicity unless the reference is (a) “wholly unrelated” to the underlying work or (b) “a disguised commercial

15. *Id.* at 578.

16. Yen-Shyang Tseng, *Protecting the First Amendment Rights of Video Games from Lanham Act and Right of Publicity Claims*, 48 PEPP. L. REV. 425, 454 (2021) (“The right of publicity originated from the right to privacy.”).

17. *See Zacchini*, 433 U.S. at 578.

18. *See, e.g., Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989).

19. *See, e.g., id.* (“[Multiple] courts, citing their concern for free expression, have refused to extend the right of publicity to bar the use of a celebrity’s name.”).

20. *See, e.g., id.*

21. *See, e.g., id.* (articulating the *Rogers* test); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 163 (3d Cir. 2013) (applying the transformative use test to a publicity right claim).

22. *See* 875 F.2d at 1004.

23. *Id.* at 996–97.

24. *Id.* at 997.

25. *See id.* at 1004.

advertisement” for the defendant’s products.²⁶ In evaluating the facts of the instant case, the court acknowledged that the title “Ginger and Fred” could potentially mislead consumers into thinking that Ginger Rogers had endorsed the film.²⁷ However, since the names “Ginger” and “Fred” were still both artistically important to the story—and therefore were not “wholly unrelated” to the film’s content—the court held that the defendant’s free speech rights prevailed.²⁸ As legal scholarship developed post-*Rogers*, the two prongs of the decision came to be known as the “*Rogers test*.”²⁹ Since the court in *Rogers* dealt with both a trademark claim and a right of publicity claim, it enacted a similar two-prong test for trademarks as well.³⁰

The Sixth Circuit affirmed the *Rogers test* in *Parks v. LaFace Records*.³¹ Here, Rosa Parks sued hip-hop duo OutKast for naming one of its songs “Rosa Parks.”³² As the song was largely about partying and violence—including lines like “[w]e the type of people make the club get crunk” and “[w]e stabbing every city then we headed to that bat cave”—Parks argued that the song had nothing to do with her and was thus misrepresenting her likeness.³³ In ruling in favor of Parks, the court explained that a reasonable person could find the title “Rosa Parks” to be “wholly unrelated” to the content of the song, thus failing the *Rogers test*.³⁴ As it explained, “reasonable persons could conclude that there is no relationship of any kind between Rosa Parks’ name and the content of the song—a song that is nothing more . . . than a paean announcing the triumph of superior people in the entertainment business.”³⁵

In evaluating why OutKast named their song “Rosa Parks” in the first place, the court explained that the title “unquestionably enhanced the song’s potential sale to the consuming public” and that

26. *Id.*

27. *Id.* at 1001 (“The survey evidence . . . indicates at most that some members of the public would draw the incorrect inference that Rogers had some involvement with the film.”).

28. *Id.* at 1004–05.

29. *See Rothman, supra* note 3, at 130–31.

30. *See Rogers*, 875 F.2d at 999 (noting that a defendant’s trademark would violate the Lanham Act if (a) “the title has no artistic relevance to the underlying work whatsoever” or (b) if the title “explicitly misleads as to the source or the content of the work”). *But see* Jack Daniel’s Properties, Inc. v. VIP Prod. LLC, 599 U.S. 140, 163 (2023) (holding that *Rogers* does not apply to trademark cases where a defendant’s parody or modification of another trademark serves as a mark for his own goods).

31. 329 F.3d 437, 461 (6th Cir. 2003).

32. *Id.* at 442.

33. *Id.* at 443, 459, 461.

34. *Id.* at 461.

35. *Id.* at 442, 453.

other titles “would not have the marketing power of an icon of the civil rights movement.”³⁶ The potential harm in permitting such a title, the court explained, was that it could mislead consumers as to what the song was about.³⁷ Although the use of Parks’s name was “unquestionably . . . a good marketing tool,” the court believed that it could be a “flagrant deception” of the public because it implied that Parks herself had approved of the song when she did not.³⁸ Accordingly, the Sixth Circuit reversed and remanded the lower court’s grant of summary judgment for the defendants.³⁹

C. The Transformative Use Test

Although the *Rogers* test was one of the earliest tests for publicity right claims, the Third and Ninth Circuits have noted that it produces bad results in many cases.⁴⁰ In *Hart v. Electronic Arts Inc.*, for example, the Third Circuit declined to apply *Rogers* to a case involving a video game avatar.⁴¹ Here, former Rutgers quarterback Ryan Hart sued Electronic Arts (EA) for portraying a character resembling him in EA’s video game, *NCAA Football 2006*, without his consent.⁴² Hart argued that EA unfairly profited off his public persona when it created a digital avatar of a Rutgers quarterback with appearances, clothes accessories, and biographical details matching himself.⁴³ He also argued, and the court agreed, that the similarities between the game’s avatar and himself were not coincidental.⁴⁴ Since customers would find EA’s game more enjoyable if their characters resembled real-life players, the court found that EA had based the game’s avatars on real players to increase the game’s profit and appeal.⁴⁵

Given EA’s motives for using Hart’s likeness, the court noted that the *Rogers* test was unsuitable.⁴⁶ Since *Rogers* restricts works that reference celebrities in “wholly unrelated” ways, it is inapplicable when a defendant purposefully makes its product as *related* to the celebrity

36. *Id.* at 453.

37. *Id.*

38. *Id.* at 453–54.

39. *Id.* at 463.

40. *See, e.g.,* *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1179 (9th Cir. 2015) (declining to apply the *Rogers* test to right of publicity claims since the test was “designed to protect consumers from the risk of consumer confusion”).

41. 717 F.3d 141, 146–47, 157 (3d Cir. 2013).

42. *Id.* at 146.

43. *Id.* at 147, 166.

44. *See id.* at 168.

45. *Id.*

46. *See id.* at 157.

as possible.⁴⁷ In other words, while *Rogers* would prevent a water polo video game from using Hart's likeness—since water polo and Hart are wholly unrelated to each other—the test would be completely fine with, and perhaps even encourage, a video game about college football that incorporates Hart's likeness.⁴⁸ Thus, since *Rogers* seemed to reward rather than punish EA for exploiting Hart's reputation, the court reasoned that applying the test in such a scenario would “turn the right of publicity on its head.”⁴⁹

After deciding that *Rogers* was not applicable, the Third Circuit applied the “transformative use test,” which originally was articulated by the California Supreme Court.⁵⁰ Unlike *Rogers*, which permits any use of a celebrity's likeness that is somewhat related to the underlying product,⁵¹ the transformative use test sets an upper bound on how heavily a defendant can copy a celebrity's appearance.⁵² The transformative use test is based on the first factor of copyright's fair use doctrine,⁵³ and it states that a defendant can only depict a celebrity's likeness in a product if he “sufficiently transforms” the likeness.⁵⁴ In evaluating whether a work is sufficiently transformative, courts look at five general factors: (1) if the celebrity likeness is “one of the ‘raw materials’ from which an original work is synthesized,” (2) if the work is “primarily the defendant's own expression,” (3) “whether the literal and imitative or the creative elements predominate in the work,” (4) “whether the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted,” and (5) “whether the ‘artist's skill and talent is manifestly subordinated to the

47. See *id.* at 157–58.

48. Cf. *Parks v. LaFace Recs.*, 329 F.3d 437, 453 (6th Cir. 2003) (observing that a song about partying and violence may not be named “Rosa Parks” under the *Rogers* test while implying that a song about civil rights could be).

49. See *Hart*, 717 F.3d at 157.

50. *Id.* at 165; *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808–09 (Cal. 2001).

51. *Rogers v. Grimaldi*, 875 F.2d 994, 1005 (2d Cir. 1989) (noting that even a “minimally relevant use” of a celebrity's name could be permissible if it was not intentionally misleading).

52. See *Hart*, 717 F.3d at 163.

53. *Comedy III Prods., Inc.*, 21 P.3d at 808 (“[T]he first fair use factor . . . [which asks] whether and to what extent the new work is ‘transformative’ . . . [is] at the heart of any judicial attempt to square the right of publicity with the First Amendment.”); *Hart*, 717 F.3d at 159 (“[T]o import the ‘fair use’ analysis from copyright, the *Comedy III* court decided that only the first fair use factor, ‘the purpose and character of the use,’ was appropriate.” (citing *Comedy III Prods., Inc.*, 21 P.3d at 808)).

54. *Hart*, 717 F.3d at 163.

overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame.”⁵⁵

In applying the transformative use test, the court in *Hart* found that the defendant’s video game did not pass muster.⁵⁶ Since the game’s avatar looked exactly like Hart and did exactly what Hart did in real life—play college football in college football stadiums—the use of his likeness was not transformative enough to warrant First Amendment protections.⁵⁷ Even if EA’s game looked somewhat different from real life due to its digital nature, this difference was too minute.⁵⁸ Accordingly, the court reversed and remanded the lower court’s ruling of summary judgment in favor of EA.⁵⁹

Like the Third Circuit, the Ninth Circuit has also affirmed the transformative use test as the standard for publicity right claims.⁶⁰ In *In re NCAA*, the court heard a case similar to *Hart* where a college quarterback sued EA for incorporating his digital lookalike into a video game without his consent.⁶¹ Like the Third Circuit, the Ninth Circuit also found in favor of the plaintiff under the transformative use test.⁶² In applying the transformative use test over *Rogers*, the Ninth Circuit noted, like the Third Circuit, that *Rogers* was ill-equipped for the case’s particular facts.⁶³ “[The Plaintiff’s] publicity claim is not founded on an allegation that consumers are being illegally misled into believing that he is endorsing EA,” it explained.⁶⁴ “Instead, [his] claim is that EA has appropriated, without permission . . . his talent and years of hard work on the football field.”⁶⁵ As a result, the court reasoned that the *Rogers* test was “simply not responsive” to the facts at hand.⁶⁶

Going further than the Third Circuit, the Ninth Circuit reasoned in *In re NCAA* that *Rogers* was inapplicable not only to video game cases, but to all right of publicity cases.⁶⁷ It noted that while *Rogers*’s main goal was preventing consumer confusion—the hallmark of a

55. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1274 (9th Cir. 2013) (citing *Comedy III Prods., Inc.*, 21 P.3d at 809–10).

56. *Hart*, 717 F.3d at 170.

57. *See id.* at 166.

58. *Id.* (“[T]his is not transformative . . . [because] the various digitized sights and sounds in the video game do not alter or transform the Appellant’s identity in a significant way.”).

59. *Id.* at 170.

60. *In re NCAA*, 724 F.3d at 1273–74 (9th Cir. 2013).

61. *See id.* at 1271.

62. *Id.* at 1284.

63. *Id.* at 1281–82.

64. *Id.* at 1281.

65. *Id.*

66. *Id.*

67. *See id.* at 1280.

trademark infringement claim—the right of publicity was concerned with a different harm.⁶⁸ As the court explained, “[t]he right of publicity . . . does not primarily seek to prevent consumer confusion.”⁶⁹ “Rather,” it continued, “it primarily protects a form of intellectual property [in one’s person] that society deems to have some social utility.”⁷⁰ The court then argued that because the right of publicity protects the celebrity as opposed to the consumer, the consumer-focused *Rogers* test was not a good fit for right of publicity claims.⁷¹ Outside of *In re NCAA*, the Ninth Circuit has affirmed its adherence to the transformative use test by applying it to a variety of publicity right cases, such as those involving celebrity parodies and other video game cases.⁷²

II. DELINEATING THE TWO HARMS OF THE RIGHT OF PUBLICITY

In characterizing the conflict between the *Rogers* test and the transformative use test, one recurring theme has been the difference between trademark and copyright law.⁷³ Numerous courts have observed that the *Rogers* test is rooted in trademark law,⁷⁴ while the transformative use test is based on copyright law.⁷⁵ Thus, if the conflict between the two tests mirrors the differences between trademark and copyright law, understanding this conflict requires an understanding of the differences between trademarks and copyrights themselves. In Sections A–E below, this Note will delve into the fundamental features of trademarks and copyrights, and it will explain how a clear understanding of these features can clarify, and even help resolve, the current split on the right of publicity.

68. *See id.* at 1281.

69. *Id.* at 1280.

70. *Id.* (citing *Comedy III Prods., Inc.*, 21 P.3d at 804) (cleaned up).

71. *See id.* at 1281–82 (highlighting the flaws of the *Rogers* test before declining to apply it).

72. *See, e.g.*, *Hilton v. Hallmark Cards*, 599 F.3d 894, 911 (9th Cir. 2010) (applying the transformative use test to a right of publicity case involving parody); *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1178 (9th Cir. 2015) (applying the transformative use test to a right of publicity case involving a video game character).

73. *See, e.g.*, *Hart*, 717 F.3d at 153 (“[Between] the trademark-based *Rogers* Test, and the copyright-based Transformative Use Test”).

74. *E.g., id.*; *In re NCAA*, 724 F.3d at 1280 (“[T]he *Rogers* test . . . was designed to protect consumers from the risk of consumer confusion—the hallmark element of a Lanham Act claim.”); *Davis*, 775 F.3d at 1179 (affirming that the *Rogers* test is focused on trademark-type claims); *Hart*, 717 F.3d at 153.

75. *E.g.*, *In re NCAA*, 724 F.3d at 1273–74 (noting that the transformative use test was based off copyright’s fair use doctrine); *Hart*, 717 F.3d at 153.

A. Trademarks and the Harm of Consumer Deception

Trademarks are labels that point consumers to a particular producer.⁷⁶ Because people like to buy products from companies they are familiar with, signaling to a customer that a product is made by a famous brand increases the chances that they buy that product.⁷⁷ Importantly, however, trademarks cannot be functional.⁷⁸ Since marks that are functional give a material competitive advantage without the limits of a patent, US trademark law bars marks that increase the functionality of their product.⁷⁹

Because trademarks cannot be functional, they may be characterized as providing an “extrinsic” value to the goods they reside on.⁸⁰ Trademarks only provide extrinsic value because they can only increase a product’s worth by invoking a customer’s outside knowledge of the producer.⁸¹ Nike’s swoosh logo does not make the shoe feel more comfortable or last longer; its only value is signaling that the shoe was produced by Nike.⁸² Conversely, removing the trademark from a product also does not make it substantively worse.⁸³ Stripping the Nike logo off a shoe will not cause the shoe to wear out faster or feel less comfortable; taking the Coca-Cola label off a Coke drink will not make it taste less sweet.⁸⁴ As a trademark cannot affect the underlying, intrinsic quality of the good it is placed on, it only contributes an extrinsic value to it.⁸⁵

Because trademarks rely on a customer’s preexisting knowledge of the product’s maker, the primary harm in trademark infringement is consumer deception.⁸⁶ Although a fake Nike or Coke logo will not improve the quality of the product it is placed on, infringers will still

76. MARY LAFRANCE, UNDERSTANDING TRADEMARK LAW § 2.02 (2020) (ebook).

77. *See id.*

78. *See id.* § 2.03.

79. *See id.* §1.06 (“The functionality limitation of trademark and unfair competition law is intended to prevent these doctrines from impermissibly overlapping with federal patent law.”).

80. *Cf. id.* § 2.02.

81. *See id.* (“[T]he trademark is a form of communication . . . in which the merchant identifies which products or services it stands behind, and distinguishes them from competing products.”).

82. *See Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165 (1995) (“[A] product feature . . . cannot serve as a trademark, if it is essential to the use or purpose of the article or if it affects the cost or quality of the article.”) (cleaned up).

83. *Cf. id.*

84. *Cf. id.*

85. *Cf. id.*

86. *See LAFRANCE, supra* note 76, § 1.05 (“As originally enacted, the Lanham Act reflected the traditional common law view of trademark . . . as prohibiting only those uses that ‘convey a false impression to the public mind.’”).

use these marks to exploit the public's preexisting goodwill toward these companies.⁸⁷ If a defendant knows that his shoes are inferior to Nike's, he may use a lookalike Nike logo to make customers think that his products come from the superior brand. The fake logo does not actually give his shoes the quality of a Nike shoe; it only persuades consumers to think so. Thus, because an infringer exploits a mark's extrinsic value by misleading consumers about the product's source, the hallmark principle of trademark law is the likelihood of confusion test.⁸⁸ By barring marks that confuse consumers about a product's true origins, the likelihood of confusion test cuts off the infringer's ability to exploit another brand's goodwill for himself.⁸⁹

Importantly, however, consumer deception is a different harm from appropriation or non-originality.⁹⁰ In trademark infringement cases, the issue is not that the defendant did not make his own original products.⁹¹ When a person wants to utilize a knockoff Nike or Coke logo, he must produce his own shoes or drinks first; if he does not, he has nothing to place his deceptive marks on in the first place.⁹² Thus, the issue in trademark infringement is not that the defendant did not create his own products; it is that he did make his own products, but then labeled them as if they came from someone else.⁹³

B. Copyrights and the Harm of Appropriation

Copyrighted works, on the other hand, differ from trademarks because they can generate an "intrinsic" value for their products.⁹⁴ Copyrighted works provide an inherent aesthetic value to the items on which they reside.⁹⁵ Take the example of background music in video games. For a standard shoot-em-up video game, an awe-inspiring Hans Zimmer soundtrack may greatly improve someone's playing

87. *See id.*

88. *Id.* § 3.02.

89. *See id.* (noting that the likelihood of confusion test bars marks if "ordinarily prudent consumers are likely to be misled or confused") (cleaned up).

90. *See, e.g., Parks v. LaFace Recs.*, 329 F.3d 437, 453 (6th Cir. 2003) (noting that the defendant could deceive consumers even though its song was unrelated to the plaintiff's identity).

91. *See generally id.*

92. *Cf. id.* (describing how the defendant put the plaintiff's likeness in an original song).

93. *Cf. LAFRANCE, supra* note 76, § 1.06 ("In contrast, a trademark may be protected without any showing of novelty, nonobviousness or originality.").

94. *See* Laura N. Gasaway, *Copyright Basics: From Earliest Times to the Digital Age*, 10 WAKE FOREST INTELL. PROP. L.J. 241, 246 (2010) (noting that copyrights protect the substantive aesthetic value of artistic works).

95. *See id.* at 245.

experience.⁹⁶ Upon playing, a customer may enjoy and thus pay more for a game that has the epic instrumentals of *The Dark Knight* or *Inception* than a game that is completely silent.⁹⁷ Here, Zimmer’s music provides an “intrinsic” value because it makes the game itself a better product; unlike the label on a soft drink or the logo on a shoe, Zimmer’s music actually improves the quality and performance of the underlying product.⁹⁸

Notably, a game’s background music can be valuable regardless of whether a customer knows who made it.⁹⁹ Even if a player has no idea who Hans Zimmer is, his music can still greatly improve the player’s gaming experience. Because music has an inherent aesthetic value—it simply sounds good to the ears—a consumer may value and thus pay more for a product that incorporates it.¹⁰⁰ Most copyrighted works provide intrinsic value this way. Putting a beautiful painting on a shirt will make the shirt more valuable than leaving a blank design; printing a clever poem on a mug will make it more marketable than leaving it completely bare. In comparison to trademarks, which normally only bring value if the customer recognizes who the producer is, copyrighted works like music or art can be valuable regardless of whether the customer recognizes its creator.

Because copyrighted works provide an intrinsic value to their products, the harm associated with them is appropriation.¹⁰¹ Whether it be making a shirt that depicts a famous movie scene or uploading a YouTube video that plays a beautiful song in the background, infringers appropriate the copyrighted works of others because it makes their own products more valuable.¹⁰² Since it is often much cheaper to copy another person’s art work than to create one from scratch, copyright

96. See *The Importance of Music in Video Games*, ANARA PUBLISHING, <https://www.anarapublishing.com/the-importance-of-music-in-video-games/> [<https://perma.cc/FX3K-WUPP>] (last visited Mar. 8, 2024) (“[W]ith the rapid advancements in technology accompanying video games, soundtracks . . . have become an important part of the storytelling process.”).

97. *Cf. id.*

98. *Cf. id.*

99. *Cf. id.* (observing that background music can inherently improve a game’s playing experience).

100. *Cf. id.*

101. See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1281 (9th Cir. 2013) (“[The plaintiff’s claim] is that EA has appropriated, without permission . . . his talent and years of hard work on the football field.”); Gasaway, *supra* note 94, at 241 (“As long as there have been artistic, literary, and musical works produced, there have been unscrupulous persons who . . . appropriated it as his or her own.”).

102. *Cf., e.g., Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 539 (1985) (describing how a magazine attempted to copy from a presidential memoir to make its product more valuable).

infringement is a near cost-free way to boost the commercial value of one's products.¹⁰³

To prevent unfair appropriation, the first factor of copyright's fair use doctrine—"the purpose and character of the use"¹⁰⁴—generally requires potential infringers to transform the work into their own.¹⁰⁵ If a YouTube uploader wants to use a Taylor Swift song in a video without a license, the uploader cannot simply paste the song and enjoy the increased profits for free.¹⁰⁶ Rather, to qualify for fair use, she must put her own effort into transforming the song—through parody, commentary, or otherwise—such that the work is essentially her own.¹⁰⁷ By requiring secondary authors to contribute their own creative efforts to the product, the fair use doctrine raises the bar for when someone can use the copyrighted works of another.¹⁰⁸

However, the harm of artistic appropriation is not equivalent to consumer deception.¹⁰⁹ Since defendants can profit from copyright infringement even when consumers do not recognize the original artist, consumer deception is not the primary issue in copyright infringement cases.¹¹⁰ For example, if a YouTuber uploads a dance video with a Taylor Swift song in the background, she is not necessarily deceiving her viewers about its source.¹¹¹ After all, it is unlikely that a viewer thinks that just because the video has Swift's music in the background, Swift herself must have produced it. Rather, the issue is that the infringer has used Swift's song to boost the value of her own video without compensating Swift—thus disincentivizing her from making more music in the future.¹¹² Because Swift's music makes the

103. See *id.* at 562 ("The crux [is] . . . whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.").

104. 17 U.S.C. § 107(1).

105. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (noting that analysis of the first fair use factor "turns primarily on whether, and to what extent, the challenged use is *transformative*").

106. See Jimit Bagadiya, *The Do's & Don'ts [sic] for Using YouTube Copyright Music*, SOCIALPILOT (Aug. 15, 2023), <https://www.socialpilot.co/youtube-marketing/youtube-copyright-music#:~:text=If%20you%20wish%20to%20utilize,whenever%20their%20work%20is%20used> [<https://perma.cc/NN3J-46Z2>].

107. See Leval, *supra* note 105, at 1111.

108. See *id.*

109. See, e.g., *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1280–81 (9th Cir. 2013) (noting that the defendant's exploitation of the plaintiff's likeness was unrelated to consumer confusion).

110. See *id.* at 1281.

111. See *id.*

112. See Ben H. Weil & Barbara Friedman Polansky, *Copyright Basics and Consequences*, 24 J. CHEM. INF. COMPUT. SCI. 43, 43 (1984) (noting how copyrights provide artists with "requisite

Youtuber's video inherently more attractive, simply admitting the infringement to the video's viewers may not resolve the harm. Even if the Youtuber tells her viewers that she is using Swift's music without a license, her viewers may enjoy the music so much that they watch the Youtuber's videos regardless—thus continuing to provide the Youtuber revenue. In this case, the infringer would still be harming the artist (Swift) even when she is not deceiving her everyday customers.

Thus, copyrights and trademarks predominately protect different groups of people.¹¹³ Because trademark infringement primarily harms ordinary consumers, the likelihood of confusion test was developed to protect consumers from being deceived.¹¹⁴ On the other hand, because copyright infringement primarily harms the creators of artistic works, the fair use doctrine was developed to protect the economic incentives of creators.¹¹⁵ While copyrights and trademarks may seem like near-equivalent forms of intellectual property, they differ in both the harms they prevent and the people they protect.¹¹⁶

C. *The Rogers Test as the Analog to Trademark Infringement*

Since the *Rogers* test and the transformative use test are respectively based on trademark and copyright law, highlighting the differences between the two doctrines provides new context to the circuit split.¹¹⁷ The reason for the split between the Third-Ninth and Second-Sixth Circuits is not that the *Rogers* test and the transformative use test are inherently incompatible.¹¹⁸ Rather, the circuits applied

economic incentive" to create art). For clarification, dancing to a song does not qualify as a fair use of that copyrighted work. See *Copyright and Fair Use*, HARV. U. OFF. GEN. COUNS., <https://ogc.harvard.edu/pages/copyright-and-fair-use> [<https://perma.cc/X2ZU-58G3>] (last visited Aug. 20, 2024) (noting that "the creator has the exclusive right" to "perform" the work, which includes dances).

113. Compare LAFRANCE, *supra* note 76, § 1.05 (describing consumer confusion as a harm against the "ordinary purchaser"), with Leval, *supra* note 105, at 105 (describing copyright infringement as a harm against the author).

114. See LAFRANCE, *supra* note 76, § 3.02.

115. See Weil, *supra* note 112, at 43.

116. See *supra* Section II.A, B (distinguishing consumer deception from appropriation). Compare LAFRANCE, *supra* note 76, § 2.02 (describing consumer harms), with Leval, *supra* note 105, at 1105 (describing harms against creators).

117. See *supra* Section I (discussing the circuit split); *supra* Section II.A, B (discussing the differences between trademark and copyright law).

118. See generally *Parks v. LaFace Recs.*, 329 F.3d 437, 451–52 (6th Cir. 2003); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1280 (9th Cir. 2013).

different tests because the cases before them had different harms that warranted different standards of evaluation.¹¹⁹

Rogers and *Parks* relied on trademark principles because the defendants were using celebrity names for their extrinsic value—i.e., like trademarks.¹²⁰ The defendants' movie and song titles resembled trademarks because they were labels that told customers with whom the products were associated.¹²¹ Just as a swoosh on a shoe tells customers that the shoe comes from Nike, the title "Ginger and Fred" could imply to consumers that the movie was affiliated with Ginger Rogers and Fred Astaire, as could the song title "Rosa Parks" for Rosa Parks.¹²² Like trademarks, the titles also did not improve the intrinsic quality of the products they resided on. Just as a Coke logo does not improve the taste of the drink it labels, the name "Rosa Parks" did not improve the musical quality of OutKast's song, nor did the title "Ginger and Fred" increase the watchability of the filmmaker's movie.¹²³ Had the defendants' movie or song titles been replaced, the underlying content of these works would not have been affected.

The titles thus behaved like trademarks because they relied on invoking the public's prior goodwill towards these celebrities.¹²⁴ If a consumer did not have outside knowledge of who Ginger Rogers or Rosa Parks were, the titles would have provided no value for their products other than being random names.¹²⁵

Therefore, since the defendants in these cases were using celebrity names for their extrinsic value, the harm in question was consumer deception.¹²⁶ As movie and song titles can function like public labels, the courts were concerned that the titles could mislead consumers as to who actually sponsored the defendant's product.¹²⁷ In *Rogers*, the court observed that the title "Ginger and Fred" could mislead viewers into thinking that the film was affiliated with Ginger

119. Compare *Parks*, 329 F.3d at 453 (noting the present harm of consumer deception), with *In re NCAA*, 724 F.3d at 1280 (noting that consumer deception was not a relevant harm in the case).

120. See *Rogers v. Grimaldi*, 875 F.2d 994, 1003 (2d Cir. 1989); *Parks*, 329 F.3d at 452.

121. See *Rogers*, 875 F.2d at 998 (noting that titles serve a commercial promotion purpose); *Parks*, 329 F.3d at 454.

122. See *Rogers*, 875 F.2d at 1001; *Parks*, 329 F.3d at 453.

123. Since a product's title is analogous to a brand name (a type of trademark), it does not increase the product's functionality. Cf. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165 (1995) (holding that trademarks cannot be functional).

124. Cf. *id.*

125. Cf. *Rogers*, 875 F.2d at 1001.

126. See *supra* Section II.A (explaining that consumer deception occurs when defendants exploit an item for its extrinsic value, such as in the case of trademark infringement).

127. See, e.g., *Parks v. LaFace Recs.*, 329 F.3d 437, 453 (6th Cir. 2003).

Rogers and Fred Astaire when it was actually about two made-up characters.¹²⁸ Similarly in *Parks*, the court observed that the name “Rosa Parks” could imply that Parks had endorsed OutKast’s song when in reality she wanted nothing to do with it (hence the suit).¹²⁹ Since the defendants had named their products after celebrities who did not endorse them, there was genuine concern that they were using the celebrity names like deceptive trademarks.¹³⁰

Because both cases involved consumer deception concerns, the courts applied a test rooted in trademark doctrine.¹³¹ Just as the likelihood of confusion test bars marks that are likely to confuse consumers about a product’s source, courts use the *Rogers* test to bar celebrity depictions that deceive consumers about a product’s official sponsor.¹³² In requiring that a celebrity likeness not be “wholly unrelated” to the underlying product or a “disguised commercial advertisement,” the *Rogers* test imports the consumer protection principles of the likelihood of confusion test into the realm of publicity rights.¹³³

In addition to protecting against source confusion, the *Rogers* test also protects against content confusion.¹³⁴ Under *Rogers*, defendants cannot use celebrity likenesses to mislead consumers about their product’s content.¹³⁵ The title “Rosa Parks” was not only problematic because it implied that Rosa Parks sponsored the song; it was also problematic because it implied that the song’s lyrics were about her.¹³⁶ As the court in *Parks* noted, a customer could potentially purchase the song thinking it would be about Parks’s civil rights legacy, only to be bombarded by a violent party anthem.¹³⁷ Since a customer might have never purchased the song had he known its true contents, the court was concerned that the title could bait consumers into buying an otherwise undesirable product.¹³⁸ The plaintiffs in *Rogers* brought up a similar concern: had viewers known that the defendant’s movie

128. See *Rogers*, 875 F.2d at 1001 (noting that some consumers could draw an “incorrect inference” about Fred and Ginger’s involvement with the film).

129. *Parks*, 329 F.3d at 453–54.

130. See *Rogers*, 875 F.2d at 1001; *Parks*, 329 F.3d at 454.

131. See *Rogers*, 875 F.2d at 1004; *Parks*, 329 F.3d at 451–52.

132. See *Rogers*, 875 F.2d at 1004; *Parks*, 329 F.3d at 451–52.

133. See *Rogers*, 875 F.2d at 1004.

134. See *id.* at 999 (noting that a title cannot mislead “as to the source or the content of the work”).

135. See *id.*

136. See *Parks*, 329 F.3d at 452, 454.

137. See *id.* at 453–54.

138. See *id.* at 453.

was not about Ginger Rogers and Fred Astaire, they likely would not have bought tickets in the first place.¹³⁹

The *Rogers* test thus springs from the dual concerns of source deception and content deception.¹⁴⁰ Not only must a product not deceive customers as to who its sponsors are, but it also cannot deceive customers as to what the product is about.¹⁴¹ In requiring that a celebrity likeness not be a “disguised advertisement” or “wholly unrelated” to the underlying product, the *Rogers* test pushes sellers of celebrity-related products to provide their customers with full and accurate information.¹⁴² Since consumer deception was the key concern in *Rogers* and *Parks*, therefore, both courts decided that the trademark-based *Rogers* test was the most appropriate test.¹⁴³

D. The Transformative Use Test as the Analog to Copyright Infringement

While the Second and Sixth Circuits applied a trademark-based test to cases where consumer deception was prevalent, the Third and Ninth Circuits applied a copyright-based test to cases where the primary harm was appropriation.¹⁴⁴

In *Hart*, *In re NCAA*, and the other similar video game cases, the defendant had used the plaintiffs’ likenesses for their intrinsic value.¹⁴⁵ Because games based on real players often feel more immersive, EA used the likenesses of people like Hart to improve the intrinsic quality of its game.¹⁴⁶ In *Hart*, the Third Circuit agreed with the district court’s observation that “video game consumers enjoy . . . EA-produced video games as a result of the heightened realism associated with actual players.”¹⁴⁷ As “heightened realism” is essentially a functional characteristic,¹⁴⁸ EA was using Hart’s likeness like a copyrighted work.¹⁴⁹ Just as a soundtrack in a game or a poem on a mug increases

139. See *Rogers*, 875 F.2d at 997.

140. See *id.* at 999.

141. See *id.* at 999–1000.

142. See *id.* at 1005.

143. See *id.* at 1004; *Parks*, 329 F.3d at 447, 450.

144. See, e.g., *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1273–76 (9th Cir. 2013); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 163 (3d Cir. 2013).

145. See, e.g., *Hart*, 717 F.3d at 168.

146. *Id.*

147. *Id.*

148. See *id.*

149. Compare *id.*, with *Parks v. LaFace Recs.*, 329 F.3d 437, 449 (6th Cir. 2003).

the intrinsic value of the product it resides on, EA used Hart's likeness to similarly improve the substantive quality of its game.¹⁵⁰

Since the harm at hand resembled copyright infringement, the *Hart* court applied a test based on copyright's fair use doctrine.¹⁵¹ Like fair use doctrine, the transformative use test raises the bar for when one party can appropriate the work of another.¹⁵² Just as fair use protects an artist from having his copyrighted work exploited, the transformative use test protects a celebrity from the exploitation of his popular appeal.¹⁵³ To prevent unfair appropriation, the transformative use test requires a defendant's product to be "so transformed that it become[s] primarily the defendant's own expression rather than the celebrity's likeness."¹⁵⁴ In requiring that a product derive its marketability from the author's "transformative or creative contribution" rather than "the fame of the celebrities depicted," the test embodies the same fair use principles that prohibit infringers from blatantly copying artworks.¹⁵⁵ In other words, because the fair use doctrine prevents people from appropriating the intrinsic value of artistic works, the Third and Ninth Circuits imported its principles into the right of publicity context to prevent defendants from exploiting celebrity likenesses in a similar way.¹⁵⁶

E. The Complementary Nature of the Rogers Test and the Transformative Use Test

The factual differences between the *Rogers* cases and the transformative use cases explain why those courts applied different tests for the right of publicity.¹⁵⁷ The *Parks* court applied a test rooted in trademark law because the relevant harm was consumer deception—the primary harm of trademark infringement.¹⁵⁸ On the other hand, the *Hart* court applied a test rooted in fair use doctrine

150. See, e.g., *Hart*, 717 F.3d at 168.

151. See *id.* at 159, 165.

152. See *id.* at 159–60.

153. See *id.*

154. See *id.* at 160 (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001)).

155. *Hart*, 717 F.3d at 160 (quoting *Comedy III Prods., Inc.*, 21 P.3d at 811); see Gasaway, *supra* note 94, at 246 (noting that copyrights protect the substantive aesthetic value of artistic works).

156. Compare Weil, *supra* note 112, at 48, with *Hart*, 717 F.3d at 160.

157. Compare *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989), and *Parks v. LaFace Recs.*, 329 F.3d 437, 461 (6th Cir. 2003), with *Hart*, 717 F.3d at 146, and *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1176 (9th Cir. 2015).

158. See *Parks*, 329 F.3d at 453.

because the relevant harm was appropriation—the primary harm of copyright infringement.¹⁵⁹

The fact that right of publicity violations can produce multiple types of harm, however, explains why the tort is so hard to define. Because publicity right violations often look similar on the surface, the fact that they can have subtle but important legal differences makes the cases difficult to distinguish.¹⁶⁰ In *Parks* and *Hart*, for example, both defendants committed the same general wrong of exploiting a celebrity’s likeness for money.¹⁶¹ However, since their conduct differed subtly in who they harmed and the type of harm that they caused, the two cases required different legal tests despite seeming similar on the surface.¹⁶²

Thus, because right of publicity infringements can resemble both trademark and copyright infringement, courts need *both* the *Rogers* test and the transformative use test to address the full scope of the tort.¹⁶³ Although many courts have assumed that the two tests are mutually exclusive,¹⁶⁴ subsections 1–3 below will show how both tests play indispensable roles that the other cannot fill.

1. The Insufficiency of the Transformative Use Test

The transformative use test cannot be the only test for the right of publicity because it does not prohibit conduct that results in blatant consumer deception.¹⁶⁵ In *Parks*, the court applied the *Rogers* test and found that the defendants likely deceived consumers into buying a song they had no interest in.¹⁶⁶ However, if one were to apply the transformative use test to *Parks*, the test would not raise any issue with the defendant’s conduct.¹⁶⁷ After all, it is readily clear that the song “Rosa Parks”—a song mostly about partying, violence, and sex—is sufficiently “transformative” of Rosa Parks’s real identity.¹⁶⁸ As the Sixth Circuit put it bluntly, “[the] Defendant’s lyrics . . . contain

159. See *Hart*, 717 F.3d at 146–47.

160. Cf. Rothman, *supra* note 3, at 89 (noting that definitions of the right of publicity have been “notoriously incoherent and inconsistent”).

161. *Parks*, 329 F.3d at 453; *Hart*, 717 F.3d at 168.

162. See *Parks*, 329 F.3d at 453; *Hart*, 717 F.3d at 146.

163. Compare *Parks*, 329 F.3d at 453, with *Hart*, 717 F.3d at 146.

164. See, e.g., *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1280–82 (9th Cir. 2013) (suggesting that the transformative use test should be the sole test for the right of publicity).

165. See, e.g., *Parks*, 329 F.3d at 453.

166. Cf. *id.* (noting that the defendant’s song was very different from Parks’s real identity).

167. See *id.*

168. See *id.*

absolutely nothing that could conceivably, by any stretch of the imagination, be considered, explicitly or implicitly, a reference . . . [to] Rosa Parks.”¹⁶⁹ Similarly, the transformative use test would find no issue with the defendant’s movie in *Rogers*.¹⁷⁰ As *Ginger and Fred* was an entirely made-up story, the movie was certainly “the defendant’s own expression”; it could not have been a “conventional portrait” of Ginger Rogers and Fred Astaire because it was not about them in the first place.¹⁷¹ Thus, the fact that the transformative use test would not have raised concerns with the conduct in *Parks* and *Rogers*, when both had genuine risks of consumer deception,¹⁷² shows that the test is not suitable for all types of publicity right claims.

The reason the transformative use test cannot resolve cases like *Parks* or *Rogers* is that it addresses the wrong type of harm. As discussed in the trademark context, the harm of consumer deception is distinct from non-originality.¹⁷³ Because a trademark infringer must first make his own products before he can put his deceptive marks on them, the fact that his products deceive consumers does not necessarily mean that they are unoriginal or appropriated.¹⁷⁴

Because *Parks* and *Rogers* resemble trademark infringement cases, they were also not concerned with non-originality.¹⁷⁵ Outkast did not copy Rosa Parks’s speeches for its song lyrics (clearly), nor did the defendant in *Rogers* use Ginger Rogers’s real-life story for his movie script.¹⁷⁶ In both cases, the defendants’ works were completely original; the only issue was with how they were labeled.¹⁷⁷ Since the transformative use test focuses primarily on non-originality,¹⁷⁸ however, it would not address the harm that is most relevant to those cases.

169. *Id.*

170. *See Rogers v. Grimaldi*, 875 F.2d 994, 1001 (2d Cir. 1989).

171. *See id.*, 875 F.2d at 997; *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809–10 (Cal. 2001).

172. *See Parks*, 329 F.3d at 453; *Rogers*, 875 F.2d at 1001.

173. *See supra* Section II.A (discussing how someone who seeks to use a deceptive mark must make his own original product first).

174. *See id.*

175. *See, e.g., Parks*, 329 F.3d at 453 (discussing how OutKast’s lyrics were not related at all to Rosa Parks’s real life).

176. *See id.; Rogers*, 875 F.2d at 996.

177. *See Parks*, 329 F.3d at 453; *Rogers*, 875 F.2d at 996.

178. *See supra* Section II.B, D (discussing how the copyright fair use doctrine is focused on originality, and how the transformative use test draws from these copyright principles).

2. The Insufficiency of the *Rogers* Test

Conversely, the trademark-based *Rogers* test is a bad fit for right of publicity cases involving appropriation.¹⁷⁹ As the Third and Ninth Circuits have already observed, *Rogers* is ineffective when a defendant exploits someone's likeness for its intrinsic rather than extrinsic value.¹⁸⁰ In *Hart*, the infringing company did not use Hart's likeness to deceive consumers; instead, it purposefully copied his real-life story to persuade his fans to buy the game.¹⁸¹ The problem was not that EA's video game was too *unrelated* to Hart's real-life identity—it was that it was too *related*.¹⁸² Because EA intentionally emulated a celebrity's identity to exploit their fame, the *Rogers* test—which only punishes “unrelated” uses of a celebrity likeness—would encourage rather than discourage this detrimental conduct.¹⁸³

The *Rogers* test cannot resolve cases like *Hart* because it focuses on the wrong harm.¹⁸⁴ In the copyright context, consumer deception is not a necessary concern because a copyright infringer—like a YouTuber who plays an artist's song without a license—can exploit an artist's work even without deceiving ordinary consumers.¹⁸⁵ Since cases like *Hart* resemble copyright infringement cases, they are also not primarily concerned with consumer deception.¹⁸⁶ The consumers in *Hart* could enjoy playing as Hart's character even if he did not endorse the game in real life, so EA could profit off Hart's likeness without needing to deceive consumers that Hart was officially associated with the game.¹⁸⁷ (In fact, not only were ordinary consumers not harmed by EA's conduct, but they arguably *benefitted* from it because they got a more realistic video game.)¹⁸⁸ Thus, because consumer deception was not the relevant concern in *Hart*, the consumer-focused *Rogers* test was the wrong test to apply in that case.¹⁸⁹

179. See *Hart*, 717 F.3d at 158; *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1179 (9th Cir. 2015) (declining to apply *Rogers* to a video game avatar case).

180. See, e.g., *Hart*, 717 F.3d at 158; *Davis*, 775 F.3d at 1175.

181. See *Hart*, 717 F.3d at 168.

182. See *id.* at 157.

183. See *id.*

184. Cf. *id.* (noting that the *Rogers* test is a bad fit for the facts of Hart's claim).

185. See *supra* Section II.B.

186. Cf. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1281 (9th Cir. 2013) (noting in a similar case to *Hart* that the plaintiff's right of publicity claim was “not founded on an allegation that consumers [were] being illegally misled”).

187. Cf. *id.*

188. *Hart*, 717 F.3d at 163.

189. See *id.* at 157; *In re NCAA*, 724 F.3d at 1281.

The *Rogers* test and the transformative use test are thus complementary. While a court should apply *Rogers* when the defendant is exploiting the plaintiff's likeness for its extrinsic, source-identifying value, it should apply the transformative use test when the defendant is exploiting the plaintiff's likeness for its intrinsic, functional value.

3. Cases Requiring Both the *Rogers* and the Transformative Use Tests

Importantly, courts should note that celebrity likenesses can sometimes produce extrinsic and intrinsic value at the same time—acting simultaneously as a trademark and a copyrighted work.¹⁹⁰ A picture of Taylor Swift's face, for example, can produce extrinsic value like a trademark: if it is placed on a T-shirt, it can indicate to the consumer that the shirt comes from a company affiliated with Swift.¹⁹¹ Swift's face, however, can also provide an intrinsic value that is distinct from source identification. If a passionate enough "Swiftie" sees a T-shirt with Swift's face on it, he might like it so much that he buys it even if he knows it is a knockoff brand.¹⁹² Because the appeal of the shirt comes from Swift's own appearance—not just the company that made the shirt—her likeness provides an intrinsic value to the product as well.¹⁹³ Thus, since a celebrity likeness like Swift's can create both the extrinsic, source-identifying value of a trademark and the intrinsic, functional value of a copyrighted artwork, a defendant's depiction in this case must pass *both* the *Rogers* test and the transformative use test.¹⁹⁴

III. THE DUAL HARM APPROACH AND ITS APPLICATIONS

The right of publicity is hard to define because it essentially combines the protections of both trademark and copyright law. While the right of publicity can protect someone's likeness from being used

190. See generally *Parks v. LaFace Recs.*, 329 F.3d 437, 453 (6th Cir. 2003); *Hart*, 717 F.3d at 168.

191. This is a modern-day take on a past publicity rights case with similar facts. *Cf. Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 801 (2001) (examining a right of publicity claim where the likeness of The Three Stooges band was pasted on a T-shirt).

192. "Swiftie" is a term for Taylor Swift fans. See also Kate Perez, *Swifties' Friendship Bracelet Craze Creates Spikes In Jewelry Sales During Eras Tour*, USA TODAY (Aug. 9, 2023, 11:16 AM), <https://www.usatoday.com/story/money/retail/2023/08/08/taylor-swift-friendship-bracelets-driving-michaels-sales/70549834007/> [<https://perma.cc/W9HL-T9Y8>] (discussing how Taylor Swift fans bought crafting materials in mass to create their own Swift-themed merchandise).

193. *Cf. Comedy III Prods.*, 21 P.3d at 802.

194. See *Rogers v. Grimaldi*, 875 F.2d 994, 997 (2d Cir. 1989); *Hart*, 717 F.3d at 168.

like a source-identifying trademark, it can also prevent that likeness from being appropriated like a copyrighted work of art.¹⁹⁵ Thus, the challenge for courts evaluating right of publicity claims will be knowing when to apply trademark principles, copyright principles, or both.

The “dual harm approach” brings clarity to the right of publicity by dividing its claims into two main harms—consumer deception and appropriation.¹⁹⁶ Under the first step of this approach, a court with a right of publicity claim must ask whether a defendant is exploiting the plaintiff’s likeness for its extrinsic or intrinsic value.¹⁹⁷ In the second step, if the defendant is exploiting a likeness for its extrinsic value, a court would determine that consumer deception is the relevant harm and apply the trademark-based *Rogers* test.¹⁹⁸ On the other hand, if the defendant is exploiting a likeness for its intrinsic or functional value, the court would determine that the relevant harm is appropriation and apply the copyright-based transformative use test.¹⁹⁹ In the case that both types of harm are present, a court would apply both tests.²⁰⁰

The dual harm approach has important practical benefits. Since the designations of extrinsic and intrinsic value are analogs to trademark and copyright law, the dual harm approach would keep the right of publicity doctrinally aligned with existing intellectual property (IP) precedent.²⁰¹ By allowing judges to analogize publicity right cases to existing trademark and copyright cases, judges can evaluate new fact patterns with familiar IP principles—like the likelihood of confusion and fair use—without having to invent new rules.²⁰²

In Sections A–D below, this Note will apply the dual harm approach to past right of publicity cases and discuss its impact on issues like generative AI.

195. See *Hart*, 717 F.3d at 152.

196. See, e.g., *Parks v. LaFace Recs.*, 329 F.3d 437, 453 (6th Cir. 2003); *Hart*, 717 F.3d at 163; *Rothman*, *supra* note 3, at 90 (“The underlying difficulty with the right of publicity is that it prohibits conduct without specifying the particular harm the tort seeks to address.”).

197. See *supra* Section II.A, B.

198. See *supra* Section II.A, C; *Rogers*, 875 F.2d at 1004.

199. See *supra* Section II.B, D; *Hart*, 717 F.3d at 159.

200. See *supra* Section II.E.3.

201. See *Hart*, 717 F.3d at 153 (acknowledging that the *Rogers* test and the transformative use test are respectively based on trademark and copyright law).

202. See, e.g., *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 972–74 (10th Cir. 1996) (conducting an original policy analysis of parodies in order to resolve a publicity right case); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399–400 (9th Cir. 1992) (conducting an original analysis using a hypothetical of a Michael Jordan ad to resolve a right of publicity parody case).

A. *Carson v. Here's Johnny Portable Toilets, Inc.*

One decision the dual harm approach can clarify is *Carson v. Here's Johnny Portable Toilets, Inc.*²⁰³ In *Carson*, the Sixth Circuit held that celebrity Johnny Carson was entitled to judgment after the appellee referenced his catchphrase “Here’s Johnny” in his company “Here’s Johnny Portable Toilets.”²⁰⁴ The court reached its decision on the grounds that the defendant’s conduct resembled past cases where defendants had been found liable.²⁰⁵ However, because the court was writing before *Rogers* and *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, it did not articulate a general test to balance a defendant’s free speech rights against the right of publicity.²⁰⁶

The dual harm approach could reach the same intuitive outcome as *Carson* while giving a clearer, more replicable line of reasoning.²⁰⁷ For the first step of this approach, a court would ask whether the defendant is exploiting the plaintiff’s identity for its extrinsic or intrinsic value.²⁰⁸ Here, the defendant clearly exploited Carson’s likeness for its extrinsic value.²⁰⁹ The phrase “Here’s Johnny” in the company name creates extrinsic value since it can publicly imply that it is affiliated with Johnny Carson; on the other hand, since the name does not improve the quality of the defendant’s toilets themselves, it does not provide intrinsic value.²¹⁰

Since the defendant’s conduct is exploiting the extrinsic value of Carson’s likeness, under the second step the relevant harm would be consumer deception, and the relevant test would be *Rogers*.²¹¹ Under the *Rogers* test, the defendant would likely be liable.²¹² As Carson’s reputation as a TV host is wholly unrelated to toilet-making, the defendant would fail the first prong of the *Rogers* test.²¹³ Furthermore, since the slogan “Here’s Johnny Portable Toilets” clearly uses Carson’s catchphrase as a disguised commercial advertisement—if it could even

203. See 698 F.2d 831, 837 (6th Cir. 1983).

204. *Id.* at 832–33, 836.

205. See *id.*

206. See *id.* at 835–36.

207. See *id.*

208. See *supra* Section II.A, B.

209. Compare *Carson*, 698 F.2d at 832–33 (noting that the defendant named his company after a celebrity), with *Parks v. LaFace Recs.*, 329 F.3d 437, 441 (6th Cir. 2003) (noting that the defendant had named their song after a celebrity).

210. Compare *Carson*, 698 F.2d at 832–33, with *Parks*, 329 F.3d at 449, and *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 170 (3d Cir. 2013) (describing the intrinsic function of Hart’s likeness).

211. See *supra* Section II.C.

212. See *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989).

213. See *Carson*, 698 F.2d at 832–33.

be considered disguised—the defendant would be liable under *Rogers*'s second prong as well.²¹⁴ Thus, the dual harm approach offers a clearer and more systematic way to resolve cases like *Carson* than case-by-case factual comparisons.²¹⁵

Carson also illustrates why the transformative use test cannot be the sole test for publicity rights.²¹⁶ If a judge were to apply the transformative use test here, he would be forced to ask the strange question of whether toilets are a “transformative” use of Johnny Carson’s persona.²¹⁷

A court could try to avoid this issue by arguing that the title itself must be transformative—thus ignoring what the underlying product is. In this case, the transformative use test could still establish liability because the title “Here’s Johnny Portable Toilets” does not sufficiently transform the catchphrase “Here’s Johnny.”²¹⁸ However, this line of reasoning would lead to an overprotection of celebrity names.²¹⁹ If the right of publicity required product names to be transformative in a vacuum, it would invalidate countless songs that are directly named after celebrities: “Magic Johnson” by the Red Hot Chili Peppers, “Chanel” by Frank Ocean, “Donald Trump” by Mac Miller, and hundreds of others.²²⁰ When it comes to product titles, therefore, the *Rogers* test is still the best suited.²²¹ While it still allows defendants to use celebrity names in their song titles, it requires that a title be related enough to the song’s content that it does not misrepresent what the song is actually about.²²² By permitting the song titles above while barring deceptive titles like “Rosa Parks” in *Parks*, the *Rogers* test strikes an effective balance between artists’ creative freedoms and consumers’ well-being.²²³

214. See *Carson*, 698 F.2d at 832–33; *Rogers*, 875 F.2d at 1004.

215. See *Carson*, 698 F.2d at 832–33.

216. Compare *Carson*, 698 F.2d at 833, with *Hart*, 717 F.3d at 168.

217. See *Carson*, 698 F.2d at 833; cf. *Hart*, 717 F.3d at 168.

218. See *Carson*, 698 F.2d at 832–33.

219. See *Rogers*, 875 F.2d at 998 (“For all these reasons, the expressive element of titles requires more protection than the labeling of ordinary commercial products.”).

220. See *Songs with Famous People in the Title*, SONGFACTS, <https://www.song-facts.com/category/songs-with-famous-people-in-the-title> [<https://perma.cc/82UY-ETF5>] (last visited Mar. 8, 2024) (listing 196 songs that are directly named after celebrities).

221. See discussion *supra* Section II.C (describing how the *Rogers* test is best suited to address things like titles); *Parks v. LaFace Recs.*, 329 F.3d 437, 452 (6th Cir. 2003).

222. See *Rogers*, 875 F.2d at 999 (describing a balancing act for artistic titles).

223. See *id.*

B. Parody Cases

The dual harm approach also clarifies past right of publicity cases involving parodies.²²⁴ While parodies of copyrighted works have historically qualified for fair use,²²⁵ courts have not broadly accepted a parody exception for celebrity likenesses.²²⁶ Because of this, courts dealing with parodies of celebrity likenesses have often had to approach the issue from scratch, resulting in opinions that vary in both their reasoning and outcomes.²²⁷

For example, in *Cardtoons, L.C. v. Major League Baseball Players Association*, the Tenth Circuit found that the defendant's mock baseball playing cards were not tortious after holding that parodies were exempt from Oklahoma's right of publicity statute.²²⁸ The court reached its conclusion by analyzing the public policy implications of parodies, weighing factors such as the economic harm to celebrities,²²⁹ the incentives for parody artists,²³⁰ and the overall utility of parodies to society.²³¹ In finding that these factors favored having a parody exception for right of publicity claims, the court affirmed the lower court's decision in favor of the defendants.²³²

Conversely, in *White v. Samsung Electronics America, Inc.*, the Ninth Circuit evaluated the defendant's parody defense by distinguishing between commercial and non-commercial parodies.²³³ After focusing mostly on whether a parody could invoke a celebrity's likeness even after extensively modifying her appearance, the court briefly analyzed the defendant's parody defense.²³⁴ In asserting that parodies used for commercial purposes did not have the same protection

224. See generally *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 962–63 (10th Cir. 1996); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396–97 (9th Cir. 1992).

225. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994).

226. See Andrew Koo, *Right of Publicity: The Right of Publicity Fair Use Doctrine—Adopting a Better Standard*, 4 BUFF. INTELL. PROP. L.J. 1, 18 (2006) (noting that scholarship is divided over whether to apply copyright's fair use doctrine to publicity rights).

227. Compare *Cardtoons*, 95 F.3d at 972–74 (conducting a policy analysis of parodies), with *White*, 971 F.2d at 1399, 1401 (differentiating commercial and non-commercial parodies), and *Hilton v. Hallmark Cards*, 599 F.3d 894, 910 (9th Cir. 2010) (applying the transformative use test).

228. 95 F.3d at 976.

229. *Id.* at 974.

230. *Id.*

231. *Id.* (“Without First Amendment protection, *Cardtoons*' trading cards and their irreverent commentary on the national pastime cannot be freely distributed to the public.”).

232. *Id.* at 976.

233. See 971 F.2d 1395, 1401 (9th Cir. 1992).

234. See *id.* at 1397–99, 1401.

as non-commercial parodies, the court denied the defendant's summary judgment motion.²³⁵

Eighteen years later in *Hilton v. Hallmark Cards*, the Ninth Circuit evaluated another publicity right parody case, this time involving a cartoon depiction of Paris Hilton on a birthday card.²³⁶ Here, however, the court did not ask whether the defendant's parody was commercial or not, nor did it analyze whether the likeness in the card was actually Hilton's.²³⁷ Instead, making no mention of its previous decision in *White*, the court applied the transformative use test to the card and evaluated whether the defendant had sufficiently modified Hilton's appearance.²³⁸ Finding that it had not, the court dismissed the defendant's appeal of the denied motion to dismiss.²³⁹

As these cases show, there has not been a broad consensus on how to evaluate parodies of celebrity likenesses.²⁴⁰ While the court in *Cardtoons* approached the issue by analyzing the policy benefits of parodies,²⁴¹ the Ninth Circuit in *White* distinguished between commercial and non-commercial parodies,²⁴² only to discard this distinction in *Hilton* in favor of the transformative use test.²⁴³ The reason for this incongruity is that these courts did not connect parodies of celebrity likenesses to parodies of copyrighted works.²⁴⁴ Because these courts did not see that right of publicity claims could be analogous to copyright infringement claims, they did not rely on existing copyright law precedent and thus had to reason from scratch.²⁴⁵

The dual harm approach resolves this issue by tying the right of publicity back to its copyright roots.²⁴⁶ In recognizing that publicity rights and copyrights are both focused on preventing appropriation, the dual harm approach would treat parodies of celebrity likenesses no

235. *Id.* at 1401–02.

236. 599 F.3d 894, 899–900 (9th Cir. 2010).

237. *Id.* at 910 (applying the transformative use test over other approaches).

238. *Id.* at 910–12.

239. *Id.* at 912–13.

240. *See* Koo, *supra* note 226, at 18.

241. *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 972–74 (10th Cir. 1996).

242. *See* *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1401 (9th Cir. 1992).

243. *See* *Hilton*, 599 F.3d at 910.

244. *See generally* Koo, *supra* note 226, at 18.

245. *See* *Cardtoons*, 95 F.3d at 973; *White*, 971 F.2d at 1397–99.

246. *See* Koo, *supra* note 226, at 22 (“[B]orrowing from copyright law . . . comment (including parody), teaching or research should also weigh this factor in favor of [applying] finding fair use [to right of publicity cases].”).

differently than parodies of copyrighted works.²⁴⁷ In other words, instead of evaluating copyright parodies under one test and right of publicity parodies under another, the dual harm approach would apply the transformative use test uniformly.²⁴⁸

Applying the transformative use test to both types of parodies is a simple and intuitive solution.²⁴⁹ As the most natural question when evaluating parodies is to ask whether they are transformative, applying the fair use doctrine to both copyrighted works and publicity rights should streamline courts' decision-making processes.²⁵⁰ As one court has observed, "fair use can provide a reasonable, systematic, and consistent frame of reference for evaluating right of publicity matters."²⁵¹ After all, it makes no sense that a parody of a celebrity's general appearance would not be protected by fair use when a parody of a photo of that celebrity would be.²⁵² In holding publicity rights and copyrighted works to the same standard, courts would avoid the problem of *White* where a protection is created for the right of publicity that has no analog in copyright law.²⁵³

The dual harm approach can even help clarify parody cases outside the right of publicity context.²⁵⁴ In *Jack Daniel's Properties, Inc. v. VIP Products LLC*, for example, the US Supreme Court evaluated whether a trademark claim under the Lanham Act had to apply the *Rogers* test to trademark parodies.²⁵⁵ While the Court held that *Rogers* did not apply in the instant case since the defendant had used its parody as its own trademark,²⁵⁶ it declined to speak on whether *Rogers* should apply generally to cases involving parodies.²⁵⁷

The dual harm approach, however, can explain why *Rogers* should not apply to parody cases. Because a parodist is trying to mock

247. See *supra* Section II.D (noting how courts applied the transformative use test to emulate fair use principles).

248. See *id.*

249. See *Koo*, *supra* note 226, at 22.

250. See *Apple Corps Ltd. v. Leber*, No. C 299149 1, 2 (Cal. Super. Ct. June 3, 1986).

251. *Id.*

252. See, e.g., *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 524–25 (2023) (acknowledging the fair use defense for an alleged parody of a photograph of Prince).

253. Judge Kozinski criticized *White* for barring artists from even reminding the public of a celebrity—an "Orwellian notion." *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1514 (9th Cir. 1993) (Kozinski, J., dissenting from a denial of en banc review).

254. See, e.g., Robert J. Shaughnessy, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 VA. L. REV. 1079, 1080–81 (1986) (arguing that copyright's fair use principle should apply generally to trademark parodies).

255. 599 U.S. 140, 152–53 (2023).

256. *Id.* at 163.

257. *Id.* at 153.

the logo of another company, he is not trying to trick consumers into thinking that his product comes from the company itself.²⁵⁸ As the court in *Cardtoons* put it, “in the case of a good trademark parody, there is little likelihood of confusion, since the humor lies in the *difference* between the original and the parody.”²⁵⁹ Thus, because consumer deception is not a relevant concern in parody cases, the *Rogers* test, whose central focus is on consumer deception, would not be the appropriate test.²⁶⁰

On the other hand, because parodies can make a product more humorous—and therefore more intrinsically valuable to consumers—the relevant harm is appropriation, and the relevant test would be transformative use.²⁶¹ Like in *Hilton*, courts could evaluate trademark parody claims by asking whether the parodist has transformed the mark into his own original work.²⁶² While fair use would not apply if the parody is being used as the parodist’s own trademark,²⁶³ it could apply to all other cases where a defendant makes a parody for the sake of profit.²⁶⁴

C. Generative AI

The dual harm approach would also be useful in analyzing publicity right issues relating to AI. With the rise of video-generation technologies such as OpenAI’s Sora, some experts in the entertainment industry worry that moviemakers could soon replace actors’ entire performances with AI-generated models.²⁶⁵

Characterizing this harm as consumer deception, however, is not enough.²⁶⁶ If courts hold that AI-generated actors are only wrong because they deceive consumers, film companies could get around this

258. See *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 970 (10th Cir. 1996).

259. *Id.* (emphasis added).

260. See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1280 (9th Cir. 2013) (“[T]he *Rogers* test . . . was designed to protect consumers from the risk of consumer confusion.”).

261. See *Cardtoons, L.C.*, 95 F.3d at 970; *supra* Section II.D.

262. See *Hilton v. Hallmark Cards*, 599 F.3d 894, 911 (9th Cir. 2010).

263. *Jack Daniel’s Props., Inc. v. VIP Prod. LLC*, 599 U.S. 140, 162 (2023).

264. See *id.*

265. *E.g.*, *How OpenAI’s Sora Video Tool Could Change Hollywood*, PYMNTS (Feb. 26, 2024), <https://www.pymnts.com/news/artificial-intelligence/2024/how-openai-sora-video-tool-could-change-hollywood/#:~:text=%E2%80%9CSora%20is%20somewhat%20different%2C%20as,cannot%20yet%20generate%20good%20screenplays> [https://perma.cc/2AXU-YLHR] (“Sora . . . seeks to replace actors, visual effects, stunts and locations.”).

266. See the hypothetical involving the Taylor Swift shirt *supra* Section II.E.3.

by simply telling their viewers that their actors are AI-generated. This may not stop them from copying actors' appearances, however. Imagine, for example, that a filmmaker releases an AI-generated movie trailer where a bikini-clad Margot Robbie sits a luxurious yacht. Even if the trailer tells viewers that the scene is AI-generated, a Margot Robbie fan may be so drawn to her appearance on the yacht that he buys a ticket regardless. Because Robbie's likeness can attract her fans even when the actress herself is not in the film, simply giving consumers notice will not protect celebrities like Robbie from being exploited.²⁶⁷

In this way, the AI depiction of actors is no different from the digital depiction of athletes in video games.²⁶⁸ Because celebrity likenesses improve the inherent quality of the films they act in, they can be exploited for their intrinsic as well as extrinsic value.²⁶⁹ Thus, a producer who uses AI-generated actors should pass both the *Rogers* test and the transformative use test.²⁷⁰ Not misleading viewers about the nature of the actors is not enough—filmmakers must also modify these AI-generated likenesses such that they are their own creative expressions (and not just carbon copies of celebrities' faces).²⁷¹ It is only by addressing both harms of the dual harm approach that courts can balance filmmakers' rights to use AI technology and actors' rights to profit off their own likenesses.²⁷²

D. A Federal Right of Publicity

Lastly, defining the right of publicity as a combination of trademark and copyright protections could help streamline the creation of a federal right of publicity. As state laws governing the right of publicity differ greatly, smoothing out these differences individually

267. See discussion of hypothetical YouTube infringer *supra* II.B.

268. Cf. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 146 (3d Cir. 2013).

269. See *id.* at 168; *Parks v. LaFace Recs.*, 329 F.3d 437, 454 (6th Cir. 2003).

270. See *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989); *Hart*, 717 F.3d at 165.

271. See *Rogers*, 875 F.2d at 1004; *Hart*, 717 F.3d at 165.

272. This two-pronged requirement would apply to AI-generated music as well. Music that replicates singers' voices exploits their voices for their extrinsic, source-identifying value (by convincing listeners that the song was actually made by the artist) and their intrinsic aesthetic value (by attracting listeners who simply like the sound of the artist's voice). As a result, a music creator who uses AI-generated voices may have to satisfy both the *Rogers* test and the transformative use test. Cf., e.g., *Rogers*, 875 F.2d at 1003 (talking generally about balancing the First Amendment and publicity rights).

could take a long time.²⁷³ However, since states already defer to the federal government for trademark and copyright law—traditional areas of federal expertise—using trademark and copyright principles to define the right of publicity would be an easier way to establish a uniform federal policy.²⁷⁴

Relying on trademark and copyright law would also make it easier for trial judges to evaluate claims under a federal right of publicity. As trademark and copyright law already have an established body of federal common law, district court judges could rely on cases and concepts they are familiar with rather than having to build up the right from scratch.²⁷⁵

IV. CONCLUSION

The dual harm approach is a simple and flexible way to evaluate right of publicity claims. In recognizing that one's likeness can be exploited like a trademark, a copyrighted work, or both, this approach helps judges apply the test most suitable for the facts at hand while relying on traditional IP law principles.

The dual harm approach may also be a helpful methodology for intellectual property cases in general. By asking courts to look at the harm of the defendant's conduct rather than just the form of the infringed work (i.e., whether the work is a publicity right, a trademark, a copyright, etc.), the approach can give courts increased flexibility to address the specific harms of their cases.

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273. Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMM. LAW. 14, 14 (2011) (observing that without a federal standard, state laws on the right of publicity have become "widely divergent").

274. *See id.*; *Apple Corps Ltd. v. Leber*, No. C 299149 1, 2 (Cal. Super. Ct. June 3, 1986) (observing that copyright's fair use test would be an effective way to evaluate certain right of publicity cases).

275. *See, e.g., Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 970–76 (10th Cir. 1996) (determining from scratch whether the right of publicity should protect against commercial parodies).

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