

UNCERTAINTY SQUARED: THE RIGHT OF PUBLICITY AND SOCIAL MEDIA

Brian D. Wassom[†]

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[†] Partner and Chair of the Social, Mobile and Emerging Media Practice Group at Honigman Miller Schwartz and Cohn, LLP (Bloomfield Hills, MI); Instructor of Social Media Law and Ethics at Central Michigan University; law clerk to the Hon. Alice M. Batchelder, United States Court of Appeals for the Sixth Circuit (1999-2000); J.D. *magna cum laude*, Case Western Reserve University School of Law (1999). I dedicate this Article to my wife, Sheri Wassom, whose love, support and encouragement have been indispensable to my career.

INTRODUCTION

The laws of probability tell us that the likelihood of a particular result goes down dramatically as the number of variables on which that result depends goes up. So, for example, while the odds of rolling an even number on a six-sided die is $\frac{1}{2}$, the odds of rolling two even numbers on two dice is $\frac{1}{2}$ times $\frac{1}{2}$, or only $\frac{1}{4}$.

Predicting the applicability of publicity rights law in the context of social media is a bit like that. Each variable in the equation is itself the subject of greater-than-average uncertainty compared to other fields of law and technology. The right of publicity, for example, is generally treated as a species of intellectual property (“IP”), yet it is a product of state (as opposed to federal) common law, and has only been acknowledged by barely more than half of the states. It has as many sources of law as it does jurisdictions that recognize it—more, in fact—and many of its critical elements remain either disputed or undeveloped. Likewise, social media—as we currently understand that term—has been in the public consciousness for not much longer than five years; yet it has already come to dominate the way that individuals and entire societies communicate worldwide. At the same time, the technology behind, and precise expressions of social media remain incredibly fluid, with individual forums rising from obscurity to prominence and back again all within the space of a year. The proper role of social media in civil society and the parameters of the law that governs it, therefore, are equally uncertain.

Keeping these caveats in mind, however, it is nevertheless both possible and fruitful to explore how the right of publicity—that is, the right of an individual to control the commercial exploitation of his or her identity—will manifest itself in social media. This is actually quite an important inquiry, since the very thing that makes social media special is that it enables individuals to create and deepen interpersonal relationships with specific people—often, people they already know through other means. The identities of our online “friends” and “followers,” therefore, are a crucial component of our social media experience.

The companies that provide these experiences realized this long ago. Indeed, since social media users generally do not pay for the privilege of using the service, the service providers have based their entire business models on exploiting their unique access to our interpersonal relationships. The initial, easiest, and still-predominant way that they profit from our use of their services is by selling advertisers access to our eyeballs. But as social media services have

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become more sophisticated and the pressure to monetize the services has increased, service providers have dug deeper into the granular detail of our interactions in order to target their ads even more effectively. In many cases, they are relying on the credibility of our friends to sell us goods and services. As discussed below, that practice has given rise to legal action by social media users who argue that this amounts to a commercial exploitation of their identities in violation of the right of publicity.

At the same time, social media's focus on interpersonal relationships naturally results in a lot more data about individuals being shared in digital form than had previously been done. That, in turn, naturally increases the probability that some of that data will be exploited by commercial means—again implicating the right of publicity.

For several decades before the advent of the social internet and related forms of digital publishing, the right of publicity was a curious blend of privacy, IP, and First Amendment law that was litigated only infrequently and barely registered in the public consciousness. Courts went so far as to explicitly hold that only “celebrities” could even possess the right, and the realities of pre-internet media imposed severe limits on the ability of any given person to achieve enough celebrity to make their identities *worth* exploiting commercially. Social media—along with reality TV, self-publishing, and the internet in general—changed all that. Perhaps, therefore, the example of rolling two dice is not as apt of an analogy as it may first seem because those two variables are completely independent of each other. The development of publicity rights case law and social media, by contrast, may well depend in large part on each other.

The discussion below begins with a brief summary of the right of publicity, including its elements, development, and remaining areas of uncertainty. It then examines several of the most likely ways that this body of law will influence, and be influenced by social media including: the manner of measuring the “commercial value” in an individual's identity; the proper amount of damages for misappropriations of that identity; the availability of defenses based on the First Amendment, the Copyright Act, and other related legal rights; and the role social media plays in fueling publicity rights violations.

I. LEGAL BACKGROUND: THE RIGHT OF PUBLICITY

A. *An Uncertain Pedigree*

Any generalized discussion of the right of publicity necessarily comes with an asterisk, because there is no unitary source of legal authority on this right. It is generally—though not universally—considered a species of IP, yet it is a creature of state, not federal law. As such, the right is articulated in a slightly different manner by each jurisdiction that recognizes it—and not all do.

As a matter of fact, only slightly more than half of the states have expressly acknowledged its existence.¹ Among these, some states have created the right by statute, some have discovered it in the common law—and some have done both, recognizing two types of publicity rights with different characteristics within the same state.²

That said, there is enough commonality between the various articulations of the right that some basic, unifying characteristics—or, at the very least, some ranges of difference—can be discerned. Indeed, some courts—including two decisions from the Sixth Circuit—have expressly endorsed the idea of building a consistent body of case law nationwide on the right of publicity.³ Therefore, hope remains that the differences between the various jurisdictions will someday narrow, and perhaps even coalesce into a single, federal right.

B. *The Core of the Publicity Right and of the Cause of Action for Appropriating It*

The best summary of the right of publicity as generally understood across the United States comes from the Restatement (Third) of Unfair Competition section 46: “[o]ne who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability.”⁴ Unpacking this sentence, we find two core elements of the

1. See generally RIGHT OF PUBLICITY, <http://rightofpublicity.com/statutes> (last visited Dec. 3, 2012).

2. See generally CITIZEN MEDIA LAW PROJECT, <http://www.citmedialaw.org/legal-guide/california-right-publicity-law> (last visited Dec. 3, 2012).

3. See *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 622-23 (6th Cir. 2000) (“As case law on this right is exceedingly rare . . . nationwide, and because of the general constitutional policy of maintaining uniformity in intellectual property laws, courts typically give attention to the entire available body of case law when deciding right of publicity cases.”); *Herman Miller v. Palazzetti Imps. & Exps.*, 270 F.3d 298, 326 (6th Cir. 2001) (following *Landham*, 227 F.3d at 622-23).

4. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

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right—“indicia of identity” and “commercial value”—and two elements of an unlawful “appropriation” of that right: use “for purposes of trade” and lack of “consent.”⁵

1. Indicia of Identity

This phrase has its common meaning—that is, it encompasses anything that indicates to a third party the identity of the rights holder. The Restatement expressly lists two examples of ways in which a person’s identity can be “indicated”: their “name” (which typically includes both the name itself and the person’s signature) and their “likeness,” or personal appearance.⁶

Many of the courts and legislatures that have articulated the right, however, recognize that any attempt to exhaustively list the forms that publicity right infringements can take is simply an invitation to creative infringers to devise some other means of appropriating someone’s identity. Much like the concept of “identity” itself, therefore, the idea of “appropriating” that identity must necessarily remain fluid.

Case law bears out this concern. Various courts have found a plaintiff’s identity to have been “indicated” by such other means as sound-alike voices;⁷ a catchphrase publically associated with the plaintiff;⁸ a picture of the race car that plaintiff drives;⁹ and animatronic robots dressed like characters the plaintiffs play¹⁰ or in the distinctive style of dress associated with the plaintiff.¹¹

In the same way that this open approach to defining “identity” protects against creative infringers, however, it also encourages

5. *Id.* § 46, cmts. a, b, f.

6. *Id.* § 46.

7. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1100 (9th Cir. 1992). *But see Romantics v. Activision Publ’g, Inc.*, 574 F. Supp. 2d 758, 764 (E.D. Mich. 2008) (noting that Michigan does not recognize a right of publicity in one’s voice).

8. *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 836 (6th Cir. 1983); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978).

9. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974). *But see Brill v. Walt Disney Co.*, 246 P.3d 1099, 1105 (Okla. Civ. App. 2010) (rejecting professional driver’s claim that animated character “Lightning McQueen” infringed on his right of publicity).

10. *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 809 (9th Cir. 1997); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992). *But see Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 621, 626 (6th Cir. 2000) (rejecting claim based on similarities between plaintiff actor and toy based on character he played, and expressly declining to follow *White*).

11. *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 448 (S.D.N.Y. 2008).

plaintiffs and lawyers to devise increasingly inventive theories of liability. To the extent that this incentive encourages case law to keep up with the realities of human interaction, it serves the public policies behind the right of publicity. Whether such litigation becomes abusive and counter-productive, however, remains to be seen.

2. *Commercial Value*

In nearly all jurisdictions, it is not simply enough for a right of publicity plaintiff to show that their likeness has been reproduced in some fashion.¹² They must also show that their identity is worth something—in other words, that it has commercial value.¹³ The most straightforward way of measuring commercial value is to ask the question: does associating this identity with a product or service make a customer more likely to purchase that product or service?

For this reason, most courts have historically described—and to some degree, still do describe—the right as belonging to “celebrities.” After all, “[a] celebrity is a person who has a prominent profile and commands a great degree of public fascination and influence in day-to-day media. The term is [] synonymous with . . . great popular appeal, prominence in a particular field, and [being] easily recognized by the general public.”¹⁴ It is this popular appeal and recognition on which a marketer seeks to capitalize by associating a celebrity with the product or service being marketed.

In multiple ways, however, contemporary media has broken down the barriers between “celebrities” and the rest of us—at least in terms of the ability to associate popular appeal and recognition with one’s identity. Reality television, human interest news reporting, and digital publishing accelerated this development, but—as discussed below—it may be social media that completes it.

3. *Use for Purposes of Trade*

Similar to the requirement that the plaintiff’s identity have “commercial value” is the need to prove that the defendant capitalized upon that value in a commercial manner.¹⁵ This symmetry ensures that “the punishment fits the crime,” so to speak, and keeps the courts focus

12. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1993).

13. *Id.*

14. *Celebrity*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Celebrity> (last visited Oct. 13, 2012) (Wikipedia is cited as the authority for this definition by several other sources).

15. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47.

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on protecting the interest that the right is designed to protect.

There is also broad consensus that these “commercial” limitations are mandated, at least to a large degree, by the First Amendment to the United States Constitution.¹⁶ Protected too broadly, publicity rights could trample on forms of expression that have long been recognized as constitutionally privileged. One recent example of such overreaching came in the complaint by actress Lindsay Lohan against E-Trade, simply because a character in an E-Trade commercial was called “Lindsay.”¹⁷

The United States Supreme Court has been of no help in drawing this line. It has decided only one case involving the right of publicity: *Zacchini v. Scripps-Howard Broadcasting Company*.¹⁸ There, the plaintiff was a circus performer whose act consisted of shooting himself out of a cannon.¹⁹ That act was the only thing that made him famous—i.e., the only thing that gave his identity commercial value.²⁰ A local news station filmed and broadcast the entire act, thus entirely supplanting Zacchini’s ability to draw audiences to see his act.²¹ He no longer had the ability to attract revenue using the commercial value of his likeness.²²

The Court did acknowledge the tension between the media’s First Amendment right to report the news and Zacchini’s interest in protecting the commercial value of his identity.²³ However, the Court found it unnecessary to balance Zacchini’s publicity rights against First Amendment protections because this case involved a wholesale appropriation.²⁴ “Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not,” it said, “we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act

16. Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J.L. & ARTS 165, 173-74 (2010).

17. Kieran Crowley, *Lindsay Lohan Wants \$100M over E-Trade Ad*, N.Y. POST, Mar. 9, 2010, http://www.nypost.com/p/news/national/lohan_such_baby_jVdQWABj9z0MgXzCv1Nh10.

18. *See generally* 433 U.S. 562 (1977).

19. *Id.* at 563.

20. *Id.* at 576.

21. *Id.* at 564.

22. *Id.*

23. *Zacchini*, 433 U.S. at 565.

24. *Id.* at 574-75.

without his consent.”²⁵ Left with no guidance, various courts have come up with their own tests for drawing that line.

4. *Consent*

It might seem that determining whether or not a plaintiff has consented to the commercial use of her likeness would be simple. That is not, however, a guarantee. For example, one federal judge in Michigan declined to hold that a musician plaintiff had consented to the recording and distribution of his likeness on DVD.²⁶ Even though the performance at issue was done on stage in front of television cameras for the purpose of being broadcast in that case, there was no authoritative precedent from the Sixth Circuit defining “consent” in the specific context of publicity rights.²⁷ In a more recent example involving social media, a court rejected Facebook’s argument that its users gave implied consent to the use of their names in Sponsored Story advertising.²⁸

Despite the areas of general consensus listed above in what the right of publicity protects, substantial areas of difference—or outright uncertainty—remain. The law still varies significantly from state to state, and many fundamental components of the right remain woefully underdeveloped in many jurisdictions. That can be a source of challenge and excitement for trial lawyers, but it does little to assure potential litigants or give clarity to those trying to avoid liability—especially those who operate on a national scale, as virtually everyone on the internet does by definition.

II. APPLYING THE RIGHT OF PUBLICITY TO SOCIAL MEDIA

Speculating as to how the right of publicity will be applied and enforced in the context of social media requires quite a speculation. Not only are the boundaries of the right itself so indeterminate, but the landscape of social media changes almost more quickly than courts and legislatures can be expected to keep up with. Nevertheless, the following concerns seem likely to present themselves in one fashion or another.

25. *Id.*

26. *Armstrong v. Eagle Rock Entm’t, Inc.*, 655 F. Supp. 2d 779, 787 (E.D. Mich. 2009).

27. *Id.* at 787.

28. *Cohen v. Facebook, Inc. (Cohen I)*, 798 F. Supp. 2d 1090, 1095-96 (N.D. Cal. 2011).

*A. Defining Commercial Value**1. The Capacity for Interpersonal Relationships as a Commercially Valuable Commodity*

As mentioned above, publicity rights case law in many of the relevant jurisdictions has evolved to recognize that a broader class of individuals than those typically thought of as bona fide “celebrities” can be capable of developing commercial value in their personas. When, for example, the YouTube video “David After Dentist” (depicting a child still hilariously dazed after dental surgery) becomes so popular that it garners three million views in three days²⁹ and spawns a line of T-shirts and other merchandise with David’s image and his catchphrases (such as “Is This Real Life?”),³⁰ there can be no doubt that even this previously unknown child can nevertheless prove that his identity carries commercial value, and merits protection by the right of publicity.

Indeed, social media may be the most direct means imaginable to support the argument that anyone and everyone’s identity has some level of commercial value. By definition, the value that users derive from social media lies in the personal interactions they carry out with other individuals. And it is not simply the aggregate number of relationships formed that users enjoy, but also the *identity* of the individuals with whom those relationships are formed. Social media relationships are not generally made with pure strangers, but rather with *friends* and *followers*.

To be sure, this general statement is subject to exceptions and applies with varying degrees of accuracy to different sites. At one end of the spectrum, a service like Path³¹ is very much concerned with the identity of one’s “friends,” as they are capped at 150 and thus intended for only the very closest pre-existing relationships in a user’s life.³² Most Facebook relationships are likewise between people who already know each other IRL.³³ YouTube, on the other hand, is more of a

29. David DeVore, *How It Happened*, D.A.D. BLOG (last visited Dec. 3, 2012, 8:20 PM), <http://www.davidafterdentist.com/pages/how-it-happened>; see *David After Dentist*, YOUTUBE (Jan. 20, 2009), available at www.youtube.com/watch?v=txqjwrBYGr.

30. See generally David DeVore, *D.A.D. Shop*, D.A.D. BLOG, <http://www.davidafterdentist.com/collections/frontpage> (last visited Dec. 3, 2012).

31. See generally PATH, <http://www.path.com> (last visited Dec. 3, 2012).

32. The Path Team, *Why Can I Only Share with 150 People?*, PATH, <http://service.path.com/customer/portal/articles/659426-why-can-i-only-share-with-150-people> (last updated Aug. 9, 2012, 4:20 PM).

33. That is, “in real life” (“IRL”).

platform for publishing content than it is for building relationships, even though “social” interactions between users do occur.³⁴ Twitter straddles this divide, depending on how a user approaches it. It can be either a place for intense social interaction or a one-way publishing platform in which the number of one’s “followers” is more significant than their identity. Sometimes the value of the interaction does not emerge until after the relationship is initiated online.

By and large, however, the identity of the person with whom one interacts in social media both incentivizes people to participate in social media and adds qualitatively significant value to the experience. And the more such interactions that occur on a particular social media site, the more benefit the owner of that site derives (in terms of advertising revenue, search engine tie-ins, or whatever the site’s business model may be). In a very direct and measurable way, therefore, social media is a context in which literally every user’s identity has potential commercial value.

Judge Richard Seeborg of the United States District Court for the Northern District of California acknowledged this fact in *Cohen v. Facebook, Inc.* (“*Cohen P*”).³⁵ That case involved “Friend Finder[,] . . . a service that a Facebook user can choose to employ by giving the system access to email accounts the user may have on other services.”³⁶ “The system then searches the contact information in those accounts, compares it to the Facebook user database, and presents the user with a list of other Facebook users he or she already knows, but who are not among his or her Facebook ‘friends.’”³⁷ Plaintiffs did not object to these features.³⁸ But:

Facebook [also] promotes the availability of the Friend Finder service by periodically placing notifications on the ‘home’ pages of users’ accounts, stating that certain of their Facebook ‘friends’ have utilized the service to locate persons they know, and encouraging the users to ‘[g]ive it a try!’ The notices include the names and profile pictures of the ‘friends’ who have purportedly used the service.³⁹

It was these advertisements to which a class of plaintiffs objected, alleging that the use of their names and photos amounted to a

34. See generally YOUTUBE, <http://www.youtube.com> (last visited Oct. 24, 2012).

35. 798 F. Supp. 2d 1090 (N.D. Cal. 2011).

36. *Id.* at 1092.

37. *Id.*

38. See *id.*

39. *Id.* (internal citations omitted).

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commercial appropriation of their likenesses.⁴⁰ In the June 2011 opinion,⁴¹ Judge Seeborg found:

it is beyond dispute that [Facebook's] ability to earn advertising revenues and its valuation as a company are dependent on the size and involvement of its user base. In any ordinary sense, therefore, the alleged misappropriation of plaintiffs' names and likenesses to promote the Friend Finder service was undertaken for Facebook's 'advantage.'⁴²

The Judge, therefore, declined to dismiss plaintiffs' misappropriation claims on this ground.⁴³

However, Judge Seeborg's *Cohen v. Facebook, Inc.* ("Cohen II") in October 2011 muddled this holding somewhat.⁴⁴ While discussing plaintiffs' failure in that case to quantify their alleged injuries, he contrasted these plaintiffs to both celebrity and non-celebrity plaintiffs in prior cases who had been able to demonstrate that their likenesses had commercial value.⁴⁵ He also made this observation about the manner and context in which Facebook used the likenesses:

[i]t is also worth noting that this is not a situation where the defendant is alleged to have publicized the plaintiffs' names or likenesses to any audience or in any context where they did not already appear—rather, the names and likenesses were merely displayed on the pages of other users who were already plaintiffs' Facebook 'friends' and who would regularly see, or at least have access to, those names and likenesses in the ordinary course of using their Facebook accounts.⁴⁶

Taken together, these comments indicate a rejection of the argument that social media users' likenesses have commercial value.

40. *Cohen I*, 798 F. Supp. 2d at 1092.

41. *Id.* at 1090.

42. *Id.* at 1096 (internal citations omitted).

43. *Id.* at 1097. In her *Fraleley* opinion, Judge Koh would later characterize Judge Seeborg as "not persuaded" by this argument. 830 F. Supp. 2d 785, 800 (N.D. Cal. 2011). I think this is a misunderstanding of *Cohen I*. Judge Seeborg actually expresses agreement in both *Cohen* opinions that Facebook gained an economic advantage from using the user likenesses to expand its user base. See generally *Cohen I*, 798 F. Supp. 2d 1090; see also *Cohen v. Facebook, Inc. (Cohen II)*, No. Civ. 10-5282, 2011 WL 5117164 (N.D. Cal. Oct. 27, 2011). The *Cohen II* opinion, in fact, characterizes *Cohen I* as having "rejected Facebook's argument that it could not be said to have used the names and likenesses to its own 'advantage.'" *Cohen II*, 2011 WL 5117164, at *3. However, he was not persuaded that this argument was enough to show that the plaintiffs were injured by this use of their likenesses. *Id.*

44. See generally *Cohen II*, 2011 WL 5117164.

45. *Id.* at *2-3.

46. *Id.* at *3.

Read in context, however, these comments are more fairly read as an indictment of the proofs offered by plaintiffs in this specific case. To be sure, they acknowledge that the normal boundaries of the right of publicity still apply online and plaintiffs must still demonstrate that their likenesses have commercial value in order to prevail.⁴⁷ Judge Seeborg left the door open to using the social media site operator's revenues as evidence that the users' likenesses have value; these plaintiffs simply could not capitalize on that opening.⁴⁸ Both *Cohen* opinions dismissed the plaintiffs' claims at the pleading stage, a hurdle that ordinarily does not take significant evidence to avoid.⁴⁹ Indeed, when Judge Koh in the Northern District of California refused to dismiss right of publicity claims against Facebook in her December 2011 *Fraleley v. Facebook, Inc.* ("*Fraleley*") opinion, she distinguished both *Cohen I* and *Cohen II* on these exact grounds.⁵⁰

2. Social Endorsements

Perhaps more than anything else, *Fraleley* has drawn public and media attention to the application of the right of publicity to social media.⁵¹ That is due both to the fact that it involves Facebook, the social media titan to which purportedly a seventh of the world's population subscribes, and because of the amount of money involved. In May 2012, the world took notice when a \$20 million⁵² settlement of the *Fraleley* case was announced.⁵³ And in August 2012, things got even more interesting when the presiding judge decided that the amount was not enough.⁵⁴ As of the date of this writing, the case remains pending.

Fraleley involved a different Facebook feature—namely,

47. *Id.*

48. *Id.*

49. *Cohen I*, 798 F. Supp. 2d 1090, 1098 (N.D. Cal. 2011); *Cohen II*, 2011 WL 5117164, at *3; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . .").

50. 830 F. Supp. 2d 785, 800 (N.D. Cal. 2011).

51. *Id.* at 800.

52. \$10 million to charity and up to \$10 million to the plaintiffs' lawyers.

53. *Facebook Settles "Sponsored Stories" Class Action; "Friend Finder" Case Still Pending*, IMPACT LITIG. J., May 25, 2012, <http://www.impactlitigation.com/2012/05/25/facebook-settles-%E2%80%9C-sponsored-stories%E2%80%9D-class-action-%E2%80%9Cfriend-finder%E2%80%9D-case-still-pending/>.

54. Karen Gullo, *Facebook's Settlement Over 'Sponsored Stories' Blocked by Judge*, BLOOMBERG BUSINESSWEEK (Aug. 18, 2012), <http://www.businessweek.com/news/2012-08-17/facebook-loses-bid-to-approve-sponsored-stories-suit-accord>.

“Sponsored Stories.”⁵⁵ These advertisements

appear on a member’s Facebook page, and which typically consist of another member’s name, profile picture, and an assertion that the person “likes” the advertiser, coupled with the advertiser’s logo. Sponsored Stories are generated when a member interacts with the Facebook website or affiliated sites in certain ways, such as by clicking on the “Like” button on a company’s Facebook page.⁵⁶

Facebook’s argument in *Fraleley* was informed by Judge Seeborg’s analysis in both *Cohen II* only a few months earlier. For example, Facebook no longer challenged the argument in *Fraleley* that its use of users’ likenesses was to Facebook’s advantage.⁵⁷ Rather, it focused on the argument that plaintiffs had not been injured because their likeness had no commercial value.⁵⁸ It argued “that, because [plaintiffs] are not celebrities, they must demonstrate some preexisting commercial value to their names and likenesses, such as allegations that they previously received remuneration for the use of their name or likeness, or that they have ever sought to obtain such remuneration.”⁵⁹

Judge Koh, however, rejected the suggestion that plaintiffs were required “to provide proof of *preexisting* commercial value and efforts to capitalize on such value in order to survive a motion to dismiss.”⁶⁰ Moreover, “the appropriation of the identity of a relatively unknown person may result in economic injury *or may itself create economic value in what was previously valueless.*”⁶¹ Therefore, in Judge Koh’s view, not only were plaintiffs not required to prove pre-existing commercial value in order to survive the pleading stage, but they could potentially use the misappropriation itself as evidence that their likenesses had commercial value.

However, the opinion essentially rendered this discussion moot by making a finding that plaintiffs’ allegation would survive even a heightened burden of proof.⁶² For this conclusion, Judge Koh relied on what she apparently considered a “smoking gun” admission from Facebook executives that user identities do, in fact, have great

55. *Fraleley*, 830 F. Supp. 2d at 790.

56. *Id.*

57. *Id.* at 804.

58. *Id.* at 806.

59. *Id.* (internal quotation marks omitted).

60. *Fraleley*, 830 F. Supp. 2d at 806.

61. *Id.* at 807 (quoting *Motschenbacher v. R.J. Reynolds Tobacco, Co.*, 498 F.2d 821, 825 n.11 (9th Cir. 1974)).

62. *Fraleley*, 830 F. Supp. 2d at 808.

commercial value to social media service providers.⁶³ For example, the judge quoted Facebook founder Mark Zuckerberg as saying that “[n]othing influences people more than a recommendation from a trusted friend. A trusted referral influences people more than the best broadcast message. A trusted referral is the Holy Grail of advertising.”⁶⁴ Likewise, the judge quoted Facebook’s COO Sheryl Sandberg as explaining that:

[m]arketers have always known that the best recommendation comes from a friend . . . This, in many ways, is the Holy Grail of marketing . . . When a customer has a good experience . . . on Facebook, the average action is shared with the average number of friends, which is 130 people. This is the illusive [sic] goal we’ve been searching for, for a long time; [m]aking your customers your marketers. On average, if you compare an ad without a friend’s endorsement, and you compare an ad with a friend’s [Facebook] ‘Like,’ these are the differences: on average, 68% more people are likely to remember seeing the ad with their friend’s name. A hundred percent—so two times more likely to remember the ad’s message; and 300% more likely to purchase.⁶⁵

On this basis, the plaintiffs argued that their individual endorsements carried as much economic value in the Facebook context as celebrity endorsements traditionally have done in typical advertising, and that this ability to drive sales constitutes precisely the type of “commercially exploitable opportunities” that the right of publicity protects.⁶⁶

Judge Koh was persuaded that these arguments sufficed to state a claim of misappropriation.⁶⁷ She cautioned, however, “at summary judgment or at trial, Plaintiffs may not simply demand \$750 in statutory damages in reliance on a bare allegation that their commercial endorsement has provable value, but rather must prove actual damages like any other plaintiff whose name has commercial value.”⁶⁸ Given that a settlement of the case was announced six months later, the *Fraley* case is unlikely to provide further guidance on whether social media users could, in fact, substantiate such claims enough to prevail and

63. *Id.* at 808-09.

64. *Id.* (internal quotation marks omitted).

65. *Id.* at 808 (quoting Second Amended Complaint ¶¶ 43, 45, *Fraley v. Facebook, Inc.*, No. 11-CV-01726 (June 6, 2011)).

66. *Fraley*, 830 F. Supp. 2d at 808-09 (internal quotation marks omitted).

67. *Id.* at 810.

68. *Id.* at 809 (quoting *Miller v. Collectors Universe, Inc.*, 72 Cal. Rptr. 3d 194, 207 (Cal. Ct. App. 2008)).

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collect damages, or on where the lines are between appropriate uses of user likenesses and commercial misappropriation.

3. *Beyond Endorsements*

Making the lines even fuzzier is the fact that social media sites need not go as far as incorporating users' identities into actual advertising in order to have exposure to liability for publicity rights appropriation. Many practitioners assume that a false endorsement claim under the federal Lanham Act⁶⁹ is the same thing as a right of publicity claim. Even some courts have made similar statements in certain factual contexts.⁷⁰

But there are important distinctions. "The right of publicity isn't aimed at or limited to false endorsements; that's what the Lanham Act is for."⁷¹ Moreover, a publicity claim "does not require any evidence that a consumer is likely to be confused."⁷² This is a critical distinction because a likelihood of confusion is central to any Lanham Act claim. The Tenth Circuit illustrated the point with this hypothetical:

[a]lthough publicity rights are related to laws preventing false endorsement, they offer substantially broader protection. Suppose, for example, that a company, Mitchell Fruit, wanted to use pop singer Madonna in an advertising campaign to sell bananas, but Madonna never ate its fruit and would not agree to endorse its products. If Mitchell Fruit posted a billboard featuring a picture of Madonna and the phrase, "Madonna may have ten platinum albums, but she's never had a Mitchell banana," Madonna would not have a claim for false endorsement. She would, however, have a publicity rights claim, because Mitchell Fruit misappropriated her name and likeness for commercial purposes. Publicity rights, then, are a form of property protection that allows people to profit from the full commercial value of their identities.⁷³

69. Lanham Act (Lanham Trade-Mark Act) (Trademark Act of 1946), ch. 540, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051-1141(n) (2012)).

70. See, e.g., *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (citing Bruce P. Keller, *The Right of Publicity: Past, Present and Future*, 808 PLI/Comm. 159, 170 (Oct. 2000)).

71. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1515 n.17 (9th Cir. 1993) (citing *Eastwood v. Superior Ct. of L.A. Cnty.*, 198 Cal. Rptr. 342, 348 (Cal. Ct. App. 1983), *superseded by statute*, CAL. CIV. CODE § 3344(a) (West 2012)).

72. *Parks v. LaFace Records*, 329 F.3d 437, 460 (6th Cir. 2003) (citing *Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 319-20 (6th Cir 2001); *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989); *Cairns v. Franklin Mint Co.*, 24 F. Supp. 2d 1013, 1030 (C.D. Cal. 1998)).

73. *Cardtoons L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 967-68

Presumably, Mitchell Fruit—and any other company—would run the same risk by making a similar use of Madonna’s likeness on its Facebook page.

Luxury fashion retailer Burberry recently found itself in a dispute very similar to the Mitchell Fruit hypothetical. In early 2012, Burberry took advantage of Facebook’s then-new “Timeline” chronological display to showcase the use of its products by historical celebrities over time.⁷⁴ The timeline began with the launch of the first Burberry store in 1856.⁷⁵ Under the 1942 header, Burberry posted a photo of the actor Humphrey Bogart with the caption, “Humphrey Bogart wearing a Burberry trench coat in the final scene of *Casablanca*.”⁷⁶ Burberry had licensed the copyright in the image, but an entity claiming to own Bogart’s posthumous publicity rights threatened to sue for misappropriation of his likeness.⁷⁷ In May 2012, Burberry filed a declaratory judgment action in New York seeking to confirm its right to use the image.⁷⁸ The Bogart entity countersued for misappropriation of publicity rights and related claims.⁷⁹ Both suits were later resolved out of court without adjudication.⁸⁰

These examples demonstrate that it is not enough to simply advise social media service providers to steer clear of the Sponsored Story fact pattern. Counsel must examine each individual fact pattern on its own.

B. The Measure of Damages

The amount of money at issue in *Fraley* is so interesting because the method of calculating damages in any right of publicity case is so uncertain. Many successful publicity rights plaintiffs end up settling for a relatively modest royalty. But great infringement sometimes brings great liability. Hockey player Tony Twist, for example, secured a \$15 million verdict—upheld on appeal—against the publisher of the *Spawn*

(10th Cir. 1996).

74. Jeff John Roberts, *Burberry Faces Lawsuit for Using Bogart Image on Facebook Timeline*, PAIDCONTENT (May, 2, 2012, 5:44 PM), <http://paidcontent.org/2012/05/02/burberry-faces-lawsuit-for-using-bogart-image-on-facebook-timeline/>.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Emily Grannis, *Burberry Drops Lawsuit Against Humphrey Bogart Heirs*, BLOOMBERG (Aug. 1, 2012, 2:40 PM), <http://www.bloomberg.com/news/2012-08-01/burberry-drops-lawsuit-against-humphrey-bogart-heirs.html>.

80. *Id.*

comic book, which used his name as an inspiration for one of its villains.⁸¹ And a relatively unknown male model in California won an even larger sum from Nestlé after learning that his face had appeared for 16 years, without permission, on packages of Taster’s Choice coffee.⁸² That award, however, was erased on appeal; the California court decided that its state’s publicity right is limited by the “single publication rule”—an import from the common law of privacy, from which the right of publicity originated.⁸³

Compare these results to that in Johnny Carson’s groundbreaking litigation against Here’s Johnny Portable Toilets in the 1980s. It took three trips to the Sixth Circuit and eight years of litigation, but Carson finally prevailed in a seminal decision that still appears in IP casebooks.⁸⁴ The damages award he received for his trouble, however, was only \$31,661.96.⁸⁵

As reflected in section 49 of the Restatement (Third) the general common law measurement of damages for right of publicity misappropriation is “the pecuniary loss to the other caused by the appropriation or for the actor’s own pecuniary gain resulting from the appropriation, whichever is greater.”⁸⁶

Some of those states also offer statutory damages as an alternative remedy, although even this approach varies between states. In Ohio, for example, the minimum statutory damage award is \$2,500, while the maximum is \$10,000.⁸⁷ Most other statutory damages ranges are lower, although there are still a variety of approaches to calculating the amount. Significant examples include the following:

CA ⁸⁸	Minimum of \$750 for mental distress
CT ⁸⁹	Punitive damages for reckless or intentional violations, up to the amount of plaintiff’s litigation expenses
FL ⁹⁰	Maximum penalty of \$1,000 in addition to damages

81. Doe v. McFarlane, 207 S.W.3d 52, 56, 76 (Mo. Ct. App. 2006).

82. Christoff v. Nestlé USA, Inc., 62 Cal. Rptr. 3d 122, 128 (Cal. Ct. App. 2007), *aff’d in part, rev’d in part*, 213 P.3d 132 (Cal. 2009).

83. *Id.* at 131.

84. *See* Carson v. Here’s Johnny Portable Toilets, Inc., 810 F.2d 104 (6th Cir. 1987).

85. *Id.* at 105.

86. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49(1) (1995).

87. OHIO REV. CODE ANN. § 2741.07(A)(1)(b) (West 2012).

88. CAL. CIV. CODE § 3344.1(a)(1) (West 2012).

89. Venturi v. Savitt, Inc., 468 A.2d 933, 935 (Conn. 1983).

IL ⁹¹	Maximum of \$1,000 as alternative to damages
IN ⁹²	Maximum of \$1,000 as alternative to damages; treble damages, punitive damages, and attorneys' fees also available
MA ⁹³	Treble damages for knowing violations
NV ⁹⁴	Minimum damages of \$750
TN ⁹⁵	Treble damages for members of the armed forces

These remedies are in addition to several other forms of potential relief including compensatory damages, punitive damages, and injunctive relief.

Even case law within the context of social media—and within the same jurisdiction—shows confusion over how to calculate the proper measurement of damages. As mentioned above, Judge Seeborg of the Northern District of California—to whom the *Fraleley* case was reassigned months after Judge Koh's December 2011 order—vacated a \$20 million settlement as insufficient to compensate a class of plaintiffs for the use of their identities by Facebook's Sponsored Story advertising even though liability had not yet been conclusively determined.⁹⁶ Yet in *Cohen I*, the same judge had twice held that the plaintiff class of Facebook users had failed as a matter of law to show they had been injured at all, despite reaching the conclusion (against Facebook's objection) that Facebook had used the plaintiffs' likenesses to its advantage.⁹⁷

C. Social Media as a Breeding Ground for Publicity Right Infringement

As with other areas of IP, the internet in general, and social media in particular, allows anyone to be an infringer. Users identify themselves online with icons and avatars, which may incorporate the likenesses of famous people. Retro nostalgia and mash-up videos drive the re-use of iconic photographs. In a competitive business environment where customers are increasingly scarce, it is difficult for

90. FLA. STAT. ANN. § 540.08(3) (West 2012).

91. 765 ILL. COMP. STAT. ANN. § 1075/40(a)(1)-(2) (West 2009).

92. IND. CODE ANN. §§ 32-36-1-10; 32-36-1-12 (LexisNexis 2002).

93. MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2012).

94. NEV. REV. STAT. ANN. § 597.810 (LexisNexis 2011).

95. TENN. CODE ANN. § 47-25-1106 (2012).

96. *Fraleley v. Facebook, Inc.*, No. C 11-1726 RS, 2012 U.S. Dist. LEXIS 116526, at *3, *7-9 (N.D. Cal. Aug. 17, 2012).

97. See *Cohen I*, 798 F. Supp. 2d 1090, 1092-93, 1096-97 (N.D. Cal. 2011).

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many companies to resist piggybacking on the drawing power of recognizable celebrity identities.

It can also be hard to ignore the billions of photographs available for instant download. In 2007, a fifteen year-old Texas girl sued Virgin Mobile after learning that the company had found an unflattering picture of her on Flickr and used it in an Australian ad campaign.⁹⁸ In June 2009, a Missouri couple discovered that a Christmas family portrait they had shared with relatives online had become an advertisement for a grocery store in the Czech Republic.⁹⁹ Because the very point of “social” media is the exchange of *personal* information, photos, and other content, the percentage of such information that carries with it the potential for incorporating someone’s identity is much higher than in other forums.

D. Who Owns You?

When employees who actively use social media accounts to promote their employer’s business leave their jobs, it can lead to disputes over whether those accounts and their followers belong to the employer or employee. Several such disputes have arisen in recent months.¹⁰⁰ When employers continue to operate these accounts after an employee leaves, it could give rise to a right of publicity misappropriation claim.

That is what happened after Jill Maremont was involved in a serious car accident in September 2009.¹⁰¹ Maremont managed the Facebook and Twitter presence of her employer, a Chicago interior design firm.¹⁰² In Maremont’s absence, her employer appointed a replacement editor to manage the accounts, even after Maremont

98. *Virgin Mobile Sued over Flickr Image Used in Ad*, NBCNEWS.COM (Sept. 20, 2007, 9:49 PM), http://www.msnbc.msn.com/id/20896643/ns/business-world_business/t/virgin-mobile-sued-over-flickr-image-used-ad/#.UGrBu03A98E.

99. Maev Kennedy, *American Family’s Web Photo Ends Up as Czech Advertisement*, GUARDIAN (June 11, 2009, 7:17 AM), <http://www.guardian.co.uk/media/2009/jun/11/smith-family-photo-czech-advertisement>.

100. See, e.g., Brian Ries, *What Are Your Twitter Followers Worth, and Who Owns Them?*, DAILY BEAST (Dec. 28, 2011, 4:45 AM), <http://www.thedailybeast.com/articles/2011/12/28/what-are-your-twitter-followers-worth-and-who-owns-them.html>; David Coursey, *Who Owns Your LinkedIn Contacts?*, FORBES (Nov. 3, 2011, 3:32 PM), <http://www.forbes.com/sites/davidcoursey/2011/11/03/who-owns-your-linkedin-contacts/>.

101. *Maremont v. Susan Fredman Design Grp., Ltd.*, No. 10 C 7811, 2011 U.S. Dist. LEXIS 140446, at *6 (N.D. Ill. Dec. 7, 2011).

102. *Id.* at *4-5.

regained consciousness and asked her employer not to.¹⁰³ She eventually sued, claiming, among other things, that the employer's posts to these accounts in her absence unlawfully traded on the goodwill that she had personally built up through them, and confused her followers as to whether she or someone else authored the content.¹⁰⁴

Although her right of publicity claims survived the pleading stage, she eventually lost them on the merits.¹⁰⁵ Discovery ultimately showed that the employer announced Maremont's accident through the social media accounts, identified the new editor as a temporary replacement, and Maremont herself thanked the replacement editor for her work after she regained control of the accounts.¹⁰⁶ Therefore, the employer "did not appropriate Maremont's identity."¹⁰⁷

III. POTENTIAL DEFENSES

A. *The Extent of First Amendment Protection*

As described above, the freedom of speech protected by the First Amendment requires that a line be drawn somewhere between use of a person's likeness purely for the purpose of commercial exploitation, which is actionable, and using it in the context of communicating some larger, more expressive message (like political commentary or entertainment), which is generally considered protected. Yet there is little to no consensus on the location of that line and the method for locating it.

Left with no guidance, the courts of various jurisdictions have come up with their own tests for drawing that line. In California, where the right is most heavily litigated, courts follow the "transformative use" test, which was imported from the case law of the "fair use" exemption in the Federal Copyright Act.¹⁰⁸ Under this approach, parties are free to use a celebrity's likeness as a starting point for expression, so long as they do something more that alters the likeness in some creative fashion.¹⁰⁹ So, for example, simply reproducing an image of the Three

103. *Id.* at *6-7.

104. *See* *Maremont v. Susan Fredman Design Grp., Ltd.*, 772 F. Supp. 2d 967, 969-70 (N.D. Ill. 2011).

105. *Id.* at 972; *Maremont*, 2011 U.S. Dist. LEXIS 140446, at *9.

106. *See* *Maremont*, 2011 U.S. Dist. LEXIS 140446, at *18-19.

107. *Id.* at *19.

108. *See* *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001).

109. *Id.* at 809.

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Stooges on t-shirts was non-transformative and hence infringing,¹¹⁰ while using a popular singer's likeness as "raw material" for a video game avatar that contained many similarities to the singer but also some differences was protected speech.¹¹¹

Even this analytical distinction can be applied in radically different ways, however. A case in point involves the use of real college football players' likenesses in video games. Two cases involving such games have fallen on opposite sides of the "transformative" line. In one, the videogame maker's use of college players' likenesses in the game was found by a California court to be a wholesale appropriation and thus not transformative.¹¹² In the other, a federal judge in New Jersey focused on the ability that the game gives players to alter a college player's physical characteristics.¹¹³ The court found this to be sufficiently transformative, and therefore protected by the First Amendment.¹¹⁴

Other courts do not use the "transformative" analysis at all but rather apply their own First Amendment analysis. The Eighth Circuit, Tenth Circuit, and Missouri State courts have all developed their own approaches to balancing First Amendment rights against the right of publicity.¹¹⁵ Courts within the Sixth Circuit—again, consistent with that court's concern for developing a harmonious, consistent body of case law nationwide—employ a pastiche of all of these approaches and have consistently held in favor of broad First Amendment protection, as encouraged by the Restatement.¹¹⁶

How First Amendment rights will balance against the right of publicity in the social media context remains to be seen. Judge Koh's *Fraley* opinion is among the first to attempt to strike that balance.¹¹⁷ There, Facebook argued that the information it shared in "Sponsored

110. *See id.* at 811.

111. *See Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 616 (Cal. Ct. App. 2006).

112. *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 U.S. Dist. LEXIS 10719, at *16 (N.D. Cal. Feb. 8, 2010).

113. *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 783 (D.N.J. 2011).

114. *Id.* at 784.

115. *Compare C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823-24 (8th Cir. 2007) (weighing freedom of expression against economic harm), *and Cardtoons, L.C., v. Major League Baseball Players Ass'n*, 95 F.3d 959, 972 (10th Cir. 1996) (balancing magnitude of speech restriction against the asserted IP right), *with Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (discerning the predominant purpose of the publication).

116. Jon M. Garon, *Playing in the Virtual Arena: Avatars, Publicity, and Identity Reconceptualized Through Virtual Worlds and Computer Games*, 11 CHAP. L. REV. 465, 492 (2008).

117. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 790 (N.D. Cal. 2011).

Stories” concerning users’ “likes” and activities were “newsworthy because (1) Plaintiffs are ‘public figures’ to their friends, and (2) ‘expressions of consumer opinion’ are generally newsworthy.”¹¹⁸ California has codified First Amendment protections in its publicity rights statute.¹¹⁹ Like many jurisdictions that have explicitly articulated these protections, the First Amendment exceptions in the California statute include “use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign.”¹²⁰ “This First Amendment defense extends to ‘almost all reporting of recent events,’ as well as to publications about ‘people who, by their accomplishments, mode of living, professional standing, or calling, create a ‘legitimate and widespread attention’ to their activities’” —i.e., to “public figures.”¹²¹

Facebook’s argument was a clever one. It took plaintiffs’ attempt to prove the commercial value of their likenesses and attempted to turn it against plaintiffs. If, as plaintiffs say, they are “celebrities” in the eyes of their friends, then, as “celebrities,” they are newsworthy individuals, and the reporting of their actions via Sponsored Stories is news reporting protected by the First Amendment.¹²²

Judge Koh “agree[d] with [Facebook] that Plaintiff[s] ‘cannot have it both ways’ — Plaintiffs cannot assert economic injury under the theory that they are ‘celebrities’ to their Facebook Friends, while at the same time denying that they are ‘public figures’ to those same friends for newsworthy purposes.”¹²³ But she did not give the argument as much emphasis as Facebook did. “[E]ven newsworthy actions,” she held, “may be subjects of [misappropriation] liability when published for commercial rather than journalistic purposes.”¹²⁴ That assertion, which Judge Koh based on Ninth Circuit precedent,¹²⁵ is certainly subject to being tested and qualified by future case law. But *Fraleley* demonstrates that, as powerful as First Amendment considerations are, they do not provide an impenetrable shield against liability for misappropriation of publicity rights.

118. *Id.* at 804.

119. CAL. CIV. CODE § 3344 (West 1997).

120. *Fraleley*, 830 F. Supp. 2d at 804 (quoting CAL. CIV. CODE § 3344(d)).

121. *Fraleley*, 830 F. Supp. 2d at 804 (quoting *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001)).

122. *Fraleley*, 830 F. Supp. 2d at 804-05.

123. *Id.* at 804.

124. *Id.* at 805.

125. *Id.*

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Section 230 of the Communications Decency Act has proven to be one of the most important and versatile laws of the Internet Age. It exempts internet service providers from most tort liability arising out of user-generated content hosted on their sites.¹²⁶ Since its adoption in 1996, § 230 has been invoked to shield web hosts from allegations of defamation, invasion of privacy, infliction of emotional distress, and many others.¹²⁷ That immunity does not apply, however, to “intellectual property” claims.¹²⁸ It seems likely that most or all of the legislators who debated this provision were thinking about patent, copyright, and trademark infringement. But modern courts typically recognize publicity rights as another species of IP, as reflected by the fact that the right is now discussed in the Restatement on the law of unfair competition¹²⁹ rather than the privacy law treatise where it originated.¹³⁰

Not all states are uniform in recognizing this doctrinal evolution, however. For these reasons courts have been similarly split as to whether a plaintiff may legitimately bring a cause of action for appropriation of publicity rights against an internet service provider based on user-generated content.¹³¹ Section 230 immunity likewise does not apply to content created by, rather than simply hosted by, the service provider.¹³² That is the basis on which Judge Koh rejected Facebook’s § 230 claim in *Fraley*, even though the Ninth Circuit applies § 230 to right of publicity claims.¹³³

C. Will Claims Be Preempted by the Copyright Act?

This question often arises in publicity rights litigation because, more often than not, the plaintiff’s likeness is incorporated into a copyrighted work that the plaintiff does not own. Copyright law gives owners five basic exclusive rights; the right to “reproduce, derive,

126. 47 U.S.C. § 230(c) (2006).

127. See Eric Goldman, *47 USC 230 Retrospective Conference Recap*, ERIC GOLDMAN BLOG (Mar. 21, 2011, 9:25 AM), http://blog.ericgoldman.org/archives/2011/03/47_usc_230_retr.htm.

128. 47 U.S.C. § 230(e)(2).

129. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

130. See RESTATEMENT (SECOND) OF TORTS § 652 (1977).

131. Compare *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1121 (9th Cir. 2007), with *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 304 (D.N.H. 2008).

132. 47 U.S.C. § 230.

133. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 801-03 (N.D. Cal. 2011).

distribute, display, or perform” original works.¹³⁴ Pursuant to 17 U.S.C. § 301, “all [rights] equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . are governed exclusively by this title.”¹³⁵ “The Copyright Act is unusually broad in its assertion of federal authority.”¹³⁶

Determining where the line is between rights “equivalent to” the Copyright Act and rights that are materially different is vexing. Courts within the Sixth Circuit, where I am based, have had a particularly difficult time. For example, in *Landham v. Lewis Galoob Toys, Inc.*, the plaintiff was an actor who objected to a toy being made in his character’s likeness.¹³⁷ He lost, but not on preemption grounds.¹³⁸ The Court held that

Landham is not claiming the right of publicity in order to gain rights in the telecast of his performance, or to contest Fox’s right to create derivative works from its copyrighted work in general. Rather, he claims that the toy evokes his personal identity—an inchoate ‘idea’ which is not amenable to copyright protection—to his emotional and financial detriment, . . . it does assert a right separate from those protected by the Copyright Act.¹³⁹

More recent decisions, however, have been more willing to find publicity claims preempted because the remedies being sought are equivalent to those protected by the Copyright Act. Recent examples include the Ninth Circuit’s decision in *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, and two Eastern District of Michigan decisions in *Romantics v. Activision Publishing, Inc.*, and *Armstrong v. Eagle Rock Entertainment*.¹⁴⁰

We have yet to see this defense raised to a right of publicity claim in the context of social media. It will not always be available. The *Cohen* and *Fraleley* cases, for example, were primarily concerned with users’ names and actions, which are not copyrightable subject matter.¹⁴¹ Likewise, much of the textual communication that is exchanged in

134. 17 U.S.C. § 106 (2006).

135. *Id.* § 301.

136. *Ritchie v. Williams*, 395 F.3d 283, 286 (6th Cir. 2005).

137. 227 F.3d 619, 623-24 (6th Cir. 2000).

138. *Id.* at 623.

139. *Id.*

140. 617 F.3d 1146, 1155 (9th Cir. 2010); 574 F. Supp. 2d 758, 767-68 (E.D. Mich. 2008); 655 F. Supp. 2d 779, 787 (E.D. Mich. 2009).

141. See generally *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555 (9th Cir. 1990); *Fraleley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011).

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social media is so brief and bereft of creative expression that it would be difficult to argue that it is copyrightable. Photographs, video, and other forms of social media posts, however, do contain the requisite level of creative expression to at least qualify for copyright protection.¹⁴² Therefore, practitioners need to carefully craft their allegations in the complaint to seek remedies and allege claims that are distinct from what the Copyright Act protects. Many plaintiffs, however, may have difficulty overcoming this hurdle when their sole objection is to the manner in which a copyrighted work is being reproduced, distributed, and performed.

CONCLUSION

Predicting *how* the right of publicity and social media will evolve, and where society will draw the boundaries between proper and improper exploitation of individual identities online, is exceedingly difficult. On the other hand, that these two fields *will* continue to evolve—and do so hand in hand—is inevitable. If nothing else, that renders the intersection between the two of them a fascinating and fertile ground for both academic study and litigation.

142. 17 U.S.C. § 102 (2006).