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## Flash Infringement 2.0: Protecting “Unique Performance” From Live Social Media Distribution as a Right of Publicity

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### Cover Page Footnote

Professor of Law, Southwestern Law School, and Supervising Editor of the Journal of International Media & Entertainment Law, published by the Donald E. Biederman Entertainment and Media Law Institute at Southwestern, in association with the American Bar Association’s Forum on Communications Law and the ABA’s Forum on the Entertainment and Sports Industries. Director of the Amicus Project at Southwestern Law School. The author thanks Suna Izgi, a Biederman Scholar at Southwestern, and Professor Robert C. Lind for assistance in the preparation of this article.

# **FLASH INFRINGEMENT 2.0: PROTECTING “UNIQUE PERFORMANCE” FROM LIVE SOCIAL MEDIA DISTRIBUTION AS A RIGHT OF PUBLICITY**

*Michael M. Epstein* \*

This Article posits that state law right of publicity actions offer a potential remedy for non-musical performers who fall victim to the phenomenon of “flash infringement,” the instantaneous and unauthorized uploading and dissemination of performances by live event audiences. In 2021, comedians, actors and magicians, may be able to use the right of publicity to protect the value of their unique performances, since their non-musical acts are not covered by the Federal Anti-Bootlegging Statute. Moreover, under California law, secondary liability actions with respect to this unique performance right might allow performers to sue social media companies for providing a commercial platform for the infringement. That could lead to significant recovery for these performers and for other stakeholders in the rights of the performance.

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\* Professor of Law, Southwestern Law School, and Supervising Editor of the Journal of International Media & Entertainment Law, published by the Donald E. Biederman Entertainment and Media Law Institute at Southwestern, in association with the American Bar Association’s Forum on Communications Law and the ABA’s Forum on the Entertainment and Sports Industries. Director of the Amicus Project at Southwestern Law School. The author thanks Suna Izgi, a Biederman Scholar at Southwestern, and Professor Robert C. Lind for assistance in the preparation of this article.

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## I. INTRODUCTION: REVISITING “FLASH INFRINGEMENT”

In a 2016 article, this author coined the term “flash infringement” to describe a phenomenon whereby tech users infringe on the intellectual property of others in the blink of an eye.<sup>1</sup> The Article focused on issues of music intellectual property infringement at live concerts and DJ-driven mash-up parties, where the covalent forces of social media apps and flash mob culture enable fans to upload and disseminate rights-protected content in an instant and without authorization. Often, the flash infringer is a fan, or in some cases, an opportunist, who attends a live performance, records all or most of it without authorization, and then posts or distributes it to friends or to the public via social media.<sup>2</sup> By the onset of the 2020 pandemic, this problem had worsened; it also manifested differently than originally predicted in 2016. As it turns out, flash infringement is no longer a major threat to the value of a musical artist’s sound recordings, and the music industry has adjusted fairly well to the realities of live streaming to its advantage.

The problem that persists today is the online infringement of unique *non-musical* performances—live stand-up comedy acts being the prime example that this article will cover. The nature of social media platforms, such as Instagram and YouTube, makes it easy for a recording to be uploaded either simultaneously or soon after the performance ends. While music performers who sell or stream sound recordings for profit *have* suffered some injury by unauthorized distribution of bootlegged performances,<sup>3</sup> the extent of their injuries have been muted.<sup>4</sup> Additionally, music performers have a remedy that offers them the possibility of recouping their losses. The same cannot be said, however, for non-musical acts who have their performances distributed online without permission and without payment.

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1. Michael M. Epstein, *Social Media and “Flash Infringement”*: *Live Music Culture and Dying IP Protection*, 3 BELMONT L. REV. 1 (2016).

2. See, e.g., Chris Stokel-Walker, *Illicit Bootlegs on Youtube Are Giving Musicals A Second Life*, MEDIUM: FFWD (Dec. 9, 2019), <https://ffwd.medium.com/illicit-bootlegs-on-youtube-are-giving-musicals-a-second-life-dd945e23409e> [<https://perma.cc/SN7N-X5RY>].

3. See, e.g., Chris Cooke, *Amazon and Google Sued Again Over Bootleg Recordings*, COMPLETE MUSIC UPDATE (Jan. 24, 2020), <https://completemusicupdate.com/article/amazon-and-google-sued-again-over-bootleg-recordings/> [<https://perma.cc/AG7U-6JJV>].

4. While the antbootlegging statute provides the basis for the cause of action for unauthorized music performances, there is no standard for injury that must be alleged in order for a claim to move forward in the courts. 17 U.S.C. § 1101 (2018).

One likely reason that music performers have not been especially damaged by live streaming is that their most sought-after performances are usually non-live, rehearsed studio recordings. Another reason is that the unauthorized recording of an artist's performance in a concert, where much of flash infringement occurs, does not actually hurt the market for original sound recordings as once feared.<sup>5</sup> Put simply, unauthorized social media distribution of music performances has not resulted in lower ticket sales for the artist.<sup>6</sup> In fact, data suggests that live streaming actually *drives* ticket sales instead of hindering them.<sup>7</sup> For example, sixty-seven percent of live video viewers are more likely to buy a ticket to a concert or event after watching a live video of that event or a similar one; forty percent of consumers state that video increases the chance they will purchase a product on their mobile device; thirty percent of people who watch a livestream of an event will attend the same event in person the following year.<sup>8</sup>

Music performers also have clear protection afforded to them by the federal anti-bootlegging statute,<sup>9</sup> which gives them a chance to pursue the most egregious infringers of their live performance rights. The statute forbids “fixing ‘the sounds or sounds and images of a live musical performance in a copy or phonorecord,’ without consent of the performers involved.”<sup>10</sup> The statute also forbids the unauthorized reproductions and distributions of such recordings.<sup>11</sup> As a result of this statute, “most civil remedies of copyright law are available against infringers of unfixed musical performances.”<sup>12</sup> This protection applies not only to music performances and

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5. *E.g.*, *Stokel-Walker*, *supra* note 2.

6. *Id.*

7. *E.g.*, *id.*; see also, Victor Yanev, *37+ Live Streaming Statistics Every Marketer Should Keep in Mind in 2020*, TECHJURY (July 2, 2020), <https://techjury.net/stats-about/live-streaming/> [<https://perma.cc/6QM2-KCX2>].

8. Rachel Grate, *5 Myths About Livestreaming An Event - Busted*, EVENTBRITE BLOG (Aug. 22, 2016), <https://www.eventbrite.com/blog/livestreaming-an-event-myths-busted-ds00/> [<https://perma.cc/699U-SBUH>]; Yanev, *supra* note 7.

9. 17 U.S.C. § 1101.

10. 3 DAVID NIMMER, NIMMER ON COPYRIGHT § 8E.03 (2020); 17 U.S.C. § 1101.

11. NIMMER ON COPYRIGHT § 8E.03, *supra* note 10; 17 U.S.C. § 1101.

12. NIMMER ON COPYRIGHT § 8E.03, *supra* note 10; 17 U.S.C. § 1101.

concerts but also to musical theater.<sup>13</sup> The biggest complaint in the musical performance context is that concert-goers constantly use their phones or tablets to record snippets of a performance as opposed to the act of recording itself. This is because the use of these devices creates a distraction—a bother to the performers and to other members of the audience. It is for this reason that theaters and concert venues have started to police their audiences by using storage pouch system pioneer companies like Yondr or other methods to ensure devices are stowed away during performances. None of the complaints from musical acts are about the theft of protected intellectual property;<sup>14</sup> the complaints are about the concert-going experience generally.

For big stars, bootlegs of concerts appear to increase ticket sales, either by exposing their performances to new audiences or generating new excitement for established fans.<sup>15</sup> Bootleg clips of performances can also bring exposure and enthusiasm to potential fans for emerging artists. These up-and-comers can benefit greatly from bootlegs that are distributed virally on social media. Established or not, online bootleg distribution is akin to offering a “free sample” of a performance that fans want to experience again and again. Seeing a grainy, amateur video of a music act in concert encourages people to seek out the artist’s professionally created sound recordings, which benefits the artist and the artist’s record label. Thus, live streaming has become a viable marketing tool for artists. The very act of attending these venues to engage in simultaneous recording of the event is the type of communal fan experience that leads fans to infringe at the venue. There is an excitement among concert-going fans seeking to share their experiences with other fans in and out of the venue. Since fans must buy concert tickets to participate in that shared experience, the prospect of engaging in flash infringement can actually be a net positive for concert attendance.

## II. FLASH INFRINGEMENT AND THE NON-MUSICAL PERFORMER

While music performers may benefit from bootlegging in various ways, the same may not be true, however, for non-music performers. This category includes performers such as comedians, actors in stage plays, magicians, and acrobats as well as some podcasters. The federal anti-bootlegging statute does not provide a remedy for an unauthorized recording made of a non-

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13. 17 U.S.C. § 1101.

14. *See infra* notes 22–25.

15. Grate, *supra* note 8; Yanev, *supra* note 7.

musical performance.<sup>16</sup> The anti-bootlegging statute was designed to provide a federal remedy since live performances of any kind are not copyrightable subject matter.<sup>17</sup> The Copyright Act provides that “[c]opyright protection subsists . . . in original works of authorship fixed in any *tangible* medium of expression.”<sup>18</sup> A live performance, in contrast to, for example, a sound recording, is not fixed in a tangible form on its own.<sup>19</sup> While the underlying work being performed may be eligible for copyright protection, a performance of that work is not.<sup>20</sup> Herein lies the problem for non-musical performers: unauthorized recordings of their performances can be remedied neither by copyright law nor by the anti-bootlegging statute.<sup>21</sup>

Comedians are among the most vigilant when it comes to policing their performance venues. There are many stories about high-profile comedians who have walked off stage after realizing they were being recorded<sup>22</sup> or kicked out those who were recording a performance.<sup>23</sup> Comedians have also taken other actions to try to keep their comedy routines out of social media.<sup>24</sup> One of America’s best-known comedians, Dave Chapelle, for example, is

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16. See 17 U.S.C. § 1101.

17. 1 DAVID NIMMER, NIMMER ON COPYRIGHT § 1.08 (2020).

18. 17 U.S.C. § 102(a) (2018) (emphasis added).

19. *Id.*; NIMMER ON COPYRIGHT § 1.08, *supra* note 17.

20. NIMMER ON COPYRIGHT § 1.08, *supra* note 17.

21. *Id.*

22. See, e.g., Chris Wiegand, *Russell Howard Walks Out of Standup Gig After Audience Member Films Him*, GUARDIAN (Aug. 14, 2020), <https://www.theguardian.com/stage/2020/aug/14/russell-howard-walks-out-of-standup-gig-after-audience-member-films-him> [https://perma.cc/W56M-S8AC].

23. See, e.g., Nick Robins-Early & Josh Wolk, *A Recent History of Dave Chapelle’s Many On-Stage Moods*, VULTURE (Aug. 30, 2013), <https://www.vulture.com/2013/08/history-of-dave-chappelle-angry-at-crowd.html> [http://archive.today/TT1xd].

24. Dan Reilly, *Go Ahead, Post These Comedians’ Sets on Instagram*, VULTURE (June 25, 2019), <https://www.vulture.com/2019/06/why-some-comedians-let-people-record-their-sets.html> [https://perma.cc/QGV5-2VZD].



reported to have been a major investor<sup>25</sup> in Yondr,<sup>26</sup> perhaps the best-known policing program for concert venues. Other high-profile comedians such as Ali Wong, Hannah Gadsby, and Kevin Hart have also begun to use Yondr for their shows.<sup>27</sup>

The reason that comedians are vested in, and invest in, ways to curtail unauthorized recordings of performance goes to the nature of their content, and the expectation of those who attend their performances. Fans do not look to re-experience a comedian's performance. Comedians, like magicians, create content with what can be described as "curated spontaneity." A successful comedian carefully constructs a stand-up routine or a comedy sketch that seems casual, informal, and on-the-fly. The performance depends on the illusion that the comedian is telling a fresh story to the audience, and the surprise of a punch line that the audience has not heard before or did not expect. That differs, of course, from the experience from those who go to see their favorite musical artists perform songs they already know. It is that desire to experience and re-experience the musical performance that drives the same fans to buy or stream the musical recordings over and over again.

It does not work that way, however, for comedians and other non-musical performers. Comedians go to great lengths to protect their standup routines. It is easy for other comedians to adapt an act or just downright steal a rival's jokes. But it is also an experience that is enjoyed best the first time—it is the element of surprise. To illustrate, most people would rather relisten to a new Billie Eilish or Taylor Swift album or enjoy one of their recorded live performances on a streaming service over and over but would likely not re-watch the same Netflix stand-up special or watch a comedian's same recycled routine. While there may be a small cadre of die-hard fans that may repeatedly consume a comedian's iconic act—someone seeking to memorize or imitate a classic George Carlin routine, for example—most people are

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25. Jeffrey Brown, *No Smartphones Allowed? That's Just How Dave Chappelle Wants It*, PBS (May 22, 2018, 6:25 PM), <https://www.pbs.org/newshour/show/no-smartphones-allowed-thats-just-how-dave-chappelle-wants-it> [<https://perma.cc/CJY4-NND2>].

26. YONDR, <https://www.veryondr.com/> [<https://perma.cc/KVW4-X32K>]. Yondr produces pouches for mobile phones that contain a patented locking system allowing venues to police mobile phone usage during an event without having to confiscate attendees' devices. When an attendee arrives, they are asked to put their phone in the pouch, the pouch is then locked with a magnetic device, and given back to the attendee. The attendee can then have the pouch unlocked on their way out of the venue.

27. Reilly, *supra* note 24.

unlikely to sit through the same jokes a second or third time; nor would they be willing to invest themselves in the longer, more elaborate performance that a stand-up special or a live routine entails.

To be sure, some up-and-coming comedians who, like emerging musical artists, view unauthorized recording and distribution of their work by fans as a way to increase their exposure to in an increasingly crowded space for newcomers.<sup>28</sup> Social media also serves as a way for comedians to test out new material if they are unable to perform live.<sup>29</sup> For these comedians, the sharing of their performances on Instagram, for example, is a price they are willing to pay, at least in the short term, for fame.<sup>30</sup> In that sense, these comedians are willing to offer their content to fans just as a business may offer loss-leaders to lure customers into buying products or services with higher profit margins. The difference for these “performance peddlers” is delayed gratification; the promises of profit down the road from being paid for performances after they have achieved fame.

Unlike musical artists, comedians have another reason to fear unauthorized recording and distribution: fear of recrimination by offended audiences. The common practice for most stand-up comedians is to test out their jokes in small club settings.<sup>31</sup> In these venues, an attempt to make fun of a controversial topic may come across as racist, misogynist or homophobic.<sup>32</sup> Depending on how an audience responds, the comedian may decide to drop the joke or the topic in its entirety. Even high-profile comedians show up at clubs, often unannounced, to try out new material.<sup>33</sup> With flash infringement, a joke that missed its mark in a test run, or one that generates a hostile

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28. *Id.*

29. *Id.*

30. *Id.*

31. See, e.g., Jess Zafarris, *Jerry Seinfeld's 5-Step Comedy Writing Process*, WRITER'S DIGEST (May 13, 2019), <https://www.writersdigest.com/write-better-nonfiction/jerry-seinfelds-5-step-comedy-writing-process> [<https://perma.cc/5L35-YBZ7>].

32. See, e.g., David Barden, *Louis C.K.'s Sexually Explicit Stand-Up Rant Proves He's Learned Nothing In 2018*, HUFFPOST (Dec. 31, 2018, 1:07 AM), [https://www.huffpost.com/entry/louis-ck-bootleg-recording-comedy-cellar\\_n\\_5c298ef5e4b08aaf7a91c1b8](https://www.huffpost.com/entry/louis-ck-bootleg-recording-comedy-cellar_n_5c298ef5e4b08aaf7a91c1b8) [<https://perma.cc/K5KA-GQ4L>]. Secret footage of comedian Louis C.K.'s test set in a small venue caused backlash in 2018.

33. See, e.g., *Is Eddie Murphy Reportedly Sneaking into Comedy Clubs to Test Jokes?*, ESSENCE (Jan. 8, 2020), <https://www.essence.com/celebrity/eddie-murphy-testing-jokes-comedy-club/> [<https://perma.cc/7KED-GNGR>].

audience response, can spread virally on social media, damaging the career of the comedian.<sup>34</sup> For instance, Michael Richards' racist tirade against a heckler at a Los Angeles comedy club is easy to find on the internet, even though the fan recording occurred many years ago.<sup>35</sup> The viral distribution of his tirade effectively ended the former *Seinfeld* actor's career as a mainstream performer.<sup>36</sup> Recordings of misogynist jokes by Louis C.K.,<sup>37</sup> and of a homophobic punch line from Tracy Morgan,<sup>38</sup> damaged their standing among fans.<sup>39</sup>

The crisis brought about by flash infringement is presently not really about sound recordings of music. It is not about concerts headlined by music performers. The problem today, in 2021, revolves around comedians and other non-musical performers, including theatrical actors. So, what to do about this? Is there a potential remedy for a performer who wants to protect his or her unique performance from social media distribution without their consent? Since it is clear that the federal anti-bootlegging statute does not include non-musical performances,<sup>40</sup> and since copyright does not protect these performances,<sup>41</sup> where is the remedy?

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34. Reilly, *supra* note 24.

35. Dan Glaister, *Seinfeld Actor Lets Fly with Racist Tirade*, GUARDIAN (Nov. 22, 2006), <https://www.theguardian.com/world/2006/nov/22/usa.danglaister> [<https://perma.cc/4F6D-VTMS>].

36. *Id.*

37. Jordan Moreau, *Louis C.K. Downplays His Sexual Misconduct in Controversial New Special*, VARIETY (Apr. 4, 2020, 5:03 PM), <https://variety.com/2020/digital/news/louis-ck-stand-up-special-metoo-1234571387/> [<https://perma.cc/6UWN-RDH2>].

38. *Tracy Morgan Goes on Anti-Gay Tirade at Nashville Show*, HOLLYWOOD REP. (June 10, 2011, 7:11 AM), <https://www.hollywoodreporter.com/news/tracy-morgan-goes-anti-gay-196697> [<https://perma.cc/3JFP-F55B>].

39. Moreau, *supra* note 37.

40. 17 U.S.C. § 1101.

41. 1 DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12 (2020). A comedy routine or even a single joke may be protected by copyright, even though the live performance is not. *See Kaseberg v. Conaco, LLC*, 260 F. Supp. 3d 1229 (S.D. Cal. 2017).

### III. REMEDY-IN-WAITING: THE RIGHT OF PUBLICITY TO PROTECT UNIQUE PERFORMANCES

The solution to protect unique performances may lie in the right of publicity, a state law remedy available in a majority of states, including California.<sup>42</sup> The right of publicity is a right that is separate and apart from the tort of appropriation privacy and protects a plaintiff's name and likeness from being used without their consent.<sup>43</sup> In California, the right is protected both under statute<sup>44</sup> and common law,<sup>45</sup> common law protection being broader than under statute.

Under the statute, codified as California Civil Code Section 3344, a plaintiff must prove the following elements to prevail on a right of publicity claim: (1) use of the plaintiff's name, voice, signature, photograph or likeness; (2) commercial use; (3) lack of consent; and (4) resulting injury.<sup>46</sup> Commercial use is defined narrowly as any use "in any manner, on or in products, merchandise, or goods, or *for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services.*"<sup>47</sup> The statute also exempts the use of a person's name and likeness "in connection with any news, public affairs, or sports broadcast or account, or any political campaign" from being a right of publicity violation.<sup>48</sup>

Plaintiffs who sue under the common law must prove the following: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to *defendant's advantage, commercially or*

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42. JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD*, 3 (2018). States vary in the protections conferred by their publicity statutes. Some states also recognize publicity rights as a subset of privacy law. *Id.* at 3-4.

43. 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2020).

44. CAL. CIV. CODE § 3344 (West 2020).

45. 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *RIGHTS OF PUBLICITY AND PRIVACY* § 6:25 (2d ed. 2020).

46. CAL. CIV. CODE § 3344.

47. *Id.* (emphasis added).

48. *Id.*

otherwise; (3) lack of consent; and (4) resulting injury.<sup>49</sup> On the issue of commercial use, the common law right of publicity appears to offer protection more broadly than the statutory requirements because it is not limited by the language of the statute.<sup>50</sup>

When most people consider the right of publicity, they think about the right to protect one's signature, photo, likeness or, more expansively, one's identity in the context of selling a product or service. It is in fact this notion of the right that Professor Nimmer discussed in his seminal law review article from 1954, where he set out to describe the right of publicity as an evolving area of the law.<sup>51</sup> Indeed, prior to the 1970s, there was no legal precedent for using the right of publicity to protect a performance. Even so, the notion that performances have inherent economic value as a property interest is nothing new. Although protecting performance is a road less traveled in right of publicity jurisprudence, it is, as a policy matter, an issue that deserves full consideration legally. To accept this approach of applying right of publicity to live performances is to accept that a performance is of fundamental value to the performer, a value that the performer should not lose as technology advances and the means by which a performance can be disseminated changes.

The Supreme Court itself recognized the value of a unique performance in 1977 when it decided *Zacchini v. Scripps-Howard Broadcasting Company*.<sup>52</sup> In *Zacchini*, the Court addressed the implications of a television broadcaster airing a performer's entire cannonball act without his permission in a news segment.<sup>53</sup> Hugo Zacchini, the plaintiff in this landmark case, came from a family of circus performers who brought the human cannonball act to the United States after being discovered by John Ringling in 1929.<sup>54</sup> Zacchini's act involved him being shot out of a cannon into a net as far as

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49. *Orthopedic Sys., Inc. v. Schlein*, 135 Cal. Rptr. 3d 200, 211 (Ct. App. 2011).

50. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992).

51. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204 (1954).

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

53. *See id.* at 563–64.

54. Lee Levine & Stephen Wermiel, *The Court and the Cannonball: An Inside Look*, 65 AM. U. L. REV. 607, 610 (2016).

200 feet away, which he regularly performed at a county fair in Ohio.<sup>55</sup> It was at this fair that a news broadcaster, the defendant in this case, filmed his entire act and aired it on the news that night.<sup>56</sup> Zacchini sued the broadcaster for commercializing his act without his consent.<sup>57</sup> The Court held in favor of Zacchini because “the broadcast of a film of [his] entire act [posed] a substantial threat to the economic value of [his] performance.”<sup>58</sup> The Court stated that it was the strongest case for a right of publicity violation since it involved the appropriation of the performer’s entire act.<sup>59</sup> The ability to exclusively control a performance, the court reasoned, is central to the economic value of the performance because it is far beyond using an artist’s reputation to draw attention to a product—it is “the appropriation of the very activity by which the entertainer acquired his reputation in the first place.”<sup>60</sup> In finding for Zacchini, the Supreme Court effectively used what was then a novel right of publicity action to protect his performance, even above asserted First Amendment interests.

*Zacchini* remains the only right of publicity case to reach the U.S. Supreme Court. It has also been construed narrowly by courts, which has diminished its value as legal precedent.<sup>61</sup> Courts have uniformly focused on the fact that Hugo Zacchini’s entire act was broadcast.<sup>62</sup> Requiring a wholesale theft of an entire act has greatly limited the reach of *Zacchini* in subsequent cases. To be sure, the facts of *Zacchini* support limiting its application to unconsented use of an entire act. The defendant in *Zacchini* was a broadcaster whose employee had set out to report the news.<sup>63</sup> The First

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55. *Zacchini*, 433 U.S. at 563.

56. *Id.* at 563–64.

57. *Id.* at 564.

58. *Id.* at 575.

59. *Id.* at 576.

60. *Id.* at 575–576.

61. See generally *Orthopedic Sys., Inc.*, 135 Cal. Rptr. 3d 200; *White*, 971 F.2d 1395; *Zacchini*, 433 U.S. 562.

62. See generally *Orthopedic Sys., Inc.*, 135 Cal. Rptr. 3d 200; *White*, 971 F.2d 1395; *Zacchini*, 433 U.S. 562.

63. *Zacchini*, 433 U.S. at 563.

Amendment issues attaching to news coverage lend themselves well to the Court requiring an egregious rights violation such as wholesale theft; perhaps anything less than the entire act would have required the court to consider the First Amendment implications of its decision. While it is not possible to change the way *Zacchini* has developed as legal precedent over the last forty-five years, *Zacchini* speaks volumes in terms of the value of a unique performance and the centrality of performance to some right of publicity claims. In the realm of policy, if not legal precedent, the Court saw reason to value a unique performance and acted to protect it.

This reasoning appears in decisions from various courts across the country.<sup>64</sup> In *Wisconsin Interscholastic Athletic Association v. Gannett Co.*, the Seventh Circuit recognized the centrality of performance in *Zacchini* when it concluded that “the ability to control broadcast of one’s performance does not just happen to be consistent with the Constitution; it also provides an important economic benefit.”<sup>65</sup> The Seventh Circuit further stated that producers of entertainment content are clearly entitled to make money off of those performances.<sup>66</sup> In *Cardtoons, L.C. v. Major League Baseball Players Association*, the Tenth Circuit reiterated the idea that “whether the commercial value of an identity is the result of a celebrity’s hard work, media creation, or just pure dumb luck, no social purpose is served by allowing others to freely appropriate it,” supporting the value of performances.<sup>67</sup> In *Guglielmi v. Spelling-Goldberg Productions*, the Supreme Court of California did not opine to the value of protecting performance; in a concurring opinion, however, Chief Justice Bird referenced *Zacchini* to proffer that the producers would have violated the plaintiff’s right of publicity if they had procured footage from a performance unlawfully and used it in the film as opposed to creating a film based on a person’s identity.<sup>68</sup> The Northern District of California has also emphasized the use and inherent economic value of performances *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*,

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64. See generally *Orthopedic Sys., Inc.*, 135 Cal. Rptr. 3d 200; *White*, 971 F.2d 1395; *Zacchini*, 433 U.S. 562.

65. *Wisconsin Interscholastic Athletic Ass’n v. Gannett Co., Inc.*, 658 F.3d 614, 624 (7th Cir. 2011).

66. *Id.*

67. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 976 (10th Cir. 1996). The court, however, decided against the plaintiffs.

68. *Guglielmi v. Spelling-Goldberg Prod.*, 160 Cal. Rptr. 352, 362 (1979).

stating that a creator has a reasonable expectation to be compensated by another who uses their performance.<sup>69</sup> Overall, it is clear that courts around the country have continued to honor what *Zacchini* stands for as a matter of policy: that performances are of intrinsic economic value, and that creators deserve a remedy when third parties use those performances without consent.<sup>70</sup> This is true even in the many cases where the infringement is based on an appropriation of identity associated with a performance, as opposed to an unauthorized use of the performance itself.

The maker of an unauthorized recording does not need to sell the recording as a commodity.<sup>71</sup> In *Zacchini*, it was enough for the Supreme Court that the broadcaster simply aired the performance for it to meet the commercial use requirement.<sup>72</sup> The station did not attempt to sell the video of the act to third parties.<sup>73</sup> The right of publicity in the *Zacchini* case was violated by one or perhaps a few airings of the performance on the local station.<sup>74</sup> That limited distribution, without anything more, was sufficient for liability.<sup>75</sup> The salient issue for the Court was that the television station had a commercial purpose when it aired the performance to increase viewers and elevate ratings.<sup>76</sup> The distinction is raised in the opinion's rejection of First Amendment protections to the station's actions.<sup>77</sup> Today's online equivalent of ratings-driven commercial use are social media platforms that sell ads alongside uploads of user-distributed content.

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69. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1140 (N.D. Cal. 2014).

70. *See, e.g., Wisconsin Interscholastic Athletic Ass'n*, 658 F.3d 614, 624; *Cardtoons*, 95 F.3d 959; *Guglielmi*, 160 Cal. Rptr. 352; *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126.

71. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574 (1977).

72. *Id.* at 562. California law supports this expansive view of commercial use, but the media use exception in New York's statute does not constitute a commercial use. *See* N.Y. CIV. RIGHTS § 51 (2020).

73. *Zacchini*, 433 U.S. at 562.

74. *Id.*

75. *Id.*

76. *See generally Zacchini*, 433 U.S. 562.

77. *Id.* at 578.



Commercial use is considerably more pronounced today than it was back when *Zacchini* was decided. If a social media user, whether a fan, an influencer, or a business, makes a recording or distributes a performance without authorization, it harms a proprietary right to the artist's performance that the right of publicity ought to protect. In fact, the damages are arguably much worse today than in the *Zacchini* era because digital copies can be distributed and re-distributed without degradation of quality and without any limit on the number of people who eventually can consume the performance either by directly viewing in on the social media account of the person who posted a recording or through subsequent forwarding of the content. Publicity rights violations in the digital age know no geographic boundaries. This alone justifies the need for the law to adapt.

#### IV. CHALLENGES IN USING THE RIGHT OF PUBLICITY TO PROTECT PERFORMANCES

##### A. *Proving Commercial Use*

The first challenge to establish that a performer's right of publicity has been violated by a spectator recording a performance and posting it on his or her social media is proving that the recording was used for commercial gain. This is important because personal use is not covered by right of publicity and most individuals have social media for personal use.<sup>78</sup> The hurdle for proving commercial use is highest under section 3344 because it narrowly defines commercial use as any use "in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services."<sup>79</sup> It may be difficult to prove that a flash infringer used his or her recording of a performance commercially when all the individual has done is share it to a social media platform. But that is not all the flash infringer may have done. By posting a performance on social media, the user has knowingly made the performer's intellectual property available for others to enjoy, without permission or payment to the performer. This is true for postings even on social media accounts set to private, but especially applies to recordings distributed on

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78. 2 ENTERTAINMENT LAW 3D: LEGAL CONCEPTS AND BUSINESS PRACTICES § 13:30 (Thomas D. Selz, Melvin Simensky, Patricia Acton & Robert Lind eds. 2020).

79. CAL. CIV. CODE § 3344 (emphasis added). Because New York's statute allows a media use exception to commercial use, one would have to argue that user-controlled websites fall outside the exception—a harder but perhaps not impossible argument to make. See N.Y. CIV. RIGHTS § 51.

accounts with public access. Right of publicity plaintiffs may also have leeway to argue commercial use more broadly under the common law but looking to the common law may not be necessary, as the language in California's statute appears to support a finding of commercial use, especially if the posting is accompanied by advertising.<sup>80</sup>

These potential violations are the modern-day equivalents of what occurred in *Zacchini*. The analogy is only strengthened by the fact that social media platforms are often ad-supported and are becoming increasingly similar to television broadcasters. There is a pressing need for a remedy to protect the pecuniary interests of performers in their unique performances. The right of publicity developed over time as an action separate from privacy torts because the circumstances of the times required the law to change to protect an individual's name and likeness in light of the rise of commercial endorsements.<sup>81</sup> Moreover, Professor Nimmer has opined that although the right of publicity should come with *some* limitations, these limitations should not be arbitrary.<sup>82</sup> “[A]ttracting an audience is of great pecuniary value,”<sup>83</sup> and the performer should not lose this pecuniary interest in a performance because of technological advancements. Systems for sharing advertising revenue are now standard on most social media platforms.<sup>84</sup> This ad sharing allows social media networks, and many users, to monetize the value of their posted content.<sup>85</sup> The time has come for the law to adapt with respect to live performances.

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80. See generally discussion *infra* Part IV. “Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).” CAL. CIV. CODE § 3344(e).

81. Nimmer, *supra* note 51, at 204.

82. *Id.* at 217.

83. *Id.* at 215.

84. See generally David Perell, *Models of Internet Monetization*, STUDENT PULSE: JOURNALQUEST, <http://www.inquiriesjournal.com/articles/1479/models-of-internet-monetization> [<https://perma.cc/M6U2-RC2G>].

85. *Id.*

## B. Proving Injury

The second challenge in proving a right of publicity claim in this context is proving that the performer suffered injury in some way. While some data suggests that music concerts that are live streamed or recorded do not reduce ticket sales,<sup>86</sup> the same cannot be said for comedy shows or other live performances.<sup>87</sup> For example, comedians, as a matter of course, take their stand-up routines to clubs or larger venues on national or international tours.<sup>88</sup> An unauthorized recording that goes viral on social media may have a negative impact on that tour. Readily available bootlegs of a comedian's current act may also make a television special less valuable.<sup>89</sup> It could also hurt the comedian's chances of getting picked up for a special on HBO or Netflix, limiting their opportunities to make money and reach broader audiences. Taken together, this could reduce the number of people buying live event tickets or using a streaming service to see a comedian, devaluing that comedian's performance.

If *Zacchini* guides us to conclude that the whole point of protecting performances is that they are inherently economically valuable, and that value comes from the ability to control this pecuniary property interest, then performers should not need to meet a high standard of proof in order to prove injury.<sup>90</sup> The injury is that recorders are taking the performer's power to control a performance, a proprietary right, away from him or her. Under the common law approach, injury from recording and disseminating performances without the performer's consent should be *presumed*, and this presumption should be on the defendant to rebut. Presuming injury in these contexts may help performers better protect their performances from going viral in the future. Up-and-comers who want fans to distribute unauthorized

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86. Grate, *supra* note 8; Yanev, *supra* note 7.

87. See, e.g., Barden, *supra* note 32; Matt, *Patton Oswalt Clashes With An Audience Member, Who Wins?*, LAUGH BUTTON (Jan. 10, 2012), <https://thelaughbutton.com/patton-oswalt-clashes-audience-member-wins> [<https://perma.cc/W67D-4LUH>].

88. *Is Eddie Murphy Reportedly Sneaking into Comedy Clubs to Test Jokes?*, *supra* note 33.

89. Grate, *supra* note 8; Yanev, *supra* note 7.

90. Under California Civil Code § 3344, the \$750 statutory minimum remedy is itself an indication of harm. The statute also includes attorney's fees and the availability of punitive damages.

recordings as a way to gain exposure can simply consent to the unauthorized use of their performances in advance.

Once again, the times have changed, and the law must adapt accordingly. While the injury inflicted on Zacchini when his entire act was aired on local television may have only hurt his act in Ohio nearly fifty years ago, a digital recording of Zacchini's act on social media today could have potentially gone viral and reached the entire world, depriving him of his pecuniary interest. The stakes are higher today than they were in 1977 when the Supreme Court decided *Zacchini*. The main focus in the publicity right violation analysis should not be commercial use, as discussed above, or injury, but rather that a performance must be uniquely associated with the performer's identity to be protected. A performance of some knucklehead performing stunts in his backyard may not qualify for protection, unless that knucklehead is Johnny Knoxville. An actor or a comedian who performs for a living would certainly be protected, as would a human cannonball. Performers, and especially up-and-coming performers, could seek a remedy for unauthorized copying and distribution of their performances without being pre-empted by the Copyright Act. Musical performers may also have this state law remedy in tandem with federal law.<sup>91</sup>

### C. Fair Use Considerations

The development of social media streaming features increasingly puts live performances at risk of being disseminated without permission, which is exactly what *Zacchini* sought to prohibit. For example, Instagram has a feature, called a "location story[.]" that compiles all Instagram stories posted by users that are tagged at a particular location.<sup>92</sup> These stories are all public, provided that the user's account is also public.<sup>93</sup> This means that if a user goes to a certain location's page by using the search feature, the user is able to see everything that has gone on for the past twenty-four hours.<sup>94</sup> This makes it possible for an entire act to be pieced together through users' public stories tagging the location of the performance. Twitch, a platform solely

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91. The anti-bootlegging statute provides a remedy for the infringement of live musical performances. 17 U.S.C. § 1101.

92. Features used on Instagram are available at [about.instagram.com/features](https://about.instagram.com/features).

93. Features used on Instagram are available at [about.instagram.com/features](https://about.instagram.com/features).

94. Features used on Instagram are available at [about.instagram.com/features](https://about.instagram.com/features).

devoted to live streaming, presents similar issues.<sup>95</sup> For example, there have been cases where a live streamer's account was not suspended after he streamed three hours of a television show.<sup>96</sup> A Twitch user could potentially stream an entire act, and yet would not be held accountable by the performer under current law. Recognizing a right of publicity cause of action would help remedy a quickly evolving landscape of flash infringement.

In this context, a defendant could raise the argument that her recording is transformative, which is an affirmative defense borrowed from the fair use doctrine of copyright law.<sup>97</sup> In California, a defendant would not be held liable if the use of the plaintiff's name and likeness is transformative enough.<sup>98</sup> This concept was first articulated by the Supreme Court of California in *Comedy III Productions v. Saderup*.<sup>99</sup> In *Saderup*, the owner of all of the rights to the Three Stooges comedy act sued an artist for violation of publicity rights when the artist produced and sold t-shirts with a realistic charcoal drawing of the Three Stooges reprinted on them.<sup>100</sup> The defendant argued that a judgment against him would violate his right to free speech and expression under the First Amendment.<sup>101</sup> In addressing the tension between the right of publicity and the First Amendment, the court determined that a defendant "may raise as an affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the

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95. TWITCH, <https://www.twitch.tv/p/en/about/> [<https://perma.cc/5W5H-L7GU>]; Devon Delfino, 'What is Twitch?': Here's What You Need to Know About the World's Leading Live-Streaming Platform for Gamers, BUS. INSIDER (June 11, 2020, 8:58 AM), <https://www.businessinsider.com/what-is-twitch> [<https://perma.cc/4ARR-K3UB>].

96. Bhernardo Viana, *Trainwreckstv Streams Masterchef on Twitch for 3 Hours Without Being Punished*, DOT ESPORTS (June 13, 2019, 9:56 AM), <https://dotesports.com/streaming/news/trainwreckstv-streams-masterchef-on-twitch-for-3-hours-without-being-punished> [<https://perma.cc/YJ2A-8MGU>].

97. Fair use is an affirmative defense in copyright law that allows courts to preserve the freedom of expression in certain infringement contexts. 4 DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (2019).

98. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 407 (2001).

99. *Id.*

100. *Id.* at 393.

101. *Id.* at 396.

celebrity's fame.”<sup>102</sup> According to the court, “when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity.”<sup>103</sup> The threshold determination that the court said must be made is “whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness,” regardless of the quality of the artistic expression.<sup>104</sup> The court then held that the use of the charcoal drawings was not transformative enough because there was no discernable creative transformation or contribution.<sup>105</sup> The same reasoning should apply to live performances because an unauthorized recording of a performance is by no means transformative—the recording adds nothing to the work when simply recorded and streamed.

Some courts<sup>106</sup> and scholars<sup>107</sup> have suggested that the entire fair use doctrine should be applied to right of publicity cases. This would mean that a defendant could raise the fair use defense when accused, and the court would need to evaluate all four factors required by the doctrine. The four factors considered under the fair use doctrine are the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used; and the effect on the market.<sup>108</sup> The first factor will

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102. *Id.* at 407.

103. *Id.* at 405.

104. *Id.* at 406.

105. *Id.* at 409. *But see* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019).

106. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 189 (2003) (“[T]he ‘fair use’ defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances . . . .”); Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977); Apple Corps Ltd. v. Leber, No. C 299149, 1986 WL 215081, at \*2 (Cal. Super. Ct. June 3, 1986) (applying fair use factors to find *Beatlemania* stage show violated the Beatles' right of publicity).

107. *Cf.* Roberta Rosenthal Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191, 232 (1983); Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836, 915 (1983); Stephen R. Barnett, *The Right of Publicity Versus Free Speech in Advertising: Some Counter-Points to Professor McCarthy*, 18 HASTINGS COMM. & ENT. L.J. 593, 604 (1996).

108. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560–69 (1985).

weigh in favor of finding a fair use if the work constitutes criticism, comment, news reporting, teaching scholarship or research and the work is considered transformative, as discussed above.<sup>109</sup> Under this factor, commercial use weighs against the finding of fair use because a commercial use may be “an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.”<sup>110</sup> In cases in which an infringer merely duplicates a protected work for commercial purposes, such as with a recording, plaintiffs would be entitled to a presumption of market harm as a result of the commercial use.<sup>111</sup> The second factor weighs in favor of finding fair use if the copyrighted work is more factual as opposed to creative.<sup>112</sup> The third factor weighs in favor of fair use if the infringing work does not take the heart of the copyrighted work.<sup>113</sup> Lastly, the fourth factor weighs in favor of fair use if the infringing work does not have an adverse impact on the market that the copyrighted work is in.<sup>114</sup>

In the flash infringement context, even if all four fair use factors are considered by a court, fair use will likely not apply. Under the first factor, and as referenced above, a recording of live performances likely will not be transformative because the lens being used, a hand-held smartphone, is not sufficiently artistic in this live setting; the person is still recording the performance occurring in front of him or her. Nothing in the manner that the act is being performed would change due to the unauthorized recording. Under the second factor, the very nature of the underlying work that a person is recording is creative, which weighs against the finding of fair use. The third fair use factor would also weigh against the finding of fair use because recording a performance takes too much of the work or the very heart of the work of a non-musical performance. Recording all or most of a comedian’s set would typically use too much of a work. But a finding against fair use can result even if an unauthorized video does not capture the entire act, but

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109. NIMMER ON COPYRIGHT § 13.05, *supra* note 97.

110. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

111. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994) (The only “presumption” of market harm supported by *Sony* would apply in a case involving mere duplication for commercial purposes).

112. *Harper & Row*, 471 U.S. at 563.

113. *Id.* at 564–65.

114. *Id.* at 566–67.

only the one joke that goes viral. Lastly, and perhaps most importantly, the fourth fair use factor also weighs against the finding of fair use because for non-musical acts, disseminating a new performance without authorization can cause great injury to the market for the performance. In the vast majority of cases, the right of publicity could adequately protect the interests of performers against those claiming fair use.

## V. EXTENDING LIABILITY TO SOCIAL MEDIA PLATFORMS: SECONDARY LIABILITY

### A. *Vicarious Liability and Contributory Liability*

Bringing a right of publicity action against a flash infringer would be a game changer for a performer. However, the performer may not be able to recover a full judgment, especially if the flash infringer is a one without the resources to pay a big judgment, such as a high school or college student. While there could be other benefits—including having the recording taken down from the platform it was posted on, getting an injunction, or executing an agreement to prevent the flash infringer from posting the recording again in the future—the actual cash payout likely would not be that high. A performer could be better compensated for a flagrant violation of their pecuniary interest by going directly to the source: social media companies. This could be accomplished by bringing an action for contributory liability or vicarious liability, both forms of secondary liability, for the breach of the right of publicity, which would allow performers to recover from social media giants. For musical and non-musical performers, both forms of secondary liability would offer a more effective remedy than that available to a copyright stakeholder under the Digital Millennium Copyright Act (“DMCA”).<sup>115</sup>

Even if there are copyright claims concurrent with a performance, holding platforms liable for third-party content that infringes on the copyright of the rights holder is notoriously difficult because platforms are able to shirk responsibility by relying on the rights holder to issue takedown notices pursuant to the DMCA.<sup>116</sup> Under the DMCA’s takedown provisions, websites do not even have a duty to filter or flag unauthorized posts of copyrighted content unless and until a rights holder gives notice of an infringement.<sup>117</sup>

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115. 17 U.S.C. § 512 (2018).

116. *Id.*

117. 17 U.S.C. § 512(c).



Of the two forms of secondary actions, contributory liability would be the harder claim to win in a dispute over infringing material that has been uploaded, since a website like YouTube or Facebook would not be held liable without actual knowledge,<sup>118</sup> without direct financial benefit, and only if it fails to remove the infringing material upon being notified.<sup>119</sup> Under these provisions, an online service provider is not obligated to take down material unless the rights holder follows the DMCA takedown procedures.<sup>120</sup>

“Vicarious liability for copyright infringement [may exist when the defendant] has the right and ability to supervise infringing activity and an obvious and direct financial interest in exploitation of the copyrighted material.”<sup>121</sup> To succeed on this claim, a defendant must either have control and supervision of the infringing activity typical of agents that would bind a principal or have a right to that control and supervision. Third-party posters of infringing content, at first blush, do not appear to fall into the category of infringers that would cause vicarious liability. They are third parties, after all. But websites today exercise a great deal of control of their third-party users through code that forces users to behave in a certain way and monitors user activities in ways that are visible and not visible.<sup>122</sup> Moreover, the terms of use agreements that users are required to sign give websites rights of control that may exceed that which the sites exercise. Still, without enough evidence of control and supervision to collapse a non-employee agency relationship, the third-party status of the infringer likely means that websites will continue to benefit from the DMCA’s safe harbor. There is thus no incentive for video repositories and social media sites to develop mechanisms to block the flash infringer from posting unauthorized content in the first place; at least, with respect to copyright infringement.

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118. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001) (defining actual knowledge as knowing or having reason to know that infringement is occurring on a platform).

119. 17 U.S.C. § 512(c)(1)(B)–(C).

120. *See* 17 U.S.C. § 512(c)(3)(A).

121. KINNEY & LANGE, P.A., *INTELLECTUAL PROPERTY LAW FOR BUSINESS LAWYERS* § 8.10 (2019-2020 ed.).

122. *See, e.g.*, LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999).

California law recognizes contributory infringement actions for the right of publicity.<sup>123</sup> This is because the right of publicity is considered a commercial tort, which means that a party that knowingly aids and abets the violation of the right can become liable for contributory infringement.<sup>124</sup> To prevail on a contributory claim, the plaintiff would need to show (1) that the platform knew that the conduct of the third party violated the plaintiff's publicity right and (2) that the platform gave assistance or encouragement to the direct violation.<sup>125</sup> Vicarious liability, an alternative to contributory liability, requires "sufficient control or personal involvement in the infringing activities to be [held] liable."<sup>126</sup> The outcome from cases like *Perfect 10 v. Visa International* suggests that there may be too much distance between a website and rights holder, factually and structurally, for a plaintiff to prevail.<sup>127</sup> Still, a secondary claim may be easier to prove today, in an age of digital primacy, when social media platforms are highly prevalent in our daily lives. Today, social media has become more akin to broadcasting, with a much wider reach and much greater surveillance. These platforms are designed to be social, encouraging users to create and recreate content or a particular experience. It is this recreation element that is the problem for rights holders. Through data collection, social media companies monetize virtually every action—every click, every download, and, relevant to our inquiry here, every upload, which can include the uploading of unauthorized recordings.<sup>128</sup> Allowing a secondary infringement action could lead to significant recovery for these performers and for other stakeholders in the rights of the performance. It would also encourage online platforms to take concrete steps to prevent the unauthorized distribution of performances by users.

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123. 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 3:20 (2d ed. 2020).

124. *Id.*

125. 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 3:20 (2d ed. 2020).

126. *Id.* at n.2 (citing *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788 (9th Cir. 2007), *cert. denied*, 553 U.S. 1079 (2008)).

127. *Perfect 10, Inc.*, 494 F.3d at 803–05.

128. Greg McFarlane, *How Facebook, Twitter, Social Media Make Money From You*, INVESTOPEDIA (Feb. 7, 2020) <https://www.investopedia.com/stock-analysis/032114/how-facebook-twitter-social-media-make-money-you-twtr-lnkd-fb-goog.aspx> [<https://perma.cc/KLS4-MJMS>].

### B. Preemption, Immunity, and the Nature of the Publicity Right

Unlike copyright law, the right of publicity is a state law action that can be an effective tool to protect performers if used aggressively against social media platforms that promote live streaming features. By pursuing a claim of secondary liability claim for a publicity right violation, websites cannot rely on a safe harbor that allows them to preside over a business model that effectively monetizes the value of unauthorized recordings. Websites would likely mount a defense to liability as a matter of law on two fronts: preemption and Section 230 immunity. Case outcomes are hard to predict, but plaintiff performers have a good chance of prevailing on both of these issues. Many courts across the nation, including the Supreme Court in *Zacchini*, have recognized that the right of publicity is not always preempted by federal copyright law.<sup>129</sup> In the performance context, there is case law to support the notion that copyright law will not preempt a right of publicity violation for recording a non-musical performance.<sup>130</sup> The general inquiry in a preemption analysis is “whether the rights asserted by the plaintiff are equivalent to any of the exclusive rights within the general scope of the copyright.”<sup>131</sup> As previously stated, a live performance is not a copyrightable work under the Copyright Act.<sup>132</sup> There are no exclusive federal rights flowing from that live performance that the performer is entitled to. While a right of publicity claim based on a musical performance may be preempted by the

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129. Rothman, *supra* note 42, at 163. See also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 577 (1977) (“The Constitution does not prevent Ohio from making a similar choice here in deciding to protect the entertainer’s incentive in order to encourage the production of this type of work”); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1010 (9th Cir. 2001); *Bi-Rite Enter., Inc. v. Button Master*, 555 F. Supp. 1188, 1201 (S.D.N.Y. 1983) (“The right of publicity . . . grants plaintiffs relief where none exists under federal law. Federal preemption poses no bar to such relief.”); *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1028 (3d Cir. 2008); *Brown v. Ames*, 201 F.3d 654, 658 (5th Cir. 2000); *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 623 (6th Cir. 2000).

130. See, e.g., *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 852 (2d Cir. 1997) (stating that a partial preemption doctrine should be adopted whereby a claim based on misappropriation of a broadcast would be preempted but not claims based on the misappropriation of underlying facts); *Dryer v. Nat’l Football League*, 814 F.3d 938, 943 (8th Cir. 2016) (stating that misappropriation claims may not be preempted if the underlying purpose of the misappropriating work is commercial as opposed to expressive).

131. *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146, 1154–55 (9th Cir. 2010).

132. 17 U.S.C. § 102(a); NIMMER ON COPYRIGHT § 1.08, *supra* note 17.

anti-bootlegging statute,<sup>133</sup> the same will not be the case for a claim based on a non-musical performance.

Section 230 of the Communications Decency Act, part of the Telecommunications Act of 1996, provides broad immunity to websites from tort liability for content posted by third parties.<sup>134</sup> One exception to this immunity is for third-party posts that violate intellectual property rights.<sup>135</sup> Whether the right of publicity is an intellectual property right has not been fully settled by courts. Sixteen states and the District of Columbia do not even recognize the right as distinct from the tort of privacy.<sup>136</sup> There are those, this author included, who hesitate to use the word “infringement” to describe the violation of the right. But in a majority of states, including California, the right of publicity is regarded as an intellectual property right that can be transferred, inherited, and subjected to fair use considerations.<sup>137</sup>

If the right of publicity is not intellectual property, then what is it? An offshoot of the right of privacy? That is not a good fit since the right of publicity is economic, not personal. A commercial tort? That gets closer to recognizing the economic value of the right, but it does not explain transferability or descendability. To the extent that there is a split in jurisdictions on whether the publicity right is or is not intellectual property, the debate must be settled before one can say for certain that websites can face secondary liability for a third-party user’s violation of the right. The language in Section 230’s intellectual property exception supports an expansive interpretation of intellectual property, with a broad reference to “any law pertaining to intellectual property.”<sup>138</sup> If Congress had wanted to limit the immunity exception to copyright, trademark and patent, it could have done so expressly. Moreover, use of the words “pertaining to intellectual property” suggests that even if the publicity right was not formally designated as intellectual property, it might still fall within the immunity exception. If courts begin to

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133. 17 U.S.C. § 1101.

134. 47 U.S.C. § 230(c)(1)–(2) (2018).

135. 47 U.S.C. § 230 § 230(e)(2).

136. SELZ, ET AL., *supra* note 78, at § 13:1; *see generally* 1 J. THOMAS MCCARTHY & ROGER E. SCHECTER, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 6:25 (2d ed. 2020)).

137. *See, e.g.*, 2 J. THOMAS MCCARTHY & ROGER E. SCHECTER, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 9:3 (2d ed. 2020).

138. 47 U.S.C. § 230(e)(2) (2018).

recognize that the right of publicity is violated when a performance is recorded and uploaded by a user to a platform, then the opportunity to hold platforms accountable arises through a secondary infringement argument. With preemption and immunity issues settled in a performer's favor, social media platforms, video repositories, and other websites may be forced to take prophylactic action to protect against unauthorized uploads of performances. These websites will be on notice that they can be held liable because they profit from and provide the mechanisms for content that third parties post in violation of a performers' intellectual property rights.

## VI. CONCLUSION

Social media has become this generation's primary strategy of distributing content effectively, with influencer marketing being the most popular method.<sup>139</sup> Moreover, the U.S. is currently competing against China to become the top provider of 5G networks and reap the economic rewards, which suggests that the public will see the rise of 5G technology quickly.<sup>140</sup> 5G networks will have greater bandwidth than the current 4G LTE networks, meaning that more devices will be able to connect to the same network at the same time.<sup>141</sup> This means that smartphone users will no longer experience slower connections in areas with large crowds of people, such as at performance venues.<sup>142</sup> As 5G networks begin to take hold and consumers begin to purchase more devices that are 5G compatible, smartphone users will be able to live stream more efficiently than ever before.<sup>143</sup> The slow networks and slow hardware that once were impediments to flash infringement will no longer exist in the next few years. This is all the more reason to rely on legal

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139. *Top Content Distribution Strategies for 2020*, MAILMUNCH (Jan. 14, 2019), <https://www.mailmunch.com/blog/content-distribution-strategies/> [<https://perma.cc/F4GN-D3ND>].

140. William M. Lawrence & Matthew W. Barnes, *5G Mobile Technology—FCC Preemption and Geopolitics*, 80 ALA. LAW. 276, 278 (2019).

141. Clare Duffy, *What Is 5G? Your Questions Answered*, CNN: BUSINESS (Mar. 6, 2020), <https://www.cnn.com/interactive/2020/03/business/what-is-5g/index.html> [<https://perma.cc/EV5S-RYKB>]; Clare Duffy, *The Big Differences Between 4G and 5G*, CNN: BUSINESS (Jan. 17, 2020, 10:10 AM), <https://www.cnn.com/2020/01/17/tech/5g-technical-explainer/index.html> [<https://perma.cc/3537-Q8US>].

142. *What Is 5G? Your Questions Answered*, *supra* note 139; *The Big Differences Between 4G and 5G*, *supra* note 141.

143. *What Is 5G? Your Questions Answered*, *supra* note 139; *The Big Differences Between 4G and 5G*, *supra* note 141.

remedies to protect the theft of performances. The times are changing, and the law must adapt to accommodate non-musical performers. Indeed, the remedy already exists under the law, as long as we are willing to recognize it.