TAKE MY LIKENESS, PLEASE: THREATS TO THE RIGHT OF PUBLICITY IN LIGHT OF *STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. V. CAMPBELL*

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I. INTRODUCTION

Celebrities were recently deprived of a valuable asset. This time, however, the perpetrator was not an Internet hacker, a supermarket tabloid, or an unscrupulous business manager. It was the United States Supreme Court. Although *State Farm Mutual Automobile Insurance Co. v. Campbell*[1] concerns the constitutionality of punitive damages, it may have the unintended effect of limiting celebrities' nationwide rights of publicity.

The right of publicity affords an individual an interest in the use of that individual's name, likeness, photograph, voice, and other personal characteristics in connection with commercial exploitation and the marketing of goods and services.[2] It is the "inherent right of every human being to control the commercial use of his or her identity . . . and recover in court damages and the commercial value of an unpermitted taking."[3] Although this body of law has its roots in privacy rights, such as those concerning public disclosure of embarrassing facts, the right of publicity is

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1. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

2. ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 789 (3d ed. 2003). *See also* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 569 (1977); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 215–16 (1954).

3. J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2003).

an explicit recognition of the *commercial* injury caused by the use of a person's identity.[4]

As of early 2003, eighteen states recognized common law rights of publicity[5] and seventeen states had statutory provisions.[6] While there is some overlap, as some states recognize both statutory and common law rights of publicity, twenty-two states do not recognize any such right at all.[7]

Despite the fact that causes of action related to the right of publicity are based on a single state's law, many of the remedies sought in such cases are of a national scope. Plaintiffs often seek nationwide injunctive relief to prevent the dissemination of publications or advertisements using their likenesses.[8] Additionally, they frequently seek compensatory damages for the commercial value of the appropriation of their images, often for national use.[9] Finally, in some jurisdictions, such as California, plaintiffs have won punitive damages that have nationwide components, such as deterrence.[10] The right of publicity is unusual, therefore, because it is grounded in state law, yet encompasses rights that often may be exploited on a national scale.

The recent Supreme Court decision in *State Farm* has been noted by commentators as placing significant constitutional restrictions on punitive damages.[11] The Court held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[12] Although the facts of *State Farm* had nothing to do with the right of publicity, the Court articulated certain principles that may have the unintended effect of severely limiting the viability of this cause of action. Most significantly, the Court held that state courts do not have a legitimate concern in punishing defendants for conduct outside their borders, regardless of whether or not such conduct is lawful.[13]

4. *Id.* §§ 1:4, 1:7.

5. *Id.* § 6:3.

6. *Id.* §§ 6:3, 6:8.

7. *See id.* § 6:3.

8. *E.g.*, Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1022 (C.D. Cal. 1998), *aff'd sub nom.* Diana Princess of Wales Mem'l Fund v. Franklin Mint Co., 216 F.3d 1082 (9th Cir. 1999); Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454 (Cal. 1979) (per curiam); MCCARTHY, *supra* note 3, § 11:25.

9. *See* MCCARTHY, *supra* note 3, § 11:32.

10. *See, e.g.*, Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992).

11. *See, e.g.*, Howard L. Andari, *The Constitutional Battle Against Punitive Damages: The Aftermath of* Campbell v. State Farm, 40 ARIZ. ATT'Y 32 (2003).

12. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

13. *Id.* at 421–22.

While there has been a steady stream of scholarship on *State Farm*'s effect on punitive damages, minimal attention has been devoted to its impact on state laws that may have other extraterritorial effects. Furthermore, no court has noted the relevance of *State Farm* to the right of publicity.[14]

This Note explores the effects of *State Farm*'s holding on the future viability of causes of action based on the right of publicity. Part II reviews the predecessor case to *State Farm*, *BMW, Inc. v. Gore*,[15] and discusses its effect on the right of publicity. Part III introduces the new holding from *State Farm*. Part IV argues that the due process concerns articulated in *BMW* and *State Farm* are applicable to the right of publicity, despite conflict of laws principles and the single publication rule. Finally, Part V analyzes the due process concerns *State Farm* raised and argues that those due process concerns suggest that it is unconstitutional to apply one state's right of publicity laws to causes of action based on out-of-state activity. Part V also proposes several actions that state legislatures and courts can take to ensure that both the content and application of states' right of publicity laws comply with due process.

II. *STATE FARM*'S PREDECESSOR: *BMW* AND ITS EFFECT ON THE RIGHT OF PUBLICITY

Prior to *State Farm*'s holding about punitive damages, the Supreme Court had already made clear in *BMW* that punitive damages could only be awarded for conduct that was unlawful in the state in which it occurred. While the Court only referred to punitive damages in its reasoning in *BMW*, the logic of its holding applies to compensatory damages, as well. Thus, *BMW*'s holding affected the scope of recovery in right of publicity cases.

A. BACKGROUND

Dr. Ira Gore purchased a "new" BMW from an Alabama auto dealer but later discovered that the car had been repainted, due to exposure to acid rain.[16] He subsequently brought a suit alleging that the failure to disclose the repainting constituted fraud under Alabama law.[17] At trial, Gore introduced evidence that, nationwide, BMW had sold nearly a thousand

14. To the author's knowledge, as of the writing of this Note, there has been no published scholarship on *State Farm*'s effect on the right of publicity.

15. BMW, Inc. v. Gore, 517 U.S. 559 (1996).

16. *Id.* at 563 n.1.

17. *Id*.

refinished cars as new.[18] Based on this national evidence, the jury awarded Gore punitive damages of $4,000,000, using the actual damage estimate of $4000 per vehicle.[19] In a post-trial motion to set aside the punitive damage award, BMW presented evidence that its nondisclosure policy for repairs that do not exceed three percent of the car's retail price was consistent with the laws on disclosure obligations in approximately twenty-five states. BMW argued that conduct that was lawful in those states could not provide a basis for punitive damages.[20]

The Supreme Court agreed with BMW, holding that a "State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."[21] The Court went on to state that "Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct *that is lawful in other jurisdictions*."[22]

The Court used a due process analysis to review the constitutionality of the punitive damages award. First, it reiterated the principle that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[23] An award that is "grossly excessive" in relation to those interests, however, enters "the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."[24]

Next, the Court focused on the scope of Alabama's legitimate interest in punishing BMW and deterring it from future misconduct. It noted that while a state may protect its citizens by prohibiting deceptive trade practices and requiring disclosure, states need not provide such protection in a uniform manner.[25] Indeed, the diverse policy judgments of lawmakers in the fifty states have resulted in a patchwork of rules based on varied principles of contract and tort law.[26]

18. *Id.* at 564.
19. Gore was also awarded $4000 in compensatory damages for his vehicle. *Id.* at 564–65.
20. *Id*. at 565.
21. *Id.* at 572.
22. *Id.* at 572–73 (emphasis added) (internal footnote omitted).
23. *Id.* at 568.
24. *Id.*
25. *Id.* at 568–69.
26. *Id.* at 569–70.

The Court concluded this part of its analysis by holding that no single state can "impose its own policy choice on neighboring States."[27] The Court emphasized that "[n]o State can legislate except with reference to its own jurisdiction"[28] and that "[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."[29] In a footnote, the Court reiterated the principle that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."[30]

B. THE EFFECT OF *BMW*

1. *BMW*'s Application to Compensatory Damages

While *BMW* explicitly deals with punitive damages, much of the Court's language implicitly applies to compensatory damages, as well. After all, if a state has no legitimate interest in punishing or changing a tortfeasor's conduct in other states with punitive damages, how can it have a legitimate interest in imposing compensatory damages in another state where there has been no tortious conduct? In *BMW*, the Court made it clear that states may not impose their policy choices on other states through punitive damage awards.[31] Thus, if punishing a person for something lawful violates due process, it follows that awarding compensation for lawful activity must also violate due process.

2. How *BMW* Affects the Right of Publicity

Under the reasoning the Court applied in *BMW*, a court must violate due process if it applies one state's right of publicity laws to out of state conduct that was lawful in the jurisdiction where it occurred. As described above, this holds true for both punitive and compensatory damages. Surely, if Dr. Gore had purchased his repainted BMW in a state that permitted nondisclosure of minor alterations, he could not have recovered damages under Alabama law. Applying the same reasoning to the right of publicity, celebrities must also be barred from recovering for the commercial use of their image in a jurisdiction that does not provide for such rights.

27. *Id.* at 571.
28. *Id.* (quoting Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881)).
29. *Id.* at 572 n.16 (quoting Bigelow v. Virginia, 421 U.S. 809, 824 (1975)).
30. *Id.* at 573 n.19 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)).
31. *Id.* at 571.

The patchwork of state laws on consumer protection is analogous to the patchwork of state laws on the right of publicity. Each state's policymakers have decided whether, and to what extent, that state will afford its celebrity-citizens commercial rights in their images. Just as a state cannot enact consumer protection legislation that applies outside its own jurisdiction, so too is a state prohibited from legislating rights of publicity outside its jurisdiction. The California legislature has already recognized this principle and has incorporated it into a right of publicity statute.[32] Consequently, state legislatures and courts must take great care in how they apply right of publicity laws. In light of *BMW*, they must follow the principle that "to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."[33]

3. Potential Impact on State Laws: The Astaire Celebrity Image Protection Act

While few courts have recognized the potential effect *BMW* has on the right of publicity, at least one state legislature incorporated its principles when it amended a right of publicity statute. In 1999, the California legislature amended its right of publicity statute that applies to the estates of deceased celebrities and renamed it the Astaire Celebrity Image Protection Act.[34] While the amendment was intended to address several unrelated issues, in order to comply with *BMW*, the legislature added language restricting the law to "cases in which the liability, damages, and other remedies arise from acts occurring *directly* in this state."[35] California's Assembly Judiciary Committee noted that a group of law scholars opposed a prior version of the bill that did not include the in-state-only limitation:

> The group of law scholars . . . assert that [the bill] " . . . may well be seen as intending to create liability and impose damages for conduct that is lawful in other states. This is precisely the type of statute *BMW v. Gore* condemns. This is because, in the Supreme Court's view, California may

32. *See infra* text accompanying notes 35–37.

33. *BMW*, 517 U.S. at 573 n.19 (quoting *Bordenkircher*, 434 U.S. at 363).

34. CAL. CIV. CODE § 3344.1 (West 2003) (originally introduced as S.B. 209, 1999–2000 Leg., Reg. Sess. (Cal. 1999)).

35. *Id.* § 3344.1(n) (emphasis added). *See also Deceased Celebrities' Heirs: New Statutory Protections: Hearing on S.B. 209 Before the Assem. Comm. on Judiciary*, 1999–2000 Leg., Reg. Sess. (Cal. 1999), *available at* http://www.assembly.ca.gov/acs/committee/c15/publications/sb209_99.pdf [hereinafter *Hearing on S.B. 209*]. The law that applies to living celebrities, which has not been amended since 1984, does not contain a comparable provision. *See* § 3344.

be reaching outside its boundaries to impose liability and damages for conduct in other states" that was in fact lawful where it occurred.[36]

III. THE EFFECT OF *STATE FARM*

The preceding discussion shows that applying one state's right of publicity laws to activities in another state may violate due process, particularly if the activity is permitted in the state where it occurs. What about activity that is barred by both states? Imagine a hypothetical "mom and pop" grocery store in New York that prints an advertisement in a local paper that includes, without permission, a photograph of a famous actress who resides in California. Assuming both states' laws regard this as a violation of her right of publicity, but California affords more protection, does the celebrity have a viable cause of action under California law, or must the court rely on New York law to determine the outcome? Arguably *BMW* does not apply where the activity is illegal in both states. The more recent holding of *State Farm*,[37] however, suggests that the actress may not be able to bring suit under California law.

A. BACKGROUND

In 1981, Curtis Campbell attempted to pass six vans traveling ahead of him on a two-lane highway.[38] To avoid a head-on collision, the driver of an oncoming vehicle swerved and lost control of his vehicle, resulting in a collision that killed him and permanently disabled another driver.[39] Although the consensus of investigators and witnesses was that Campbell caused the crash, his insurance company, State Farm, refused to settle and took the case to trial.[40] In doing so, State Farm assured Campbell and his wife that their assets were safe, that they had no liability, and that they need not procure separate counsel.[41] When a jury found Campbell at fault and awarded a judgment far in excess of the amount originally offered in settlement, State Farm refused to cover the excess and suggested the Campbells "put for sale signs on [their] property."[42]

36. *Hearing on S.B. 209*, *supra* note 35, at 12.
37. State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408 (2003).
38. *Id.* at 412.
39. *Id.* at 412–13.
40. *Id.* at 413.
41. *Id*.
42. The plaintiffs had originally offered to settle for the policy limit of $50,000 and the jury's judgment was for $185,849. *Id.*

The Campbells brought suit against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress. They also introduced evidence of a national scheme by State Farm to limit payouts on claims.[43] The jury awarded them $2.6 million in compensatory damages and $145 million in punitive damages.[44] Although the trial court reduced both awards, the Utah Supreme Court reinstated the $145 million punitive damages award, relying on the evidence of the nationwide policy.[45]

In reversing this decision, the Supreme Court reaffirmed the principles articulated in *BMW* that a jury must be instructed not to use evidence of out-of-state conduct to punish a defendant for actions that were lawful where they occurred.[46] Although the opinion primarily dealt with certain guideposts that courts should use when reviewing punitive damages, the Court specifically addressed the use of evidence of out-of-state conduct: "A State cannot punish a defendant for conduct that may have been lawful where it occurred."[47] The Court then proceeded to take this principle a step further, stating: "Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for *unlawful* acts committed outside of the State's jurisdiction."[48] By expanding the principle from lawful acts to unlawful acts, the Court has made it clear that it is not a legitimate concern for a state to punish *any* activity outside of its borders. The Court reiterated that "[l]aws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States."[49]

B. THE AFTERMATH OF *STATE FARM*

To date, there are few explicit judicial references to *State Farm* in cases involving the application of one state's laws to conduct in other states. The Supreme Court of Missouri, however, in a recent contract class action suit, held that a trial court abused its discretion in certifying the class with respect to potential class members whose contracts were subject to the laws of states other than Missouri.[50] In a footnote to its reasoning, the court pointed out that, "[a]lthough addressing other issues, the recent case of

43. *Id.* at 414–15.
44. *Id.* at 415.
45. *Id*.
46. *Id.* at 421–22.
47. *Id.* at 421.
48. *Id.* (emphasis added).
49. *Id*. (quoting Huntington v. Attrill, 146 U.S. 657, 669 (1892)).
50. Missouri *ex rel.* Am. Family Mut. Ins. Co. v. Clark, 106 S.W.3d 483, 487 (Mo. 2003).

State Farm Mutual Automobile Insurance Co. v. Campbell indicates the constitutional care that must be taken by state courts in cases that exceed the forum state's borders."[51]

But can it be this simple? Can one case concerned with punitive damages single-handedly destroy an established state right? What about principles of conflict of laws and the single publication rule, which give states' laws extraterritorial effect?[52] Do these principles contradict the due process arguments presented here? The next section will address these questions and argues that such principles do not mitigate the due process violation caused by one state's right of publicity law being applied to activity in another state.

IV. IS THE APPLICATION OF *BMW* AND *STATE FARM* TO RIGHT OF PUBLICITY LAWS LIMITED BY CONFLICT OF LAWS PRINCIPLES AND THE SINGLE PUBLICATION RULE?

Courts have used two principles to resolve problems related to claims arising out of activities in multiple states: conflict of laws and the single publication rule. Following *BMW* and *State Farm*, courts must use particular care when applying these principles to right of publicity laws.

A. CONFLICT OF LAWS

Conflict of laws is a branch of jurisprudence that reconciles inconsistencies among the laws of different states or jurisdictions and decides which law is to govern a particular case.[53] As explained in the *Restatement (Second) of Conflict of Laws* ("Restatement"): "Each state has rules to determine which law (its own local law or the local law of another state) shall be applied by it to determine the rights and liabilities of the parties resulting from an occurrence involving foreign elements."[54] As varied as states' substantive laws are, however, states' rules for choice of law are chaotic, with states using numerous approaches and inconsistent, complicated methods.[55] These include: the vested rights approach, the most

51. *Id.* at 487 n.6 (internal citation omitted).

52. For further discussion of conflict of laws and the single publication rule, see *infra* Part IV.

53. BLACK'S LAW DICTIONARY 271 (5th ed. 1985).

54. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (1971).

55. EDWIN SCOTT FRUEHWALD, CHOICE OF LAW FOR AMERICAN COURTS: A MULTILATERALIST METHOD 1 (2001).

significant relationship test, the governmental interest analysis, and the better rule approach.[56]

The variation among the states is particularly acute and problematic with respect to the right of publicity.[57] Some states, such as California and Indiana, characterize the right of publicity as a property right, while others, like New York, view it as sounding in tort.[58] As J. Thomas McCarthy observed in his treatise on the right of publicity:

> [F]or a nationally known celebrity, where is the "situs" of the property right in the right of publicity? At the person's domicile? And if plaintiff in a case is not the celebrity, but his or her exclusive licensee, does the "property" in the right of publicity exist in the states of incorporation of the exclusive licensees, so that the law of several different states applies to several different plaintiffs?[59]

Given the variations in substantive publicity laws, the choice of which state's law applies to a given controversy may be decisive.[60] For example, depending on the choice of law, the right may not ever descend to one's heirs, it may descend only in the particular commercial context in which it was exercised during life, it may descend in all commercial contexts if exercised during life, or it may descend in all commercial contexts regardless of whether it was exercised during life.[61]

Furthermore, the divergence of state law regarding the right of publicity has led to a chronic problem of forum shopping.[62] The choice of law can quickly determine the outcome of a case or even whether the matter will be heard.[63] The problem of forum shopping is exemplified by potentially overreaching state long-arm statutes, such as Indiana's publicity laws, which apply to acts or events that occur within Indiana, regardless of the litigant's domicile, residence, or citizenship.[64] Consequently, lawyers have difficulty assessing which law is applicable to right of publicity

56. *Id.* at 6 n.4.

57. *See, e.g.*, Joseph J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, 16 BERKELEY TECH. L.J. 1165, 1239–48 (2001); Richard Cameron Cray, Comment, *Choice of Law in Right of Publicity*, 31 UCLA L. REV. 640, 641 (1984) (arguing that choice among divergent state laws in multistate publicity right controversies is inherently arbitrary, and federal legislation is needed to achieve uniformity).

58. *See* MCCARTHY, *supra* note 3, §§ 6:4–6.

59. *Id.* § 11:8.

60. Cray, *supra* note 57, at 644.

61. *Id.* at 645.

62. Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 227, 244 (1999).

63. *Id.*

64. *Id.* (citing IND. CODE § 32-13-1-1 (1998)).

matters and confusion therefore results. For example, a court's distinction between commercial use and a "newsworthy" exception will often determine whether a person's right of publicity has been violated.[65] If in our earlier hypothetical, the California actress chooses to sue the New York grocery store, her rights and remedies may substantially differ depending on whether the court decides that California or New York right of publicity law governs.

Cases such as *White v. Samsung Electronics America, Inc.*[66] cause further confusion. Samsung ran a consumer electronics ad campaign depicting a robot dressed in a wig and gown standing next to a game board, similar to the one used on the television show *Wheel of Fortune*, along with the caption, "Longest-Running Game Show, 2012 A.D."[67] Vanna White, of *Wheel of Fortune* letter-turning fame, sued, alleging Samsung's robot violated her right of publicity by appropriating her "identity for commercial use."[68] The Ninth Circuit held that the right of publicity extends beyond name and likeness to anything that "evokes" a celebrity's personality.[69] After *White*, a national advertiser must first assess whether its ad will merely remind the public of a celebrity, and if so, the advertiser must next guess which state's law will apply.

In his dissent to the Ninth Circuit's order denying a rehearing of *White* en banc, Judge Kozinski stated: "So you made a commercial in Florida and one of the characters reminds Reno residents of their favorite local TV anchor (a California domiciliary)? Pay up."[70] This unfortunate result stems from the fact that "[t]he broader and more ill-defined one state's right of publicity, the more it interferes with the legitimate interests of other states."[71]

Choice of law, therefore, can lead to disparate results and, in some right of publicity cases, may give one state's laws extraterritorial effect. Does this possibility, which is generally accepted in modern jurisprudence, contradict the notion that applying one state's right of publicity rule to activity in another state violates due process? Absolutely not. Choice of law is also subject to due process constraints, as further discussed below.

65. *Id*. at 244, 246.

66. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992), *rehearing en banc denied*, 989 F.2d 1512 (9th Cir. 1993).

67. *Id*. at 1396.

68. *Id*.

69. *Id*. at 1398–99.

70. White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1519 (9th Cir. 1993) (Kozinski, J., dissenting) (denying a rehearing en banc).

71. *Id*.

This section argues that, depending on the approach a state uses to resolve conflicts of laws in a right of publicity case, a state may directly violate due process in the very manner that concerned the Court in *BMW* and *State Farm*.

1. Due Process Constraints on Choice of Law

The Constitution places limits on choice of law. As the Restatement explains: "A court, *subject to constitutional restrictions*, will follow a statutory directive of its own state on choice of law."[72] Furthermore, the Supreme Court plurality, in *Allstate Insurance Co. v. Hague*, noted:

> In deciding constitutional choice-of-law questions, whether under the Due Process Clause or the Full Faith and Credit Clause, this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation. In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair, the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.[73]

In other words, a state that does not have significant contacts creating interests in a controversy may not constitutionally apply its law to that controversy.

Hague's dissenting Justices, with few reservations, also accepted this principle. They stressed, however, that the due process clause prohibits application of the law of a state that has only "slight and casual" contacts to the litigation.[74] As the dissent explained:

> The State has a legitimate interest in applying a rule of decision to the litigation only if the facts to which the rule will be applied have created effects within the State, toward which the State's public policy is directed. To assess the sufficiency of asserted contacts between the forum and the litigation, the court must determine if the contacts form a reasonable link between the litigation and a state policy.[75]

Furthermore, the plurality stated that "for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state

72. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971) (emphasis added).

73. Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) (plurality opinion) (internal citations omitted) (internal footnote omitted).

74. *Id.* at 332–33 (Powell, J., dissenting, joined by Burger, C.J. & Rehnquist, J.).

75. *Id.* at 334.

interests, such that choice of its law is *neither arbitrary* nor *fundamentally unfair*."[76]

In *Phillips Petroleum Co. v. Shutts*, the Supreme Court held that the application of one state's laws to every claim in a class action violated the due process clause because the "application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits."[77] In its reasoning, the Court noted that the case involved the laws of multiple states and that the state lacked an interest in those claims unrelated to Kansas.[78]

One conflict of laws scholar asserts that *BMW* provides guidance for evaluating choice of law.[79] When a state court adopts its own law where another state has a significantly closer connection to the controversy, the interests of the latter state and its citizens are not respected and due process may be violated.[80] Such unreasonable choice of law may make otherwise lawful conduct unlawful, solely because the forum state extended its reach beyond appropriate limitations.[81] *BMW* and now *State Farm* demonstrate that this kind of application of state law violates due process.

Thus, the constitutional limitations on conflicts of law analyses are consistent with the notion that one state's laws may not be given extraterritorial effect when that state has no legitimate interests in the occurrence.

2. Examples of Legislative and Judicial Recognition of *BMW*'s Due Process Effects on Choice of Law

a. Amendment to the Astaire Celebrity Image Protection Act

The California legislature has already acknowledged the constitutional limitations, implied by *BMW*, on choice of law for right of publicity cases. An early version of the bill to amend California's postmortem right of publicity statute originally included a choice of law provision, which provided that, pursuant to California's long-arm jurisdiction statute, "a plaintiff has standing to bring an action pursuant to this section if any of the acts giving rise to the action occurred in this state, whether or not the

76. *Id.* at 312–13 (plurality opinion) (emphasis added).
77. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985).
78. *Id.* at 821–22.
79. FRUEHWALD, *supra* note 55, at 75.
80. *Id.*
81. *Id.*

decedent was a domiciliary of this state at the time of death."[82] The legislature rejected this provision because, as the Assembly Judiciary Committee indicated:

> [T]his language may unfortunately be too broad to satisfy the U.S. Supreme Court's recent holding in *BMW v. Gore*, which provided that "while we do not doubt that Congress has ample authority to enact . . . policy for the entire Nation, it is clear that no single state could do so, or even impose its own policy choice on neighboring States."[83]

Proponents of the choice of law provision argued that *BMW* did not apply because in a multistate tort action, it would require a plaintiff to either file suits in all fifty states to recover damages, or ask a single court to determine the applicable law of fifty states.[84] The California legislature rejected this argument, stating:

> Proponent's argument side-steps the fact that only 10–15 states nationwide currently recognize a descendible right to publicity. The bill, therefore, arguably does not only allow the application of California law to tortious activities in other states, but also imposes liability for activities that may have been lawful in the state where they occurred or where the damage resulted.[85]

In order to comply with the Supreme Court's pronouncements in *BMW*, the legislature ultimately eliminated the choice of law provision and added the following language to the final version of the bill: "This section shall apply to the adjudication of liability and the imposition of any damages or other remedies in cases in which the liability, damages or other remedies arise from acts occurring *directly in this state*."[86] Thus, by limiting the statute's scope to acts occurring directly in the state, the legislature ensured that it would not be applied to extraterritorial activities, and thus would not raise the due process concerns of *BMW*.

While the legislative history behind this law is not binding authority on choice of law disputes, it does point to the direction courts and legislators may take in applying the principles articulated in *BMW* and *State Farm* to choice of law in right of publicity cases. In fact, the Ninth

82. *Hearing on S.B. 209*, *supra* note 35, at 12.

83. *Id*. (internal citation omitted) (second alteration in original). A group of law scholars also wrote the Assembly Committee in opposition to the choice of law provision, arguing that the bill "may well be seen as intending to create liability and impose damages for conduct that is lawful in other states. This is precisely the type of statute *BMW v. Gore* condemns." *Id. See also supra* notes 34–36 and accompanying text.

84. *Hearing on S.B. 209*, *supra* note 35, at 12.

85. *Id*.

86. CAL. CIV. CODE § 3344.1(n) (West 2003) (emphasis added).

Circuit took note of this statute's legislative history when it denied a postmortem right of publicity in California to the estate of the late Diana, Princess of Wales.[87]

b. Court Denial of Right of Publicity Recovery: *Cairns v. Franklin Mint Co.*

In *Cairns v. Franklin Mint Co.*, the executors of the estate of Princess Diana brought an action against the Franklin Mint alleging it infringed on the Princess's right of publicity by producing and marketing jewelry, plates, sculptures, and other commemorative objects depicting her likeness.[88] Applying California's choice of law rules, the court held that the law of the Princess's domicile at the time of her death, Great Britain, should apply with respect to whether a right of publicity is included in the estate.[89] Because British law does not recognize a descendible right of publicity, the court granted Franklin Mint's motion to dismiss for failure to state a claim.[90]

In a subsequent motion, the Princess's estate asserted that the new language added to California's amended statute, regarding acts occurring "directly" in the state, is a choice of law provision and therefore requested that the court reinstate the right of publicity claim.[91] The district court, which was later affirmed by the Ninth Circuit, denied the motion, ruling that section 3344.1(n) of the California Civil Code is not a choice of law provision.[92] As support for its conclusion, the court pointed to the legislative history of section 3344.1 and the concern that the original language was unconstitutional under *BMW*.[93]

The Ninth Circuit affirmed the lower court's decision and denied the estate's claim that California law should be applied to the right of publicity claim.[94] In its reasoning, the court also cited the California Assembly Judiciary Committee Hearing as providing evidence that the law of Great Britain must govern the matter.[95]

87. Cairns v. Franklin Mint Co., 292 F.3d 1139, 1148–49 (9th Cir. 2002).

88. Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1021–22 (C.D. Cal. 1998), *aff'd sub nom.* Diana Princess of Wales Mem'l Fund v. Franklin Mint Co., 216 F.3d 1082 (9th Cir. 1999).

89. *Id.* at 1028–29.

90. *Id.* at 1029.

91. Cairns v. Franklin Mint Co., 120 F. Supp. 2d 880, 881–82 (C.D. Cal. 2000), *aff'd*, 292 F.3d 1139 (9th Cir. 2002).

92. *Id*. at 882.

93. *Id.* at 885–86.

94. Cairns v. Franklin Mint Co., 292 F.3d 1139, 1147 (9th Cir. 2002).

95. *Id.* at 1148–49.

Thus, a state legislature, as well as federal courts, has acknowledged that *BMW* places limitations on choice of law in right of publicity cases. *State Farm*'s subsequent affirmation of the principles of *BMW* only gives further weight to these limitations. The question then arises: how can a state properly apply conflict of laws principles to right of publicity cases and still comply with due process? Choice of law in defamation cases provides some insight.

3. Analogizing Defamation Laws to Right of Publicity Laws

Right of publicity claims have certain similarities to defamation claims. First, the substantive law varies significantly among the states. Second, the infringing activity may emanate from one state, yet have potential consequences in multiple, if not all states. Finally, the plaintiff and defendant create a similar tension as they compete for their respective interests: for the plaintiff, an image or reputation, and for the defendant, values of freedom of expression.

Commentators have long argued about the complexity and inconsistency in choice of law issues arising in multistate defamation cases.[96] Laurence Rose argues that, in light of the Supreme Court's recent statements, the focus on the plaintiff's reputation is "no longer the most important consideration; now, the inspection must revolve around the actions of the defendant to see if it committed any fault."[97] He notes that, in the context of a media publication, applying the law of the place of the defendant's conduct accomplishes the choice of law goals of certainty, predictability, uniformity of result, and ease in determining the correct standard in a cohesive way. This is because both the plaintiff and defendant know, or can easily ascertain, the location of each of the activities that are claimed to be unlawful. Furthermore, a media defendant will be able to predict, prior to publication, the relevant state law applied to its conduct.[98]

Applying the defamation approach to the right of publicity would be consistent with the due process concerns of extraterritorial application articulated in *BMW* and *State Farm*. If a plaintiff seeks damages for unauthorized use of a likeness, the place where the right was allegedly violated is, after all, the place where it is deemed to exist. Under this

96. *See, e.g.*, James R. Pielemeier, *Choice of Law for Multistate Defamation—The State of Affairs as Internet Defamation Beckons*, 35 ARIZ. ST. L.J. 55, 55 (2003); Cray, *supra* note 57, at 664–66.

97. Laurence M. Rose, *Interstate Libel and Choice of Law: Proposals for the Future*, 30 HASTINGS L.J. 1515, 1532 (1979).

98. *Id.* at 1533.

approach, the law of the state in which the right was created is applied to the claim. After all, it is the state that recognizes the right that has the closest interest in affording it protection.

In our grocery store hypothetical, if the store knows that it is only bound by the law of the state in which it advertises (New York), it may achieve some certainty over how it may use a celebrity likeness. Perhaps it may choose to merely "evoke" the image of the California actress, without fear that *White* will control.[99]

In a multistate action, this approach may force a court to apply the laws of multiple states. The Restatement acknowledges this possibility with respect to multistate defamation:

> The rule of this Section under which all damages are determined under a single law may not apply in situations where the plaintiff is claimed to have suffered one kind of special damages in one state and another kind of special damages in a second state. It is possible that in such situations the local law of each of these states will be applied to determine the plaintiff's right to recover for the special damage he is alleged to have suffered within its territory.[100]

Although this may be burdensome to a court, the Supreme Court has already articulated that the analysis of choice of law "is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum."[101]

Similar to defamation, in a right of publicity case, a plaintiff may have suffered different harms in different states. For example, if a defendant makes an unauthorized use of a singer's likeness and sound in a national commercial,[102] the singer may only have viable claims relating to the likeness use in some states. In states that recognize a right in one's sound, the claims will be different in nature. Applying the law of each state where the infringing activity took place will allow the singer to recover for infringement of sound rights where they exist, yet does not preclude recovery for the use of likeness in states that only recognize the likeness right.

99. *See supra* text accompanying notes 53–72; White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992).

100. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150 cmt. d (1971).

101. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985).

102. *See, e.g.*, Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

Therefore, applying the law of the state in which the tortious activity occurred consistently protects each state's interest in enforcing its own laws without violating the due process concerns articulated in *BMW* and *State Farm*.

4. The Current State of Conflict of Laws as Applied to the Right of Publicity

Currently, conflict of laws jurisprudence is largely unsettled. Many courts adjudicating right of publicity cases have ignored choice of law altogether.[103] Trial court rulings are commonly reversed for failing to consider choice of law constraints.[104] Some courts, when applying a "significant contacts" test to determine which state has a stronger interest in a controversy, end up choosing the law of the domicile of the plaintiff.[105]

Domicile may be emphasized by courts in choice of law for right of publicity actions because the right originated as a privacy right, which one intuitively thinks of as existing where the individual resides. For example, the law of domicile is generally applied in multistate privacy actions because it is usually considered to be the place where the plaintiff has suffered the greatest emotional injury.[106] This is inappropriate, however, in a right of publicity action where the harm is economic, not emotional.[107]

Unlike other privacy rights, infringement of a right of publicity involves commercial use of one's image. It is a state-created intellectual property right. Because of the right's intangible nature, a celebrity's domicile is not analogous to the situs of tangible property.[108] Furthermore, it is a right that exists only to the extent that a state acknowledges that it exists. If California (or a federal court interpreting California law) contends that a right in one's musical vocal styling exists, it exists in California. If, on the other hand, Nevada does not consider a "sound alike" use to be an infringement of a right of publicity, such a right does not exist in Nevada. It would be nonsensical to say that domiciliaries of California have had their sounds infringed upon in Nevada, where such a right is not recognized.

103. Cray, *supra* note 57, at 646.

104. Usha Rodrigues, *Race to the Stars: A Federalism Argument for Leaving the Right of Publicity in the Hands of the States*, 87 VA. L. REV. 1201, 1222 (2001).

105. Cray, *supra* note 57, at 654–55.

106. *Id.* at 656; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 153 (1971).

107. Cray, *supra* note 57, at 656.

108. *Id.* at 655 (arguing that the analogy falsely assumes that domicile is a contact reflecting state interest, which improperly inflates the interest of the state of a public figure's domicile in the choice of law equation).

A more appropriate choice of law principle for the right of publicity is the place of infringement—where the acts occurred that infringed upon a right recognized by that state's law. This approach implicitly recognizes the interest of a state in protecting a right that exists exclusively in that state. It furthers the choice of law goals of predictability and ease in determining applicable law.[109] Also, the plaintiff may not be the celebrity, but an heir or assignee who can only suffer a monetary loss from an infringement; therefore, applying the law of the place of infringement would be much more effective than applying the law of the plaintiff's domicile.[110] Furthermore, applying the law of the state of infringement is consistent with property principles in choice of law, which hold that the situs of the property determines the appropriate law of decision.[111] In other words, it is the jurisdiction *where the right has been exploited* that should determine choice of law. If an advertisement is published in a local New York paper, New York law should apply. If a radio spot is broadcast in San Francisco and Reno, then California and Nevada law should apply, respectively.

This approach would also be consistent with *BMW* and *State Farm* in that each state's laws would be applied only to the rights the state recognizes within its own borders. In addition, it would provide predictability for potential defendants who could then know in advance which laws would apply to their conduct in each state. Thus, advertisers, broadcasters, and other media outlets would have the benefit of knowing which rights they must acquire by contract prior to publication. For example, an advertiser who wants to use the likeness of a deceased celebrity in a national magazine would be prudent to negotiate with the celebrity's estate for rights in those states that recognize postmortem rights of publicity. On the other hand, for a local use in a state that does not recognize a postmortem right, the advertiser could use the likeness unlicensed, without fear that a court would apply the law of another state.

Furthermore, celebrities and their heirs would be able to maintain tighter, more predictable control over their publicity rights in states that recognize such rights, without running the risk of a forum-shopping defendant evading liability. Predictability in general would allow both sides to contract accordingly for different state rules, rather than relying on courts to determine their rights after the fact.

109. *Id.* at 663.
110. *Id.* at 656.
111. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 244 (1971).

The downside to this approach is that it would require courts to apply the law of multiple states in a nationwide cause of action. A first response to this criticism is that, as noted above, the Supreme Court has held that the burden of a large number of transactions should not interfere with constitutional limitations in choice of law analysis. Constitutional concerns trump any burden on a court.[112] Furthermore, the more predictable outcome should reduce litigation, or at least the number of separate claims litigated. There would be less value in making a claim for infringement in the twenty-two states that do not provide rights of publicity. Look-alike and sound-alike claims would be limited to only those states that recognize such rights. Thus, the burden on a court of having to adjudicate multiple claims under multiple laws would be mitigated by the parties themselves, recognizing that there would not be a viable cause of action for each claim in all locations.

Although the Supreme Court recognized that a state's choice of law rules may give the state's law extraterritorial effect, allowing the application of one state's law to a nationwide right of publicity claim imposes liability for activities that may have been lawful where they occurred. If courts would only apply the law of the jurisdiction where the rights were exploited, the constitutional concerns of *BMW* and *State Farm* would not be violated.

B. THE SINGLE PUBLICATION RULE

Most states have adopted the single publication rule in some form to deal with concerns that arise out of publication-based torts.[113] Primarily, it promotes judicial efficiency and protects defendants from multiple harassing suits by requiring plaintiffs to recover, in one cause of action and in one jurisdiction, damages suffered in all jurisdictions based on a single publication, such as an edition of a newspaper or any one broadcast over radio or television.[114] This procedural mechanism joins all claims arising out of a single publication in a single action.[115]

As more claims have been consolidated and actions become more complex, however, courts have expanded the single publication rule to

112. *See supra* note 101 and accompanying text.

113. RESTATEMENT (SECOND) OF TORTS § 577A reporter's note (1977) ("The great majority of states now follow 'the single publication rule.'"); Debra R. Cohen, *The Single Publication Rule: One Action, Not One Law*, 62 BROOK. L. REV. 921, 924, 931 (1996).

114. RESTATEMENT (SECOND) OF TORTS § 577A (1977); Cohen, *supra* note 113, at 933.

115. Cohen, *supra* note 113, at 933.

choice of law.[116] This has resulted in one state's substantive law being applied to multiple claims, because courts treat the claims as a *single* claim, rather than multiple claims *joined* in a single action.[117] This expansion of the rule from a procedural mechanism to application of substantive law is done solely for judicial convenience and is neither contemplated by the Uniform Single Publication Act nor section 577A of the *Restatement (Second) of Torts*, the two model codifications of the single publication rule.[118]

This practice has been criticized because it results in courts creating national laws out of a single state's law and permits recovery for injury in states whose laws may not even grant a right of action.[119] At least one legal scholar has noted that language from *BMW* supports the criticism above.[120] The Supreme Court of Montana has explicitly rejected the single publication rule altogether.[121]

There is additional evidence that suggests applying *BMW* and *State Farm* to the right of publicity is not contradicted by the single publication rule. Proponents of the earlier version of California's Astaire Celebrity Image Protection Act, that allowed a nondomiciliary of the state to bring suit, claimed that California's single publication rule demonstrates that their opponents' interpretation of *BMW* did not apply to the bill.[122] They argued that the Supreme Court in *Keeton v. Hustler Magazine, Inc.* has approved use of the single publication rule for choice of law.[123] In rejecting this argument, the Committee pointed out that the issue in *Keeton* was whether a New Hampshire court could assert personal jurisdiction, *not* choice of law.[124] The committee also noted, "nothing has been put forward to support the contention that the single publication rule is intended to confer upon an individual a right that is not recognized in the state in which

116. *Id.* at 938.

117. *Id.* at 938, 943.

118. *Id.* at 938–40.

119. *Id.* at 943.

120. Pielemeier, *supra* note 96, at 57 n.14 (2003) (quoting BMW, Inc. v. Gore, 517 U.S. 559, 572–73 (1996) ("Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents.")).

121. Lewis v. Reader's Digest Ass'n, 512 P.2d 702, 704 (Mont. 1973).

122. *Hearing on S.B. 209*, *supra* note 35 at 12–13.

123. *See id*. at 13 (arguing that the Supreme Court in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), held that "[t]he New Hampshire statute of limitations was constitutional because it governed conduct that occurred within New Hampshire; the fact that it had extraterritorial affect under applicable conflicts of law rules did not make it invalid"). The proponents of the earlier version of the Act argued that since "SB 209 has the same effect," it too should be constitutional.

124. *Id.*

the damage occurred."[125] Thus, in the context of the right of publicity, at least one state legislature has rejected the notion that the single publication rule permits extraterritorial application of state law.

Therefore, when a court treats multiple state claims as a single claim under the single publication rule, it creates national law out of one state's law. Such use of the rule permits recovery for both lawful and unlawful activities in other states and thus directly violates the due process concerns of *BMW* and *State Farm*.

V. CONSTITUTIONAL LIMITATIONS ON THE RIGHT OF PUBLICITY

The notion prescribed in *BMW* and *State Farm* that a state does not have a legitimate interest in punishing a defendant for acts committed outside of the state, whether lawful or not, has implications beyond punitive damages. This part will argue that the due process concerns presented by these cases cast constitutional doubt on the extraterritorial enforcement of state laws in general and that, because of certain unique characteristics of the right of publicity, its enforcement beyond state lines must be scrutinized and restricted. Additionally, this part will discuss measures courts and state legislatures can take to ensure that right of publicity laws comply with due process.

A. DUE PROCESS GENERALLY

The Due Process Clause of the Fourteenth Amendment has been interpreted to provide two types of protection: "procedural due process" and "substantive due process."[126] Procedural due process analysis examines procedures that the government must provide when it deprives a person of life, liberty, or property, such as notice and a hearing. Substantive due process, on the other hand, looks at the government's reasons and justifications for taking away one's life, liberty, or property.[127]

Courts have primarily used substantive due process to protect two areas: economic liberties and privacy.[128] Although no law has been invalidated on economic substantive due process grounds since 1937, *BMW* and *State Farm* are more recent cases in which the Supreme Court has

125. *Id*.
126. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 451 (2001).
127. *Id.*
128. *Id*.

declared a government action unconstitutional under the Due Process Clause in an economic area: punitive damages.[129] These anomalies may be partly due to the fact that the Court seems to have also used *procedural* due process grounds in both decisions. In both cases, the Court pointed out that individuals must receive fair notice of both the conduct that will subject them to punishment and the severity of the penalty that a state may impose.[130] By focusing on the lack of adequate notice, the court used procedural grounds to find punitive damages grossly excessive.

Lack of adequate notice is just as much a threat for compensatory damages as it is for punitive damages when state law is applied beyond its borders. Where an individual acts lawfully in one state, yet is subjected to compensating a party for damages only recognized outside that state, the fair notice concerns of due process are directly implicated. It is for this reason that the holdings in *BMW* and *State Farm* have implications for compensatory as well as punitive damages. If a state "cannot punish a defendant for conduct that may have been lawful where it occurred,"[131] how can it require a defendant to compensate another for conduct that was lawful where it occurred?

B. *BMW* AND *STATE FARM* APPLIED TO THE RIGHT OF PUBLICITY

Although *BMW* and *State Farm* dealt explicitly with punitive damages, they also apply directly to the right of publicity, with respect to both punitive and compensatory damages. This is due to three unique qualities of rights of publicity, whose combination results in a body of law particularly vulnerable to due process violations. These three qualities are (i) the paradox of being a privacy right based on commercial value; (ii) the wide variation of substantive law among the states, including some states that do not recognize the existence of the right at all; and (iii) the fact that the right of publicity is an intangible intellectual property right arising from state law.

129. *See id.* at 476; FRUEHWALD, *supra* note 55, at 73 (noting that the *BMW* Court applied a seemingly "heightened substantive due process analysis"); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 478 (14th ed. 2001) (classifying *BMW* as a revival of substantive due process).

130. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003); BMW, Inc. v. Gore, 517 U.S. 559, 574 (1996).

131. *State Farm*, 538 U.S. at 421.

1. The Privacy Versus Commercial Interest Paradox

The right of publicity has its roots in privacy rights. As Dean Prosser pointed out in his seminal article on privacy, there are four torts relating to privacy: intrusion on one's solitude, public disclosure of private facts, placing an individual in a false light in the public eye, and appropriation of one's name or likeness for commercial advantage.[132]

Though formulated as a privacy right, the right of publicity differs greatly from other types of privacy. Privacy is generally a personal right that is inalienable and only has subjective value. Publicity, on the other hand, is an economic right with property-like commercial value. Individuals can freely license the commercial use of their images. Unlike infringing a publicity right, the public disclosure tort usually involves something embarrassing that is offensive or objectionable to a reasonable person.[133] Intrusion on one's solitude involves prying into personal and private matters.[134] In contrast, celebrities generally welcome the commercial exploitation of their images, so long as they maintain control of the scope of, and remuneration for, such activities. While the personal harm caused by defamation is highly subjective, a celebrity's image or endorsement often carries a readily ascertainable market value.[135] Furthermore, in some jurisdictions the right is not only assignable, but also descendible. Neither is true of the other forms of privacy rights. As the Supreme Court stated in *Zacchini v. Scripps-Howard Broadcasting Co.*, a state's interest in protecting the right of publicity "is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation."[136]

This distinction has ramifications for the location of the right. Generally, an invasion of privacy can be said to harm the plaintiff wherever the plaintiff is located. For example, a disclosure of a private fact harms the individual in a personal and emotional sense. A property right, on the other hand, is typically infringed at the location of the property, not the location of the owner. This is why conflict of laws principles often designate the situs of the harm as the appropriate choice of law in a property dispute.[137] The right of publicity is a strange hybrid that both protects an individual's

132. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).
133. *Id.* at 396.
134. *Id.* at 390–91.
135. MCCARTHY, *supra* note 3, § 11:32.
136. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977).
137. *See supra* note 117 and accompanying text.

persona and allows control of the exploitation of an intellectual property right. Unlike other privacy rights, which follow the individual, the right of publicity exists where it is recognized and exploited.

To this day, however, many states couch their publicity protections in privacy terms. This opens a window of due process vulnerability because, while there is a tendency among courts to view the right as stemming from the individual in a privacy right sense—protecting feelings and reputation—the substantive law covering the right often defines the right in a property sense. This results in courts applying the law of the plaintiff's domicile, as it would in a defamation case, where the personal feelings and reputation have been harmed. Applying the law of the plaintiff's domicile, however, can create a national right of publicity, though no such right exists.[138] Creating this national right invites states to hold defendants accountable for "damages" for activities that have not infringed on any recognized right where they occurred. This is exactly the type of due process violation *BMW* and *State Farm* caution against.

2. Variations of Rights of Publicity Among the States

The Court in *Zacchini* noted that states may make their own choices about to how to protect rights of publicity.[139] And they certainly have. What exists today is a hodgepodge of statutes and common law that vary greatly from state to state.[140] While some states define it as a property right, others ground it in tort principles. The substantive contours of the right are unknown or partially defined in most states and, in some states, the right has been molded by federal courts applying an interpretation of state law in diversity actions.[141]

As argued above, however, the right only exists in the location where it can be exploited. If a given state recognizes an exploitable right and defines its contours and limits, such a right can be said to exist in that state. Likewise, if a state places limitations, such as denying descendibility, the right is limited accordingly in that state. Unlike the typical multistate tort action, where all states would recognize that some injury has occurred and then determine which state's law should be applied to the action, the application of one state's law in this context may result in no recognizable cause of action at all.

138. *See supra* text accompanying notes 112–14.
139. *Zacchini*, 433 U.S. at 577–79.
140. *See supra* text accompanying notes 59–63.
141. Cray, *supra* note 57, at 642.

In addition to the wide variations among states in how rights of publicity are treated, many states do not recognize such rights at all. This is not solely due to faulty legislation or a lack of celebrity residents. States can have legitimate policy reasons for the way they define the right of publicity, its contours, and its limitations. These include First Amendment and freedom of expression concerns, as well as a desire to foster creativity and a rich public domain by encouraging the free use of popular culture icons.[142] As Judge Kozinski articulated in his dissent in *White*:

> [I]ntellectual property law is full of careful balances between what's set aside for the owner and what's left in the public domain for the rest of us: The relatively short life of patents; the longer, but finite, life of copyrights; copyright's idea-expression dichotomy; the fair use doctrine; the prohibition on copyrighting facts . . . . All of these diminish an intellectual property owner's rights. . . . But all are necessary to maintain a free environment in which creative genius can flourish.[143]

Therefore, just as some states have legitimate interests in recognizing rights of publicity, others have equally legitimate reasons to limit or prohibit such rights. This particular quality of the right, that its absence may be as deliberate as its existence, places great tension on any competition among states whose laws may potentially apply to a conflict. The tension between diverse state interests renders a cause of action more vulnerable to the constitutional concern expressed in *BMW* and *State Farm* over one state's legitimate interest in activity occurring in another state. How does one determine which state's interest is more legitimate? If one state has chosen to leave certain rights in the public domain, can another state cross into its borders and remunerate a plaintiff for use of that public domain element? After *State Farm*, the answer is no. As the Court articulated in *BMW*, no single state can impose its own policy choice on neighboring states.[144] Diverse state policy decisions make application of the right of publicity vulnerable to doing just that.

142. *See, e.g.*, Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993) (arguing that the right of publicity poses a threat to free expression and cultural pluralism, creates socially undesirable incentives, and promotes, rather than prevents, unjust enrichment).

143. White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1516 (9th Cir. 1993) (Kozinski, J., dissenting).

144. *See supra* text accompanying notes 27–31.

3. Intellectual Property Governed by State Law

Finally, protection of intellectual property rights is typically afforded on a national basis under federal law. Federal statutes govern copyright, trademark, and patent law and often preempt state laws to the contrary.[145]

Courts may be prone to affording nationwide protection to a right of publicity because it is an intangible right without a clear location and other national intellectual property schemes provide a seemingly persuasive precedent.[146] Not only is this wrong, but the Supreme Court has also prohibited it.

In *Goldstein v. California*, the Court addressed the question of whether a copyright granted under one state's law would prejudice the interests of other states.[147] The Court stated that "a copyright granted by a particular State has effect only within its boundaries. If one State grants such protection, the interests of States which do not are not prejudiced since their citizens remain free to copy within their borders those works which may be protected elsewhere."[148] Thus, if citizens of a state that does not recognize another's copyright protection remain free to make copies without permission, by analogy, citizens of a state that does not recognize a right of publicity may use a celebrity's likeness without permission.

The fact that the right of publicity is a state-based intellectual property right thus leaves it vulnerable to courts improperly affording it national recognition and protection. The combination of the three characteristics discussed above render the right of publicity particularly vulnerable to due process violations. Courts must, therefore, take particular care and exercise restraint in applying one state's right of publicity laws beyond that state's borders.

C. RECOMMENDATIONS

Courts and legislatures can take certain measures to avoid the constitutional limitations of applying one state's right of publicity laws outside of its borders. Although having a national right of publicity law is a simple and often-suggested solution, it is not necessary to usurp this

145. *See, e.g.*, 17 U.S.C. § 301 (2000).

146. Although trade secret law is a state-based intellectual property regime, it does not usually involve multistate publication and thus is less vulnerable to the extraterritorial concerns of *BMW* and *State Farm*.

147. Goldstein v. California, 412 U.S. 546, 558 (1973).

148. *Id.*

traditionally state-based right. Given that there are legitimate policy reasons for states to maintain control of how they define the contours of these rights, there are other, simple measures that courts and lawmakers can take to ensure that state laws stay within constitutional boundaries.

First, state legislators in those states that define the right of publicity by statute should add a provision, such as section 3344.1(n) of the California Civil Code,[149] which limits the applicability of a law to acts and damages that occur "directly" in the state. This limitation would set a bright line for courts that would only give a state's law effect within its territory. Just as the California legislature added this provision to its postmortem rights of publicity in response to *BMW*, it is even clearer, after *State Farm*, that such a limitation should be placed on all state statutes, including those defining rights for living celebrities.

In addition, courts and legislatures should adopt a uniform choice of law principle for all right of publicity cases. The location where the right has been established and the alleged injury has occurred should determine the substantive law applied to a claim. Furthermore, the use of domicile for choice of law should be avoided because of its potential to create national law out of an individual state's law.

Where there are multiple claims in one action, the appropriate state law should be applied to each claim, depending on where the infringement occurred. This practice should be applied even where there are numerous claims and a court must apply multiple states' laws. Although this may be burdensome, the Supreme Court has articulated that such burdens do not supersede constitutional restrictions on choice of law. Thus, appropriate choice of law principles can steer a case clear of due process violations.

Finally, although courts should follow the single publication rule to the extent they can join multiple claims arising from one publication into a single *action*, the rule should not be extended to combining multiple claims into one single *claim*. Courts should not create national law out of one state's law by applying it to all multistate claims joined in one action under the single publication rule.

VI. CONCLUSION

Many states' right of publicity laws have traditionally been extended, either by statute or by common law, to acts occurring outside of state borders. Furthermore, remedies for right of publicity infringement

149. CAL. CIV. CODE § 3344.1(n) (West 2003).

frequently include injunctive relief, punitive damages, and reputational damages, each of which often encompasses a national element. The California legislature has already begun to revise its right of publicity laws in response to the holding in *BMW*—specifically, that a state cannot impose economic sanctions for conduct that was lawful where it occurred. In light of the recent reaffirmation of the principles of *BMW* and the Court's statements in *State Farm* pertaining to extraterritorial punishment of acts that are even *unlawful* in other states, a right of publicity based on a single state's laws is not constitutionally enforceable in any other state.