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## Infringement, She Wrote: The Intellectual Property Rights of Victims in True Crime Craze

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## Infringement, She Wrote: The Intellectual Property Rights of Victims in True Crime Craze

By: Laura Callihan

### I. Introduction

True crime is a captivating and immensely popular genre in various mediums, including podcasts, tv shows, movie documentaries, books, and even music. Particularly in the past several years, true crime has grown increasingly popular, as evidenced by content like podcasts “Serial,” “Crime Junkies,” and “Morbid,” as well as Netflix documentaries such as *Making a Murderer*, *the People v. O.J. Simpson*, and *Amanda Knox*.<sup>1</sup> But true crime has been a popular genre throughout history, with origins dating back even to ancient texts such as the *Iliad*, which details and dramatizes the infamous Trojan War. In the comparatively modern era, British authors between 1550 and 1700 were printing “an unprecedented number of publications that reported on capital crimes.”<sup>2</sup> Later in the 19<sup>th</sup> century, true crime came in the medium of essays, focusing more upon the scientific nature of the crimes in both Britain as well as America.<sup>3</sup> Of course, there have also been variations of true crime such as detective novels, law enforcement tv shows and movies, and the formation and rise of criminology, the study of criminal activity itself.<sup>4</sup>

With this most recent resurgence of true crime popularity, the newest form of intellectual property protection, the right of publicity, could potentially be implicated because of the

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<sup>1</sup> See Sarah Koenig, *Serial*, <https://serialpodcast.org/> (last visited Feb. 14, 2022); Ashley Flowers, *Crime Junkie*, [crimejunkiepodcast.com](https://crimejunkiepodcast.com) (last visited Feb. 14, 2022); Alaina Urquhart, *Morbid: A True Crime Podcast*, <https://www.momenthouse.com/morbid> (last visited Feb. 14, 2022); *Making a Murderer*, NETFLIX (Dec. 18, 2015), <https://www.netflix.com/watch/80115431?trackId=13752289&tctx=0%2C0%2C94f5e0a0d8a497a4917095e3fac4fd9227c78fda%3Aabc231ced4ea9a532a9a303b321a99e62e8a93026%2C%2C>; *The People v. O.J. Simpson*, NETFLIX (2016), <https://www.net-flix.com/watch/80127673?trackId=13752289&tctx=0%2C0%2C752e03d7-0f42-4223-9db0-b8b30e6e96f7-319298354%2C%2C>; *Amanda Knox*, NETFLIX (2016), <https://www.netflix.com/watch/80081155?source=35>.

<sup>2</sup> Pamela Burger, *The Bloody History of the True Crime Genre*, JSTOR DAILY (Aug. 24, 2016), <https://daily.jstor.org/bloody-history-of-true-crime-genre/>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

widespread use of the victims' names, pictures, and stories, as well as those of the victims' families and those of the perpetrators. Of course, "courts have long protected the pecuniary worth of a person's identity, albeit under a number of legal theories," which has become protected by state common law.<sup>5</sup> In fact, there is not a recognized right of publicity in federal statutes nor in federal courts, and protections vary among states. But should these protections extend to the victims of crime and their families in media coverage, or would the extension of those rights lead to a landslide effect for the use of the right of publicity?

## II. Background

The true crime genre has continuously evolved throughout history, but one principle has remained true — humans are fascinated by the horrific and heinous side of their fellow mankind. The growing trend of true crime is attributed to a myriad of explanations, including an evolutionary reaction to danger, a psychological fascination with the capabilities of the human mind, the intellectual exercise of solving the "puzzle" behind the mystery of a case, or simply the satisfaction of allowing yourself to be entertained by what is essentially presented as a story, whether we recognize the truth and reality of the story or not.<sup>6</sup> The true crime genre has a lengthy and complex history, beginning in the modern era in Britain around 1550. Between 1550 and 1700, crime reporting was distributed through crime pamphlets, ballads, and trial accounts.<sup>7</sup> The sensationalism

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<sup>5</sup> See Fred M. Weiler, *The Right of Publicity Gone Wrong: A Case For Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT LJ 223 (1994) (citing *e.g.*, *Brown Chem. Co. v. Meyer*, 139 U.S. 540, 544 (1891)) ("A man's name is his property, and he has the same right to its use and enjoyment as he has to that of any other species of property."); accord *Edison v. Edison Polyform & Mfg. Co.*, 67 A. 392 (N.J. Ch. 1907); *Miller v. Madison Square Garden Corp.*, 28 N.Y.S.2D 811 (N.Y. Sup. Ct. 1941) (privacy). *Burton v. Cromwell Pub. Co.*, 82 F.2d 154 (2d Cir. 1936) (defamation); *Chaplin v. Amador*, 269 P. 544 (Cal. 1928) (unfair competition), see *infra* note 6 and accompanying text or trademark infringement, *Societe Anonyme du Filtre Chamberland Systeme Pasteur Chamberland Filter Co.*, 8 Trademark Rep. 298 (S.D. Ohio 1918).

<sup>6</sup> Stephanie Organ, *Why are we so obsessed with true crime?*, BBC Science Focus Magazine (2020), <https://www.sciencefocus.com/the-human-body/why-are-we-so-obsessed-with-true-crime/> (last visited Apr 10, 2022).

<sup>7</sup> Phoebe Lett, *Is our true-crime obsession doing more harm than good?*, The New York Times (2021), <https://www.nytimes.com/2021/10/28/opinion/true-crime-petito.html> (last visited Apr 10, 2022).

surrounding particularly gory and unsavory crimes was increasingly popular, particularly among the artisan and upper class.<sup>8</sup> Much like true crime content today, crime reporting came in various forms, including sensationalism, state propaganda, spiritual and didactic emphases, and moralizing tales.<sup>9</sup> Whatever the motivations behind the rise in true crime content, the reality remains that, like any other factual content captured and represented into a new work by a creator, there are legal implications. Of course, the intellectual property fields of patents, trademarks, and trade secrets are not implicated by true crime content. However, both copyright protections and right of publicity protections are both involved within the creative process.

Like other art forms and genres, the legal surroundings of true crime have also formed and changed over time as the genre itself evolves. For instance, the earliest forms of true crime content in Britain were not always covered under copyright protection. As the printing press became more popularized and widely accessible, copyright laws began to develop and evolve.<sup>10</sup> Additionally, as intellectual property began to develop legal protections in America, the case law surrounding what could and could not receive copyright protection evolved with seminal cases such as *Baker v. Selden*, which rejected the “sweat of the brow” doctrine.<sup>11</sup> This doctrine promotes protecting works through copyright protections based on the amount of work or skill that has gone into a creation and rewards authors for their efforts.<sup>12</sup> However, the U.S. Supreme Court in *Baker* rejected this principle outright because the sweat of the brow gives authors the ability to potentially copyright facts — a category unprotectable by 17 U.S.C. §102. The statute states that:

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> 'Industries: Printing', in *A History of the County of Middlesex: Volume 2, General; Ashford, East Bedfont With Hatton, Feltham, Hampton With Hampton Wick, Hanworth, Laleham, Littleton*, ed. William Page (London, 1911), pp. 197-200. *British History Online* <http://www.british-history.ac.uk/vch/middx/vol2/pp197-200> [accessed 10 April 2022].

<sup>11</sup> *Baker v. Selden*, 101 US 99 (1978).

<sup>12</sup> *Id.*

“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”<sup>13</sup>

This limitation upon the uncopyrightability of fact is incredibly important in determining how intellectual property applies to true crime. The nature of the genre itself is that the material contains facts, similar to news reporting. News articles are generally not copyrightable because they are reporting facts which are not copyrightable. Moreover, the expression of those facts might also not be eligible for copyright protection because of the merger doctrine. The merger doctrine provides that “Under the doctrine of “merger,” where an idea and its expression are inseparable—that is, the idea can effectively be expressed in only one way—copyright protection will yield to the principle that ideas may not be monopolized.”<sup>14</sup> The only potential protections afforded to news articles would be if the article was copied word for word without the appropriate recognition given to the author.

The copyright protections surrounding true crime content can be deceptively complex because of the multidisciplinary approach that true crime content typically takes. For instance, the true crime documentary on Netflix, *Making a Murderer*, follows the investigations and trials of Steven Avery, first for sexual assault and attempted murder and later for first-degree murder.<sup>15</sup> Steven Avery was wrongfully convicted of sexual assault and attempted murder in 1985 in Manitowoc County, Wisconsin.<sup>16</sup> Later in 2007, Steven Avery was convicted of the murder of Teresa Halbach.<sup>17</sup> The documentary details the investigation and trial, including scenes from the courtroom, video footage of Steven Avery’s property, and interviews with family members,

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<sup>13</sup> 17 U.S.C. §102(b).

<sup>14</sup> Clayton Lewis, “The Merger Doctrine,” *The National Law Journal*. (June 6 2005).

<sup>15</sup> *Making a Murderer*, (Netflix broadcast Dec. 18, 2015),

<https://www.netflix.com/watch/80115431?trackId=13752289&tctx=0%2C0%2C94f5e0a0d8a497a4917095e3fac4fd9227c78fda%3Aabc231ced4ea9a532a9a303b321a99e62e8a93026%2C%2C>

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

attorneys, and law enforcement officers.<sup>18</sup> While the facts of the case themselves are not copyrightable, certain aspects of the documentary certainly are, such as the studio's original footage and interviews, the selection of courtroom scenes and video footage of Avery's property, and, to an extent, the order in which the material is presented to the viewer. In other words, while the case itself is not copyrightable as to facts, the dramatization can receive some protections. This is also the case for true crime presented in other mediums, such as podcasts or news articles covering the case itself.

The more novel issue explored in this article concerns whether the right of publicity is implicated in true crime content and, if so, to what extent the crime victims, their families, the officials involved in the case, and the perpetrators themselves should receive protections. In a recent article, Ashton Williams argues that "in most cases, true crime capitalizes on the exploitation of individuals' personhood," and this dramatization and capitalization should lead to broader protections under the right of publicity.<sup>19</sup> She contends that "not only are their crimes broadcast over the news throughout their violent killing sprees, the vicious murders are now often memorialized in the form of dramatic reenactments in the popular genre of 'true crime,'" and because of the romanticized and dramatized nature of the content, the right of publicity is a necessary compensation for victims and their families.<sup>20</sup>

The right of publicity has roots in the right to privacy -- a right which is highly regarded, particularly in America, but which does not actually explicitly exist within the Bill of Rights.<sup>21</sup> Nonetheless, legal scholars such as Samuel Warren and Louis Brandeis have promoted this right

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<sup>18</sup> *Id.*

<sup>19</sup> Ashton Williams, *Shockingly Evil: The Cruel Invasive Appropriation and Exploitation of Victims' Rights of Publicity in the True Crime Genre*, 27 J. Intell. Prop. L. 303 (2020). Available at: <https://digitalcommons.law.uga.edu/jipl/vol27/iss2/6>

<sup>20</sup> *Id.*

<sup>21</sup> U.S. Bill of Rights.

to privacy in scholarship, recognizing “that the growth of society require[s] a ‘protection of the person,’ which should be found through ‘the right ‘to be let alone.’”<sup>22</sup> This right to privacy has since been transformed into various protections such as cybersecurity concerns, Fourth Amendment protections, and the right to publicity. For instance, the Supreme Court of Georgia recognized the right of privacy in 1905 when an insurance company attempted to use a private citizen’s image in an advertisement without authorization.<sup>23</sup> In that case, the court held that a private citizen may protect his right “to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty.”<sup>24</sup>

In more recent cases, the Second Circuit in *Haelen Laboratories vs. Topps Chewing Gum, Inc.* 202 F.2d 866 (2d Cir. 1953) held that “individuals have a right in the publicity value of their photograph.”<sup>25</sup> However, “this right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.”<sup>26</sup> This case holds extreme importance in the development of the right of publicity because it recognizes not only the right of publicity itself, but also the potentiality for compensation for a violation of those rights.<sup>27</sup> This view is also repeated in the Ninth Circuit in *Midler v. Ford Motor Co.*, in which Bette Midler’s distinctive voice was imitated by an independent actor and used in a Ford commercial without her permission.<sup>28</sup> In this case, the Ninth Circuit held that “when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to

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<sup>22</sup> Williams, *supra* note 19, at 309. (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197 (1890) (“It is our purpose to consider whether the existing law affords a principle which can be invoked to protect the privacy of the individual.”).

<sup>23</sup> *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905)

<sup>24</sup> *Id.*

<sup>25</sup> *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

sell a product, the sellers have appropriated what is not theirs and have committed a tort in California.”<sup>29</sup>

Finally, the Supreme Court has also recognized the right of publicity, although there are no federal statutory protections for the right itself.<sup>30</sup> In this case, the petitioner performed an act as a “human cannonball” in which he was shot from a cannon into a net that sat around 200 feet away.<sup>31</sup> The newscasting company, Scripps-Howard Broadcasting Co., recorded the entire performance and aired it on their news program later that day.<sup>32</sup> Subsequently, Zacchini brought an action against the newscasting company, alleging a violation of his right to publicity.<sup>33</sup> The Supreme Court held that “the broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance, since (1) if the public can see the act free on television it will be less willing to pay to see it at the fair, and (2) the broadcast goes to the heart of petitioner's ability to earn a living as an entertainer... the protection of petitioner's right of publicity provides an economic incentive for him to make the investment required to produce a performance of interest to the public.”<sup>34</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

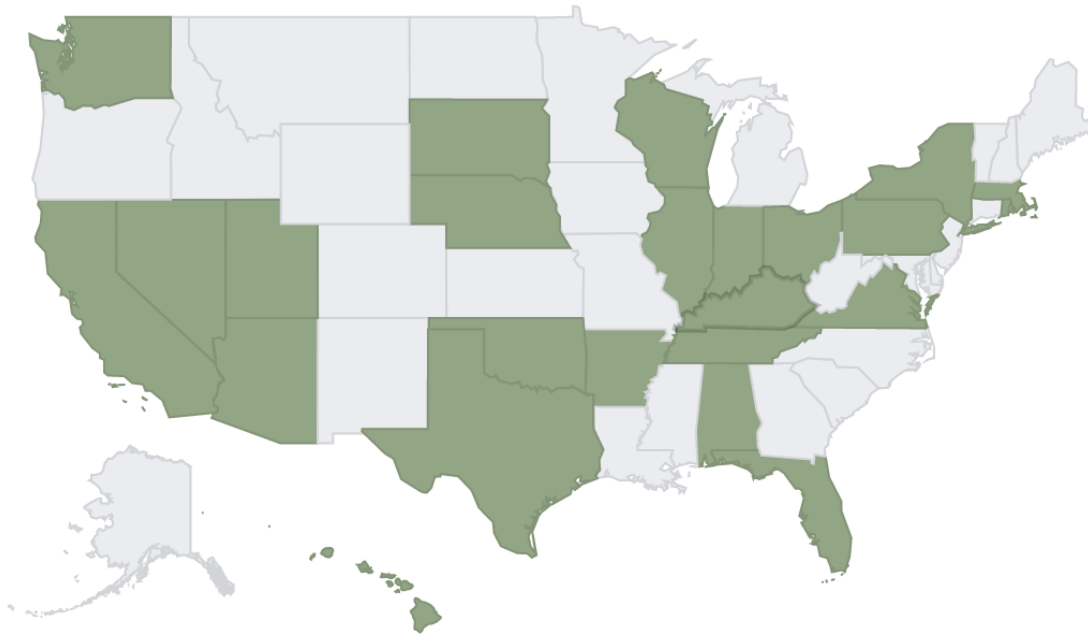
<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 575-577.





*Map demonstrating the states which recognize the right of publicity statutorily,*

<https://rightofpublicity.com/statutes>

The right to publicity is still limited in its application, as it is only statutorily recognized by 13 states. Although other states have given some credence to the right to publicity within their common law tradition, the invocation of the right is relatively scarce, and the instances in which a plaintiff prevails is rare. There is an increase in right to publicity claims, particularly amongst athletes and even more specifically, student athletes.<sup>35</sup> Of course, the right is not only limited to celebrities - any person whose name or likeness is used for commercial purposes without their

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<sup>35</sup> *Game On: How the Right of Publicity, Legalised Gambling and Fair Pay to Play Laws Are Changing US Professional and Amateur Sports*, Gibsondunn.com, <https://www.gibsondunn.com/wp-content/uploads/2020/05/Edelman-Bach-Game-On-How-the-Right-of-Publicity-Legalised-Gambling-and-Fair-Pay-to-Play-Laws-Are-Changing-US-Professional-and-Amateur-Sports-Business-Law-International-05-2020.pdf> (last visited Apr 10, 2022)

permission will potentially have a claim of an infringement on their right of publicity.<sup>36</sup> We have seen that recently within the student-athlete community because the NCAA has recently changed their policy regarding right to publicity.<sup>37</sup> Effective in the 2021-2022 season, student athletes may now receive compensation for the use of their image or likeness.<sup>38</sup> This is an example of persons who are well-known, while not being full-blown celebrities, protecting their rights to publicity.

Of course, there are also instances where “everyday” persons may claim and infringement of this right, such as a child’s picture taken at a toy store used in a toy’s advertisement campaign. But the student athlete instance demonstrates an example of where persons who, while not quite household names, but also not ordinary, everyday persons, would be able to claim a right to publicity. In a somewhat similar fashion, crime victims, their families, and the perpetrators may be “famous” within certain contexts and communities while not being commonly known across the nation. This is important because it is a recognition of the seriousness of the commercialization of these people’s identities and sufferings.

In fact, courts have also recognized a right to publicity interest in cases involving crime victims, their families, or the perpetrators themselves. For instance, O.J. Simpson’s name and likeness was litigated under a right to publicity theory.<sup>39</sup> After Simpson was acquitted for the murders of Nicole Brown and Ronald Goldman, the families of the deceased won a judgment

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<sup>36</sup> Frederick J. Sperling, *Famous athlete cases offer right of publicity lessons* ArentFox Schiff (2020), <https://www.afslaw.com/perspectives/news/famous-athlete-cases-offer-right-of-publicity-lessons> (last visited Apr 10, 2022).

<sup>37</sup> *NCAA Allows Right of Publicity Endorsement* | Intellectual Property Center, LLC Intellectual Property Center, LLC, <https://theipcenter.com/2020/04/student-athletes-earning-money-from-rights-of-publicity/#:~:text=The%20Right%20of%20Publicity%2C%20generally,their%20identity%20for%20commercial%20purposes.> (last visited Apr 10, 2022).

<sup>38</sup> *Id.*

<sup>39</sup> Laura Hock, *What’s in a Name? Fred Goldman’s Quest to Acquire O.J. Simpson’s Right of Publicity and the Suit’s Implications for Celebrities*, 35 PEPP. L. REV. 347, 348 (2008).

against Simpson in a wrongful death civil suit.<sup>40</sup> The judgment award was \$35 million in damages, but the civil judgment remained unpaid by Simpson for nearly ten years.<sup>41</sup> In response to the lack of payment, Ronald Goldman's father petitioned the court to assign and transfer Simpson's right of publicity in order to partially satisfy the judgment.<sup>42</sup> The petition was dismissed, but as noted by legal scholar Laura Hock, this raises an interesting and novel legal question of the transferability of the right of publicity in settlements and judgment awards. Moreover, Simpson's case also raises an interesting question as to whether the right of publicity can be transferred at all. After the Court's decision in *Zambini* that determined the right to publicity is a separate property right from the right to privacy, states can now, if statutorily recognized by states, permits those rights to be transferred.<sup>43</sup>

Perhaps victims and their families do deserve and require a higher form of protection. Williams offers an insight into the potential harm done to crime victims and their families, saying:

Crime victims are often forcibly thrust into the spotlight. These are not individuals who want attention and to profit off of their likeness. They want the privacy protection of the right of publicity inherent in their personhood. There is a lack of protection covering victims' rights of publicity in California. As a leading state for media production, California needs to adopt a more effective and enforceable right of publicity. The new evolution of technology and true crime necessitates an expansion of the recognized rights.<sup>44</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 353.

<sup>43</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *E.g.* O.R.C. 2741.09(A).

<sup>44</sup> Williams, *supra* note 19, at 318.

There are also cases where, in order to not reward murderers, some laws guard against the right the publicity. For instance, Son of Sam laws prevent a murderer from profiting from the use of his name or likeness. Ashton Williams explains that:

“Son of Sam” laws are state laws which generally prohibit criminals from profiting from their crimes. The name “Son of Sam” comes from David Berkowitz, a serial killer in New York City during the late 1970s. He murdered six people within the span of a year and terrorized the city. During this time, Berkowitz sent several notes to law enforcement, teasing them about not being able to catch him. In his letters, he would refer to himself as the “Son of Sam”. His impact and widespread news coverage led “[t]he New York legislature [to] preemptively [push] for a law that prevented criminals from monetizing their crimes by selling their stories – the country’s first so-called Son of Sam law.” Other states have also followed suit by enacting their own versions.<sup>45</sup>

While the right to publicity can be very important, there are also other considerations concerning those rights. The first (and perhaps the most significant) is that the First Amendment protects the freedom of speech as well as the freedom of the press. True crime content often comes as a form of news-reporting and journalism.<sup>46</sup> In line with journalism and free speech, much of this information, including the names of the involved individuals, are in the public domain because they are facts. Now, if this was a perfect defense entirely, there would not truly be a right to publicity at all. Instead, in the seminal case of *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the US Supreme Court held that the First Amendment does not allow the news media to immunize themselves against right of publicity statutes in certain instances. In *Zacchini*, a reporter recorded and published the entire act of a human cannonball performer who subsequently sued under a theory of the right to publicity. The Court found that by recording an entire performance, the reporter had violated the right to publicity

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<sup>45</sup> Williams, *supra* note 19, at 321.

<sup>46</sup> Boling, Kelli, *True crime podcasting: Journalism, justice or entertainment?*, Radio Journal:International Studies in Broadcast & Audio Media, vol. 17.

that, in this instance, was more akin to a property right as sometimes viewed in copyright and patent law.

However, while the US Supreme Court has recognized the value of the right to publicity in the face of the First Amendment, the holding in *Zacchini* is also somewhat narrow because of the facts of the case involving the recording of an entire performance. In contrast to true crime media, there is not a “performance” to be recorded. Instead, it is potentially the likeness and persona that is being “recorded” and used. Furthermore, there are several fair use defenses to a claim of infringement of the right to publicity, including using a person’s name or likeness for the news or for something predominantly for public interest rather than for commercial use. These types of fair use defenses are aimed primarily at ensuring that names and likenesses, as facts, can be reported and used in newspapers and other fact-reporting works while also ensuring that this fair use is not exploited by advertising and marketing agencies or for other commercial purposes.

Of course, because of the content of true crime media, the right of publicity being violated is often that of a deceased victim. This brings in other considerations about when the right to publicity was allegedly violated, whether the violation had commercial purpose or value, and when the effective date of the violation should be determined to have occurred.<sup>47</sup> However, each of these factors vary widely among state jurisdictions.<sup>48</sup> For instance, in Ohio, offers 60-year post-mortem protection for most deceased.<sup>49</sup> In contrast, Utah requires that the deceased’s right to publicity be exploited during their lifetime in order to be able to bring a suit

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<sup>47</sup> *The Post-Mortem Right of Publicity: Defining it, Valuing it, Defending it, and Planning for it* Wilmingtontrust.com, <https://www.wilmingtontrust.com/content/dam/wtb-web/pdfs/The-Post-Mortem-Right-of-Publicity.pdf> (last visited Apr 10, 2022)

<sup>48</sup> *Id.*

<sup>49</sup> R.C. 2741.02(A)(3).

postmortem.<sup>50</sup> Therefore, whether the right to publicity would even attached would also depend upon the jurisdiction.

### *Conclusion*

In the end, I think that it is not only improbable that the right to publicity would be further extended but it is also likely unwise. Although victims of crime and their families do deserve privacy and respect, the right to publicity is likely not the way that the legal system can best provided that. Because of fair use, the facts involved that cannot be protected under copyright, and the broad implications that the expansion of the right to privacy might have, extending the right to privacy further into this field would be unwise.

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<sup>50</sup> *Nature's Way Prods., Inc. v. Nature-Pharma, Inc.*, 736 F. Supp. 245, 252 (D. Utah 1990).