THE RIGHT OF PUBLICITY AS MARKET REGULATOR IN THE AGE OF SOCIAL MEDIA

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INTRODUCTION

The right of publicity is defined as a property right in one's name and likeness,[1] and stems from the idea that each of us should be able to wield control over how representations of ourselves are used by others.[2] It is commonly associated with celebrities asserting commercial control over their identity.[3] A recent example is that of singer Ariana Grande suing clothing brand Forever 21 for using photos of her to promote its products on the company's social media accounts without her consent.[4]

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1 *See* 2 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 10:7 (2d ed. 2019).

2 JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 2–3 (2018).

3 *See id.* at 1.

4 *See* Julia Jacobs, *Ariana Grande Sues Forever 21 over "Look-Alike Model" in Ads*, N.Y. TIMES (Sept. 3, 2019), https://www.nytimes.com/2019/09/03/arts/music/ariana-grande-forever-21.html [https://perma.cc/NKG2-M3KK]. Grande also sued Forever 21 for the use of images of a model strikingly similar to her, wearing a "style" she claims to have created in one of her music videos. *See* Jennifer E. Rothman, *Ariana Grande Sues Forever 21 over Social Media Posts*, ROTHMAN'S ROADMAP TO RIGHT PUBLICITY (Sept. 10, 2019, 12:30 PM), https://www.rightofpublicityroadmap.com/news-commentary/ariana-grande-sues-forever-21-over-social-media-posts [https://perma.cc/BHV2-EX7L]. What attributes constitute "identity" depend on state law and can be a contested issue. Generally, if the lookalike evokes the original to such an extent that it creates confusion, the plaintiff has a valid claim. *See* Onassis v. Christian Dior—New York, Inc., 472 N.Y.S.2d 254, 261 (N.Y. Sup. Ct. 1984) (discussing in the case of the use of a model similar to Jackie Onassis in advertising, "a representation which conveys the essence and likeness of an individual, ... which was intended to be, and did, in fact, convey the idea that it was the plaintiff" violated the New York Civil Rights statute). When, on the other hand, only a few elements are used to evoke the plaintiff, jurisdictions differ. California favors a loose interpretation of "identity." *See, e.g.*, White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1396 (9th Cir. 1992), *as amended* (Aug. 19, 1992) (ruling that the defendant was found in violation of right of publicity statute after depicting, in an ad, a robot dressed like plaintiff hostess of game show in a signature pose next to replica game). New York reads "identity" more narrowly. *See, e.g.*, Burck v. Mars, Inc., 571 F. Supp. 2d 446, 448 (S.D.N.Y. 2008) (holding that New York street performer "Naked Cowboy" loses lawsuit against Mars for right of publicity violation in an M&Ms commercial where the candy was wearing plaintiff's "signature costume"). California's reading has attracted significant criticism for the dangers it poses to the First Amendment. *See* Diane Leenheer Zimmerman, *Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!*, 10 DEPAUL J. ART, TECH. & INTELL. PROP. L. 283, 286–87 (2000); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 248 n.107 (2005); ROTHMAN, *supra* note 2, at 101.

But the proliferation of social media marketing[5] has resulted in a growing number of right of publicity claims brought by non-celebrities.[6] In one case, images taken by an Instagram user at a restaurant were linked, without the user's knowledge, to the restaurant's "Deal offer page" on Groupon, an internet marketplace promoting local merchants to its subscribers.[7] In another case, Facebook users unwittingly endorsed third-party products to an audience of "friends" through the social network's "like" feature.[8] Yet another case concerns "influencers"[9] whose Instagram

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5 William McGeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105, 1107–08 (explaining that "social marketing is a form of reputational piggybacking" that uses "[i]nteractive tools on the internet—including social networks and other utilities for sharing opinions about products and services" and "[u]nlike [how] other arrangements . . . capitalize[] on individuals' reputations among their friends, not just in the public at large").

6 A non-celebrity, here, is intended as a private individual whose name and likeness do not have an established value in the marketplace. *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 4:16. As discussed in Section II.C, the distinction between celebrity and non-celebrity is increasingly becoming an arbitrary one. *See* discussion *supra* Section II.C. For social media marketing cases, see, for example, *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 799–800, 807–09 (N.D. Cal. 2011) (showing a class action suit for violation of California's right of publicity statute when Facebook used customers' "likes" on certain products to advertise these products to the customers' friends); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1195 (N.D. Cal. 2014) (showing where plaintiffs claimed a violation of the California right of publicity statute when LinkedIn sent repeated email invitations to users' "network." The court ruled that the emails sent after the first one were beyond the scope of consent); *Parker v. Hey, Inc.*, Case No. CGC-17-556257, 2017 Cal. Super. LEXIS 609 (Super. Ct. Cal. Apr. 14, 2017) (alleging defendants, which included Twitter, used name in text invitations sent to contacts through the set-up process of its mobile application without consent); *O'Brien v. PopSugar Inc.*, No. 18-cv-04405-HSG, 2019 U.S. Dist. LEXIS 19526 (N.D. Cal. Feb. 6, 2019) (alleging that PopSugar misappropriated the identities and likenesses of internet bloggers by creating duplicates of their profiles on its website for commercial gain); *Dancel v. Groupon, Inc.*, No. 18 C 2027, 2019 U.S. Dist. LEXIS 33698 (N.D. Ill. Mar. 4, 2019) (alleging defendant Groupon used individuals' photographs and likenesses posted on Instagram without their consent to promote business Groupon hosted); *Dobrowolski v. Intelius, Inc.*, No. 17 CV 1406, 2017 U.S. Dist. LEXIS 138587 (N.D. Ill. Aug. 29, 2017) (showing where plaintiffs alleged their name was used in search results in association with advertisements). *See also* Daniel Garrie, *CyberLife: Social Media, Right-of-Publicity and Consenting to Terms of Service*, LEGAL EXECUTIVE INST. (July 19, 2017), http://www.legalexecutiveinstitute.com/cyberlife-social-media-right-of-publicity [https://perma.cc/M8Q2-5QF7].

7 Groupon used public Instagram data linking to the restaurant's location in order to automatically collect the images. *See* Dancel v. Groupon, Inc., 940 F.3d 381, 383 (7th Cir. 2019).

8 *Fraley*, 830 F. Supp. 2d 785.

9 "Microcelebrity influencers" or "lifestyle bloggers" are "everyday, ordinary Internet users who accumulate a relatively large following on blogs and social media through the textual and visual

posts were copied by a lifestyle blog and shopping platform.[10] The platform removed the links through which the influencers could monetize from the posts and replaced them with its own.[11]

In cases such as these, compared to Ariana Grande's, plaintiffs face additional hurdles in order to succeed on a right of publicity claim. Some of these hurdles are procedural; the right of publicity is a state right, and differences in state law can hinder classification of a class action lawsuit.[12] Other hurdles hinge on the courts' interpretation of the scope of the right, specifically with respect to the notions of "consent" and "injury."[13] This Note examines whether this latter class of obstacles should be removed, and if so, why. In doing so, it contextualizes the right of publicity within wider concerns over (mis)uses of personal data[14] in the information

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narration of their personal lives and lifestyles, . . . and monetize their following by integrating 'advertorials' into their blogs or social media posts and making physical paid-guest appearances." Crystal Abidin, *"Aren't These Just Young, Rich Women Doing Vain Things Online?": Influencer Selfies as Subversive Frivolity*, SOC. MEDIA + SOC'Y 1, 3 (2016).

10 Batra v. PopSugar, Inc., No. 18-cv-03752-HSG, 2019 WL 482492, at *1 (N.D. Cal. Feb. 7, 2019) (denying defendant's motion to dismiss).

11 *Id.*

12 *See, e.g.*, Lightbourne v. Printroom Inc., 307 F.R.D. 593 (C.D. Cal. 2015) (ruling student athlete's complaint against photography company for violation of right of publicity not certified because differences in state law were material to the litigation's choice of law; each class member's state of residency had an interest in regulating conduct that affected the publicity rights of their residents); Dancel v. Groupon, Inc., No. 18 C 2027, 2019 U.S. Dist. LEXIS 33698, at * 9–10 (N.D. Ill. Mar. 4, 2019), *aff'd*, 949 F.3d 999 (7th Cir. 2019) (noting that the court did not ultimately certify the plaintiffs' class action because the "question of whether *any* Instagram username identifies an individual to a ordinary [sic], reasonable viewer" is necessarily an individual inquiry. Usernames were deemed insufficient to identify all the members of a class (internal quotation marks omitted)).

13 *See* McGeveran, *supra* note 5, at 1155 ("Because they impose few conditions . . . publicity rights actually offer the greatest scope for addressing all the possible concerns about social marketing, provided the problems of *consent* and *proof of damages* can be solved." (emphasis added)).

14 *See* Jaron Lanier & E. Glen Weyl, *A Blueprint for a Better Digital Society*, HARV. BUS. REV., Sept. 26, 2018, at 2, 4 ("'[D]ata' . . . include[s] most digital activity. It is intentionally created entertainment data, like a YouTube video or a social media meme, as well as less deliberately produced data gathered through surveillance or biological sensors, such as location or metabolic logs."); José Manuel Martínez & Juan Manuel Mecinas, *Old Wine in a New Bottle?: Right of Publicity and Right to be Forgotten in the Internet Era*, 8 J. INFO. POL'Y 362, 365 (2018) ("On the Internet, likeness is an image and it is also data . . . . Altogether, this implies that protecting an image is a problem of data.").

economy.[15] This Note suggests that the right of publicity can be a useful tool for ordinary people to gain more control and bargaining power over their online personas.[16] This, in turn, would maximize both individual and collective welfare.[17]

Frequent calls for a reconceptualization of the right of publicity in the context of online advertising and social media marketing have, until now, overlooked the societal repercussions of the right's doctrinal shortcomings.[18] Discourse over the right's justifications tends to focus on what it takes away from the public good, rather than what it can contribute to it.[19] In social media marketing cases—almost always class

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15 This is an economy where "information is the core resource for creating wealth." Shoshana Zuboff, *The Emperor's New Workplace: Information Technology Evolves More Quickly than Behavior*, 273 SCIENTIFIC AM. 202 (1995). Concerns over loss of personal data have increased steadily since 2010, becoming widespread since the Facebook-Cambridge Analytica scandal in early 2018. *See* Jennifer Valentino-DeVries, *What They Know About You*, WALL ST. J., https://www.wsj.com/articles/SB10001424052748703999304575399041849931612 [https://perma.cc/8BDR-7663] (last updated July 31, 2010, 12:01 AM); *The Cambridge Analytica Files*, GUARDIAN, https://www.theguardian.com/news/series/cambridge-analytica-files [https://perma.cc/XF5D-S2Q3].

16 "Persona" here is intended as "individually or collectively, the name, portrait or picture, voice, or signature of an individual." Assemb. A08155B, 2017 Leg., Reg. Sess. (N.Y. 2017). For an overview of what constitutes "persona" in each state, see RIGHT OF PUBLICITY COMM., INT'L TRADEMARK ASS'N, RIGHT OF PUBLICITY STATE OF THE LAW SURVEY, https://www.inta.org/Advocacy/Documents/2019/INTA_2019_rop_survey.pdf [https://perma.cc/4T3E-QKTE].

17 *See* discussion *infra* Section II.D.

18 For discussions of the right of publicity in the context of social media, see Jennifer E. Rothman, *The Right of Publicity: Privacy Reimagined for New York?*, 36 CARDOZO ARTS & ENT. L.J. 573, 574 (2018); McGeveran, *supra* note 5, at 1149; Jesse Koehler, Note, Fraley v. Facebook*: The Right of Publicity in Online Social Networks*, 28 BERKELEY TECH. L.J. 963 (2013); Brian D. Wassom, *Uncertainty Squared: The Right of Publicity and Social Media*, 63 SYRACUSE L. REV. 227 (2013); Alison C. Storella, Note, *It's Selfie-Evident: Spectrums of Alienability and Copyrighted Content on Social Media*, 94 B.U. L. REV. 2045 (2014).

19 *See* David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 121 (2005) ("If the critics of publicity rights are good at tearing down positive arguments for a right of publicity, they are not nearly as good at building their own positive case against those rights."); Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891, 894 (2017) (The right of publicity is a "negative[]" right without a "good positive description," leading courts to keep having to work on the question of what it is not.).

actions[20]—the injury is scrutinized on an individual basis,[21] which may make it seem trivial.[22] But since the value of a social media user's unwitting endorsement lies in the aggregate, the injury also has a collective dimension. This Note suggests that these types of misappropriations detract from the public good in two interrelated ways: (1) they increase the imbalance of power between companies and consumers by concealing the true nature of their relationship;[23] and (2) they siphon economic value to the company away from the prosumer (producer-consumer) who has created it.[24] This has negative economic ramifications that go beyond the relationship between the company and the single user.[25] A rethinking of the right of publicity in the age of social media should take into account these far-reaching consequences.

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20 The financial stakes would otherwise be too low compared to the costs of a lawsuit. Recovery amounts per class member are low. *See, e.g.*, Fraley v. Facebook, Inc., 966 F. Supp. 2d 939, 944 (N.D. Cal. 2013) ("[P]ayments of $15 each to those class members who filed claims, is a reasonable compromise.").

21 *See, e.g.*, Marshall v. NFL, 787 F.3d 502, 514 (8th Cir. 2015) (explaining that classification was not accorded due to the complexity of the choice of law inquiry, and because the question of damages required an individualized assessment for nearly 25,000 individuals).

22 *See supra* note 12.

23 *See* KANE X. FAUCHER, SOCIAL CAPITAL ONLINE: ALIENATION AND ACCUMULATION 17 (2018) ("The more hidden and proprietary aspects [of the transactions between users and social networks] occur 'under the hood' or behind closed doors, such as in the sifting and sorting of data, in the algorithmic visibility of content, and through the sale of data to third party advertisers."). *See generally* FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (2015) (discussing the lengths to which companies go to shield information on their business models from consumers); SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019) (arguing that we live in an era of "surveillance capitalism," "[a] new economic order that claims human experience as free raw material for hidden commercial practices of extraction, prediction, and sales").

24 The terms "prosumer," referring to one who is both producer and consumer, and "prosumption," a combination of production and consumption, were coined by Alvin Toffler in 1980. The rise of the internet and social networking has made the practice more common and attracted academics' attention. George Ritzer et al., *The Coming of Age of the Prosumer*, 56 AM. BEHAV. SCIENTIST 379 (2012).

25 *See* JARON LANIER, WHO OWNS THE FUTURE? 65–67, 154–57 (2013) (describing how networks of powerful computers owned by tech giants, which he calls "Siren Servers," gather personal data and keep it secret, giving them the ability to distort the market); Imanol Arrieta Ibarra et al., *Should We Treat Data as Labor?: Moving Beyond 'Free,'* 108 AM. ECON. ASS'N PAPERS & PROC. 38 (2018); Adam Satariano & Mike Isaac, *Facebook Used People's Data to Favor Certain Partners and Punish Rivals, Documents Show*, N.Y. TIMES (Dec. 5, 2018), https://www.nytimes.com/2018/

Part I of this Note retraces the present formulation of the right of publicity into its intricate historical background. It lays the foundation of Part II's claim that the right's formulation in terms of opposing dichotomies—public or private, and commercial or non-commercial—makes it particularly ill-suited to face the challenges of a world in which these categories have collapsed.[26] Part II also looks at recent cases concerning the appropriation of online personas, and how changes in technology and society have impacted the meaning of "consent" and "injury."

Part III proposes reconceptualizing the right of publicity to meet new technological challenges and makes some practical recommendations. By adopting Helen Nissenbaum's concept of "contextual integrity,"[27] this Note suggests a novel approach for courts and legislators towards the issue of "consent," one that takes into account both the expectations of consumers and the needs of businesses. Additionally, this Note proposes a revised regime of statutory damages that removes the proof of injury impediment and encourages companies to compensate users according to their commercial contribution.[28]

I. THE RIGHT OF PUBLICITY: ORIGIN AND CONFLICTING VIEWS

In an image-saturated world, the ability to protect from misuses of personal indicia[29] should be held in high regard, yet the right of publicity

12/05/technology/facebook-documents-uk-parliament.html?searchResultPosition=1 [https://perma.cc/YVB4-EZVG].

26 *See* Wassom, *supra* note 18, at 234 ("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 . . . more quickly than courts . . . can . . . keep up with.").

27 *See* Helen Nissenbaum, *Respecting Context to Protect Privacy, Why Meaning Matters*, SCI. & ENGINEERING ETHICS 831, 837–43 (2018).

28 For the current regime of statutory damages by state, see *infra* note 156. For a discussion on why the current system is often inadequate, see *infra* notes 132–133 and accompanying text.

29 *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 3:9 ("To trigger infringement of the right of publicity, the plaintiff must be 'identifiable' from defendant's unauthorized use."). The identifying elements ("personal indicia") for a valid right of publicity claim vary state by state. They generally include name, voice, signature, photograph, and likeness. *See, e.g.*, CAL. CIV. CODE § 3344 (2016); ARK. CODE. ANN. § 4-75-1103 (2016); 765 ILL. COMP. STAT. 1075/5 (1999). The expression "personal indicia" is used here interchangeably with "persona." *See supra* note 16.

is viewed as something of a second-class right within the legal arena.[30] The right's association with celebrity culture, concerns over doctrinal overbreadth, and limitations to freedom of speech have led critics to question whether its existence is sufficiently justified.[31] Several other factors may contribute to this negative perception. The right of publicity did not emerge from the Constitution, nor is it protected by a federal statute; it has developed under different guises in the approximately thirty-five states where it is recognized by statute or at common law.[32] These factors result in uncertainty over the nature and scope of the right of publicity.[33] While there is a consensus that the right of publicity emerged from the right to privacy, its subsequent developments are contested.[34] This Part provides a framework to the courts' difficulties in rationalizing their decisions in the social media marketing cases discussed

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30 *See* Mark Bartholomew, *The Political Economy of Celebrity Rights*, 38 WHITTIER L. REV. 1, 1 (2018) ("If you ask legal academics, nobody cares much for the right of publicity."); Westfall & Landau, *supra* note 19, at 118 ("While there has been a raging debate between supporters and critics of publicity rights about whether the rights should exist at all, the stakes involved in the general debate ultimately seem low.").

31 *See* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 127 (1993) (questioning the justifications of a right of publicity as pertaining to celebrities); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 929–30 (2003) (expressing concerns about the First Amendment); Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1166 (2006) (suggesting a right of publicity more similar to trademark law and focused on consumer protection).

32 *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 6:4. Some states, like New York, have privacy statutes that also recognize the right of publicity. Others, like New Jersey and South Carolina, recognize the right at common law but not by statute, and some, like California, Texas, and Florida, recognize a common law publicity right as well as a statutory one. In some states (e.g., New York, Illinois) the statute preempts common law. A few states have statutes with a limited focus: Arizona has a statutory publicity right only for military personnel; Idaho's right of publicity statute protects from revenge porn and the use of drones. In terms of postmortem rights, where the right of publicity survives death, the duration varies from twenty years in Virginia to 100 years in Indiana. For an overview by state, see *The Law*, ROTHMAN'S ROADMAP TO RIGHT PUBLICITY, https://www.rightofpublicityroadmap.com/law [https://perma.cc/KC9G-ZQRW]; RIGHT OF PUBLICITY COMM., *supra* note 16.

33 *See* Johnson, *supra* note 19, at 908 ("[T]he added analytical complexity makes right-of-publicity problems more prone to erratic results and thus makes the case law less scrutable for lawyers who want to provide solid advice to clients."). *See generally* Joshua L. Simmons & Miranda D. Means, *Split Personality Constructing a Coherent Right of Publicity Statute*, 10 LANDSLIDE 37 (2018).

34 *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 1:4.

in Part II. It roots the courts' approach to the right of publicity in the formulation of its predecessor, the right to privacy.[35] After providing historical background, this Part delves into the contested areas of the right of publicity, outlining the prevailing and alternative views on its doctrinal scope.

A. *From the "Gift of Privacy"*[36] *to Publicity*

Unlike its loftier older sibling, the right to privacy, which has some constitutional footing,[37] the right of publicity was developed through the writings of academics and the opinions of the courts.[38] It is not recognized federally, but at common law and by statute through a patchwork of often

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[35] *See* McKenna, *supra* note 4, at 226–28 (pointing out that the right of publicity was defined negatively with respect to the right to privacy).

[36] At the time E.B. White used this expression in his 1949 essay *Here Is New York*, privacy was truly perceived as a "gift." E.B. WHITE, HERE IS NEW YORK 13 (1st ed. 1949) ("New York blends the gift of privacy with the excitement of participation; and better than most dense communities it succeeds in insulating the individual (if he wants it, and almost everybody wants or needs it) against all enormous and violent and wonderful events that are taking place every minute."). Contrast with a quote attributed to Sun Microsystems' CEO Scott McNealy: "You have zero privacy anyway . . . . Get over it." Polly Sprenger, *Sun on Privacy: 'Get Over It,'* WIRED (Jan. 26, 1999, 12:00 PM), https://www.wired.com/1999/01/sun-on-privacy-get-over-it [https://perma.cc/7KJS-KGNU].

[37] *See* Ken Gromley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1340 (1992) (describing the five intertwined species of legal privacy: (1) tort privacy (Warren and Brandeis's version); (2) Fourth Amendment privacy (relating to warrantless governmental searches and seizures); (3) First Amendment privacy ("a 'quasi-constitutional' privacy which exists when one individual's free speech collides with another individual's freedom of thought and solitude"); (4) Fundamental-decision privacy (involving fundamental personal decisions protected by the Due Process Clause of the Fourteenth Amendment); and (5) state constitutional privacy (a mix of the four species above)).

[38] *See, e.g.*, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Harold R. Gordon, *Rights of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553 (1960); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977); *see also* Madow, *supra* note 31, at 167 ("[T]he whole matter [of the right of publicity] was negotiated by courts and commentators with something less than divine ease and grace.").

widely differing state legislation.[39] The right of publicity derives from the tort of the right to privacy.[40] Both were theorized in response to what commentators perceived to be the pressing challenges of a fast-changing world.[41]

The right to privacy came about near the end of the nineteenth century, announced by Samuel D. Warren and Louis D. Brandeis.[42] By that time, photography had become less cumbersome, the newspaper industry more competitive, and production and distribution of mass-produced goods widespread.[43] The press increased circulation through so-called "yellow" journalism by publishing sensationalistic headlines concerning the crimes or sex escapades of the famous as well as the non-famous.[44] Advertisers and producers of goods used pictures of ordinary people, without asking for permission, to promote their products in the marketplace.[45] The cases arising from such a situation were known as the "circulating portraits" cases.[46] Such uses caused the plaintiff much

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[39] The main differences between the states concern: (1) which attributes are protected; (2) whether the plaintiff must demonstrate commercial value of persona; (3) whether there is a postmortem right and, if so, for how long; and (4) whether the claimant must register her persona in order to have a valid right. *See* U.S. COPYRIGHT OFFICE, AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 115–16 (2019); *see also* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 6:4.

[40] *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 1:4.

[41] *See* Warren & Brandeis, *supra* note 38, at 193 ("Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society."); *see also* Warren Sandman, *Revisiting the Right "To be Let Alone" in the Age of Social Media*, *in* REGULATING SOCIAL MEDIA: LEGAL AND ETHICAL CONSIDERATIONS 147 (Susan J. Drucker & Gary Gumpert eds., 2013) ("Warren and Brandeis's tort theory was more a construction of social and technological changes than a logical progression of the law."); Nimmer, *supra* note 38, at 203 ("[T]he [right to privacy] doctrine, first developed to protect the sensibilities of nineteenth century Brahmin Boston, is not adequate to meet the demands of the second half of the twentieth century, particularly with respect to the advertising, motion picture, television, and radio industries.").

[42] *See* Warren & Brandeis, *supra* note 38.

[43] *See* ROTHMAN, *supra* note 2, at 11.

[44] *See* SAMANTHA BARBAS, LAWS OF IMAGE: PRIVACY AND PUBLICITY IN AMERICA 11, 16 (2015).

[45] *Id.*

[46] *See, e.g.*, Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902) (discussing a woman's portrait used to advertise flour); Pavesich v. New England Life Ins. Co., 122 Ga. 190 (1905) (discussing a man's image used to promote life insurance); *see* BARBAS, *supra* note 44, at 11, 17; Warren & Brandeis, *supra* note 38, at 195–96.

distress;[47] reputation mattered greatly at the time, especially to the emerging middle class.[48] One's good name was an important stepping stone in upward mobility; it was a part of the American dream.[49] Furthermore, advertising was looked upon with disdain.[50]

In this context, Warren and Brandeis theorized a legal tort action for invasion of privacy that would allow one to sue for embarrassing and unfavorable media depictions that were not false or defamatory.[51] Unlike libel or slander, which protected someone's "estimation [in the eyes] of his fellows," the tort's main goal was to protect from interference with the way one wanted to be known to others.[52] The right envisioned by Warren and Brandeis was deeply personal, ennobling the private sphere as a place of thought and spirituality, the violation of which caused injured feelings.[53] The right to privacy was enthusiastically received because of a

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[47] *See* ROTHMAN, *supra* note 2, at 22–24 (describing how the plaintiff in *Roberson v. Rochester Folding Box Co.* was greatly humiliated and confined to bed because of the "nervous shock").

[48] *See* BARBAS, *supra* note 44, at 19.

[49] People moved to cities and reinvented themselves, so they could not rely on a reputation established through a lifetime, or by their family over time. *Id.* at 19, 27 (noting there was a "new sensitivity to personal image that grew from the demands of social life in an increasingly urban, commercial, mass-mediated society, where appearances, first impressions, and superficial images were becoming important foundations of social evaluation and judgement"); *see also* Madow, *supra* note 31, at 159 n.160 ("At the close of the 19th century . . . a new social order (mass consumer society) began to emerge, and with it, a new and different 'vision of the self.' 'The vision of self-sacrifice,' which had dominated the 19th century, 'began to yield to that of self-realization.'" (citing WARREN I. SUSMAN, CULTURE AS HISTORY: THE TRANSFORMATION OF AMERICAN SOCIETY IN THE TWENTIETH CENTURY 271–85 (1984))).

[50] *See* BARBAS, *supra* note 44, at 46.

[51] *See* Warren & Brandeis, *supra* note 38, at 193. The first laws to address this trend were those of libel. *See* BARBAS, *supra* note 44, at 15–16. Libel is a "[d]efamatory statement published through any manner or media." *Libel*, LAW DICTIONARY, https://thelawdictionary.org/libel [https://perma.cc/T5EB-VX56]. Lawsuits by ordinary people against the press for libel became financially viable because of the development of the contingency fee agreement. *See* BARBAS, *supra* note 44, at 18.

[52] *See* Warren & Brandeis, *supra* note 38, at 197.

[53] *See id.* at 214–15 ("The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons . . . from having matters which they may properly prefer to keep private, made public against their will.").

climate of anxiety surrounding intrusion by the press.[54] Several states recognized it by 1911.[55]

Warren and Brandeis wished to differentiate the right to privacy from any type of property right, including intellectual property.[56] The authors went through some pains to explain that, once private materials were "published," they lost protection in the same way that now-defunct state common laws only granted copyright protection until publication.[57] Soon difficulties arose in adjudicating cases in which famous people claimed appropriation of their name and likeness, because the plaintiff's image had already been "published."[58] The initial attitude of the courts was to say that, having sought publicity during their careers, celebrities could not expect privacy.[59]

These cases took place at a time of increased awareness of the significant economic value of celebrities.[60] Motion picture studios set out to exploit this value by licensing the name and likeness of their stars to

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[54] *See id.* at 39. Before the right to privacy, the law was unclear about legal recourses to stop the practice. A breach of contract action only worked when the photographer had sold the portraits, but this was not often the case. Where privity was lacking, there was little chance of asserting one's rights. *See id.* at 51–52.

[55] *See id.* at 26.

[56] *See id.* at 204.

[57] *See id.* at 199–200. The publication requirement was superseded by the 1976 Copyright Act. Under the Act, a work gains protection from the moment it is fixed in a tangible medium. 17 U.S.C. § 101 (2018) ("A work is 'created' when it is fixed in a copy or phonorecord for the first time . . . .").

[58] *See, e.g.*, Gautier v. Pro-Football, Inc., 107 N.E.2d 485, 489 (N.Y. 1952) (rejecting a privacy claim made by an animal trainer, who had performed during halftime, against a football league that had televised his performance); Paramount Pictures, Inc. v. Leader Press, Inc., 24 F. Supp. 1004, 1007 (W.D. Okla. 1938) (holding that movie stars employed by plaintiff had waived their right to privacy), *rev'd on other grounds*, 106 F.2d 229 (10th Cir. 1939); Martin v. F.I.Y. Theatre Co., 1 Ohio Supp. 19 (C.P. 1938) (holding that plaintiff, an actress, had surrendered her right to privacy); *see also* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 1:25.

[59] O'Brien v. Pabst Sales Co., 124 F.2d 167, 168–70 (5th Cir. 1941). There, the court rejected a privacy claim from a college football athlete to stop a beer company from using his image in a promotional calendar. With no weight given to the fact that O'Brien had rejected offers to endorse alcoholic beverages due to personal beliefs, the court based its decision on the athlete's status as a public figure. The dissent in *O'Brien* voiced its concerns about not giving legal recourse in cases where advertisers took advantage of someone's—usually hard earned—popularity without paying a customary fee. *Id.* at 171 (Holmes, J., dissenting).

[60] *See* Madow, *supra* note 31, at 166.

advertisers.[61] Licensing companies were set up for the same purpose.[62] Legal professionals, too, started to recognize the economic dimension of the concept of fame.[63]

The case that announced the right of publicity was *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[64] It concerned the names and likenesses of professional baseball players who appeared on cards that were sold together with chewing gum by the plaintiff.[65] The defendant, a rival chewing gum manufacturer, contracted separately with the players for their images.[66] It then claimed as a defense that the plaintiff could not assert the players' privacy rights since they were personal and non-assignable.[67] Judge Frank, writing for the majority, rejected this defense and claimed that an individual had a "right of publicity:" a right to prevent the commercial use of her identity and to grant an exclusive privilege to another party, who then had an enforceable interest to assert.[68] Judge Frank used the "property" label to express the idea that the right had a cognizable monetary worth, but he warned against attaching too much value to it.[69] The right was defined negatively with respect to the right to privacy: it was expressly divorced from "bruised feelings"[70] and was purely concerned with the control of public and commercial aspects of one's life as opposed to private and spiritual ones.[71]

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61 *Id.*

62 *Id.*

63 *See, e.g.*, Nimmer, *supra* note 38, at 204–206 (discussing the pre-*Haelan* "celebrity" cases).

64 Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

65 *Id.* at 867.

66 *Id.*

67 *Id.* According to Jennifer Rothman, this proposition comes from *Pakas Co. v. Leslie* (N.Y. Sup. Ct. 1915). *See* ROTHMAN, *supra* note 2, at 46–47.

68 *See Haelan Labs., Inc.*, 202 F.2d at 868.

69 *Id.* ("Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth.").

70 *Id.* ("[M]any prominent persons . . . far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements . . . .").

71 *See* McKenna, *supra* note 4, at 228 ("[H]aving concluded that the privacy theory was inapplicable to celebrities, supporters of the right of publicity could not claim that the new claim vindicated any emotional interests. As a result, they distinguished the right of publicity from privacy claims on the basis of the economic value of celebrity identities.").

The year after *Haelan*, Melville Nimmer advocated for widespread adoption of the right of publicity[72] based on a "fruits of labor" theory.[73] He explained that a "property right"[74] that is assignable and enforceable by an assignee is "more consonant with the economic realities and the demands of justice."[75] Nimmer was inclined to suggest that only celebrities should be granted such a right, as only they had publicity interests to protect.[76] Nonetheless, he recognized that, since it would be difficult to draw a line between celebrities and non-celebrities, every person should have a right of publicity.[77] Since damages would be accorded depending on the "value of the publicity appropriated," which is directly proportional to one's fame, this value would likely be nominal for the non-famous.[78]

The courts took a while to warm up to the new right because of lack of clarity in terms of remedies and defenses, and confusion about the overlap between privacy and publicity.[79] Commentators continued to debate the exact nature of the right of publicity and its relationship to privacy.[80] Legitimization came in 1977 when the Supreme Court agreed to hear the only right of publicity case that has ever reached it, *Zacchini*

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72 *See* Nimmer, *supra* note 38.

73 *Id.* at 216 ("[E]very person is entitled to the fruit of his labors unless there are important countervailing public policy considerations.").

74 *Id.* ("The right of publicity must be recognized as a property (not a personal) right, and as such capable of assignment.").

75 *See id.* at 211.

76 *See id.* at 217 ("It may also be suggested that the right of publicity should be limited to those persons having achieved the status of a 'celebrity,' as it is only such persons who possess publicity values which require protection from appropriation.").

77 *Id.*

78 *Id.*

79 *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 1:29; ROTHMAN, *supra* note 2, at 71.

80 Prosser wrote his influential article on the right to privacy, describing it as a rubric of four torts, of which "appropriation" was the one associated with cases such as the "circulating portraits" ones and more closely related to the right of publicity. *See* Prosser, *supra* note 38. While McCarthy sees confusion in Prosser's lack of separation between privacy and publicity, others, like Rothman, see harmony. *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 1:30; ROTHMAN, *supra* note 2, at 74. Harold Gordon detected a growing awareness by the courts of the difference between the types of harms suffered through a violation of privacy (injured feelings) and publicity (appropriation of property rights for commercial exploitation). *See* Harold R. Gordon, *Rights of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553, 613 (1960).

v. Scripps-Howard Broadcasting Co.,[81] and endorsed the right.[82] In *Zacchini*, the performance of a human cannon ball was recorded without his consent and used in its entirety during a news broadcast.[83] Instead of Melville's "fruits of labor" theory, the Court here relied on copyright law's "economic incentives" theory—the idea that providing exclusive rights to creators encourages production of culture for the public's benefit—and on an "unjust enrichment" rationale—it would be to society's detriment for someone to gain, for free, a benefit that they would otherwise have to pay for.[84]

Recognition of the right by the Supreme Court,[85] as well as the passing of additional state legislation,[86] emboldened those pushing for a more "property-like" commercially exploitable right.[87] According to this view, the right of publicity and the right to privacy are complementary

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[81] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977). This was an unusual case because it did not concern appropriation of the performer's identity, but of the performance itself. *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 1:33. The issue was whether the newsworthiness of the item outweighed the performer's right of publicity. *See Zacchini*, 433 U.S. at 569, 578.

[82] *Id.* The result in *Zacchini* raised concerns about the right of publicity's capacity to sidestep the First Amendment. *See* Johnson, *supra* note 19, at 914 ("By putting the right of publicity into the same constitutional basket as copyright, the Supreme Court's rationale gave the right of publicity a powerful shield to blunt what blows the First Amendment might strike against it.").

[83] *See Zacchini*, 433 U.S. at 563–64.

[84] *Id.* at 576, 578 ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" (citation omitted)). The Court borrowed the "unjust enrichment" rationale from Harry Kalven, Jr., *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966). *See* ROTHMAN, *supra* note 2, at 80; *see also* McKenna, *supra* note 4, at 251 n.122 (asserting that *Zacchini* could have (and should have) been resolved on copyright grounds, and that the Court "offer[ed] little guidance as to the appropriate scope of the right of publicity").

[85] *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 1:33 ("After the *Zacchini* case, everyone took the right of publicity more seriously. Twenty-four years after the *Haelan* decision, the right of publicity had at last achieved prominence and respectability.").

[86] During the 1970s, the following states passed right of publicity statutes: California (1972), Rhode Island (1972), Massachusetts (1974), Wisconsin (1977), and Nebraska (1979). *See id.* § 1:32 n.5.

[87] *See id.* § 1:32 ("What marks the decisions of the 1970s is the general, but still not yet uniform, acceptance by the courts of the principle that seemed unpalatable before: the right of publicity is a new and separate legal right, quite different in shape from the more familiar 'hurt feelings' or 'insulted dignity' right of privacy.").

but distinct, like two sides of a coin.[88] Once the right of publicity is divested of the underlying individual's dignitary interests,[89] it can become freely alienable (through license or assignment, or by bequeathing it at death).[90] The trend towards the "propertization" of the right of publicity continues today,[91] but it is subject to increased pushback.[92]

B. *Contested History, Normative Confusion*

This origin story, which sees the right of publicity emancipate itself from the right of privacy[93] and transition from tort to property right,[94]

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[88] Nimmer calls the right of publicity "the reverse side of the coin of privacy." Nimmer, *supra* note 38, at 204; *see also* ROTHMAN, supra note 2, at 4; 1 MCCARTHY & SCHECHTER, supra note 1, §§ 1:3, 1:7.

[89] "Dignitary interests" is used here as "a blanket term for non-pecuniary or non-economic interests in name, voice and likeness." HUW BEVERLEY-SMITH, THE COMMERCIAL APPROPRIATION OF PERSONALITY 10 (2002).

[90] *See* MCCARTHY & SCHECHTER, *supra* note 1, § 10:8 ("[T]he right of publicity recognizes a property right in identity that can be legally separated from the person in a way that privacy rights cannot . . . ."). The conceptual leap towards a more "property-like" right facilitated the birth of a post-mortem right of publicity. *See id.* § 9:5; *see also* Westfall & Landau, *supra* note 19, at 83–87 (surveying several postmortem right of publicity cases, and describing descendability as the "[t]riumph of [l]egal [f]ormalism"). This is because the main characteristic of property is alienability. *See* RESTATEMENT (FIRST) OF PROPERTY § 489 cmt. a (AM. LAW. INST. 1944) ("Property interests are, in general, alienable. If a particular property interest is not alienable, this result must be due to some policy against the alienability of such an interest."); A. JAMES CASNER ET AL., CASES AND TEXT ON PROPERTY 625 (5th ed. 2004) ("The ability to transfer property is one of its most important attributes . . . .").

[91] *See, e.g.*, Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322 (2002) (advocating for the right of publicity to be subject to divorce marital settlements and available for debt collection); *see also* Westfall & Landau, *supra* note 19; ROTHMAN, *supra* note 2, at 85; 1 MCCARTHY & SCHECHTER, *supra* note 1, § 1:32.

[92] *See* Westfall & Landau, *supra* note 19, at 122 (suggesting limiting the right of publicity's treatment as property to particular circumstances); Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 205 (2012) (arguing that whether defined as property or not, there should be restrictions on the right of publicity's alienability); McKenna, *supra* note 4, at 231; *see also* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 1:36 ("It is too soon to tell whether Rothman's critique will have any traction with courts and legislatures and whether, as a consequence the pendulum will begin to swing the other way on either the scope of the right of publicity or its theoretical basis.").

[93] *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 5:61.

[94] *See* Johnson, *supra* note 19, at 900.

has been attacked on multiple levels. It has been noted that Nimmer and successors conveniently left out Judge Frank's limiting words from *Haelan*.[95] The language announcing the right of publicity has been described as "mere dicta" in a case decided on contract law and the tort of inducement.[96] Commentators have pointed out that the *Haelan* interpretation of precedent was erroneous,[97] and that privacy statutes predating *Haelan* already covered the same circumstances as the right of publicity, including protecting the commercial interests of well-known figures.[98] Others point out that Judge Frank took a functionalist approach in legally recognizing a business practice that was already widely used in the sports and entertainment industries.[99]

The two different readings of *Haelan* result in different definitions of the right of publicity. The prevailing one sees it as "the inherent right of every human being to control the commercial use of his or her identity."[100] The alternative definition focuses on the concept of control in general and describes it as "the right to stop others from using our identities, particularly our names and likenesses, without permission."[101] The second view emphasizes the right of publicity's inextricable connection to the right to privacy, as well as to the underlying individual.[102]

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95 *See* Westfall & Landau, *supra* note 19, at 85 n.50 ("Nimmer . . . . to make his theory more palatable . . . claim[ed] the Haelan court 'clearly held that the right of publicity . . . [was] a property right. In fact, the Court in Haelan held that the issue of whether publicity was property 'immaterial.'" (citation omitted)).

96 *See* Rothman, *supra* note 18, at 586; *see also* Johnson, *supra* note 19, at 901.

97 *See* Johnson, *supra* note 19, at 901 (arguing that the court relied on the cases of *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917), and *Madison Square Garden Corp. v. Universal Pictures Co.*, 7 N.Y.S.2d 845 (N.Y. App. Div. 1938), neither of which dealt with anything remotely resembling the right of publicity).

98 *See* ROTHMAN, *supra* note 2, at 30–45, 193–95 nn.1, 4 & 7–9 (documenting examples of public figures recovering economic damages for professional injuries and stressing the fact that privacy claims were rooted in property, and that injuries to one's professional reputation and business harms were cognizable, including lost endorsement fees).

99 *See* Westfall & Landau, *supra* note 19, at 77.

100 1 MCCARTHY & SCHECHTER, *supra* note 1, § 1:3.

101 ROTHMAN, *supra* note 2, at 1.

102 Rothman, *supra* note 92, at 217 ("[I]t is not possible to separate completely the connections between a person's public and private personas . . . . These different identities are not separable from one another; instead, the boundaries are fluid and flow in and out of one another.").

In practice, a clean separation between private and public spheres, and dignitary and pecuniary interests, is hard to achieve.[103] Furthermore, there is normative confusion about the right of publicity's two very different functions. On the one hand, as an extension of the right of privacy, it provides a remedy for unwanted fame, as in the "circulating portraits" cases. On the other hand, in cases involving celebrities, it grants the right to manage one's fame.[104] Many right of publicity cases, maybe less visible than Ariana Grande's, involve both dignitary, reputational, and economic harms. Some examples include: (1) models' photographs used by strip clubs on social media to promote their establishments;[105] (2) a gossip website showing the video of a sobriety coach implying that he was selling drugs to a celebrity;[106] (3) a physician's image being used to promote a drug for sexual dysfunction;[107] and (4) a deceased wrestler's nude images being used to accompany an article about her murder.[108] The concerns over alienability expressed by academics—most prominently Jennifer Rothman—become tangible when looking at the facts of these cases. If any of the "identity-holders" involved assigned full rights to their name and likeness, a third party "publicity-holder" could acquire them and make unrestricted use of them, including extremely damaging

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103 *See* Rothman, *supra* note 92, at 205 ("[I]t is scholars who have seen things in black and white, while the courts in the trenches have taken a more nuanced approach, albeit an underdeveloped and unacknowledged one.").

104 *See* Daniel Gervais & Martin L. Holmes, *Fame, Property & Identity: The Purpose and Scope of the Right of Publicity*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 181, 195 (2014).

105 *See* Geiger v. C&G of Groton, Inc., No. 3:19-CV-502 (VAB), 2019 7193612 WL (D. Conn. Dec. 26, 2019); Lopez v. Admiral Theatre, Inc., No. 19 C 673, 2019 WL 4735438 (N.D. Ill. Sept. 26, 2019); Underwood v. Doll House, Inc., No. 6:18-cv-1362-Orl-31GJK, 2019 WL 5265263 (M.D. Fla. Aug. 15, 2019); Hinton v. Vonch, LLC, No. 18 CV 7221, 2019 WL 3554273, at *1 (N.D. Ill. Aug. 2, 2019); Toth-Gray v. Lamp Liter, Inc., No. 19 C 1327, 2019 WL 3555179, at *1 (N.D. Ill. July 31, 2019); Edmondson v. 2001Live, Inc., No. 8:16-cv-03243-T-17AEP, 2019 U.S. Dist. LEXIS 41028 (M.D. Fla. Jan. 15, 2019). For a discussion on how the informational asymmetry on the Internet is a breeding ground for the sexualization and discrimination of racial and sexual minorities, see Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberpace*, 20 COLUM. J. GENDER & L. 224, 226–27 (2011).

106 Dice v. X17, Inc., No. B282448, 2019 WL 4786064, at *1 (Cal. Ct. App. Sept. 27, 2019).

107 Yeager v. Innovus Pharm., Inc., No. 18-cv-397, 2019 U.S. Dist. LEXIS 18095, at *2 (N.D. Ill. Feb. 5, 2019).

108 Toffoloni v. LFP Publ'g Grp., 572 F.3d 1201, 1204 (11th Cir. 2009).

ones.[109] For this reason, even proponents of full alienability accept some limitations.[110] Courts tend to scrutinize consent more closely when dignitary interest and disparity of bargaining power are involved,[111] but this usually remains unacknowledged.[112] Rothman also points out that full alienability would function mostly in the interest of corporations; its risks would be borne especially by those in a weak bargaining position.[113] Performers at the early stage of their careers, or has-been celebrities who have fallen on hard times, could potentially lose control of their identities in perpetuity by agreeing to "sell" their personas.[114] This runs counter to the idea that the right of publicity was created to protect the interests of the identity-holder.[115]

These debates are not restricted to the world of academia. Recent attempts to amend the New York privacy and publicity statute are

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[109] "The identity-holder is the person whose name, likeness, or other indicia of identity is used and, when used without permission, forms the basis of a right of publicity violation. The publicity-holder, by contrast, is the person who owns the property interest in (commercial) uses of that identity." Rothman, *supra* note 92, at 187.

[110] *See* MCCARTHY & SCHECHTER, *supra* note 1, § 10:14 (suggesting that the underlying person does not lose control over their own identity in an assignment. The assignor maintains an interest in "continuing scrutiny over the activities of the assignee. And even if no control is retained . . . the assignor in effect creates a trust relationship which should be honored by the courts.").

[111] *See, e.g.*, Facchina v. Mut. Benefits Corp., 735 So. 2d 499 (Fla. Dist. Ct. App. 1999) (discussing about a model who signed a release permitting use of his photo for advertising insurance policies alleged that the use of his photo was used in a way that made him look like a terminal AIDS patient. Court ruled in model's favor). When there are ambiguities as to duration, courts give weight to limiting language. Hernandez v. Wyeth-Ayerst Labs., 727 N.Y.S.2d 591 (N.Y. Sup. Ct. 2001); Whisper Wear, Inc. v. Morgan, 627 S.E.2d 178 (Ga. Ct. App. 2006) (explaining that out of two model release forms, the one with more specific time terms was found to be controlling).

[112] *See supra* note 103.

[113] *See* ROTHMAN, *supra* note 2, at 117 (pointing out that the major proponent of full alienability in New York, SAG-AFTRA—the Screen Actors Guild-American Federation of Television and Radio Artists—is working against the interests of its members).

[114] *See id.*; *see also An Act to Amend the Civil Rights Law, in Relation to the Right of Privacy and the Right of Publicity: Hearing on Assemb. A08155B*, 2017 Leg., Reg. Sess. (N.Y. 2017) (showing Assemblyman Ra giving the example of the has-been celebrity during the hearing).

[115] In *Haelan*, Judge Frank described the right of publicity as being in the interest of the underlying individual. *See supra* note 69 and accompanying text; *see also* Rothman, *supra* note 92, at 193 ("Despite the claim that the right of publicity was the only way to protect the economic and dignitary interests of performers, athletes, and others, the assignability of publicity rights largely promotes the interests of publicity-holders, sometimes at the expense of these identity-holders.").

testament to this.[116] Ultimately the bill,[117] proposed in 2017, 2018, and 2019, was shelved after vociferous outcry from various stakeholders expressing concerns about the potential negative consequences of alienability as well as First Amendment issues.[118]

II. THE RIGHT OF PUBLICITY IN THE SOCIALLY NETWORKED WORLD

The "propertization" of the right of publicity is relevant in the context of social media marketing cases because it disadvantages non-celebrities in two ways: (1) without an established commercial value, non-celebrities cannot bring a right of publicity claim in some states[119] and, where they can, it is hard for them to prove a cognizable injury;[120] and (2)

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116 *See* Jennifer E. Rothman, *New York Legislative Session Ends with No Vote on Right of Publicity Bill*, ROTHMAN'S ROADMAP TO RIGHT PUBLICITY (June 21, 2019, 1:45 PM), https://www.rightofpublicityroadmap.com/news-commentary/new-york-legislative-session-ends-no-vote-right-publicity-bill [https://perma.cc/K5NW-LV9Z]; Jennifer E. Rothman, *New York Right of Publicity Bill Resurrected Again*, ROTHMAN'S ROADMAP TO RIGHT PUBLICITY (June 6, 2018, 12:45 PM), https://www.rightofpublicityroadmap.com/news-commentary/new-york-right-publicity-bill-resurrected-again [https://perma.cc/ULM5-5DXD]; Jennifer E. Rothman, *New York Once Again Floats Right of Publicity Law*, ROTHMAN'S ROADMAP TO RIGHT PUBLICITY (June 7, 2017, 12:45 PM), https://www.rightofpublicityroadmap.com/news-commentary/new-york-once-again-floats-right-publicity-law [https://perma.cc/5YRX-ZTAW]. Additional attempts to amend the New York statute to make the right freely alienable and include post-mortem rights were also made in the 1976 and 1977 sessions, and in the 1988 session. *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 6:80.

117 *Assemb. A08155B*, 2017 Leg., Reg. Sess. (N.Y. 2017).

118 *See* Jennifer E. Rothman, *New York Legislature Deluged with Letters Opposing Right of Publicity Bill*, ROTHMAN'S ROADMAP TO RIGHT PUBLICITY (June 11, 2018, 10:00 AM), https://www.rightofpublicityroadmap.com/news-commentary/new-york-legislature-deluged-letters-opposing-right-publicity-bill [https://perma.cc/JD6T-SYRS]; Jennifer E. Rothman, *New York Legislature Feels the Heat and Pulls Right of Publicity Bill*, ROTHMAN'S ROADMAP TO RIGHT PUBLICITY (June 21, 2017, 9:15 PM), https://www.rightofpublicityroadmap.com/news-commentary/new-york-legislature-feels-heat-and-pulls-right-publicity-bill [https://perma.cc/D7Y4-6EGM]; Simmons & Means, *supra* note 33, at 37 ("The response to the bill was swift and heated. A coalition of 38 individuals and organizations ran a full-page advertisement in the *Albany Times-Union* urging the legislature to reject the bill on First Amendment grounds.").

119 *See, e.g.*, 42 PA. CONS. STAT. ANN. § 8316(a) (2019) ("Any natural person['s] . . . name or likeness has commercial value . . . ."); OHIO REV. CODE ANN. § 2741 (2012) ("'Persona' means an individual's name, voice, signature, photograph, image, likeness, or distinctive appearance, *if any of these aspects have commercial value*." (emphasis added)).

120 *See* discussion *infra* Section II.B.

while unencumbered assignability allows celebrities to maximize the commercial exploitation of their personas, it puts those with less bargaining power, like non-celebrities, in an even more vulnerable position.[121] This analysis looks at courts' evolving efforts in adapting the right of publicity to shifting paradigms and where the right comes short. It also traces the courts' difficulties in approaching the notions of "consent" and "injury" to recent societal changes that make the strict separation between private and public, discussed in Part I, seem obsolete. These societal changes are also at the root of the information asymmetry currently characterizing the relationship between consumers and technology giants.[122]

A. *The Right of Publicity and Online Personas*

The same instinct that spurred advertisers' use of ordinary citizens' images in "circulating portraits" cases still applies today.[123] Products are better differentiated in the marketplace by association with real people, and recommendations that feel personal and authentic are more successful in selling them.[124] Personal indicia that individuals have voluntarily put online have been used to endorse products and services with absent or questionable consent.[125]

Cohen v. Facebook, Inc.,[126] one of the first class actions brought against the social network for violation of a right of publicity statute,[127]

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121 *See supra* notes 111–114 and accompanying text.

122 *See* PASQUALE, *supra* note 23, at 19 ("[T]he contemporary world . . . resembles a one-way mirror. Important corporate actors have unprecedented knowledge of the minutiae of our daily lives, while we know little to nothing about how they use this knowledge to influence the important decisions that we—and they—make.").

123 *See supra* notes 45–46 and accompanying text.

124 *See* Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 808 (N.D. Cal. 2011) ("[M]arketers have always known that the best recommendation comes from a friend. . . . This, in many ways, is the Holy Grail of marketing . . . . This is the illusive goal we've been searching for, for a long time; [m]aking your customers your marketers." (quoting Facebook COO Sheryl Sandberg)).

125 *See* discussion *infra* Section II.B.

126 Cohen v. Facebook, Inc., 798 F. Supp. 2d 1090 (N.D. Cal. 2011).

127 *See* Rotem Medzini, *Prometheus Bound: An Historical Content Analysis of Information Regulation in Facebook*, 16 J. HIGH TECH. L. 195, 246–47 (2016); *see also* CAL. CIV. CODE § 3344 (West 2019).

concerned the company's "Friend Finder" service.[128] The service, which was not contested, generated a list of contacts of people who did not have Facebook by searching users' email accounts.[129] The alleged commercial exploitation occurred when Facebook publicized, on its members' feeds, that the plaintiffs, identified by name and profile picture, had tried the "Friend Finder" service.[130] The court ruled that the general terms of service, which contained ambiguous, broad provisions for disclosure of name and profile pictures, did not establish consent for the particular use in dispute.[131] Ultimately, the court dismissed the case for lack of injury, proclaiming that "[r]esulting injury is the *sine qua non* of a cause of action for misappropriation of name."[132] Statutory damages were not applicable because they require a showing of economic or mental harm that plaintiffs could not conjure.[133]

In *Fraley v. Facebook, Inc.*,[134] the plaintiffs alleged a violation of California's right of publicity statute when their names and profile pictures were used in association with "Sponsored Stories," which were enabled as a default setting for all members.[135] These "Stories" were paid advertisements appearing on members' feeds stating that someone in their network had "liked" the advertiser.[136] The court was once again faced with ambiguous, broad terms that would have made it challenging for an ordinary user to opt-out of the service.[137] Therefore, the court cited *Cohen* in support of its rejection that the users had given adequate consent.[138] With respect to injury, the court rejected the defendant's

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128 *Cohen*, 798 F. Supp. 2d at 1092.

129 *Id.*

130 *Id.*

131 *Id.* at 1095–96.

132 *Id.* at 1097.

133 *Id.*at 1090 ("[B]y enacting section 3344(a), the Legislature provided a practical remedy for a non-celebrity plaintiff whose damages are difficult to prove *and who suffers primarily mental harm* from the commercial misappropriation of his or her name." (emphasis added) (citation omitted)).

134 Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 808 (N.D. Cal. 2011).

135 *Id.*

136 *Id.*

137 *Id.* at 805 ("[Y]ou can use your privacy settings to limit how your name and profile picture may be associated with commercial, sponsored, or related content . . . . You give us permission to use your name and [Facebook] profile picture in connection with that content, subject to the limits you place." (alteration in original)).

138 *Id.* at 806.

argument that, to survive a motion to dismiss, the statute required the plaintiff to prove "*preexisting* commercial value and efforts to capitalize on such value."[139] In holding for the plaintiffs, the court distinguished the case from *Cohen*, as here they were able to make specific allegations about the worth of their endorsement.[140]

Perkins v. LinkedIn Corp.[141] concerned email invitations sent by LinkedIn to recipients found in members' email accounts.[142] The court explained in detail the procedure by which LinkedIn had received consent for this use.[143] The court ultimately held that, while the consent obtained by LinkedIn covered the first email to the users' contacts, subsequent emails were beyond the scope of this consent.[144] The court recognized the appropriation in itself as the injury, without the need for the plaintiffs to have a preexisting commercially viable persona.[145]

B. *Shortcomings of the Right of Publicity in the Online World*

Several issues emerge from the courts' analyses. First, as seen in *Fraley*, *Cohen*, and *Perkins*, while courts wish to preserve contractual autonomy, they are concerned about the plaintiff's lack of understanding over unintended uses of their personal data.[146] When the terms are generic and set as a "default" setting, as in *Cohen* and *Fraley*, the consent was deemed insufficient on its face.[147] The court in *Perkins* took a different approach altogether. It meticulously went through the various

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139 *Id.*

140 *Id.* at 809.

141 Perkins v. LinkedIn Corp., 53 F. Supp. 3d 1190 (N.D. Cal. 2014).

142 *Id.* at 1199.

143 *Id.* at 1195–99.

144 *Id.* at 1216 ("Although the Court concludes that Plaintiffs have consented to LinkedIn's initial endorsement email, the Court finds that Plaintiffs have plausibly alleged that they did not consent to the second and third reminder endorsement emails.").

145 *Id.* at 1210–11 ("The Court notes that this type of injury, using an individual's name for personalized marketing purposes, is precisely the type of harm that California's common law right of publicity is geared toward preventing.").

146 *See supra* text accompanying notes 137–138.

147 *See supra* text accompanying notes 137–138.

steps needed to sign up for LinkedIn[148] and drew a line between consented and non-consented uses.[149]

Second, complications arise when evaluating a violation of the right of publicity pertaining to an individual without demonstrable commercial value. As seen above, courts in the same jurisdiction have used different rationales to find value in the non-celebrity plaintiff. In *Fraley*, the court used a formal approach, stating that a Facebook member can be a celebrity in the eyes of her friends.[150] In *Perkins*, the court was more functionalist and recognized the commercial use as the proof of injury and the plaintiffs' value.[151]

In terms of damages, the options for non-celebrities are limited: the individual either has to show a quantifiable financial injury or, in order to receive statutory damages, mental harm.[152] Both are high hurdles; financial information about the value of a small-scale endorsement of a service or a product is not readily available, especially to consumers.[153] Mental anguish, defined as an "injury to the feelings without regard to any effect . . . [to] property, business, pecuniary interest, or the standing of the individual in the community,"[154] is difficult to prove with these types of intrusions.[155] Statutory damages, only contemplated in a handful of states' statutes,[156] serve the purpose of providing a remedy in situations

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148 *See supra* note 144 and accompanying text.

149 *See Perkins*, 53 F. Supp. 3d at 1214–17.

150 *See* Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 809 (N.D. Cal. 2011) ("[I]n essence, Plaintiffs are celebrities—to their friends." "Plaintiffs' allegations suggest that advertisers' ability to conduct targeted marketing has now made friend endorsements 'a valuable marketing tool,' just as celebrity endorsements have always been so considered." (citation omitted)).

151 *See supra* note 145.

152 *See supra* note 133 and accompanying text.

153 *See supra* note 23.

154 Miller v. Collectors Universe, Inc., 65 Cal. Rptr. 3d 351, 361–62 (Ct. App. 2007), *vacated*, 72 Cal. Rptr. 3d 194 (Ct. App. 2008).

155 *See* McGeveran, *supra* note 5, at 1122 (describing how disclosures unintended by users are not necessarily problematic, much less a cognizable legal injury).

156 *See* ALA. CODE § 6-5-774(1) (West 1975) (citing $5,000 per action); CAL. CIV. CODE § 3344 (West 2016) (citing $750 or actual damages); 765 ILL. COMP. STAT. ANN. 1075/40 (West 2015) (citing $1,000 or actual damages); IND. CODE ANN. § 32-36-1-10 (West 2015) (citing $1,000 or actual damages); NEV. REV. STAT. ANN. § 597.810 (West 2015) (citing $750 or actual damages); OHIO REV. CODE ANN. § 2741.07 (West 2019) ("[A]t least two thousand five hundred dollars and not more than ten thousand dollars, as determined in the discretion of the trier of fact."); TEX. PROP.

like those in the "circulating portraits" cases.[157] But the appropriations of persona occurring in *Perkins* and *Fraley* are qualitatively different. They concern an identity that the users have already made "public" by establishing and populating a profile. In *Dancel v. Groupon, Inc.*, the case mentioned in the Introduction,[158] Groupon's main defense is that the plaintiffs impliedly consented to the use because their Instagram accounts were not set to "private."[159]

C. *The Socially Networked World*[160]

The cases above illustrate how the concept of privacy, together with its relation to publicity, has changed dramatically. Privacy is still marked by the desire to control information about oneself,[161] but it has left behind the idea of a sacred space grounded in the "moral superiority of the private."[162] We have become more comfortable with being exposed in the

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CODE ANN. § 26.013 (West 2019) (citing $2,500 or actual damages); WASH. REV. CODE ANN. § 63.60.060 (West 2016) (citing $1,500 or actual damages).

157 *See supra* note 123.

158 Dancel v. Groupon, Inc., 940 F.3d 381 (7th Cir. 2019).

159 *See* Resp. Br. of Appellee Groupon, Inc., Dancel v. Groupon, Inc., No. 18 C 02027, at * 5 (N.D. Ill. Mar. 4, 2019) ("Plaintiff had a 'public' Instagram account, meaning that anyone who visited the Instagram website . . . or used the . . . app could see her photo. Instagram's Privacy Policy advised users that 'Any information or content that you voluntarily disclose for posting . . . becomes available to the public' and 'may be re-shared by others.'").

160 *See* Sandman, *supra* note 41, at 148 (claiming the "socially networked world" is "a place where distinctions between front stage and back stage 'performances' are less distinct . . . . [T]o be in the socially networked world is, by definition, to choose to be front stage all the time. It is . . . a place that is all places").

161 *See* Nissenbaum, *supra* note 27, at 839–40 (explaining the "dominant view of a right to privacy as a right to control information about ourselves").

162 *See* Sandman, *supra* note 41, at 143; DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 94 (2004) (describing Warren and Brandeis's idea of privacy as the "invasion conception," where the "value of protecting privacy is measured in terms of the value of preventing harm to the individual . . . . '[P]rivacy is inherently personal. The right to privacy recognizes the sovereignty of the *individual*'" (quoting Smith v. City of Artesia, 772 P.2d 373, 376 (N.M. Ct. App. 1989))).

public space of cyberspace;[163] actually, we enjoy it.[164] In this sense, people have given up the "right to be let alone."[165]

Social media users have been compared to buskers on a stage.[166] The social network provides the stage and imposes rules, but the users create, exchange, and consume content.[167] This simultaneous act of production and consumption has been called "prosumption."[168] The act of prosumption creates value, which in turn attracts more users.[169] There is increasing awareness that the stage is not as "free" as it may have initially seemed.[170] Social networks charge a price of admission to third-party advertisers in the form of curated network data.[171] In *Fraley* and *Dancel*, the third-party advertisers acquired the users' endorsements with the price of admission.[172] Social networks, pursuant to their terms and conditions, usually own the content created by the prosumer[173] and have rights to the commercial uses of the prosumer's persona.[174]

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163 *See* SOLOVE, *supra* note 162, at 59.

164 Cohen v. Facebook, Inc., 798 F. Supp. 2d 1090, 1092 (N.D. Cal. 2011) ("As a 'social networking' internet site, Facebook exists because its users *want* to share information.").

165 *See* Sandman, *supra* note 41, at 152.

166 *See* FAUCHER, *supra* note 23, at 19.

167 *See id.*

168 *See supra* note 24 and accompanying text.

169 *See* FAUCHER, *supra* note 23, at 22–23.

170 *See* Erin Bernstein & Theresa J. Lee, *Where the Consumer Is the Commodity*: *The Difficulty with the Current Definition of Commercial Speech*, 2013 MICH. ST. L. REV. 39, 41 ("[W]hen users don't pay for a product, often the user is the product."); *see also* Will Oremus, *Are You Really the Product? The History of a Dangerous Idea.*, SLATE (Apr. 27, 2018, 5:55 AM), https://slate.com/technology/2018/04/are-you-really-facebooks-product-the-history-of-a-dangerous-idea.html [https://perma.cc/BH2H-7DLJ] (surveying the origin and the recent frequent use of the expression "[i]f something's free, that means you're the product").

171 *See* FAUCHER, *supra* note 23, at 19.

172 *See supra* notes 7, 134–136 and accompanying text.

173 *See* FAUCHER, *supra* note 23, at 19.

174 *See* Daniel Garrie, *CyberLife: Social Media, Right-of-Publicity and Consenting to Terms of Service*, LEGAL EXECUTIVE INST. (July 19, 2017), https://www.legalexecutiveinstitute.com/cyberlife-social-media-right-of-publicity [https://perma.cc/Z6YW-T7L5] ("You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us" (quoting the Facebook Terms of Service revised after *Fraley*)).

Users are exposed to ever more online interactions, making it impossible to read every privacy policy.[175] They are also hardly in a position to grasp the consequences of their acceptance.[176] Behavioral economics[177] explains that users do not make rational choices with respect to privacy policies due to the information asymmetry between the data subject and the data holder, and the limitations posed by their innate "bounded rationality."[178] The user generally knows much less than the company with respect to the use of their data, so they are not fully capable of evaluating the potential uses associated with data collection.[179] Even with access to complete information, users can be overwhelmed by judging all the possible outcomes of privacy threats.[180] Faced with complex information and spiraling ramifications, users rely on thought processes that simplify and approximate.[181] An example of this type of

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175 *See* Laurie McNeill & John David Zuern, Introduction, *Online Lives 2.0*, 38 BIOGRAPHY v, ix (2015) ("Most of us cannot help but entrust personal information to the network in order to get on with . . . our lives . . . but we know that doing so makes us vulnerable to unwelcome surveillance, stalking, identity theft, and a wide range of increasingly sophisticated scams."); Cameron F. Kerry, *Why Protecting Privacy Is a Losing Game Today—and How to Change the Game*, BROOKINGS INSTITUTION (July 12, 2018), https://www.brookings.edu/research/why-protecting-privacy-is-a-losing-game-today-and-how-to-change-the-game [https://perma.cc/NWJ9-LSRX] ("Maybe informed consent was practical two decades ago, but it is a fantasy today. In a constant stream of online interactions, especially on the small screens that now account for the majority of usage, it is unrealistic to read through privacy policies. And people simply don't.").

176 *See* LANIER, *supra* note 25, at 298 ("Users do not understand the endless choices that must be made to master privacy policies and even the top companies routinely screw up the administration of such policies. No set of rules foresees all the twisted circumstances that occur in online life.").

177 *See* Alessandro Acquisti & Jens Grossklags, *What Can Behavioral Economics Teach Us About Privacy?*, *in* DIGITAL PRIVACY: THEORY, TECHNOLOGIES, AND PRACTICES 363, 368–69 (Alessandro Acquisti et al. eds., 2008) ("Behavioral economics studies how individual, social, cognitive, and emotional biases influence economic decisions. This research is predominantly based on neoclassical models of economic behavior, but aims to integrate rational choice theory with convincing evidence from individual, cognitive, and social psychology.").

178 *See id.* at 364.

179 *See id.*

180 *See id.*; *see also* Sandman, *supra* note 41, at 149 (describing the results of a user survey on knowledge of Facebook privacy settings and actual behavior. Users almost completely ignored potential negative consequences of misuse of data unless they had direct negative experience with it).

181 *See* Acquisti et al., *supra* note 177, at 369.

"problem solving," bounded by the data holder's reality, is the belief that a privacy policy represents privacy protection, regardless of its content.[182]

Another way consumers deal with the myriad of decisions they face in their online lives is by placing their trust in personal recommendations.[183] This has given rise to the "micro-blogger" or "micro-celebrity;" someone who creates a certain image on social media that followers connect with, and is able to monetize this image by recommending products and/or services.[184] A micro-blogger can be a celebrity in the eyes of her followers in the same way that a Facebook member can be one in the eyes of her friends.[185] As the court in *Fraley* noted, in a world dominated by social media and reality television, "the distinction between a 'celebrity' and a 'non-celebrity' seems to be an increasingly arbitrary one."[186]

The predominance of the socially networked world requires a reexamination of the common theories of justifications of the right of publicity. If we consider *Dancel*,[187] where Instagram users' photos were harvested by Groupon to promote its client-businesses, neither a "fruits of labor"[188] nor an "unjust enrichment"[189] rationale seems to apply. Both theories are based on the idea that the underlying person has made an investment in "cultivating the value of her personality."[190] It is doubtful that the average restaurant-goer has done so. A copyright "economic incentive" rationale[191] also falters, because the ordinary user is likely to have created the image without expecting compensation. These justifications are contested even in the case of traditional celebrities.[192] For someone like Ariana Grande, whose main income comes from her principle occupation as a singer, earnings derived from personality rights

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182 *See id.* at 368–69.

183 *See supra* note 124.

184 *See supra* note 9.

185 *See supra* note 150.

186 Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 808 (N.D. Cal. 2011).

187 Dancel v. Groupon, Inc., No. 18 C 2027, 2019 U.S. Dist. LEXIS 33698, at *1 (N.D. Ill. Mar. 4, 2019).

188 *See supra* note 73 and accompanying text.

189 *See supra* note 84 and accompanying text.

190 *See* ROTHMAN, supra note 2, at 106.

191 *See supra* note 84 and accompanying text.

192 *See infra* notes 193–194.

can hardly be seen as an incentive.[193] In terms of the "labor" celebrities have put into their personas, critics note that their image is forged by agents outside of their control, such as their management, or the audience's reception of them.[194] These justifications are more well-founded in the case of the micro-blogger, whose fame is their end goal and sometimes main source of income.[195]

The right of publicity protects an individual's commercial rights,[196] but the effects of a misappropriation are not always economic in nature.[197] What all the plaintiffs above have in common is that they were deprived of the ability to write "the text of [their] identity."[198] The theory of justification of "autonomous self-definition," proposed by Mark McKenna, is applicable regardless of the plaintiff's level of fame, and acknowledges that privacy and publicity are on a continuum.[199] It centers

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193 *See* Madow, *supra* note 31, at 209 ("[T]he right of publicity protects only a *collateral* source of income for athletes, actors, and entertainers. Abolition of the right of publicity would leave entirely unimpaired a celebrity's ability to earn a living from the activities that have generated his commercially marketable fame."). As Westfall and Landau note, "England does not protect publicity rights and yet it appears to have no shortage of celebrities." Westfall & Landau, *supra* note 19, at 119–20.

194 *See* Madow, *supra* note 31, at 188 ("[T]he reason one person wins universal acclaim, and another does not, may have less to do with their intrinsic merits or accomplishments than with the needs, interests, and purposes of their audience."); ROTHMAN, *supra* note 2, at 107 ("Actors, musicians, and athletes often have agents, managers, stylists, publicists, and others who create, shape, and distribute their public personas."); McKenna, *supra* note 4, at 230 ("[T]he labor theory fails as a normative justification of identity ownership because it gives celebrities much more credit than they deserve for creating the economic value of their identities.").

195 *See* Aki Ito, *What It Takes to Make Instagram Influencing a Full-Time Career*, BLOOMBERG (Nov. 29, 2018, 5:58 AM), https://www.bloomberg.com/news/articles/2018-11-29/what-it-takes-to-make-instagram-influencing-a-full-time-career [https://perma.cc/B5CK-T45G] ("My job is to make it look effortless, to look like it's the most fun ever and it's never a job . . . . But it is a job.").

196 *See supra* note 100 and accompanying text.

197 *See supra* notes 105–108 and accompanying text; *see also* McKenna, *supra* note 4, at 284 (discussing the dignitary harms experienced by the celebrity plaintiff in *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 243 (5th Cir. 1941)). For details of *O'Brien*, see *supra* note 59.

198 *See* McKenna, *supra* note 4, at 229 ("An individual's choices . . . can be viewed as the text of her identity, and unauthorized uses of a person's identity in connection with products or services threaten to recreate that text and affect the way the individual is perceived by others.").

199 *See id.* ("The individual uniquely bears the costs of those perceptions, both emotional and economic, and she therefore has an interest in controlling the uses of her identity."); Rothman, *supra* note 92, at 217 ("[I]t is not possible to separate completely the connections between a person's public and private personas . . . . These different identities are not separable from one another; instead, the boundaries are fluid and flow in and out of one another.").

on the idea that "[t]he things and people with which individuals choose to associate reflect their character and values;" thus, a third-party's unauthorized use in connection with goods or services risks meddling with their autonomy in making those choices.[200] The idea is reminiscent of Warren and Brandeis's right to control how to be known to others,[201] adapted to the socially networked world. It also echoes the court's concerns in *Perkins* over the plaintiffs being seen as "types of people who . . . are unable to take the hint that their contacts do not want to join their LinkedIn network."[202]

D. *The Right of Publicity and the Collective*

Autonomous self-definition is important for the individual, but also for the collective.[203] Where significant asymmetries of power exist, as in these cases, the appropriation of the names and likenesses of all the plaintiffs bundled together causes a separate harm than that to the single user. This harm is about loss of value and decisionmaking power. The user, in generating unremunerated value for the social network,[204]

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200 *See* McKenna, *supra* note 4, at 229.

201 *See* Warren & Brandeis, *supra* note 52 and accompanying text.

202 *See* Perkins v. LinkedIn Corp., 53 F. Supp. 3d 1190, 1216 (N.D. Cal. 2014).

203 *See* John Christman, *Autonomy in Moral and Political Philosophy*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2018) ("[B]asic assumptions about citizens' capacities for reflective deliberation and choice—autonomy—must be part of the background conditions against which an overlapping consensus or other sort of political agreement concerning principles of justice is to operate."); *see also* Debbie V.S. Kasper, *Privacy as a Social Good*, 28 SOC. THOUGHT & RES. 165, 185 (2007) ("Public forms of communication depend on 'the spontaneous inputs from a lifeworld whose core private domains are intact.' In this way, 'a well-secured private autonomy helps "secure the conditions" of public autonomy just as much as, conversely, the appropriate exercise of public autonomy helps "secure the conditions" of private autonomy.'" (citing JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTORS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., Cambridge: MIT Press 1998))).

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> Even if there may be a debate over whether social media users' content production and participation . . . is productive or unproductive *for the users*, it still generates a surplus value for the social media site that takes the use value of the users themselves (data) and transforms it into a commodity . . . .

FAUCHER, *supra* note 23, at 19.

increases the social network's power to influence the user.[205] An analogy can be drawn between the value created by the prosumer and that of women's unremunerated housework.[206] Domestic labor is not directly part of the economy, but it nonetheless affects it by allowing those who benefit from it to spend time in the workforce, increasing their buying power.[207] But, whereas the product of free domestic labor has value, the individual who produced it does not, and for this reason will find it hard to change her circumstances.[208] The negative aspects of this dynamic are not readily apparent, and this is part of the problem. Companies like Google, Amazon, or Facebook monetize their computational power into "an informal economy of barter and reputation, while concentrating the extracted old-fashioned wealth for themselves."[209] By giving up information in return for "free" services, users relinquish control over themselves without knowing how that information will be used.[210]

The larger effects of an economy based on "online social capital"[211] have started to become apparent.[212] In particular, the illusion that information is "free" only functions to the extent that the overall economy is not about information.[213] While past technological

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205 *See* Lanier & Weyl, *supra* note 14, at 3 ("Today, internet giants finance contact between people by charging third parties who wish to influence those who are connecting. The result is an internet—and, indeed, a society—built on injected manipulation instead of consensual discourse."); AMNESTY INT'L, SURVEILLANCE GIANTS: HOW THE BUSINESS MODEL OF GOOGLE AND FACEBOOK THREATENS HUMAN RIGHTS (2019), https://www.amnesty.org/download/Documents/POL3014042019ENGLISH.PDF [https://perma.cc/8JBJ-EB4P].

206 *See* Kylie Jarrett, *Through the Reproductive Lens: Labour and Struggle at the Intersection of Culture and Economy*, *in* DIGITAL OBJECTS, DIGITAL SUBJECTS: INTERDISCIPLINARY PERSPECTIVES ON CAPITALISM, LABOUR AND POLITICS IN THE AGE OF BIG DATA 103, 107 (David Chandler & Christian Fuchs eds., 2019).

207 *See id.* at 107.

208 *See* LEOPOLDINA FORTUNATI, THE ARCANE OF REPRODUCTION: HOUSEWORK, PROSTITUTION, LABOR AND CAPITAL 22 (Jim Fleming ed., Hilary Creek trans., 1995) ("[Women's] struggles against reproduction work have never been taken up in terms of a struggle against work, given the fact that it is always represented as non-work.").

209 *See* LANIER, *supra* note 25, at 69.

210 *See* discussion *supra* Section II.C.

211 This means "the labour of users that can be mined as a data commodity and converted into profit, while also existing as a strategy to keep a digitally networked community active in providing their unpaid labour." FAUCHER, *supra* note 23, at xiii.

212 *See, e.g.*, Ibarra et al., *supra* note 25.

213 *See* LANIER, *supra* note 25, at 25–26.

disruptions have, despite creating shifts in employment, not affected incomes, economists point out that this trend is changing.[214] The charge against the current free data system is that it will soon become unsustainable.[215] One commonly discussed solution is to compensate users for the value they contribute to a network.[216]

III. A PROPOSAL FOR A RIGHT OF PUBLICITY IN CONTEXT

The right of publicity must deal with two significant developments that have come about with the socially networked world. The first is the collapse of the private/public dichotomy, which makes the ability to manage online personas more relevant than simply denying access to them.[217] The second development, connected to the first one, sees the rise of the social media user as both a consumer and producer of value, and of the micro-celebrity.[218]

The right of publicity has become an ineffective instrument in countering the types of misappropriations it was intended to protect.[219] In social media marketing cases, even when the plaintiff prevails, these are Pyrrhic victories.[220] The payouts are extremely low[221] and the defendant is able to simply broaden its terms and conditions to include

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214 *See* Ibarra et al., *supra* note 25.

215 *See id.*

216 *See* McGeveran, *supra* note 5, at 1133–34; Ibarra et al., *supra* note 25 (arguing that a "Data as Labor" economy, where users are aware of the value of their data and compensated for it, is a better overall alternative to the current "Data as Capital" economy); LANIER *supra* note 25, at 24 ("[M]onetizing more of what's valuable from ordinary people, who turn out to be the uncompensated sources of the data that make networks valuable in the first place, will lead to a better future."); will.i.am, *We Need to Own Our Data as a Human Right—and Be Compensated for It*, ECONOMIST (Jan. 21, 2019), https://www.economist.com/open-future/2019/01/21/we-need-to-own-our-data-as-a-human-right-and-be-compensated-for-it [https://perma.cc/E7NK-8BNY] ("Personal data needs to be regarded as a human right, just as access to water is . . . . The ability for people to own and control their data should be considered a central human value. The data itself should be treated like property and people should be fairly compensated for it.").

217 *See* discussion *supra* Section II.C.

218 *See* discussion *supra* Section II.C.

219 *See* discussion *supra* Section II.B.

220 *See* Garrie, *supra* note 6.

221 *See supra* note 20.

more uses, leaving the user once again without recourse.[222] The right of publicity—historically a pragmatic right[223]—should adapt once again to societal and technological changes to capture more benefits for a wider class of people.[224]

In recent times, the concept of "privacy in public," chiefly proposed by Helen Nissenbaum, has gained ground as a way to study people's privacy interests beyond the private and public dichotomy.[225] This approach assumes that we are in a constant state of exposure, one that has both benefits and drawbacks; consequently, we need to devise tools to draw lines.[226] Nissenbaum suggests evaluating the context of the flow of information based on the principle of "contextual integrity."[227] The fundamental idea is that companies should collect people's personal data in a way that is "consistent with the context in which consumers provide [it]."[228] Since "context" is a malleable term that can be subject to disagreement,[229] Nissenbaum offers a model through which "context" can be interpreted more precisely when assessing the appropriateness of online informational flows.[230]

With respect to the right of publicity, the most relevant interpretations are "context as business model"[231] and "context as social

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222 *See* Garrie, *supra* note 6.

223 *See supra* notes 41, 99 and accompanying text; *see also* Westfall & Landau, *supra* note 19, at 122 ("It is . . . pointless to debate in general terms whether the right ought to exist at all. A much more fruitful argument would analyze the precise contours and characteristics of the right, to see whether it ought be expanded or cut back along each given dimension.").

224 According to a utilitarian view of the law, "an action is right in so far as it promotes happiness, and that the greatest happiness of the greatest number should be the guiding principle of conduct." *Utilitarianism*, LEXICO, https://www.lexico.com/definition/utilitarianism [https://perma.cc/285E-QCAE].

225 *See* Helen Nissenbaum, *Protecting Privacy in an Information Age: The Problem of Privacy in Public*, 17 LAW & PHIL. 559, 584–85 (1998).

226 *See id.* at 561–64.

227 *See id.* at 581–83.

228 *See* Nissenbaum, *supra* note 27, at 834. "Respect for context" was included, as a principle, in the Consumer Privacy Bill of Rights issued by the White House in 2012. *See* Kerry, *supra* note 175.

229 *See* Nissenbaum, *supra* note 27, at 834 ("Context is a mercilessly ambiguous term with potential to be all things to all people.").

230 *See id.* at 834–35.

231 *See id.* at 837.

domain."[232] In the first case, "context is established according to that business' aims and the means it chooses to achieve the[m]."[233] In the case of Facebook and Google, for example, the business model would be to devise digital products that people find useful, to collect extensive data about the users, and to sell access to this data for the purpose of targeted advertising.[234]

"Context as social domain" means that the context is dictated by the online social space where the user finds themself. In the same way that the physical space one enters (work, a friend's house, the doctor's office, etc.) determines the expectations of the norms in place, so does the online space.[235] These unwritten "informational norms" are dependent on the actors and the type of information involved.[236] In a medical context, for example, a patient would expect her information to be shared with a specialist as needed, but not with a marketing company, and there would be a relationship of trust between the actors.[237] "Contextual integrity is achieved when actions and practices comport with informational norms."[238]

Nissenbaum believes that while the other types of contexts should be considered, "context as social domain" should weigh heavily when evaluating whether the use of personal data is appropriate.[239] This Note argues for a similar approach in dealing with right of publicity violations. When Facebook uses people's "likes" to promote a product,[240] the message—the user's profile—is flowing inappropriately. When Groupon

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232 *See id.* at 838. The other types of contexts that will not be discussed in this Note are "context as technology system or platform" and "context as sector or industry." The interpretation of context as technology would be based on the practices that the technology allows. "Context as sector or industry" means "the set of rules or norms developed by, for and within respective sectors or industries." *Id.* at 835–38.

233 *See id.* at 837.

234 *See* AMNESTY INT'L, *supra* note 205, at 1, 9–10.

235 *See* Nissenbaum, *supra* note 27, at 838.

236 *See id.* at 838–39.

237 *See* Helen Nissenbaum, *A Contextual Approach to Privacy Online*, 140 DAEDALUS: J. AM. ACAD. ARTS & SCI. 32, 33 (2011).

238 *See* Nissenbaum, *supra* note 27, at 840.

239 *See id.* at 838–39.

240 *See* Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 805 (N.D. Cal. 2011); *see also* text accompanying notes 133–139.

harvests Instagram posts of users and links them to its website,[241] the audience has changed. In both cases, contextual integrity has been violated. This model is also in line with McKenna's "autonomous self-definition"[242] as the principal justification for the right of publicity, because both theories deal with disruptions to the way someone sets out to be seen by others. In practice, adopting the theory of "contextual integrity" would mean using it as a guiding principle in judicial opinions and including language for "respect for context" in state statutes.[243]

Three main arguments can be formulated against this approach: one based on consent and contractual autonomy, one based on the issue of vagueness, and one based on the framework's potential "conservativeness."[244] This last argument expresses the concern that contextual integrity, which is based on existing, often entrenched, norms, could stifle the introduction of beneficial, innovative uses seen as contravening these norms.[245] Nissenbaum responds to this charge by suggesting adopting a presumption in favor of the status quo that can be rebutted by evidence of the new norms' beneficial effects.[246] The benefits considered, then, would be internal to the context (including those relative to the business model) and external benefits important to society such as autonomy, democracy, and informational equality.[247] As applied to a case such as *Cohen*,[248] the defendant would have to make a case for

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241 *See supra* note 7 and accompanying text.

242 *See supra* notes 199–200 and accompanying text.

243 This may be easier in states like New York, where the statute protects both privacy and publicity interests. *See* N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2019).

244 Potential First Amendment issues are outside of this Note's scope. The assumption is the right of publicity uses of online personas would continue to be bound by the same First Amendment jurisprudence as commercial entities. *See* Ann Bartow, *Our Data, Ourselves: Privacy, Propertization, and Gender*, 34 U.S.F. L. REV. 633, 702 (2000) ("[T]o the extent personal information is treated like a copyrighted database or a trademark . . . concerns about free speech should be no greater for personal data than for informational components of intellectual property.").

245 *See* Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 101, 143–44 (2004) ("[B]y putting forward existing informational norms as benchmarks for privacy protection, we appear to endorse entrenched flows that might be deleterious even in the face of technological means to make things better.").

246 *See id.* at 145–46.

247 Other benefits Nissenbaum mentions are "prevention of information-based harm," "freedom," and "preservation of important human relationships." *Id.* at 146.

248 Cohen v. Facebook, Inc., 798 F. Supp. 2d 1090, 1092 (N.D. Cal. 2011).

the cumulative benefits of their use of the plaintiffs' name and profile to promote the "Friend Finder" service.

The second argument about vagueness is relevant, because detecting informational norms is not an objective process, and courts and legislators could reasonably disagree.[249] In *Perkins*[250] for example, distinguishing between consented and non-consented uses by looking at LinkedIn's business model and the users' expectations may not have helped the court in its complex evaluation and may have yielded the same result. On the other hand, using the theory of "contextual integrity" may have streamlined the court's reasoning by providing a framework that currently does not exist; this would improve overall consistency and predictability in the long run.[251] Furthermore, courts already use context by scrutinizing consent more closely where there are unanticipated uses of persona and inequality of bargaining power.[252] "Contextual integrity" would allow them to bring these considerations out in the open.[253]

The third argument values the parties' freedom to contract and would suggest as an alternative to the proposed approach an opt-in system guaranteeing genuine consent.[254] Such a system would be ideal for prosumers to manage their online right of publicity, as it could incorporate a payment system promoting transparency and fair compensation for the user. The social network provider would also benefit: by creating a legal market for prosumption, this activity would increase and the provider would "take a smaller share of a far larger pie."[255] But whereas this alternative is an end goal to this Note's proposal, it is unrealistic to think that companies will implement such a system of their own accord, since their practices are too entrenched and their

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249 *See* Nissenbaum, *supra* note 245, at 156.

250 *See supra* notes 140–144.

251 *See* ROBERT E. KEETON, VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW 11 (1969) ("[O]ur legal tradition assigns to courts a creative role in improving law, as well as a guardian's role in preserving its continuity and predictability.").

252 *See supra* note 111 and accompanying text.

253 *See supra* note 112 and accompanying text.

254 *See* McGeveran, *supra* note 5, at 1158–59 (arguing that affirmative consent would resolve issues of inadvertent disclosure, disparity in bargaining power, unfairness, and deception).

255 *See* Lanier & Weyl, *supra* note 14, at 17.

interests too large.[256] In the meanwhile, information asymmetries do not allow for informed consent.[257]

This is why this Note also proposes a different system of statutory damages allowing plaintiffs easier access to recourse. In terms of injury, misappropriation of persona should be considered a harm in itself, following the court's approach in *Perkins*[258] without the need to show economic injury or mental harm.[259] The damages accorded should reflect the market for the types of endorsements hereby discussed and therefore provide a range with a lower floor than the current statutes.[260] The calculation should take into account the value of the overall endorsement to the company as well as to the individual user.

Reconceptualizing the injury and setting a lower floor for damages would have changed the outcome in favor of the plaintiffs in *Cohen*[261] and would have prevented the litigation subsequent to *Fraley* resulting in a fifteen-dollars-per-user payout.[262] It would create uniformity among states, which would also permit the certification of some class action lawsuits.[263] Even though some obstacles would remain, like conflict between the states' interpretation of "persona,"[264] plaintiffs and attorneys would be incentivized to initiate lawsuits against tech giants compared to

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256 *See id.* at 5 ("The foremost challenge in implementing data dignity is the yawning gap between big tech platforms and the individuals they harvest data from. If we asked big tech alone to make the change, it would fail: Too many conflicts of interest exist, and the inevitable concentration of power these platforms create is inimical to competitive markets and an open society.").

257 *See* text accompanying notes 175–182.

258 *See supra* note 144 and accompanying text.

259 *See supra* text accompanying notes 152–155.

260 *See supra* note 155. A relatively high floor of $750 or $1,000 is an impediment because the court will consider it incommensurate with the injury. *See, e.g.*, Fraley v. Facebook, Inc., 966 F. Supp. 2d 939, 944 (N.D. Cal. 2013).

261 Cohen v. Facebook, Inc., 798 F. Supp. 2d 1090, 1092–93 (N.D. Cal. 2011); *see also* notes 132–133 and accompanying text.

262 *See supra* note 20.

263 *See supra* note 12 and accompanying text. Injury and damages were an issue preventing certification in *Marshall v. National Football League*, 787 F.3d 502, 514 (8th Cir. 2015). *See supra* note 21. The issue of entitlement to statutory damages was also an obstacle to class action certification in *Lightbourne v. Printroom Inc.*, 307 F.R.D. 593, 602–03 (C.D. Cal. 2015).

264 *See* U.S. COPYRIGHT OFFICE, *supra* note 39, at 115–16. These hurdles could likely only be overcome by a federal statute with at least a common floor with regard to the scope of the right, but at the moment this seems unlikely. *Id.* at 117–18.

the current system. In general, it would be easier for the non-celebrity plaintiff to bring a right of publicity claim, which would be in the interest of fairness. The recent number of cases initiated by professional models whose photos have been used to promote strip clubs on social media without their consent is alarming.[265] If this happened to a non-model who posted a bikini picture on Instagram, the current formulation of the right of publicity would not encourage her to vindicate her rights.[266]

Finally, an overarching critique to this Note's proposal could be that a right of publicity as outlined above is too close to the right to privacy,[267] and so why not simply let privacy law take care of misappropriations of online personas? But privacy regulations are not concerned with the economic incentives that are so fundamental to this proposal.[268] It is the very "commercial" nature of the right of publicity that allows it to act as a "market regulator" by redirecting value towards the user and promoting better future online practices. On the other hand, it is appropriate to draw on concepts like "contextual integrity" from the study of privacy, because the issues arising from being "priva[te] in public"[269] concern both commercial and non-commercial uses. The appropriateness of an informational flow is at stake both when a Google Street View camera takes a picture of someone out in the street,[270] and when a user's "published" Instagram post is harvested by a third party for profit.[271]

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265 *See supra* note 105.

266 The plaintiff would have difficulty proving commercial value and injury. *See* discussion *supra* Section II.B.

267 McCarthy, for example, states that we are not in a "parallel universe in which courts expanded the remedies for the appropriation-type right of privacy to include commercial injury under the 'privacy' label . . . . Instead, the right of privacy remained frozen in its 'mental distress' mold." 1 MCCARTHY & SCHECHTER, *supra* note 1, § 1:39.

268 *See* Lanier & Weyl, *supra* note 14, at 13–14.

269 *See* Nissenbaum, *supra* note 225.

270 Helen Nissenbaum gives this as an example of how there can be a privacy violation in public. *See* Alexis C. Madrigal, *The Philosopher Whose Fingerprints Are All over the FTC's New Approach to Privacy*, ATLANTIC (Mar. 29, 2012), https://www.theatlantic.com/technology/archive/2012/03/the-philosopher-whose-fingerprints-are-all-over-the-ftcs-new-approach-to-privacy/254365 [https://perma.cc/D36L-U928].

271 *See supra* note 159 and accompanying text.

CONCLUSION

This Note proposes a pragmatic approach to the right of publicity that asks how the right can remain true to its intended function and increase social welfare in a dramatically changed world. A reconceptualization of the right of publicity based on the principle of "contextual integrity" does not stray far from the courts' current one, but represents a conceptual leap because it places the image-holder—and not the corporation—at the heart of the inquiry, both as an individual and as a member of society. This promotes transparency over online flows of information and contributes to a more equal balance of power between consumers and corporations. It promotes the identity-holders' commercial interests by encouraging companies to set up a system that compensates users for the commercial use of their persona. It benefits companies by creating vast new revenue streams they can profit from.