

## SHOULD TREES HAVE PUBLICITY RIGHTS? CAPTURING VALUE FROM THE USE OF ENDANGERED SPECIES IN ADVERTISING

*Throughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable.*

— Christopher D. Stone<sup>1</sup>

Ads and logos often feature animals, including members of endangered species. Meanwhile, extinction rates are climbing and resources devoted to conservation are insufficient. Extending the right of publicity — which protects people’s names and likenesses against unauthorized commercial use — to endangered species could help capture some of the value exploited by advertisers, preventing the private appropriation of endangered species’ publicity value and increasing funding for conservation. Though this proposal may sound far-fetched, such an extension would fit neatly within the justifications for the right of publicity and would be more administrable than it might initially appear.

This Note proceeds as follows. Part I highlights the extent of use of animal imagery — including imagery depicting endangered species — in advertising and argues that this use harms rather than benefits the animals depicted. Part II argues that this gap can be closed by extending the right of publicity to endangered species, contends that this is an appropriate extension of the right, and explains how this could work in practice. Part III addresses a few counterarguments.

### I. BACKGROUND

#### A. *Animal Advertising*

Use of animal imagery in advertising and branding is widespread. To look at just a few contexts, a 2000 study found that over fifteen percent of 1990s Super Bowl advertisements contained animal imagery,<sup>2</sup>

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<sup>1</sup> Christopher D. Stone, *Should Trees Have Standing? — Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 453 (1972). Though this Note argues for the extension of certain legal rights to certain nonhuman animals and for the use of structures analogous to those used to provide legal support for certain people deemed incapable of representing their own interests, *see infra* section II.B.3, pp. 2315–16, it does not rest its arguments on any purported analogy to extensions of rights to *humans* that previously were not granted rights, such as extensions of rights to formerly enslaved people, which are inapposite and inappropriate, *see generally* Recent Case, Non-human Rights Project, Inc., ex rel. Happy v. Breheny, No. 52, 2022 WL 2122141 (N.Y. June 14, 2022), 136 HARV. L. REV. 1292 (2023). Rather, it rests its arguments on the same principles undergirding the right of publicity generally, and to the extent analogies are warranted or required, they should be drawn to other nonhuman entities with certain legal rights, such as corporations or ships.

<sup>2</sup> Chuck Tomkovick et al., *The USA’s Biggest Marketing Event Keeps Getting Bigger: An In-Depth Look at Super Bowl Advertising in the 1990s*, 7 J. MKTG. COMM’NS 89, 99 (2001).

and a 2008 study found that almost twenty percent of a sample of viral advertisements contained such imagery.<sup>3</sup> U.S. advertising spending was estimated at over \$322 billion in 2024;<sup>4</sup> if approximately one-fifth of ads contain animals (and assuming that such ads do not cost significantly more or less than others), advertisers spend over \$57 billion annually on advertisements featuring animals. Animal depictions take many forms<sup>5</sup> and may symbolize a generally desirable value,<sup>6</sup> stress some connection to the product,<sup>7</sup> or entail seemingly arbitrary mascots.<sup>8</sup> Though most animal advertising uses domesticated animals,<sup>9</sup> wild animals (especially “charismatic megafauna” — where charismatic means “attracting or appealing or preferred”<sup>10</sup> — almost all of the most charismatic of which are endangered) are also featured extensively in marketing.<sup>11</sup>

<sup>3</sup> Guy J. Golan & Lior Zaidner, *Creative Strategies in Viral Advertising: An Application of Taylor's Six-Segment Message Strategy Wheel*, 13 J. COMPUT.-MEDIATED COMMUN 959, 966 (2008).

<sup>4</sup> J.G. Navarro, *Advertising Spending in the U.S. 2020-2024*, STATISTA (Jan. 6, 2023), <https://www.statista.com/statistics/272314/advertising-spending-in-the-us> [<https://perma.cc/DG9B-P5QZ>].

<sup>5</sup> See Stephen Brown, *Where the Wild Brands Are: Some Thoughts on Anthropomorphic Marketing*, 10 MKTG. REV. 209, 218-19 (2010).

<sup>6</sup> See, e.g., Sherril M. Stone, *The Psychology of Using Animals in Advertising* 10-11 (2014) (unpublished manuscript) (on file with the Harvard Law School Library) (stating that Anheuser-Busch uses “Clydesdale horses as a symbol of power and strength which covertly insinuates that consuming Budweiser will make a person powerful, confident, and strong”); *A Whale of a Time*, PAC. LIFE, <https://www.pl150years.com/innovating-for-the-future/pacific-mutual-becomes-an-iconic-brand> [<https://perma.cc/5DMS-CS3A>] (noting that company adopted humpback whale as symbol because the whale is “unique, majestic, awe-inspiring”).

<sup>7</sup> Polar Beverages, so named because the name “conjure[s] up images of cold, pure water,” Peter Cohan, *5 Shocking Ways This CEO Keeps His 135-Year-Old Seltzer Company Running Young*, INC. (June 22, 2017), <https://www.inc.com/peter-cohan/5-shocking-ways-this-ceo-keeps-his-135-year-old-seltzer-company-running-young.html> [<https://perma.cc/L6HH-Y8S8>], has a polar bear mascot named Orson, Lindsay Corcoran, *Orson the Polar Beverages' Mascot: It's Not Easy Being a Giant Roadside Bear*, MASSLIVE (Sept. 15, 2015, 2:00 PM), [https://www.masslive.com/news/worcester/2015/09/get\\_up\\_close\\_and\\_personal\\_with.html](https://www.masslive.com/news/worcester/2015/09/get_up_close_and_personal_with.html) [<https://perma.cc/B7XU-J7SM>].

<sup>8</sup> It is hard to imagine a logical connection between Frosted Flakes and Tony the Tiger, or Froot Loops and Toucan Sam (beyond both being colorful).

<sup>9</sup> See Stone, *supra* note 6, at 15 fig.1.

<sup>10</sup> Franck Courchamp et al., *The Paradoxical Extinction of the Most Charismatic Animals*, PLOS BIOLOGY, Apr. 2018, at S1.

<sup>11</sup> E.g., *id.* at 2-3 (noting all but one of thirteen most charismatic species are either “Vulnerable, Endangered, or Critically Endangered”); George Feldhamer et al., *Charismatic Mammalian Megafauna: Public Empathy and Marketing Strategy*, 36 J. POPULAR CULTURE 160, 161, 165 (2003) (noting frequency of charismatic mammalian megafauna in advertising); see also, e.g., Nancy E. Spears et al., *Symbolic Role of Animals in Print Advertising: Content Analysis and Conceptual Development*, 37 J. BUS. RSCH. 87, 92 tbl.3 (1996) (wild animals account for over twenty percent of animal imagery in studied ads); Rama Yelkur et al., *Super Bowl Ad Likeability: Enduring and Emerging Predictors*, 19 J. MKTG. COMMUN 58, 62 (2013); Brown, *supra* note 5, at 215-17 (listing many examples). Prominent anecdotal examples include the Coca-Cola polar bears, the Lacoste crocodile, and the examples mentioned *supra* note 8. See also generally Nancy Spears & Richard Germain, *1900-2000 in Review: The Shifting Role and Face of Animals in Print Advertisements in the Twentieth Century*, 36 J. ADVERT. 19 (2007). Many sports teams also use wild animals as team names and mascots; consider, for instance, the Arizona Diamondbacks, Chicago Bears, Memphis Grizzlies, Miami Dolphins, Minnesota Timberwolves, and Tampa Bay Rays.

This use, like most or perhaps all advertising,<sup>12</sup> is carefully calibrated to encourage viewers to purchase whatever is being advertised. Use of animal imagery in advertising may help sell things for several reasons.<sup>13</sup> Research suggests that: people appreciate animals as sources of “inspiration, entertainment, and learning”;<sup>14</sup> people find animals more trustworthy than humans;<sup>15</sup> animals grab viewers’ attention (presumably better than do other subjects); use of specific animals may “dictate the qualities associated with the” thing advertised;<sup>16</sup> animal imagery is associated with a product’s being “green”;<sup>17</sup> animals allow advertisers to create characters and rely on stereotypes without risking offense;<sup>18</sup> and animals “can be used to transfer desirable cultural meanings to products.”<sup>19</sup> As a bonus, animal advertisers do not need to pay and work with human spokespersons.<sup>20</sup>

Whatever the mechanism, using animals appears to work. (If it did not, the practice would presumably not be so extensive.) Marketing studies have found that animals in ads can make a brand more likeable and memorable, make consumers more likely to buy,<sup>21</sup> and attach “a specific intended meaning to a brand.”<sup>22</sup> One study found that the presence of animals (including “frogs, monkeys, lobsters, cheetahs, goldfish, Dalmatians, and more”<sup>23</sup>) was the second-strongest predictor of Super Bowl ads’ likeability, after only “humor.”<sup>24</sup> Advertisers that use animals thus appear to derive significant benefit from doing so.

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<sup>12</sup> Cf. generally Victor Danciu, *Manipulative Marketing: Persuasion and Manipulation of the Consumer Through Advertising*, 21 THEORETICAL & APPLIED ECON. 19 (2014) (noting that advertising is carefully calibrated to achieve desired effects on the consumer).

<sup>13</sup> See generally Barbara Keller & Heribert Gierl, *Effectiveness of Animal Images in Advertising*, 42 MKTG. ZFP 3 (2020).

<sup>14</sup> *Id.* at 6; accord *id.* at 5–6. Less positively, Professor Stephen Brown has connected animals’ appeal to the infantilization of consumer culture. See Brown, *supra* note 5, at 214, 220.

<sup>15</sup> See Keller & Gierl, *supra* note 13, at 8–9.

<sup>16</sup> Stone, *supra* note 6, at 7.

<sup>17</sup> See Xingyuan Wang et al., *Are “People” or “Animals” More Attractive? Anthropomorphic Images in Green-Product Advertising*, J. CLEANER PROD., July 2020, at 10–11.

<sup>18</sup> Brown, *supra* note 5, at 220–21 (“A daffy duck or lazy lion or irritating chipmunk or thieving magpie is perfectly acceptable in a TV commercial but a stupid Polak or idle Irishman or infuriating mother-in-law . . . is almost unimaginable nowadays.” *Id.* at 221.).

<sup>19</sup> Barbara J. Phillips, *Advertising and the Cultural Meaning of Animals*, 23 ADVANCES CONSUMER RSCH. 354, 354 (1996).

<sup>20</sup> Brown, *supra* note 5, at 218.

<sup>21</sup> Rohit H. Trivedi & Thorsten Teichert, *Consumer Reactions to Animal and Human Models in Print Ads: How Animals and People in Ads Influence the Purchase-Decision Journey*, 60 J. ADVERT. RSCH. 426, 426 (2020); see also Karen M. Lancendorfer et al., *Animals in Advertising: Love Dogs? Love the Ad!*, 61 J. BUS. RSCH. 384, 389 (2008).

<sup>22</sup> Trivedi & Teichert, *supra* note 21, at 433.

<sup>23</sup> Yelkur et al., *supra* note 11, at 63.

<sup>24</sup> *Id.* at 68.

### B. *The Biodiversity Crisis*

Outside of the world of advertising, things are not going as well for wildlife. Since 1970 — the beginning of the “environmental decade”<sup>25</sup> and of major environmental lawmaking generally<sup>26</sup> — vertebrate populations have declined sixty-nine percent on average.<sup>27</sup> Biological research indicates that the earth is in or at the beginning of its sixth mass extinction (this one caused predominantly by human activities),<sup>28</sup> with estimates ranging from dozens of extinctions per day to 30,000 per year.<sup>29</sup> Present extinction rates are “1,000 times higher than natural background rates of extinction and future rates are likely to be 10,000 times higher.”<sup>30</sup> Overall, an estimated twenty-eight percent of assessed species<sup>31</sup> and over one million species total<sup>32</sup> currently face extinction.

Direct drivers of extinction and biodiversity decline include climate change, habitat conversion and fragmentation, pollution, overexploitation (for example, overhunting and -fishing), and the introduction of invasive species.<sup>33</sup> These are in turn driven by human consumption practices, which both require substantial resources (such as land and water) as inputs and generate substantial externalities (such as carbon emissions and other pollution) as outputs.<sup>34</sup> Existing legal regimes have failed to address these issues and stem the tide of species decline.<sup>35</sup>

<sup>25</sup> E.g., Gaylord Nelson, *Earth Day '70: What It Meant*, EPA J., Apr. 1980, at 6, 7.

<sup>26</sup> See, e.g., *The Modern Environmental Movement*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/earth-days-modern-environmental-movement> [<https://perma.cc/S59L-TF8E>].

<sup>27</sup> WORLD WILDLIFE FUND, *LIVING PLANET REPORT 2022*, at 32 (2022).

<sup>28</sup> E.g., Robert H. Cowie et al., *The Sixth Mass Extinction: Fact, Fiction or Speculation?*, 97 *BIOLOGICAL REVS.* 640, 656–57 (2022).

<sup>29</sup> Alex Orlando, *What Animals Are Going Extinct?*, *DISCOVER MAG.* (Mar. 30, 2023, 11:00 AM), <https://www.discovermagazine.com/planet-earth/what-animals-are-going-extinct> [<https://perma.cc/Z8XJ-CHUG>].

<sup>30</sup> Jurriaan M. De Vos et al., *Estimating the Normal Background Rate of Species Extinction*, 29 *CONSERVATION BIOLOGY* 452, 460 (2015).

<sup>31</sup> *The IUCN Red List of Threatened Species*, IUCN, <https://www.iucnredlist.org> [<https://perma.cc/5FUU-WVLV>]. Fewer than ten percent of the estimated two million described species have been assessed. *Frequently Asked Questions*, IUCN, <https://www.iucnredlist.org/about/faqs> [<https://perma.cc/59AZ-R96G>].

<sup>32</sup> INTERGOVERNMENTAL SCI-POL’Y PLATFORM ON BIODIVERSITY & ECOSYSTEM SERVS., *THE GLOBAL ASSESSMENT REPORT ON BIODIVERSITY AND ECOSYSTEM SERVICES* 239 (Eduardo Sonnewend Brondízio et al. eds., 2019).

<sup>33</sup> E.g., Navjot S. Sodhi et al., *Causes and Consequences of Species Extinctions*, in *THE PRINCETON GUIDE TO ECOLOGY* 514, 515–17 (Simon A. Levin et al. eds., 2009).

<sup>34</sup> See WORLD WILDLIFE FUND, *supra* note 27, at 66–71.

<sup>35</sup> See generally, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *SYNTHESIS REPORT OF THE IPCC SIXTH ASSESSMENT REPORT (AR6)* (2023); STEPHANIE OEHLER, SAM KOENIG & CARL BRUCH, *LEGAL CONTROLS ON DOMESTIC TRADE OF APPENDIX I–LISTED SPECIES* (2020).

To be sure, the inadequacy of responses to this crisis is largely if not primarily due to a lack of political will.<sup>36</sup> But insufficient funding also limits the ability of even committed governments and private sector actors to protect biodiversity,<sup>37</sup> and the (real or perceived) short-term cost of mitigating human environmental impacts contributes to the lack of political will.<sup>38</sup> Overall, there is an estimated biodiversity financing gap of between \$598 billion and \$824 billion per year globally.<sup>39</sup>

### C. *The Problems with Animal Advertising*

Despite providing significant value to advertisers, wildlife receive little in return. There is no obligation for companies using animals in their advertisements to give anything back. The uncompensated use of endangered species in advertisements is arguably bad in three ways.

First, it is potentially a form of greenwashing<sup>40</sup>: businesses using wildlife in advertising profit from consumers' pro-environment or -animal sentiments without necessarily behaving in a pro-environment or -animal way themselves (and most likely having harmful environmental impacts overall<sup>41</sup>). Greenwashing harms both consumers and the environment. It harms consumers by causing them to buy (often more expensive) products they otherwise might not.<sup>42</sup> It has negative environmental effects insofar as it makes it more difficult for consumers to identify and purchase products that are *actually* environmentally preferable, in turn making it less likely for such products to succeed in

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<sup>36</sup> See generally, e.g., Jason Lambacher, *The Politics of the Extinction Predicament—Democracy, Futurity, and Responsibility* (2013) (Ph.D. dissertation, University of Washington) (on file with the Harvard Law School Library); *UN Biodiversity Talks Hampered by “Lack of Political Will”*: WWF, AL JAZEERA (Dec. 14, 2022), <https://www.aljazeera.com/news/2022/12/14/un-biodiversity-talks-hampered-by-lack-of-political-will-wwf> [<https://perma.cc/S2L2-L8HB>].

<sup>37</sup> See, e.g., Nowella Anyango-van Zwieten et al., *Funding for Nature Conservation: A Study of Public Finance Networks at World Wide Fund for Nature (WWF)*, 28 BIODIVERSITY & CONSERVATION 3749, 3749 (2019).

<sup>38</sup> See, e.g., Lucas Bretschger, *Getting the Costs of Environmental Protection Right: Why Climate Policy Is Inexpensive in the End*, ECOLOGICAL ECON., Oct. 2021, at 1, 1. More accurate and holistic accounting of the costs and benefits of various environmental policies would likely indicate that most are in fact cost-efficient. *Cf. id.* at 6.

<sup>39</sup> ANDREW DEUTZ ET AL., FINANCING NATURE 9 (2020).

<sup>40</sup> “Greenwashing” describes “the intersection of two firm behaviors: poor environmental performance and positive communication about environmental performance.” Magali A. Delmas & Vanessa Cuerel Burbano, *The Drivers of Greenwashing*, 54 CAL. MGMT. REV. 64, 65 (2011). In other words, because consumers prefer and are often willing to pay more for environmentally friendly products, companies may respond by claiming that their products or practices are environmentally friendly when they are not. See generally Sebastião Vieira de Freitas Netto et al., *Concepts and Forms of Greenwashing: A Systematic Review*, ENV'T SCIS. EUR., 2020.

<sup>41</sup> Though “the environmental impact of business activities tremendously varies based on industry,” Noriko Kusumi, Book Review, 19 GLOB. ENV'T POL. 129, 130 (2019), all business activities (like all human activities) have *some* environmental impact.

<sup>42</sup> See, e.g., First Amended Class Action Complaint at 3, *Dorris v. Danone Waters of Am.*, No. 22-cv-08717 (S.D.N.Y. Jan. 5, 2023).

the marketplace.<sup>43</sup> Animal advertising may have similar effects. A 2020 study found that, for products presented as “green,” “animal-form anthropomorphic images could trigger a more positive consumer response” than human images alone.<sup>44</sup> Consumers might similarly think that products marketed with animals are in some way more “green” than others, even though this would be in many cases untrue.

Second, and maybe worse, that people see certain endangered species so much in advertising may cause them to overestimate those species’ numbers in real life, reducing interest in and calls for their conservation. In 2018, researchers found that people are “often unaware of the dire conservation status of most of” the most “charismatic” species.<sup>45</sup> The researchers noted that the species’ popularity might make people think of them as more common than they really are: “[T]hese animals may be assumed to be abundant because of their omnipresence in our culture.”<sup>46</sup> This “masks the[se species’] real, high extinction risk,” potentially “prevent[ing] conservation efforts from getting the necessary support.”<sup>47</sup>

Third, even if it does not create these tangible harms, the uncompensated commercial use of animal imagery should be considered a moral wrong in a deontological sense: advertisers making such use exploit the evident publicity value of the animals used, extracting this value from the animals without returning any of what is gained — all while, in the case of endangered species, human activity threatens the animals’ continued existence.<sup>48</sup> This dynamic is similar to that addressed by the law of unjust enrichment: one party (the advertiser) enriches itself at the expense of another (the species depicted) through a nonconsensual transaction.<sup>49</sup> Even if one is skeptical that animals themselves have any claim over the use of their likeness, it can be argued that animal advertisers are appropriating, for purely private gain, a shared resource<sup>50</sup> that should be used only for public benefit.<sup>51</sup> Either way, an advertiser that

<sup>43</sup> E.g., Courtney Lindwall, *What Is Greenwashing?*, NRDC (Feb. 9, 2023), <https://www.nrdc.org/stories/what-greenwashing> [<https://perma.cc/J77P-T3S5>].

<sup>44</sup> Wang et al., *supra* note 17, at 10.

<sup>45</sup> Courchamp et al., *supra* note 10, at 3–4.

<sup>46</sup> *Id.* at 6; *see also id.* at 7–8, 10.

<sup>47</sup> *Id.* at 8.

<sup>48</sup> Crucially, it is possible to meaningfully return some of the captured value to animals, while it would not be in the case of, say, rocks, because it is not possible to harm or benefit a rock. *See infra* note 103. Whether this argument would apply to other instances of appropriation — such as the use of Italian scenery by a coffee company — is beyond the scope of this Note.

<sup>49</sup> Cf. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. L. INST. 2011); *cf. also* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 114–16 (2020).

<sup>50</sup> *See, e.g.*, JEAN-JACQUES ROUSSEAU, DISCOURSE ON THE ORIGIN AND FOUNDATIONS OF INEQUALITY AMONG MEN (1755), *reprinted in* 3 THE COLLECTED WRITINGS OF ROUSSEAU 18, 43 (Roger D. Masters & Christopher Kelly eds., Judith R. Bush et al. trans., 1992) (“[Y]ou are lost if you forget that the fruits belong to all and the Earth to no one!”).

<sup>51</sup> Cf. MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 102 (2012).

uses an animal image without compensation is “reap[ing] where it has not sown”<sup>52</sup> — and where it (or its fellows) is salting the earth.

Others have proposed righting this wrong through voluntary means — that is, by *encouraging* animal advertisers to pay to support conservation.<sup>53</sup> While a voluntary approach might be more immediately palatable,<sup>54</sup> efforts to take such an approach have proven insufficient — not only as evidenced by the continued decline of wildlife populations, but also on their own terms. In 2018, for instance, the United Nations Development Programme launched The Lion’s Share, an initiative that “asks major advertisers to contribute [to a conservation fund] 0.5 percent of their media buy for each campaign featuring an animal.”<sup>55</sup> The fund aimed to raise \$100 million within three years,<sup>56</sup> but as of December 2021, had raised less than \$6 million total.<sup>57</sup>

To be sure, some companies may independently choose to fund conservation of species they use in marketing or branding. For instance, Pacific Life (which features a humpback whale in its logo) has a foundation that has “committed” to donating the equivalent of \$500,000 per year.<sup>58</sup> These activities may be commendable and certainly are better than nothing. But contributions may be made once, promoted extensively, and then forgotten, while use of the animal continues.<sup>59</sup> Moreover, the magnitude of these contributions may pale in comparison

<sup>52</sup> *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 239 (1918).

<sup>53</sup> See generally, e.g., Ross Abbey, *Encouraging Animal Advertisers to Pay for the Use of Animal Images: A Voluntary Certification Approach*, 3 STAN. J. ANIMAL L. & POL’Y 76 (2010).

<sup>54</sup> See *id.* at 91–93 (arguing that a voluntary approach avoids “thorny questions,” *id.* at 92, that might be associated with a compulsory approach, such as the program’s scope; enforcement; and perverse incentives discouraging advertisers from using animal imagery at all).

<sup>55</sup> Press Release, United Nations Dev. Programme, UNDP, FINCH, Mars, Nielsen, BBDO Launch The Lion’s Share (Sept. 27, 2018), <https://www.undp.org/press-releases/undp-finch-mars-nielsen-bbdo-launch-lions-share> [<https://perma.cc/4KJ4-XEJP>]. See generally *The Lion’s Share Fund*, UNITED NATIONS DEV. PROGRAMME, <https://mptf.undp.org/fund/Insoo> [<https://perma.cc/HS9Y-H2Q2>].

<sup>56</sup> Press Release, United Nations Dev. Programme, *supra* note 55.

<sup>57</sup> UNITED NATIONS DEV. PROGRAMME, CONSOLIDATED ANNUAL FINANCIAL REPORT OF THE ADMINISTRATIVE AGENT 5 (2022). Other attempts have been similarly unsuccessful. In 2007, a Canadian filmmaker established the Animal Copyright Foundation in hopes of encouraging animal advertisers to contribute to conservation one percent of their ad buys. *Put a Fiver in His Bank*, THE ECONOMIST (Mar. 9, 2006), <https://www.economist.com/business/2006/03/09/put-a-fiver-in-his-bank> [<https://perma.cc/Q2LT-ZG8C>]. The Foundation’s tax-exempt status was revoked in 2010, and it no longer appears to have an active website or other online presence. *Animal Copyright Foundation*, IRS TAX EXEMPT ORG. SEARCH, <https://apps.irs.gov/app/eos> [<https://perma.cc/X2SL-ERAC>] (choose “Organization Name” in the “Search By” dropdown menu; then type “Animal Copyright Foundation” in the adjacent box).

<sup>58</sup> *Environment*, PAC. LIFE, <https://www.pacificlife.com/home/corporate-social-responsibility/environment.html> [<https://perma.cc/V449-8RF2>].

<sup>59</sup> For example, in 2011 and 2012, Coca-Cola helped raise over \$2 million for Arctic conservation in partnership with the World Wildlife Fund. Press Release, The Coca-Cola Company, “Arctic Home” Generates over \$2 Million in Donations for Polar Bear Conservation (Apr. 18, 2012), <https://www.coca-colacompany.com/media-center/arctic-home-generates-over-2-million-polar-bear-conservation> [<https://perma.cc/29XA-EXQ4>]. Coca-Cola promoted this partnership as if it would be ongoing. See *id.* Yet there appears to have been little mention of it — or of any Coca-Cola support for polar bears — since 2012.

to conservation needs and to the value extracted by the contributing companies.<sup>60</sup> Ultimately, efforts to get animal advertisers to pay voluntarily for the use of animal imagery have not succeeded.

## II. A RIGHT OF PUBLICITY FOR ENDANGERED SPECIES

The right of publicity describes the “right of every human being to control the commercial use of [their] identity.”<sup>61</sup> State right of publicity laws vary widely in terms of what people and what aspects of identity are covered and from what, but they generally protect against the unauthorized commercial use of one’s persona.<sup>62</sup> Though the right grew out of the right to privacy (specifically, Warren and Brandeis’s public disclosure of private facts<sup>63</sup>), it crucially expanded it by allowing plaintiffs who could not meaningfully claim an interest in *privacy* — primarily celebrities — to sue regarding unauthorized commercial use of their likeness.<sup>64</sup> First invoked in a 1953 case involving the use of a baseball player’s likeness on chewing gum cards,<sup>65</sup> the right was propounded the next year in an article by Professor Melville Nimmer;<sup>66</sup> after further judicial and scholarly percolation in the 1950s and 1960s,<sup>67</sup> interest in and support for it took off in the 1970s,<sup>68</sup> and by 2020, thirty-five states recognized either a statutory or common law right of publicity.<sup>69</sup>

Extending the right of publicity to endangered species could benefit these species by allowing them to capture their publicity value. Under this approach, covered species would have a right in their likeness and trustee organizations would license the use of this likeness and use the funds for the species’ conservation. This Part argues that it would be appropriate to extend the right to endangered species in this way, then provides more detail on the form that such an approach could take.

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<sup>60</sup> See, e.g., Mya Frazier, *Should the Polar Bear Still Sell Coca-Cola?*, NEW YORKER (Nov. 6, 2014), <https://www.newyorker.com/business/currency/polar-bear-still-sell-coca-cola> [<https://perma.cc/TD7J-9CME>].

<sup>61</sup> 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2000) (May 2022 update).

<sup>62</sup> Compare, e.g., CAL. CIV. CODE § 3344 (West 2023), and *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988), with N.Y. CIV. RIGHTS LAW § 51 (McKinney 2023).

<sup>63</sup> See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

<sup>64</sup> MCCARTHY & SCHECHTER, *supra* note 61, § 1:25. Further, unlike privacy rights, the right of publicity is assignable. See *id.* § 1:26.

<sup>65</sup> *Haelan Lab’ys, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867–68 (2d Cir. 1953).

<sup>66</sup> Melville B. Nimmer, *The Right of Publicity*, LAW & CONTEMP. PROBS., Spring 1954, at 203, 203.

<sup>67</sup> MCCARTHY & SCHECHTER, *supra* note 61, §§ 1:29–30.

<sup>68</sup> *Id.* § 1:32.

<sup>69</sup> Mark Roesler & Garrett Hutchinson, *What’s in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, LANDSLIDE, Sept./Oct. 2020.



### A. *Extending the Right of Publicity to Endangered Species*

As discussed, it is apparent that animals (including endangered species) have significant publicity value. Indeed, in his germinal article on the right of publicity, Nimmer noted that it “is common knowledge that animals often develop important publicity values”<sup>70</sup> and referred to the fact that privacy rights are limited to humans as an “inadequacy” of privacy and a reason a separate right of publicity was needed.<sup>71</sup> The right of publicity protects one’s ability to control and profit from commercial use of their likeness. It is thus logical to extend it to endangered species, which have publicity value they are unable to capture.

Of course, some courts and commentators are unconvinced. Though no case has squarely addressed whether animals could enjoy a right of publicity, two have declined to extend them privacy rights.<sup>72</sup> In one, a New York trial court held that the “statutory right of privacy” “does not cover the case of a dog or a photograph of a dog.”<sup>73</sup> In the other, the Supreme Court of Missouri reversed a jury verdict awarding damages to the owner of a horse whose picture the defendant had used in an advertisement, holding that the photo did not invade the *plaintiff’s* privacy.<sup>74</sup> And some scholars have argued against such an extension. The following sections respond to several actual and potential objections.

*I. The Right of Publicity as Protecting Remuneration vs. Control.* — Most fundamentally, one might argue that the right of publicity is not (or should not be) meant as a means by which one protects their likeness’s commercial value, but rather a right to control one’s public image — and species have no right to or interest in such “autonomous self-definition.”<sup>75</sup> Some scholars, for instance, assert that the right of publicity has the “basic rationale of a natural right of every human being to *control* commercial uses of human identity and persona.”<sup>76</sup> Others similarly justify (or at least explain) the right on this ground.<sup>77</sup> But the right of publicity can just as well be construed as protecting the right to *benefit from* the use of one’s identity, with control merely a means of ensuring beneficial use (rather than an end in its own right), and scholars acknowledge that the right is commonly considered

<sup>70</sup> Nimmer, *supra* note 66, at 210.

<sup>71</sup> *See id.* at 204, 210.

<sup>72</sup> *See* MCCARTHY & SCHECHTER, *supra* note 61, § 4:37.

<sup>73</sup> *Lawrence v. Ylla*, 184 Misc. 807, 809 (N.Y. Sup. Ct. 1945). McCarthy and Schechter note that “[a]s a matter of statutory interpretation, the decision seems eminently correct, for the New York [privacy] statute is limited to a ‘living person.’” MCCARTHY & SCHECHTER, *supra* note 61, § 4:37. *But see* Nimmer, *supra* note 66, at 221.

<sup>74</sup> *Bayer v. Ralston Purina Co.*, 484 S.W.2d 473, 475 (Mo. 1972).

<sup>75</sup> *See generally* Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225 (2005).

<sup>76</sup> MCCARTHY & SCHECHTER, *supra* note 61, § 4:38 (emphasis added).

<sup>77</sup> *See generally, e.g.*, McKenna, *supra* note 75; JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY* 11 (2018).

to serve this interest.<sup>78</sup> This Note’s proposal is consistent with this conception of the right of publicity: as preventing advertisers from unjustly enriching themselves by “commercially employ[ing] a plaintiff’s identity without having paid the market rate to do so.”<sup>79</sup>

The protection of postmortem publicity rights illuminates this distinction.<sup>80</sup> The protection of publicity rights after the death of the person whose identity is protected follows from the proposition that — unlike privacy rights, which are personal rights that protect against “invasion of human dignity and resulting mental and physical suffering” — the right of publicity can be construed as a property right that “protects against *infringement of the commercial value inherent in a human identity*.”<sup>81</sup> This in turn indicates that the right of publicity regards beneficial use, rather than control for its own sake: if the right protects “commercial value,” its purpose is to ensure that rightsholders earn the full commercial value of their identity — not to ensure that they control their identity for dignitary or other intangible purposes.<sup>82</sup>

If the right of publicity were used only to protect control, it would make no sense to allow a deceased celebrity’s estate or heirs to assign or license the celebrity’s publicity rights, at least not without requiring some sort of instruction from the deceased or limiting postmortem rights to those who knew the deceased well.<sup>83</sup> Examples abound of estates or other postmortem rightsholders (or even guardians of still-living celebrities) authorizing uses of a celebrity’s identity or other intellectual

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<sup>78</sup> See, e.g., RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (AM. L. INST. 1995); Post & Rothman, *supra* note 49, at 90, 93 & n.23, 107–16 (“In some states, the right is oriented toward economic injury, and in others it encompasses injuries that are both economic and personal.” *Id.* at 90).

<sup>79</sup> Post & Rothman, *supra* note 49, at 114.

<sup>80</sup> As of May 2023, twenty-seven states protected to some extent postmortem publicity rights. MCCARTHY & SCHECHTER, *supra* note 61, § 9:17.

<sup>81</sup> *Id.* § 9:5 (emphasis added); see also *id.* § 9:6 (acknowledging that the right of publicity “recogniz[es] legally enforceable rights in the commercial value of intangible property, as distinct from emotional, physical, dignitary, reputational, or ‘civil’ rights”). But see also *id.* § 9:5 (discussing criticism of the property-based argument in favor of postmortem publicity rights).

<sup>82</sup> See *id.* § 9:10 (“A danger to avoid is the misuse of a postmortem right of publicity as a device to assert . . . reputational or dignitary interests . . . . A postmortem right of publicity should protect only ‘commercial’ interests . . .”). Some may argue that the right also “ensures that if a person . . . does not seek to commercialize the right, they are not compelled to do so,” Assemb. 242-5959, 2019 Reg. Sess. (N.Y. 2019), implying that the right really *is* about control for control’s sake. And some notable cases have involved such situations, in which a celebrity seeks not compensation but to prevent the commercial use of their likeness. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097 (9th Cir. 1992). But as discussed — see, for example, *supra* note 78; *infra* note 90; and *infra* notes 86–91 and accompanying text — that this is the primary purpose of the right of publicity is at least contested by courts and commentators. And arguably, even in cases in which a celebrity wishes to prevent the use of their likeness because they believe it would do something like undermine their artistic integrity, this can just be viewed as a form of ensuring their likeness is used only in ways that benefit them — which, for animals, would just be ways for which they are compensated.

<sup>83</sup> Cf. Andrew B. Sims, *Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453, 461 (1981).

property of which the celebrity may not have approved.<sup>84</sup> But if one considers the right as also or sometimes ensuring compensation, protecting it postmortem makes sense, as it allows celebrities' heirs to continue to reap the rewards of their ancestors' publicity value.<sup>85</sup>

Even before the advent of postmortem rights, support could be found for this view of the right of publicity. Nimmer's article can be read as supporting beneficial use over control. To be sure, Nimmer notes that a celebrity wishing to invoke the right wishes to protect the use of his identity "without his consent or without remuneration to him."<sup>86</sup> But consent and control appear to be useful as means of ensuring acceptable remuneration: Nimmer defines the publicity value discussed throughout the article as a "pecuniary value,"<sup>87</sup> control is consistently mentioned alongside profit,<sup>88</sup> and other passages imply that the payment is really what matters.<sup>89</sup> Many courts have indicated similarly.<sup>90</sup>

And if the right of publicity is understood as protecting commercial value, not control (as a means of protecting autonomy or dignity), there is no reason for it to be limited to humans. In sum:

If misappropriating the monetary value of one's unique identity without consent or compensation is instinctively unfair, then why, it might be argued, is it any less reproachable when the victim is non-human? Similarly, if the

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<sup>84</sup> E.g., Tom Breihan, "Guitar Hero" CEO Claims Kurt Cobain Avatar Use Is Perfectly Legal, PITCHFORK (Sept. 17, 2009), <https://pitchfork.com/news/36522-guitar-hero-ceo-claims-kurt-cobain-avatar-use-is-perfectly-legal> [<https://perma.cc/4DUT-7QCD>]; Army Archerd, *Astaire Won't Deal with the Devil*, VARIETY (Feb. 25, 1997, 11:00 PM), <https://variety.com/1997/voices/columns/astaire-won-t-deal-with-the-devil-1117863031> [<https://perma.cc/29MX-Q6U6>]; Derrick Bryson Taylor, *Roald Dahl's Books Are Rewritten to Cut Potentially Offensive Language*, N.Y. TIMES (Feb. 20, 2023), <https://www.nytimes.com/2023/02/20/books/roald-dahl-books-changes.html> [<https://perma.cc/6NJD-3GT4>].

<sup>85</sup> See Sims, *supra* note 83, at 467 ("The rights of publicity . . . should be survivable because they vindicate interests that are principally commercial in nature and are distinguishable from the emotional interest vindicated by the right of privacy.")

<sup>86</sup> Nimmer, *supra* note 66, at 204.

<sup>87</sup> *Id.* at 204; *accord id.* at 215.

<sup>88</sup> See *id.* at 205, 207.

<sup>89</sup> See *id.* at 216 ("[T]he measure of damages [for violations of the right] should be computed in terms of the value of the publicity appropriated by defendant rather than, as in privacy, in terms of the injury sustained by the plaintiff."); *id.* at 207 (noting that "in most situations one who has achieved such prominence as to give a publicity value to the use of his name, photograph, and likeness cannot honestly claim that he is humiliated or offended by their use," but that "he wishes to be paid for such use"); *id.* at 208 (referring to situations where, though the "use of the plaintiff's name, photograph or likeness was done in a non-offensive manner, the person wish[es] to be paid for the publicity value of such use"); *id.* at 210. Nimmer similarly implies that it was important that the right of publicity be assignable not so that persons could control in some qualitative way the uses of their likeness, but so that they could reap the full value thereof. See *id.* at 209, 212-14.

<sup>90</sup> See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) ("The rationale for [protecting publicity rights] is the straight-forward one of preventing unjust enrichment by the theft of good will." (quoting Harry Kalven, Jr., *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, LAW & CONTEMP. PROBS., Spring 1966, at 326, 331)); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983); *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 489 (N.Y. 1952) (Desmond, J., concurring) ("[Plaintiff's] real complaint . . . is that he was not paid . . ."); *Uproar Co. v. Nat'l Broad. Co.*, 8 F. Supp. 358, 361 (D. Mass. 1934); see also *supra* note 82. But see *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1032 (3d Cir. 2008).

interest protected is the objective commercial value of a person's identity as set by the market . . . then why is such a loss any less deserving of a remedy when sustained by, for example, a corporation?<sup>91</sup>

2. *Arguments Applicable to Individual Animals but Not to Entire Species.* — Admittedly, Nimmer wrote that “the human owners” of “non-human entities” such as animals should hold the publicity rights,<sup>92</sup> and gave Lassie as an example of an animal with publicity value.<sup>93</sup> Nimmer and others considering the issue thus appear to be addressing the extension of publicity rights to *individual* animals with human owners.<sup>94</sup> There does not appear to have been a serious scholarly argument in favor of extending publicity rights to entire populations or species. If anything, though, there is an even stronger argument for doing so. Like individual animals, species have publicity value — that is, there is a “pecuniary value” in the “use of [their] name, photograph, and likeness.”<sup>95</sup> And several of the arguments *against* extending the right to individual animals do not apply or apply with less force.

For instance, McCarthy and Schechter note that the “human owner of a pet or animal actor has available remedies other than the right of publicity. In a given case of unpermitted use, the human owner may well obtain satisfactory redress through assertion of the remedies of copyright infringement, trademark infringement, or false advertising and false endorsement principles.”<sup>96</sup> It is true that unauthorized uses of famous individual animals, mascots, or objects could possibly be redressed through false endorsement claims under § 43(a)(1)(A) of the Lanham Act.<sup>97</sup> If an advertisement recognizably features Mr. Ed or Lassie such that viewers think Mr. Ed or Lassie (or their owners) have sponsored the product being advertised, that might well be the basis of a cognizable Lanham Act claim.<sup>98</sup> And perhaps certain uses of famous animals may be covered by copyright law.<sup>99</sup> But these means are unavailable to species — it is implausible that anyone would think polar bears have sponsored or endorsed Coca-Cola, or tigers Frosted Flakes. And there is no copyright protection for the generalized likeness of a

<sup>91</sup> Stacy Allen et al., *Non-human Persons and the Right of Publicity*, MEDIA L. RES. CTR. BULL., Oct. 2008, at 61, 72–73. Or, by an animal?

<sup>92</sup> Nimmer, *supra* note 66, at 216.

<sup>93</sup> *Id.* at 210.

<sup>94</sup> See also Sigrid Kun, Note, *Race Horses and Intellectual Property Rights: Racing Towards Recognition?*, 17 QUINNIPIAC L. REV. 207, 228–39 (1997).

<sup>95</sup> Nimmer, *supra* note 66, at 204.

<sup>96</sup> MCCARTHY & SCHECHTER, *supra* note 61, § 4:38.

<sup>97</sup> 15 U.S.C. §§ 1051–1141n; *id.* § 1125(a)(1)(A); see also MCCARTHY & SCHECHTER, *supra* note 61, § 4:38.

<sup>98</sup> Though such a claim appears plausible, there do not appear to be any cases on point.

<sup>99</sup> See, e.g., Andrés Guadamuz, *The Monkey Selfie: Copyright Lessons for Originality in Photographs and Internet Jurisdiction*, INTERNET POL'Y REV., Mar. 21, 2016, at 1, 1–9. *But cf.* *Naruto v. Slater*, 888 F.3d 418, 425–26 (9th Cir. 2018) (denying statutory standing under Copyright Act to crested macaque that was subject of monkey selfies); U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2, at 21 (3d ed. 2021).

panda bear. The right of publicity should thus seem more attractive as a means of allowing species to capture their publicity value.<sup>100</sup>

That false endorsement claims and other alternatives are unavailable to species also addresses another objection contemplated (if ultimately discarded) by McCarthy and Schechter: namely, that there is no principled reason to draw the line between animals and (for instance) corporations, such that extending the right of publicity to animals could send the right down a slippery slope and result in all manner of entities having publicity rights.<sup>101</sup> But the fact that no other means are available to species<sup>102</sup> provides exactly such a principled reason.<sup>103</sup>

*3. Arguments Applicable to Entire Species but Not Individual Animals.* — Two arguments against extending the right of publicity, however, apply more strongly (if not uniquely) to an entire-species extension.

First, one justification for the right of publicity is that, in addition to (or even instead of) merely protecting against the uncompensated appropriation of one's identity, it protects and incentivizes one's "investment" in their identity — the time and effort that have gone into building the personal "brand" that makes an identity valuable.<sup>104</sup> It is true that species' publicity values do not spring from any particular expenditure of labor. But in practice in several states, the right of publicity is already not limited to such cases. The likenesses of non- and incidentally famous people are regularly protected,<sup>105</sup> even where private parties might be able to recover for violations of their privacy rights. The fact that one's identity is used would seem to show that the identity has commercial value,<sup>106</sup> to the extent that a private person's likeness is less

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<sup>100</sup> If one considering extending the right of publicity to an individual animal must "keep in mind that the human owner of a pet or animal actor has available remedies," MCCARTHY & SCHECHTER, *supra* note 61, § 4:38, so too should one considering extending it to entire species keep in mind that species have no such other remedies.

<sup>101</sup> *See id.*

<sup>102</sup> *See supra* notes 53–60 and accompanying text.

<sup>103</sup> One might protest that this still provides no reason to not provide publicity rights to, for instance, rocks. The key distinction between rocks and animals is that rocks and other inanimate objects, unlike animals, are not plausibly moral subjects — it makes no sense to speak of doing good for a rock or treating a rock rightly or wrongly, but one can do harm or good to an animal. *See* PAUL W. TAYLOR, *RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS* 17–18 (25th anniversary ed. 2011). Rocks are not in danger of extinction, but many species of animals are. Whether inanimate objects with cultural, historical, or aesthetic significance could have publicity rights is perhaps a closer question and is beyond the scope of this Note.

<sup>104</sup> *See, e.g.,* MCCARTHY & SCHECHTER, *supra* note 61, § 2:6; Nimmer, *supra* note 66, at 216; Steven J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y U.S.A. 111, 120 (1980).

<sup>105</sup> *E.g.,* Bullard v. MRA Holding, LLC, 740 S.E.2d 622, 626 (Ga. 2013); Canessa v. J.I. Kislak, Inc., 235 A.2d 62, 75 (N.J. Super. Ct. Law Div. 1967); KNB Enters. v. Matthews, 92 Cal. Rptr. 2d 713, 717 (Ct. App. 2000). *See generally* MCCARTHY & SCHECHTER, *supra* note 61, §§ 4:14–22 (discussing application of the right of publicity to noncelebrities).

<sup>106</sup> *See* Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553, 611 (1960).

valuable, they might simply recover less in damages.<sup>107</sup> Therefore, the right of publicity should not be denied to species on the grounds that their publicity value is not the result of any effort by the species.

Second, extending the right of publicity to endangered species would entail providing the right to groups, rather than individuals. The right of publicity has only been extended ever so slightly beyond individual people, and right of publicity statutes “typically grant protection to the name or picture of a ‘person,’” seemingly excluding groups.<sup>108</sup>

The main policy objection to a group right of publicity seems to be that such a right would overwhelm trademark law (which can already protect against unauthorized uses of aspects of group identity such as corporate names or logos).<sup>109</sup> But this argument is inapplicable to species, which, as discussed above, cannot make use of trademark law or other Lanham Act causes of action to protect their publicity value.

Moreover, several courts have found that the right of publicity protects musical groups.<sup>110</sup> The court in *Bi-Rite Enterprises, Inc. v. Button Master*<sup>111</sup> reasoned as follows in doing so:

[The right of publicity] protects the persona — the public image that . . . imbues [one’s] name or likeness with commercial value marketable to those that seek such identification. A group that develops market value in its persona should be *as* entitled as an individual to publicity rights in its name. The rationale for protecting the right to publicity does not justify treating similarly situated plaintiffs differently merely because one is an individual and one is a group member.<sup>112</sup>

The same could be said of groups of animals — their personas have market values and they are as entitled as individuals to their publicity rights. And like many musical groups, the value of a given depiction of an endangered species comes from its being a member of that species. Coca-Cola does not use the image of a specific polar bear because it is a specific polar bear, but because it is a member of the polar bear species. That extending the right of publicity to endangered species would create group rights thus should not pose a problem.

<sup>107</sup> Nimmer, *supra* note 66, at 217.

<sup>108</sup> MCCARTHY & SCHECHTER, *supra* note 61, § 4:41. See generally *id.* §§ 4:39–45.

<sup>109</sup> See Andrew W. Eaton, *We’re Not Gonna Take It!: Limiting the Right of Publicity’s Concept of Group Identity for the Good of Intellectual Property, the Music Industry, and the People*, 14 J. INTELL. PROP. L. 173, 194–203 (2006); MCCARTHY & SCHECHTER, *supra* note 61, §§ 4:44–45.

<sup>110</sup> *Apple Corps Ltd. v. A.D.P.R., Inc.*, 843 F. Supp. 342, 348 (M.D. Tenn. 1993); *Brockum Co., A Div. of Krimson Corp. v. Blaylock*, 729 F. Supp. 438, 446 (E.D. Pa. 1990); *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1199 (S.D.N.Y. 1983) (“While only one court has apparently recognized a group’s right of publicity, the rationale for protecting that interest extends to groups that have ‘persona’ sufficiently strong to meet the requirements applied to individuals.” (citation omitted) (citing *Winterland Concessions Co. v. Sileo*, 528 F. Supp. 1201, 1213 (N.D. Ill. 1981), *aff’d*, 830 F.2d 195 (7th Cir. 1987))); *Winterland*, 528 F. Supp. at 1213.

<sup>111</sup> 555 F. Supp. 1188.

<sup>112</sup> *Id.* at 1199 (citations omitted) (citing, *inter alia*, Ellen P. Winner, *Right of Identity: Right of Publicity and Protection for a Trademark’s “Persona,”* 71 TRADEMARK REP. 193, 193 (1981)).

Therefore, extending the right of publicity to endangered species could benefit species and would comport with the right's justifications.

*B. Operationalizing a Right of Publicity for Endangered Species*

Of course, even if one is inclined to agree that endangered species should benefit from the exploitation of their publicity value, there are several practical questions regarding the actual implementation of such an extension of the right of publicity. This section explains what a right of publicity for endangered species might look like. Overall, the right should be enacted by statute and limited to endangered and threatened species, and publicity rights should be controlled and licensed by environmental organizations acting as trustees of covered species. Moreover, the right should cover recognizable depictions of any genus containing endangered species and should not cover noncommercial uses.

*1. The Right of Publicity Should Be Limited to Endangered and Threatened Species.* — The right of publicity should be limited to endangered and threatened species as listed under the Endangered Species Act<sup>113</sup> (ESA) by the Fish and Wildlife Service and National Marine Fisheries Service,<sup>114</sup> as well as species for which it has been determined that listing is warranted.<sup>115</sup> (Hereinafter, all covered species are referred to collectively as “endangered species.”) This limitation has three benefits: it ensures that the right's coverage is sufficiently broad; it ensures that the right's coverage is not overly broad; and it is easy to administer.

First, pegging the right of publicity to species' ESA listing status ensures that the species most in need of protection (and thus of funding for conservation) will receive remuneration for the use of their likenesses. Moreover, insofar as charismatic megafauna are both at a high risk of extinction<sup>116</sup> and generally more likely than other wild animals to be used in advertising,<sup>117</sup> limiting the right of publicity to endangered species may also serve as an effective proxy for addressing those situations where an advertiser is appropriating the greatest value.

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<sup>113</sup> 16 U.S.C. §§ 1531–1544.

<sup>114</sup> The Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) jointly administer the ESA. *Laws & Policies: Endangered Species Act*, NOAA FISHERIES (Nov. 15, 2022), <https://www.fisheries.noaa.gov/topic/laws-policies/endangered-species-act> [<https://perma.cc/RC8V-29FL>]. The agencies list species as “endangered” if they are, as determined on the basis of the best scientific data available, “in danger of extinction throughout all or a significant portion of [their] range” and as “threatened” if they are “likely to become an endangered species within the foreseeable future.” 16 U.S.C. § 1532.

<sup>115</sup> The ESA implementing agencies can find that listing a species is “warranted but precluded,” meaning that a species “should be listed based on the available science, but that listing other species takes priority because [the other species] are more in need of protection.” KRISTINA ALEXANDER, CONG. RSCH. SERV., R41100, WARRANTED BUT PRECLUDED: WHAT THAT MEANS UNDER THE ENDANGERED SPECIES ACT (ESA) 1 (2010). As such species are effectively endangered or threatened (scientifically if not legally), they should also benefit from their publicity value.

<sup>116</sup> Courchamp et al., *supra* note 10, at 1.

<sup>117</sup> See Feldhamer et al., *supra* note 11, at 161.

Second, limiting the right of publicity to endangered species ensures that the right of publicity will not be overextended or suppress speech where there is no good reason to do so. A right of publicity that prevents the uncompensated use of dogs and cats in a commercial for pet food, or of rats and roaches in a commercial for pest control supplies, would hinder attempts to advertise useful products without comprehensibly furthering conservation goals.<sup>118</sup> Even where applying the right of publicity would arguably further conservation, there is relatively little to be gained from requiring Energizer to pay for rabbit conservation or (were it still extant) Gateway for cows, given that these species are not at risk of extinction. Endangered species, on the other hand, are by definition at risk of extinction and thus have the most to gain from — and the most need for — funding of their survival, justifying limits on their use.

Third, defining the extended right of publicity with reference to endangered species is the easiest way to extend the right without over- or underextending it. Because endangered species listings are made on the basis of a “scientifically rigorous process”<sup>119</sup> and the “best scientific and commercial data available,”<sup>120</sup> it can be assumed that any listed species is indeed at risk of extinction and thus would benefit from additional funding. And to the extent that there are endangered species with limited publicity values, it would seem that these species would most likely not be used in advertising and, if used, could simply command relatively little in licensing fees or damages<sup>121</sup> — in other words, that is no reason to let them be used freely. Developing a separate method for determining which species most need to benefit from their publicity value would thus be redundant at best and more likely over- or underinclusive.

2. *The Right Should Protect Both Names and Visual Depictions of Endangered Species and Should Protect Against Uses of “Generic” Versions of Endangered Species.* — The right of publicity for endangered species should apply to visual depictions of a species and uses of its name, as both have publicity value.<sup>122</sup> Whether a visual representation like a stylized logo sufficiently clearly depicts an endangered species to constitute a use of the species’ likeness should be a question of fact.

Though only endangered species should be able to make use of the right of publicity, the right should also protect *against* depictions of animals that clearly resemble some member of a taxon within which some

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<sup>118</sup> One could perhaps argue that pet food companies should pay for trap-neuter-release programs, or Chick-fil-A for upgrades to cattle farms to improve cows’ quality of life. Human-nature interactions, however, present substantially different ethical questions than human-domesticated animal interactions, see TAYLOR, *supra* note 103, at 53–58, and are beyond the scope of this Note.

<sup>119</sup> *Glossary: Endangered Species Act*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/laws-and-policies/glossary-endangered-species-act> [<https://perma.cc/JUR2-5BBW>].

<sup>120</sup> 16 U.S.C. § 1533(b)(1)(A).

<sup>121</sup> See *supra* note 107 and accompanying text.

<sup>122</sup> Consider, for instance, Gorilla Glue, which uses both in its marketing. THE GORILLA GLUE COMPANY, <https://www.gorillatough.com> [<https://perma.cc/95KH-2MEC>].



species are endangered, even if the depiction is not specifically identifiable as an endangered species.<sup>123</sup> Froot Loops's mascot, Toucan Sam, shows why. He is clearly a toucan; the word is part of his name. But he does not seem to be any particular *species* of toucan. The colors on his bill instead correspond (roughly) to the colors of the cereal.<sup>124</sup> And yet several species of toucan are at risk of extinction.<sup>125</sup> If the right of publicity for endangered species only protected against commercial depictions that were clearly of a specific species, toucans would receive no benefit from Froot Loops's appropriation of their publicity value, notwithstanding the mascot's wide use. Indeed, any advertiser wishing to use animal imagery without paying for it would need only to tweak an animal's features or combine features of two similar species; or could, for instance, use the name "grizzly" and just claim that they were referring to populations other than the threatened<sup>126</sup> population in the continental United States.<sup>127</sup> Thus, for a right of publicity for endangered species to work, it must protect against the depiction of animals identifiable as members of taxa containing endangered species.<sup>128</sup>

The genus is likely the best level at which to peg the right. As noted, protecting specifically against depictions of a member of a species would

<sup>123</sup> This distinction between who can avail themselves of the right of publicity and what the right protects is more clearly seen when speaking of humans' right of publicity. The former describes whether the right is held by, for instance, only celebrities or private individuals too; or only living people or deceased people as well. The latter describes what aspects of one's persona are protected — for instance, some state laws may only protect certain defined characteristics such as name or portrait, *e.g.*, N.Y. CIV. RIGHTS LAW § 51 (McKinney 2023), whereas others apply more broadly and protect "identity" and thus can apply to any usage that calls a specific person to mind, *see, e.g.*, *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397–99 (9th Cir. 1992).

<sup>124</sup> *See* Daniel S. Levine, *Froot Loops Changed Toucan Sam, and Cereal Lovers Are Not Pleased*, POPCULTURE (May 16, 2020, 11:03 PM), <https://popculture.com/trending/news/froot-loops-changed-toucan-sam-cereal-lovers-not-pleased> [<https://perma.cc/2ZTK-P3BW>].

<sup>125</sup> Six species of toucan (family *Ramphastidae*) are listed on Appendix II of the Convention on International Trade in Endangered Species (CITES), which "lists species that are not necessarily now threatened with extinction but that may become so unless trade is closely controlled," *The CITES Appendices*, CITES, <https://cites.org/eng/app/index.php> [<https://perma.cc/QRJ7-KSB6>]. *Appendices*, CITES, <https://cites.org/eng/app/appendices.php> [<https://perma.cc/E24H-KPRN>]. In August 2021, FWS concluded that listing is warranted for one species, *Aulacorhynchus huallagae* (the yellow-browed toucanet); it reaffirmed this conclusion in May 2022. *Review of Species that Are Candidates for Listing as Endangered or Threatened*, 87 Fed. Reg. 26152, 26162, 26166 (May 3, 2022).

<sup>126</sup> *Grizzly Bear* (*Ursus arctos horribilis*), U.S. FISH & WILDLIFE SERV., ENV'T CONSERVATION ONLINE SYS., <https://ecos.fws.gov/ecp/species/7642> [<https://perma.cc/QKP5-TXBN>].

<sup>127</sup> Similar "lookalike" problems exist in other contexts involving endangered species protection. For instance, CITES provides certain protections for species that are not endangered, but look similar enough to species that are that it is necessary to protect both to ensure that protections are not easily circumvented. *See generally* Sara Alfino & David L. Roberts, *Estimating Identification Uncertainties in CITES "Look-Alike" Species*, GLOB. ECOLOGY & CONSERVATION, 2019, no. e00648, at 2.

<sup>128</sup> A taxon is any taxonomic rank. A species is a "classification comprising related organisms that share common characteristics and are capable of interbreeding." *Species*, ENCYC. BRITANNICA (Feb. 27, 2024), <https://www.britannica.com/science/species-taxon> [<https://perma.cc/2LW4-CVLN>]. A genus is one level up from a species and consists "of structurally or phylogenetically related species or a single isolated species exhibiting unusual differentiation." *Genus*, ENCYC. BRITANNICA (Mar. 6, 2024), <https://www.britannica.com/science/genus-taxon> [<https://perma.cc/MTV6-2AYJ>].

render the right a nullity. On the other hand, protecting against depictions of any member of a family within which some species are endangered would likely be too broad: the family *Felidae*, for instance, includes not only the tiger and lion but also the house cat.<sup>129</sup> An advertisement featuring only a house cat would not appear to be appropriating the publicity value of a tiger, so preventing this use on that ground would not advance the purposes served by extending the right. Whether a depiction is identifiably using the likeness of a member of a genus containing endangered species should be a question of fact.

Finally, there should be an affirmative defense for advertisements that clearly depict nonendangered members of genera that contain endangered species. Advertisers that feature what are clearly not endangered species cannot be said to be appropriating the publicity value of any endangered species. For instance, an advertisement featuring a golden retriever is obviously not appropriating the publicity value of the endangered Simien fox, which is also within the genus *Canis*.<sup>130</sup> This defense would thus help ensure the right of publicity for endangered species does not creep past its core purpose of preventing appropriation of the publicity value of species that most need help.<sup>131</sup>

3. *The Right Should Be Administered by Environmental Nongovernmental Organizations.* — Perhaps the greatest practical question regarding the extension of the right of publicity to endangered species is who would license species' likenesses and sue over unauthorized uses. These functions should be served by environmental nongovernmental organizations (NGOs) acting as stewards for species they represent. The NGOs would then also be responsible for spending the funds on conservation.

Such relationships are common in the law. Courts regularly appoint guardians and conservators to protect and advocate for the interests of minors or others deemed incapable of making their own decisions.<sup>132</sup> Though state guardianship laws and procedures — including court

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<sup>129</sup> *Feline*, ENCYC. BRITANNICA (Apr. 26, 2024), <https://www.britannica.com/animal/feline> [<https://perma.cc/R9HB-XC4K>].

<sup>130</sup> *Simien Fox* (*Canis simensis*), U.S. FISH & WILDLIFE SERV., ENV'T CONSERVATION ONLINE SYS., <https://ecos.fws.gov/ecp/species/1640> [<https://perma.cc/Y5BU-JNNW>].

<sup>131</sup> Whether a similar defense should also be available in the reverse situation — where an advertisement features an individual endangered animal with its own publicity value (for example, if an advertisement featured Harambe, an individually famous endangered lowland gorilla) — is a difficult question presenting distinct issues. On the one hand, an advertisement featuring Harambe would not be appropriating gorillas' publicity value so much as Harambe's. On the other hand, this could open a loophole in which any advertiser could escape liability by merely appending the name of a famous animal to their ad. A full resolution of this issue is beyond the scope of this Note, but one potential way to thread the needle is to allow a reduction in damages to the degree a factfinder determines that the use's value came from the individual animal rather than its species.

<sup>132</sup> See *Conservatorship vs. Guardianship: What's the Difference?*, METLIFE (Oct. 24, 2022), <https://www.metlife.com/stories/legal/conservatorship-vs-guardianship> [<https://perma.cc/X29J-VX23>].

oversight practices — vary,<sup>133</sup> overseeing such relationships is a common judicial function, with an estimated 1.3 million adults and \$50 billion in assets under supervision in 2016.<sup>134</sup>

Similar structures should be used with respect to endangered species' rights of publicity. Others have proposed using these relationships to allow natural objects to sue on their own behalf: in his famous article *Should Trees Have Standing?*, Professor Christopher Stone proposed a system wherein “friend[s] of a natural object” could “apply to a court for the creation of a guardianship,” after which an environmental NGO such as the Sierra Club could be appointed to represent that object's interests in court.<sup>135</sup> More importantly, such structures have been actually established: in 2017, the New Zealand Parliament granted the Whanganui River legal personhood, giving it the right to sue and be sued, and vested responsibility for enforcing its rights in Te Pou Tupua, a two-person guardian entity.<sup>136</sup> The same year, an Indian court effectively granted legal personhood to the Ganges River and ordered the state to establish a board to keep it clean (though the Supreme Court of India reversed).<sup>137</sup>

The right of publicity for endangered species should be similarly entrusted to an NGO. As Stone noted, there are many environmental NGOs that would likely be willing and able to assume such responsibilities. Given their conservation expertise, they would know how best to spend the acquired funds and would be well positioned to negotiate appropriate rates for different species.<sup>138</sup> Just as courts assign guardians to humans who need them, so could they assign guardians to endangered species. Appointed guardians should be required to report on their activities — including licensing, lawsuits, and use of funds — so courts and the public can monitor performance and replace underperformers.

4. *The Right Should Not Apply to Noncommercial Uses as Defined by First Amendment Law.* — The right should not apply to noncommercial use of the name or likeness of an endangered species. As discussed, the right of publicity aims to prevent the unauthorized and

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<sup>133</sup> See *Guardianship*, U.S. DEP'T OF JUST. (Oct. 31, 2023), <https://www.justice.gov/elderjustice/guardianship-key-concepts-and-resources> [<https://perma.cc/F7VD-9785>].

<sup>134</sup> Catherine Anne Seal & Pamela B. Teaster, *An Argument and a Roadmap for Regulating the Court-Appointed Professional Fiduciary*, 72 SYRACUSE L. REV. 469, 469 & n.1, 471 (2022).

<sup>135</sup> Stone, *supra* note 1, at 464–66.

<sup>136</sup> Viktoria Kahui & Annabelle Cullinane, *The Ecosystem Commons*, N.Z. J. ECOLOGY, Nov. 28, 2019, at 1, 3.

<sup>137</sup> Sudipta Sen, *Of Holy Rivers and Human Rights: Protecting the Ganges by Law*, YALE UNIV. PRESS (Apr. 25, 2019), <https://yalebooks.yale.edu/2019/04/25/of-holy-rivers-and-human-rights-protecting-the-ganges-by-law> [<https://perma.cc/SK96-F6Y4>]. Relatedly, two U.S. cities have attempted to give certain natural entities legal rights by allowing citizens to sue on their behalf. See PITTSBURGH, PA., CODE OF ORDINANCES ch. 618 (2010); TOLEDO, OHIO, Lake Erie Bill of Rights (2019), *invalidated by* *Drewes Farms P'ship v. City of Toledo*, 441 F. Supp. 3d 551, 553, 557–58 (2020). Given the practicalities of licensing, however, such an approach would not be viable here.

<sup>138</sup> For instance, given differential demand, it would likely cost more to license the image of a panda than of a Bone Cave harvestman.

uncompensated appropriation of the commercial value of one's likeness. A book or movie that features an endangered species is most likely not using that species for its *commercial* value, but for *expressive* purposes, whether to create a situation that advances the plot,<sup>139</sup> make a story appeal to children,<sup>140</sup> or even bring attention to the biodiversity crisis.<sup>141</sup> Extending the right of publicity to these uses would restrict expression without the justification of preventing commercial misappropriation.

Thus, like the statutory rights of publicity of New York<sup>142</sup> and California,<sup>143</sup> the right of publicity for endangered species should only protect against *commercial* use of species' identity, using the definition of commercial speech found in First Amendment law. By this definition, speech is commercial (and treated as less valuable<sup>144</sup>) if it "does 'no more than propose a commercial transaction.'"<sup>145</sup> Advertisements and logos aiming to sell a separate good or service would be covered, while speech that *is itself* the product (namely, expressive works) would not be.<sup>146</sup>

Similarly, on purely policy grounds, the right should not apply to uses by environmental nonprofits, like advocacy groups or zoos.<sup>147</sup>

*5. The Right of Publicity for Endangered Species Should Be Statutory.* — State rights of publicity are variously creatures of statute and of the common law. The right of publicity for endangered species should be created by statute — or perhaps more precisely, it would be infeasible to create via the common law. Legislatures, not courts, are positioned to define and oversee the implementation of a program like the one described above,<sup>148</sup> which includes such specificities as protecting likenesses at the genus level and requiring reporting of guardian activities.

<sup>139</sup> *E.g.*, *THE REVENANT* (20th Century Studios 2015).

<sup>140</sup> *E.g.*, *JEAN DE BRUNHOFF, THE STORY OF BABAR* (Merle S. Haas trans., Random House 2002) (1931).

<sup>141</sup> *E.g.*, *Planet Earth: The Future*, BBC (television series 2006).

<sup>142</sup> N.Y. CIV. RIGHTS LAW § 51 (McKinney 2023).

<sup>143</sup> CAL. CIV. CODE § 3344 (West 2023).

<sup>144</sup> *See* Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1187–88 (1988).

<sup>145</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 385 (1973)).

<sup>146</sup> Advertisements intended to sell a protected work should similarly be excluded. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. a (AM. L. INST. 1995). The exact scope of protection is a difficult question. For instance, are "gift shop items" such as mugs, t-shirts, and stuffed animals expressive works or commercial products? A comprehensive resolution of what is a commercial product and what an expressive work, having stymied courts and commentators for decades, is beyond the scope of this Note. *See generally* Post & Rothman, *supra* note 49, at 91. Such a resolution is also unnecessary here because these questions can be resolved on a case-by-case basis. For now, suffice it to say that many such items (at least including t-shirts) would likely be protected by the First Amendment. *Cf., e.g.*, *Ayres v. City of Chicago*, 125 F.3d 1010, 1014 (7th Cir. 1997); *Gaudiya Vaishnava Soc'y v. City & County of San Francisco*, 952 F.2d 1059, 1063–65 (9th Cir. 1990).

<sup>147</sup> This would prevent the extension from undermining other efforts to benefit a given species. *Contra generally* Brian Potter et al., *How to Stop Environmental Review from Harming the Environment*, INST. FOR PROGRESS (Sept. 13, 2022), <https://ifp.org/environmental-review> [<https://perma.cc/N7QB-W8QR>].

<sup>148</sup> *Cf., e.g.*, *Juliana v. United States*, 947 F.3d 1159, 1169–73 (9th Cir. 2020).

## III. SELECT COUNTERARGUMENTS

A number of objections might be anticipated. Several — copyright preemption,<sup>149</sup> standing,<sup>150</sup> takings<sup>151</sup> — are beyond the scope of this Note. The following sections, however, address two possible objections.

A. *The First Amendment*

Generally, rights of publicity have been upheld as consistent with the First Amendment.<sup>152</sup> That said, the First Amendment is one obvious potential obstacle to this proposal. A full consideration of the issues it would pose is beyond the scope of this Note. But as Professors Robert Post and Jennifer Rothman note, right of publicity claims rooted in a theory of unjust enrichment (the element of the right of publicity most analogous to the extension proposed here) are, so long as they include fair use exceptions, “likely valid in the context of commercial speech” because they can satisfy intermediate scrutiny: “Although . . . unjust enrichment–based right of publicity claims decrease the amount of information circulated in commercial speech, [they] correspond to deep-seated concepts of commercial propriety, and [they] have substantial precedential support in the history of American commercial regulation.”<sup>153</sup> Endangered species are obviously different than people. But there is no clear reason why they would be *too* different.<sup>154</sup>

B. *Perverse Effects*

One possible objection concerns the merits of the proposal: One might argue that, were advertisers required to pay to use animal imagery, they would instead opt not to use such imagery. This would mean that no money would be paid for such use and the funding available for conservation would not increase; moreover, this could actually harm endangered species insofar as they would be less visible, which might result in lowered public interest in and support for conservation.

Ultimately, the degree to which this would occur is an empirical question beyond the scope of this Note. That said, it appears unlikely that advertisers would cease using endangered species altogether —

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<sup>149</sup> See generally, e.g., Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199 (2002).

<sup>150</sup> Cf., e.g., *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1099 (D.C. Cir. 2015) (Millett, J., dubitante).

<sup>151</sup> Cf. generally Dustin Marlan, Comment, *Trademark Takings: Trademarks as Constitutional Property Under the Fifth Amendment Takings Clause*, 15 U. PA. J. CONST. L. 1581, 1583–84 (2013).

<sup>152</sup> See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563 (1977).

<sup>153</sup> Post & Rothman, *supra* note 49, at 154–56.

<sup>154</sup> *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174–79 (9th Cir. 2004) (semble). For an explanation of why a privately enforced right of publicity is at least arguably superior to government enforcement or a tax-and-transfer regime, see Samuel Koenig, *Private Versus Government Regulation of Animal Advertising*, KOENIGNORAMUS (Apr. 6, 2024), <https://koenignoramus.blogspot.com/2024/04/private-versus-government-regulation-of.html> [<https://perma.cc/99NQ-WP8D>].

advertisements regularly feature celebrities and other human actors whom they must pay. But even if a right of publicity for endangered species were to have some slight perverse effect on *some* advertisers, that effect may be outweighed by the benefits the right would provide by forcing payments from other advertisers. Plus, if advertisers stopped using endangered species, that might serve to counteract the dynamic via which people overestimate the abundance of endangered species because of the species' prevalence in "virtual" settings such as advertisements and movies.<sup>155</sup> Moreover, even if there were to be a slight net perverse effect in consequential terms, it might be argued that the right of publicity for endangered species would still be justified deontologically insofar as it would prevent the misappropriation of species' publicity value.<sup>156</sup>

### CONCLUSION

Earth and its ecosystems are in the middle of a mass extinction and a biodiversity crisis. At the same time, firms derive significant value from the use of wildlife imagery in their advertisements and do little to return the favor. Extending the right of publicity to endangered species would help direct much-needed funding to conservation and would prevent the misappropriation of endangered species' publicity value.

The best objection to this proposal is perhaps "simply that [it] is a fraud — a contrived, pie-in-the-sky gimmick."<sup>157</sup> But big problems require big solutions, and dealing with climate change and other looming environmental collapses will require fundamentally rethinking human interactions with the natural world.<sup>158</sup> Giving endangered species a share of their publicity value is perhaps one small step in that direction.

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<sup>155</sup> Cf. generally Courchamp et al., *supra* note 10, at 1–2.

<sup>156</sup> See *supra* p. 2303. In that scenario — that is, if it turned out that extending the right of publicity to endangered species resulted in minimal funding for conservation and, by reducing attention paid to endangered species, reduced enthusiasm for conservation — one could object that the deontological justification does not explain why the right is limited to endangered species: it only makes sense to single out endangered species for protection because they are in greater need of conservation funding if the proposal actually increases that funding. If such perverse effects did result, then it may indeed be necessary to revise some of the contours of the newly extended right. But even then, it could be argued that the distinction between endangered and other species is justified on the ground that it is worse for people to exploit the publicity value of endangered species because people have driven them to the brink of extinction. Exploiting their publicity value after doing so adds insult to injury.

<sup>157</sup> Note, *Pack the Union: A Proposal to Admit New States for the Purpose of Amending the Constitution to Ensure Equal Representation*, 133 HARV. L. REV. 1049, 1070 (2020).

<sup>158</sup> See generally NAOMI KLEIN, *THIS CHANGES EVERYTHING: CAPITALISM VS. THE CLIMATE* (2014).