

December 2010

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### Recommended Citation

Andrew M. Jung, *Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites*, 86 Chi.-Kent L. Rev. 381 (2011).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol86/iss1/16>

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# TWITTERING AWAY THE RIGHT OF PUBLICITY: PERSONALITY RIGHTS AND CELEBRITY IMPERSONATION ON SOCIAL NETWORKING WEBSITES

ANDREW M. JUNG\*

## INTRODUCTION

Born from a lineage that includes Facebook and MySpace, Twitter is now one of the most popular online social networking fads.<sup>1</sup> It has drawn a wide range of users, from average Joes to world leaders – the British royal family has an official Twitter account, as do President Obama and Venezuela’s President Hugo Chavez.<sup>2</sup> Twitter invites users to “Discover what’s happening right now, anywhere in the world,”<sup>3</sup> and only asks users one question: “What’s happening?”<sup>4</sup> Twitter is commonly described as a “micro-blogging” site, as it has an overall feel similar to a simplified blog.<sup>5</sup> Potential users can navigate to <twitter.com> and create a free profile with little more than an email address. A user can then post messages to his account called “tweets” that can be read by “followers,” or if a user prefers, anyone in the world that stumbles onto that user’s account.

But the site has grown into more than a place for friends to announce the contents of their most recent meal and their love of the TV show “Deal

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1. Twitter is gaining popularity so quickly that within three years of its launch, it claims more than 37 million users worldwide. See William Coats and Jennifer Gossain, *What Are You Doing Legally on Twitter?*, CORP. COUNS., Sept. 17, 2009, available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202433859726>.

2. The British monarchy uses, appropriately enough, Twitter account “BritishMonarchy.” See Rory Cellan-Jones, *Royal Household Turns to Twitter*, BBC NEWS (July 10, 2009), <http://news.bbc.co.uk/1/hi/technology/8144381.stm>. President Obama uses “BarackObama.” See Twitter Account of BarackObama, TWITTER, <http://twitter.com/barackobama> (last visited Sept. 11, 2010). Hugo Chavez uses the account “Chavezcandanga.” See *Venezuela’s Hugo Chavez takes to Twitter*, USA TODAY (Apr. 29, 2010), [http://www.usatoday.com/tech/world/2010-04-28-venezuela-chavez-twitter\\_N.htm](http://www.usatoday.com/tech/world/2010-04-28-venezuela-chavez-twitter_N.htm).

3. Home Page, TWITTER, <http://twitter.com> (last visited Sept. 11, 2010).

4. About Page, TWITTER, <http://twitter.com/about> (last visited Sept. 11, 2010).

5. See, e.g., Mark Glaser, *Twitter Founders Thrive on Micro-Blogging Constraints*, PBS MEDIASHIFT (May 17, 2007), <http://www.pbs.org/mediashift/2007/05/twitter-founders-thrive-on-micro-blogging-constraints137.html> (discussing, shortly after Twitter started gaining widespread popularity, what Twitter is and how its founders envisioned its use).

or No Deal.”<sup>6</sup> It is rapidly becoming a tool for finding and applying for jobs,<sup>7</sup> and for getting better customer service from airlines.<sup>8</sup> It has become a popular way for athletes and celebrities to connect to fans.<sup>9</sup> Politicians use it to promote themselves and their policy stances.<sup>10</sup> Some say it helps people form meaningful relationships.<sup>11</sup> Yet, all of this is accomplished with surprising brevity—users are limited to “tweeting” in 140 characters or less. In fact, the simplicity of Twitter’s interface is one of the reasons so many users are choosing to use the website.<sup>12</sup>

Yet for all of its promise, Twitter raises a host of legal issues.<sup>13</sup> One of the most prominent issues relates to a phenomenon called “twitterjacking,” where someone creates a Twitter account pretending to be a famous celebr-

6. See, e.g., Melissa Gray, *Active Twitter User Celebrates 104th Birthday*, CNN (Sept. 8, 2009), <http://www.cnn.com/2009/TECH/09/07/104.twitter/index.html> (describing the Twitter usage of Britain’s Ivy Bean, who at 104-years-old may be the oldest active Twitter user).

7. For examples of Twitter being used as a job-search tool, see, e.g., Jessica Dickler, *Hired! I got My Job Through Twitter*, CNN (Sept. 4, 2009), [http://money.cnn.com/2009/09/03/news/economy/hired\\_twitter/index.htm](http://money.cnn.com/2009/09/03/news/economy/hired_twitter/index.htm) (calling Twitter “an essential element of the job hunt” in the current economy). See also *Companies Turn to Twitter While Hiring*, WJXT NEWS (Sept. 8, 2009), <http://www.news4jax.com/news/20800711/detail.html>.

8. See Steve Almasy, *Get Results By Social Networking With Airlines*, CNN (Sept. 14, 2009), <http://www.cnn.com/2009/TRAVEL/09/14/airlines.social.media/index.html>.

9. Notably, professional football players have flocked to Twitter. In fact, Twitter is so popular in the NFL that the league has banned the use of cell phones and portable media devices immediately prior to, and during games, and many teams limit when and where players can tweet because some have planned to post during games. See Jim Trotter, *NFL Embraces New World of Twitter*, SPORTS ILLUSTRATED (Sept. 4, 2009), [http://sportsillustrated.cnn.com/2009/writers/jim\\_trotter/09/04/twitter/index.html](http://sportsillustrated.cnn.com/2009/writers/jim_trotter/09/04/twitter/index.html). Additionally, the website Twitter-Athletes.com promotes itself as “a directory of professional athletes tweeting on twitter” and lists the accounts of over 1000 professional athletes, as well as a list of “Top 10 Twitter Athletes.” See *Top 10 Twitter Athletes*, TWITTER-ATHLETES.COM, <http://www.twitter-athletes.com/TopAthletes.cfm> (last visited Sept. 11, 2010). Professional basketball player Shaquille O’Neil (username “THE\_REAL\_SHAQ”) currently leads the list with well over three million followers. *Id.*

10. See, e.g., Don Reisinger, *Politicians who Get Twitter... and Some who Don’t*, CNET (MAY 4, 2009), [http://news.cnet.com/8301-17939\\_109-10232667-2.html](http://news.cnet.com/8301-17939_109-10232667-2.html) (discussing federal politicians); Adam Brandolph, *Social Media Helps Politicians Get Messages to Voters*, PITTSBURGH TRIB.-REV., Sept. 6, 2010, available at [http://www.pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/s\\_698154.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/s_698154.html) (discussing local politicians in Pennsylvania).

11. See Anna Shcherbakova, *In Twiterville, the Details of Your Life Do Matter*, CNN (Sept. 8, 2009), <http://www.cnn.com/2009/TECH/09/08/twitter.shel.israel/index.html>.

12. See Coats and Gossain, *supra* note 1. See also Gray, *supra* note 6.

13. See Coats and Gossain, *supra* note 1 (mentioning the right of publicity, defamation, and free speech). See also Stephen E. Older, *Corporate Disclosure: The Twitter Effect*, N.Y.L.J., Sept. 16, 2009, available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202433819094> (discussing violating the Securities and Exchange Commission’s general antifraud rules by reporting corporate financial information via tweets lacking proper disclosures); Denise Mann, *Medical Students Reckless on Internet, Sometimes at Patients’ Expense*, CNN HEALTH (Sept. 22, 2009), <http://www.cnn.com/2009/HEALTH/09/22/medical.students.internet/index.html> (discussing potential violations of patient privacy by medical students posting patients’ confidential medical or personal information to social networking websites).

ity. Celebrities like Tina Fey, Christopher Walken,<sup>14</sup> and Kanye West<sup>15</sup> have been victims of “twitterjacks.” So have Microsoft founder Bill Gates and former Secretary of State Condoleeza Rice.<sup>16</sup> Perhaps the most commonly impersonated group has been professional athletes. A number of members of the Washington Capitals hockey team were impersonated,<sup>17</sup> as were basketball player Shaquille O’Neal<sup>18</sup> and a number of professional football players.<sup>19</sup>

Tony La Russa, the manager of Major League Baseball’s St. Louis Cardinals was also the victim of Twitter impersonation, but is, to date, the only celebrity that has chosen to bring his case to court.<sup>20</sup> La Russa sued Twitter and his unidentified impersonators, alleging the fake Twitter account violated La Russa’s trademarks, his right of publicity, and his privacy rights, as well as constituted “cybersquatting” prohibited by the Anticybersquatting Consumer Protection Act.<sup>21</sup> La Russa included Twitter in his suit on the basis that Twitter allowed the assumption that the “Tony La Russa” Twitter account, which included a variety of vulgar and potentially insulting tweets, was authorized or created by the baseball manager.<sup>22</sup> Be-

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14. Coats and Gossain, *supra* note 1.

15. Dan Frommer, *Twitter Deletes Fake Kanye West Account After Kanye Freaks Out*, BUS. INSIDER (May 12, 2009), <http://www.businessinsider.com/kanye-west-furious-at-twitter-over-fake-accounts-2009-5>.

16. Coats and Gossain, *supra* note 1.

17. See Tarik El-Bashir, *Fake Twitter Accounts Draw Caps’ Attention*, WASH. POST, Sept. 16, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/15/AR2009091503196.html> (discussing fake profiles for three different Capitals players).

18. *Id.*

19. See Trotter, *supra* note 9 (noting the NFL’s security department routinely assists players in removing fake Twitter pages).

20. Recently, a British blogger named Donal Blaney also sued for injunctive relief in an English court to force Twitter to remove what he claims is a fake profile containing offensive statements. See *Court Order Served Over Twitter*, BBC NEWS (Oct. 1, 2009), <http://news.bbc.co.uk/2/hi/technology/8285954.stm>. Interestingly, both Blaney and Tony La Russa do have something in common: both are lawyers. See *id.*; Peter Lattman, *Tony La Russa, Esq.*, WALL ST. J. LAW BLOG (Oct. 11, 2006), <http://blogs.wsj.com/law/2006/10/11/tony-la-russa-esq>. Around the same time Blaney took action in the UK, Oneok Inc., a natural gas distribution company, brought suit against Twitter in Oklahoma federal court claiming trademark infringement over a Twitter account allegedly posing as the company’s official account. See Rod Walton, *Twitter, ONEOK Come to Terms*, TULSA WORLD (Sept. 17, 2009), [http://www.tulsaworld.com/business/20090917\\_49\\_A1\\_Twitte799174](http://www.tulsaworld.com/business/20090917_49_A1_Twitte799174) (noting also that the lawsuit was quickly dismissed by ONEOK); Complaint, ONEOK, Inc. v. Twitter, Inc., No. 4:09-cv-00597-TCK-TLW (N.D. Okla. filed Sept. 15, 2009), 2009 WL 3146140.

21. Complaint at 3–6, *La Russa v. Twitter, Inc.*, No. CGC-09-488101 (Cal. Super. Ct. filed May 6, 2009), 2009 WL 1569936.

22. See *id.* at 2–3.

fore a judge could decide any of these issues, La Russa opted to dismiss his lawsuit.<sup>23</sup>

The right of publicity is a creature of state law, and exists in statutes in nineteen states and in common law in at least twenty-eight.<sup>24</sup> The right is predominantly considered an economic property right and is generally defined as the right to control and license the use of a person's image, likeness, or name.<sup>25</sup> However, what seems like a simple property law concept is often anything but. This note examines the application of the right of publicity to social networking-based impersonation, as illustrated by the *La Russa* lawsuit. Primarily the note will focus on the website Twitter because it poses some unique issues to the right of publicity that sites like MySpace, Facebook, and LinkedIn do not.<sup>26</sup>

Part I of this note traces the origin of the right of publicity and highlights both its foundation in the protection of celebrity privacy and its evolution into a functionalist property right. Part II examines the modern expansion of the right to include a "right to evoke" and protection against non-economic uses of an identity. Part III uses the *La Russa* lawsuit to illustrate the problems in protecting a persona on social networking websites. This section also argues that copyright, trademark, and unfair competition laws are not particularly well-adapted for such a situation. And finally, Part IV argues that the right of publicity is the most useful tool for protecting celebrity personality rights on social networking sites, provided that the right is closely tied to its roots in privacy protection and functionalist reasoning. Ultimately, this section argues that a "fair use" defense borrowed from copyright law is a particularly useful tool to help limit the scope of the right and prevent unwarranted celebrity overprotection.

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23. See Notice of Dismissal of Complaint With Prejudice, *La Russa v. Twitter, Inc.*, No. CGC-09-488101 (N.D. Cal. June 26, 2009) (notice of voluntary dismissal), available at <http://www.citmedialaw.org/threats/la-russa-v-twitter-inc>.

24. Professor Jonathan Faber keeps an up-to-date listing of right of publicity statutes at his website [rightofpublicity.com](http://rightofpublicity.com). See Jonathan Faber, *Statutes*, RIGHTOFPUBLICITY.COM, <http://rightofpublicity.com/statutes> (last visited Sept. 12, 2010).

25. See Larry Moore, *Regulating Publicity: Does Elvis Want Privacy?*, 5 DEPAUL-LCA J. ART & ENT. L. 1 (2005). See also 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28.1 (4th ed. 2004) (defining the right of publicity as "the inherent right of every human being to control the commercial use of his or her identity").

26. See *infra* at Section III. The note will address other sites besides Twitter, but as Section III discusses, most of the major issues are the same across platforms.

## I. THE CREATION OF THE RIGHT OF PUBLICITY: A TALE OF TWO THEORIES

### A. *Privacy and Property*

The “right of publicity” was first judicially recognized in 1953 in the Second Circuit case *Haelan Laboratories, Inc. v. Topps Chewing Gum*.<sup>27</sup> However, the right to protect the unauthorized use of a persona had been previously recognized in other forms.<sup>28</sup> As early as the 1890s, the right was framed as part of an emerging dignitary tort.<sup>29</sup> In the late nineteenth century, Samuel D. Warren and future Supreme Court Justice Louis Brandeis argued in an influential law review article that individuals possessed a right “to be let alone”—primarily from an emerging gossip-mongering news media.<sup>30</sup> Synthesizing a line of English cases, Warren and Brandeis called their new right to protect personalities the “right to privacy.”<sup>31</sup> They ultimately decided that the link between property and personality was too attenuated,<sup>32</sup> but that publication of details about or images of a person could cause emotional distress for which the common law should provide a remedy.<sup>33</sup>

Yet for all the scholarly ink spilled over the right of privacy in the late nineteenth and early twentieth centuries,<sup>34</sup> courts were disinclined to recognizing invasion of privacy as a valid tort.<sup>35</sup> For example, in 1902, the highest court in New York held in *Roberson v. Rochester Folding Box Co.* that an invasion of privacy tort did not exist under New York law, and therefore could not help the plaintiff prevent the defendant from using the plaintiff’s image to promote the sale of flour.<sup>36</sup> The New York legislature responded to public outcry over cases like *Roberson* and enacted a privacy cause of action for “[a]ny person whose name, portrait, picture or voice is used within [New York] for advertising purposes or for the purpose of

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27. David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 *CARDOZO ARTS & ENT. L.J.* 71, 73 (2005).

28. *Id.* at 76.

29. *See id.* (noting that due to an influential law review article published in 1890, some courts and commentators believed publicity rights could be enforced through torts for invasion of privacy).

30. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193, 194–96 (1890).

31. *Id.* at 213–14.

32. *Id.* at 213.

33. *Id.* at 195–96.

34. *See* Moore, *supra* note 25 at 4–5 (discussing a direct critique of Warren and Brandeis by scholar Herbert Spencer Hadley and an article by Roscoe Pound).

35. *See, e.g.*, *Roberson v. Rochester Folding Box Co.*, 64 *N.E.* 442, 443 (N.Y. 1902); *Henry v. Cherry*, 73 *A.* 97, 108–09 (R.I. 1909).

36. 64 *N.E.* at 447–48.

trade without written consent . . . .”<sup>37</sup> But even after this statute was enacted and the right of privacy gained traction in the common law of a few states, the right of privacy doctrine was unrefined and inconsistent.<sup>38</sup>

The problems of protecting famous personas through a right of privacy soon became readily apparent. Conceptually, the doctrine of privacy, which protects individuals from being thrust into the public eye, is at odds with the idea of celebrity, which necessitates that a person is widely known by the general public and commonly in the spotlight.<sup>39</sup> And celebrities, in order to attain fame and fortune, or sustain it, likely do not want to be shielded from public view. This concept led to a waiver defense whereby well-known plaintiffs were barred from recovery because, by virtue of their fame, they were considered to have waived their privacy rights.<sup>40</sup> And, even when celebrities could show that they had suffered emotional damage from the unauthorized use of their likeness, damages were limited to the extent of that mental injury, rather than the commercial value gained by the unauthorized use.<sup>41</sup>

The eventual split between personality rights and the right of privacy that started in *Haelan* in the early 1950s was foreshadowed by some cases and commentators who justified personality rights with a natural property rights theory.<sup>42</sup> In the 1907 case *Edison v. Edison Polyform Manufacturing Company*, Thomas Edison sued a manufacturer using both Edison’s name and picture on the label for its product, a pain remedy called “polyform.”<sup>43</sup> The court enjoined the defendant from using Edison’s name and likeness, reasoning that “the term ‘property right’ is not to be taken in any narrow sense” and that Edison’s right of privacy claim rested somewhat in the inherent property rights in his being.<sup>44</sup> In 1915, Roscoe Pound explained that privacy was part of a broader concept of personality and analogized

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37. Anthony L. Pessino, Note, *Mistaken Identity: A Call to Strengthen Publicity Rights for Digital Personas*, 4 VA. SPORTS & ENT. L.J. 86, 98 (2004).

38. See Moore, *supra* note 25, at 4–7 (citing cases like *Roberson* and *Henry v. Cherry*, as well as cases that developed the common law right in various states, but also noting the disagreements between influential commentators like Warren and Brandeis, Hadley, Pound, Melville Nimmer, and William Prosser).

39. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204 (1954).

40. *Id.*

41. Stacey L. Dogan & Mark A. Lemley, *What The Right of Publicity Can Learn From Trademark Law*, 58 STAN. L. REV. 1161, 1171 (2006).

42. Westfall and Landau, *supra* note 27, at 76.

43. 67 A. 392, 392–93 (N.J. Ch. 1907).

44. *Id.* at 394–95.

that the invasion of privacy was an infringement on one's natural property rights in his personality.<sup>45</sup>

But while cases like *Edison* had already established the right to use a likeness to make money and the right to exclude others from making such uses,<sup>46</sup> it was not until after *Haelan* that personality rights began to take shape as a kind of property right. *Haelan* itself dealt with the right of publicity in a very functionalist manner—it created a new right under the common law of New York that was in large part a reflection of common practices in the entertainment industry.<sup>47</sup> In *Haelan*, a professional baseball player signed an exclusive baseball card contract with the plaintiff company.<sup>48</sup> But, the defendant company printed a competing baseball card with the same player's image.<sup>49</sup> The real issue in the case was not whether the baseball player could prevent the unauthorized publication of his name and image; existing New York privacy rights would have been sufficient for that purpose. Instead, it was whether the player could properly assign the commercial rights in his likeness to Haelan, thus giving Haelan, rather than the player, the ability to sue for unauthorized commercial use of that likeness.<sup>50</sup> The court found that the player's "right of publicity" was assignable to Haelan, and thus made personality rights alienable just like property rights.<sup>51</sup> Yet, in *Haelan*, the court specifically refused to call the right of publicity a "property right."<sup>52</sup>

### B. Functionalism and Formalism

This hesitance to actually define the right of publicity shows the functionalism inherent in the right of publicity's earliest conception. Functionalism as a legal philosophy can be understood as favoring induction of rules from policy and practice, while its antipode, formalism, works through deduction from authoritative texts, structures, or definitions.<sup>53</sup> Functionalist legal reasoning is generally aimed toward pragmatic values

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45. See Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 362–64 (1915). See also Moore, *supra* note 25, at 5–6.

46. Westfall and Landau, *supra* note 27, at 76.

47. *Id.* at 76–77. Functionalist legal reasoning is discussed *infra* part I.B.

48. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867 (1953).

49. *Id.*

50. Westfall and Landau, *supra* note 27, at 77.

51. *Id.* at 76.

52. See *Haelan*, 202 F.2d at 868 ("Whether it be [labeled] 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").

53. See William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998).



like adaptability and efficacy in the law and often seeks to create flexible standards and balancing tests, rather than the bright-line, definitional rules of formalism.<sup>54</sup> The functionalism in the *Haelan* formulation of the right of publicity is also evident when considering that baseball players routinely signed exclusive contracts with baseball card companies, and had been doing so for some time.<sup>55</sup> Additionally, movie studios licensed the images of their actors to advertisers and merchandisers,<sup>56</sup> despite the fact that courts, using a right of privacy conceptualization of the interests involved, declared such agreements unenforceable.<sup>57</sup> Therefore, *Haelan* simply created a new rule to conform legal norms with common business practices that, because of their popularity in spite of judicial hostility, proved to be “efficient and useful ways to organize entertainment-based endorsements in the modern world.”<sup>58</sup> And as scholars have rightfully observed, “it is often more efficacious for legal norms to reflect business usage than to try and reshape it.”<sup>59</sup>

A functionalist conceptualization of the right of publicity not only helped the initial expansion of the right, but also led to limits on that expansion. *Haelan* created the right of publicity to give individuals a commercial personality right that could be transferred to others. Yet, in 1962 the Second Circuit had to decide in *Miller v. Commissioner of Internal Revenue* whether a publicity right license by Glenn Miller’s widow to a movie production company was “property” for income tax purposes.<sup>60</sup> The court held that publicity rights were not property, finding support in the *Haelan* court’s avoidance of “terming” publicity rights as property rights.<sup>61</sup> The *Miller* court was ultimately afraid of the “unintended consequences which might follow from such classification”<sup>62</sup> and instead relied on the social policy against giving preferential treatment under the tax code too freely.<sup>63</sup> While seemingly at odds with the outcome in *Haelan*, *Miller* expressed the same kind of functionalist reasoning inherent in *Haelan* and echoed the *Haelan* court’s position that the scope of publicity rights should

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54. *Id.* at 21–22.

55. Westfall and Landau, *supra* note 27, at 77.

56. See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 166 (1993).

57. Westfall and Landau, *supra* note 27, at 78 & n.25.

58. *Id.* at 78.

59. *Id.*

60. 299 F.2d 706, 707–08 (2d Cir. 1962).

61. *Id.* at 709–10.

62. See *id.* at 709 n.4, 710.

63. Westfall and Landau, *supra* note 27, at 80; see also *Miller*, 299 F.2d at 711.

be determined by looking to policy considerations rather than trying to fit the rights into some kind of “property” label.<sup>64</sup>

But while the *Haelan* court created a narrow property-like right to fit social and business conventions, its ruling drastically changed the personality rights landscape. *Haelan* opened the door for the modern conceptualization of the right of publicity as full-fledged property.<sup>65</sup> As one scholar states, there is an important legal distinction between the way personal rights [like the right of privacy] and property rights are treated under the law.<sup>66</sup> Personal rights, based on feelings and emotional harm, are not transferable or descendible on death because, to put it somewhat crassly, a living person cannot assign emotional distress to someone else and a dead person no longer has any emotions to be distressed. Property rights, on the other hand, are both assignable and descendible because the value in the right exists separately from its owner.<sup>67</sup>

Once the groundwork for thinking of the right of publicity as property had been laid, academic commentators in the 1950s and 1960s continued to develop the right, but switched from a functionalist to a formalist approach. Prosser straddled the line between functionalism and formalism. He wrote that “[i]t seems quite pointless to dispute over whether such a right is to be classified as property,”<sup>68</sup> yet he went ahead and joined the dispute anyway. However, in somewhat of a step back in the evolution of the right of publicity, Prosser put publicity rights into his four-part<sup>69</sup> grouping of privacy torts, calling it “appropriation.”<sup>70</sup> And, through essentially formalist reasoning, he stated that the interest protected by the right is “a proprietary one,” rather than a mental one, and thus should be assignable.<sup>71</sup>

In contrast, Nimmer noted that the right of publicity does not fit with the conception of privacy rights because those seeking to protect the commercial value in their persona are not simultaneously seeking to protect

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64. Westfall and Landau, *supra* note 27, at 80.

65. This modern conceptualization was informed by cases like *Haelan* and *Miller*, as well as leading scholars of the time those two cases were decided. *See id.*

66. Moore, *supra* note 25, at 7.

67. *Id.*

68. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 406 (1960).

69. Prosser’s privacy rights included: 1) intrusion, i.e. the unreasonable and offensive interference with the solitude or seclusion of another; 2) public disclosure of private facts, i.e. the publication of private, truthful information about another that gives offensive publicity to this information; 3) false light, i.e. the presentation of information to the general public in such a manner as to convey a false and offensive impression of the individual; and 4) appropriation, i.e. the use of another person’s name or likeness for one’s own benefit. *See id.* at 389; Moore, *supra* note 25, at 6.

70. *See* Westfall and Landau, *supra* note 27, at 80.

71. *See* Prosser, *supra* note 68, at 406–07.

their privacy.<sup>72</sup> He also distinguished publicity rights from unfair competition, trademark, contract, and defamation theories by finding that the typical celebrity plaintiff in a right of publicity case could not be afforded an adequate remedy under any of the doctrines.<sup>73</sup> Further, Nimmer felt that there was often value created in the persona of a celebrity by the expenditure of effort, skill, and perhaps even money,<sup>74</sup> and thus tied the right of publicity to a Lockean theory of property rights.<sup>75</sup> Nimmer felt that the right of publicity had features of a property right, and thus should be afforded the same protections as any other commercial property right.<sup>76</sup>

Similarly, Harold Gordon, another influential academic commentator, wrote in 1960 that the right of publicity involved concrete monetary damages, rather than injured feelings, and thus must be classified as property.<sup>77</sup> But Gordon went further; he stated that since publicity rights must be thought of as property rights, they must also be inheritable.<sup>78</sup> This “property syllogism”—essentially reasoning that because the right of publicity has characteristics as a property right, it must be property, and therefore it must have all sorts of other property characteristics—was used by academics and courts to further expand the right of publicity through the latter half of the 20th century.<sup>79</sup> And, as discussed *infra* in Section II, formalistic reasoning and the property syllogism played a large part in moving the right of publicity away from its social policy-based functionalist roots and towards a disjointed modern formulation that is overprotective of celebrities, and as will be argued *infra* in Section III, ill-equipped to handle emerging technologies like social networking websites.

## II. MODERN COMMON-LAW EXPANSION OF THE RIGHT OF PUBLICITY: RACECARS, ROBOTS, AND . . . PORTABLE TOILETS

### A. *Background Common-Law Principles*

Since the right of publicity is a state law creation, its evolution and expansion has taken place at different speeds in different parts of the coun-

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72. Nimmer, *supra* note 39, at 204–07.

73. *See id.* at 210–15.

74. *See Moore, supra* note 25, at 9.

75. Westfall and Landau, *supra* note 27, at 82.

76. *Id.*

77. *See* Harold R. Gordon, *Right of Property in Name, Likeness, Personality, and History*, 55 NW. U. L. REV. 553, 607 (1960). *See also* Westfall and Landau, *supra* note 27, at 82.

78. Gordon, *supra* note 77, at 612–13.

79. *See* Westfall and Landau, *supra* note 27, at 81–86, 89.

try.<sup>80</sup> States having both a common-law and a statutory right of publicity can lead to some confusion.<sup>81</sup> In some states like California, both rights co-exist relatively peacefully.<sup>82</sup> And in others, notably New York, legislatures have overruled common-law rights via statute.<sup>83</sup>

Yet, there are some basic principles that underlie most states' right of publicity. The law of the state of Georgia illustrates such principles well.<sup>84</sup> In 1966, the Court of Appeals of Georgia established the right of publicity under Georgia common law in *Cabaniss v. Hipsley*.<sup>85</sup> In that case, the plaintiff, an exotic dancer, gave a publicity photo of herself to Atlanta clubs where she performed so that the clubs could advertise her performances.<sup>86</sup> She sued *inter alia* a club where she did not perform for using the publicity photo in one of its own advertisements for a performance of a different dancer.<sup>87</sup> The defendant's advertisement had mistakenly claimed that the plaintiff was the dancer at the defendant's club.<sup>88</sup> The court looked to Prosser's four-pronged conceptualization of the right of privacy, and relying on the fourth prong (Prosser's "appropriation" tort) and on *Haelan*, found that a right of publicity cause of action did exist under Georgia law and ordered a remand for a judgment on the defendant club's use of the plaintiff's likeness.<sup>89</sup>

The *Cabaniss* court articulated that the right of publicity requires: 1) the defendant's appropriation or use of the plaintiff's name or likeness; 2) the appropriation was to the defendant's advantage; 3) the plaintiff did not consent to defendant's use or appropriation; and 4) a resulting injury to the

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80. For an examination of the evolution of the right of privacy in a select few states, see Moore, *supra* note 25, at 9–28.

81. California is one state that has both statutory and common law rights. Tennessee is another such state. New York's statute is technically a right of privacy statute. See Moore, *supra* note 25, at 17, 21–25.

82. See, e.g., *Michaels v. Internet Entm't Grp., Inc.*, 5 F.Supp.2d 823, 836 (C.D. Cal. 1998) ("The statutory right complements, rather than codifies, the common law right. This distinction is important because the common law right protects a broader range of interests against a broader range of infringing conduct than does the statutory right").

83. See, e.g., *Stephano v. News Group Publ'ns*, 474 N.E.2d 580, 584 (NY 1984). Interestingly, this case rejected the Second Circuit's decision in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*—one of the landmark cases of the right of publicity doctrine—by declaring that *Haelan's* treatment of a common-law right of publicity was not state law, and that the right of publicity is an aspect of New York's right of privacy statute. See *id.*

84. Georgia was one of the first states to establish a common-law right of publicity, and its law is a good example of generalized right of publicity laws because it lacks the sort of common law/statutory law tension present in states like New York, and its development has not been as extreme as a state like California. See Moore *supra* note 25, at 26–28.

85. *Cabaniss v. Hipsley*, 151 S.E.2d 496, 503–06 (Ga. Ct. App. 1966).

86. *Id.* at 501.

87. *Id.* at 498–99.

88. *Id.* at 499.

89. *Id.* at 503–10.

plaintiff.<sup>90</sup> This formulation of the right of publicity accounts for the most basic elements of such a right. It requires an unauthorized use, but is limited to a “name or likeness.” This would easily encompass the use of a person’s given name, such as in the *Edison* case, or the use of a person’s picture or portrait as in the *Robertson* case. However, it would not include, at least on its face, the use of images or words that would merely remind a viewer of a celebrity. Nor does it seem to require the unauthorized use to be completely commercial in nature. It does not require that a putative plaintiff be a celebrity. And furthermore, it does not account for any property-like rights such as assignability or descendibility. Luckily for famous plaintiffs, in states where these gaps in the general right of publicity doctrine became an issue, courts and legislatures were often willing to expand the right to both protect more aspects of a celebrity’s persona and become more property-like.

California law is a prime example where the legislature and courts have expanded the right of publicity to protect more aspects of a persona. The California common-law right of publicity was the first to develop in the state<sup>91</sup> and has elements very similar to the Georgia common-law right of publicity. In California, a right of publicity cause of action, sometimes called an action for misappropriation of a plaintiff’s name or likeness, requires: 1) the defendant’s use of the plaintiff’s identity; 2) appropriation of plaintiff’s name or likeness to defendant’s advantage, commercial or otherwise; 3) lack of consent; and 4) resulting injury.<sup>92</sup>

However, unlike Georgia, California also has a statutory right of publicity. California Civil Code Section 3344(a) created protection against an unauthorized use of a “name, voice, signature, photograph, or likeness,”<sup>93</sup> which includes “any photograph or photographic reproduction, still or moving, or any videotape or live television transmission.”<sup>94</sup> This right protects “any person” as long as the person is “readily identifiable,”<sup>95</sup> subject to limited exceptions like where photographs or likenesses are used for news, public affairs, sports broadcasts or accounts, or political campaigns.<sup>96</sup>

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90. *Id.* at 503–06.

91. *See Moore, supra* note 25, at 21–22.

92. *See, e.g., Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 811 (9th Cir. 1997).

93. CAL. CIV. CODE § 3344(a) (West 2010).

94. *Id.* at § 3344(b).

95. *Id.*

96. *See id.* at §§ 3344(c)–(f). Publicity rights would also be subject to limitations set by the First Amendment, even if the precise contours of such limitations are arguably unclear. *See infra* Section IV.

Under this statute, a putative plaintiff does not have to be a celebrity. And considering Section 3344(a) states that a defendant can be liable for the greater of \$750 per unauthorized use or actual damages suffered by the plaintiff (including defendant's profits as a result of the use),<sup>97</sup> a plaintiff does not even have to have any demonstrable economic value to his or her name. Since the statute sets this floor on damages, it much more readily protects plaintiffs who cannot demonstrate a property-like interest or commercial value in their name or likeness. Therefore, the California right of publicity statute expanded protection from the original "name and likeness" protection offered by the early California common law (and similarly, Georgia common law). Yet, it is only the proverbial "tip of the iceberg" of publicity right expansion in California.

### B. *Publicity Rights Gone Wild*

In the past thirty-five years or so, California courts have taken the common-law right of publicity and expanded its scope such that it now touches a broader range of issues than the California statutory right of publicity.<sup>98</sup> In 1974, the Ninth Circuit held in *Motschenbacher v. R.J. Reynolds Tobacco Co.* that a race car driver had a cause of action under California law for an unauthorized use of his "likeness" in an advertisement.<sup>99</sup> But, the "likeness" at issue did not have to do with the plaintiff's image, picture, or name, and did not even show any identifiable features of the plaintiff himself.<sup>100</sup> Instead, the plaintiff sued over a picture of his race car.<sup>101</sup> The court reasoned that the plaintiff's own likeness could be identified simply by his automobile's "several uniquely distinguishing features," such as its red color, white pinstriping, and oval medallion, even after the defendant company doctored the photo by changing its number from "11" to "71" and added a "spoiler" to the car emblazoned with the logo of one of the company's cigarette brands.<sup>102</sup> Citing a Prosser treatise on torts that reasoned protection of a person's name is justified because a name functions merely as a "symbol of [a plaintiff's] identity," the court analogized that the same type of protection could be afforded to the driver's unique car that, in effect, functioned as a symbol of the driver's identity.<sup>103</sup>

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97. CAL. CIV. CODE § 3344(a).

98. See *Michaels v. Internet Entm't Grp., Inc.*, 5 F.Supp.2d 823, 836 (C.D. Cal. 1998).

99. 498 F.2d 821, 825-27 (9th Cir. 1974).

100. *Id.* at 822, 827.

101. *Id.* at 822.

102. *Id.* at 822, 827.

103. *Id.* at 824 n.9-27.

The Ninth Circuit went a step further in the 1988 case *Midler v. Ford Motor Co.* There, singer Bette Midler sued Ford because of a television commercial that featured one of Midler's hit songs, performed by another singer (ironically, one of Midler's own back-up singers).<sup>104</sup> The other singer was referred to as a "sound-alike" and was chosen to directly imitate Midler's well-known voice and singing style.<sup>105</sup> The court held that although Midler could not state a claim under California Civil Code Section 3344—after all, her own voice was never used in the commercial—she still could state a common-law right of publicity claim because Ford sought to appropriate "an attribute of Midler's identity."<sup>106</sup> The court reasoned that *Motschenbacher* stood for the proposition that California law protects against "appropriation of the attributes of one's identity," as long as those attributes were sufficient to "convey the impression" of that person herself.<sup>107</sup>

In a similar "sound-alike" case from 1992, the Ninth Circuit read *Midler* as holding that "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs" and have violated that singer's right to publicity.<sup>108</sup> Using that reasoning, the court upheld an award for singer Tom Waits who alleged that Frito-Lay, Inc. violated Waits' right of publicity by using a "sound-alike" vocal imitator in one of its television ads.<sup>109</sup>

The same year, the Ninth Circuit also decided *White v. Samsung Electronics America Inc.*, a case involving a print advertisement campaign depicting Samsung's humorous vision of life in the "futuristic" twenty-first century.<sup>110</sup> The ad in question depicted a robotic game show hostess dressed in a wig, gown, and jewelry that Samsung's ad agency consciously selected to resemble the hair and dress of popular "Wheel of Fortune" hostess Vanna White.<sup>111</sup> The robot was positioned next to a game show set piece reminiscent of the "Wheel of Fortune" game board, in a stance for which White was famous.<sup>112</sup> The court held White did not have a claim under Section 3344 because the robot did not actually constitute White's

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104. *Midler v. Ford Motor Co.*, 849 F.2d 460, 461–62 (9th Cir. 1988).

105. *Id.*

106. *Id.* at 463–64.

107. *Id.* at 463.

108. *See Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1098 (9th Cir. 1993).

109. *Id.* at 1096, 1098–1100.

110. *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992).

111. *Id.*

112. *Id.* at 1396, 1399.

“likeness” under the statute.<sup>113</sup> But, the court explained that the features of the robot and the context of the ad, taken together, “leave little doubt about the celebrity the ad is meant to depict.”<sup>114</sup> The court also held that under the common-law right of publicity, “likeness” was a broader concept and that the right was designed to protect the commercial value of a celebrity identity.<sup>115</sup> Thus, since the ad was designed to evoke the identity of Vanna White, and Vanna White’s identity was shown to be a commercially valuable commodity, the court held that White’s right of publicity was violated.<sup>116</sup> Thus, *White* not only clearly established the right of publicity’s modern emphasis on the commercial interest in one’s persona,<sup>117</sup> it also conceptualized the right of publicity as including what dissenting Judge Kozinski characterized as the right to “evoke” the identity of a recognizable celebrity.<sup>118</sup> Judge Kozinski saw the *White* case as a “classic case of over-protection” of intellectual property rights that “erects a property right of remarkable and dangerous breadth.”<sup>119</sup>

But for as much as Judge Kozinski and like-minded scholars have criticized an expansive “right to evoke,”<sup>120</sup> the broader conceptualization of the right of publicity it represents is consistent with right of publicity law in other states. In the 1983 case *Carson v. Here’s Johnny Portable Toilets*, the Sixth Circuit held that entertainer Johnny Carson had a right of publicity claim under Michigan law against a company distributing portable toilets marked with the phrases “Here’s Johnny,” two words famously used to introduce Carson on “the Tonight Show,” and “The World’s Foremost Comedian,” apparently a play on the words “comedian” and “com-mode.”<sup>121</sup> The court reasoned that even though the defendants neither used any aspect of Carson’s image, nor used his name, the defendants still violated Carson’s right of publicity because they specifically used the simple catchphrase “Here’s Johnny” to cause a viewer to conjure up a mental im-

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113. *Id.* at 1397.

114. *Id.* at 1399.

115. *Id.* at 1397–99 (showing how a common law right of publicity claim is “not so confined” to a strict “name or likeness” appropriation).

116. *Id.* at 1399.

117. The emphasis on commercial interest in an identity was also echoed by the United States Supreme Court in its one and only decision dealing with the right of publicity. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 572–73 (1977). This case also stands as the only Supreme Court case dealing with a “human cannonball” circus act.

118. *See White v. Samsung Elec. Am., Inc.* 989 F.2d 1512, 1514–15 (9th Cir. 1993) (Kozinski, J., dissenting).

119. *Id.* at 1514.

120. *See, e.g., Stacey L. Dogan, An Exclusive Right to Evoke*, 44 B.C. L. REV. 291, 292–95 (2003).

121. *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 832–33, 836 (6th Cir. 1983).



age of Johnny Carson.<sup>122</sup> Likewise, in the 1979 case *Hirsch v. S.C. Johnson & Son, Inc.*, the Wisconsin Supreme Court used reasoning similar to that in *Carson* and noted that Samuel Clemens would not have a cause of action for unauthorized use of his real name, but would for the unauthorized use of “Mark Twain.”<sup>123</sup> Thus, the court allowed a suit under Wisconsin law based merely on the use of “Crazylegs,” a professional football player’s nickname.<sup>124</sup>

Furthermore, the Indiana statutory right of publicity law extends protection to not only name, voice, signature, photograph, and likeness, but also to “distinctive appearance,” “gesture,” and “mannerisms.”<sup>125</sup> Thus, while Vanna White may not have had a claim under Georgia law, she almost certainly would under Indiana law.<sup>126</sup> Interestingly enough, such a situation would not be far-fetched. Indiana law applies “to an act or event that occurs within Indiana, regardless of a personality’s domicile, residence, or citizenship.”<sup>127</sup> Therefore, plaintiffs that would be foreclosed from protection in other states can simply bring their claims to Indiana, without having to even bring themselves. This would seem particularly applicable in a digital environment where it can be argued that making a web page or web advertisement available in Indiana is an “event that occurs within Indiana” under the statute. For example, if Samsung would have had access to the Internet in the early 1990s, on which it could publish its Vanna White-evoking ad, Vanna White may have been able to bring suit in Indiana upon showing the publishing of the ad online and that Indiana courts had personal jurisdiction over Samsung.

Indiana statutory law is also noteworthy because it illustrates a second type of doctrinal expansion: descendibility and rights that continue after death. Indiana law provides for one hundred years of post-mortem protection.<sup>128</sup> As a point of comparison, Illinois law provides for protection for a term of life plus fifty years.<sup>129</sup> Descendibility may seem like simply a natural outgrowth of assignability, which had been present since the *Haelan* court used it to justify the separation of privacy and publicity law. Howev-

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122. *Id.* at 836.

123. See *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 137 (Wis. 1979) (discussing Prosser’s 1960 article *supra* note 68).

124. *Id.* at 138.

125. See IND. CODE § 32-36-1-7 (2010).

126. That is, assuming Indiana Code § 32-36-1-1 would have been in effect at the time. In reality, Indiana did not pass its right of publicity statute until 2002. See IND. CODE § 32-36-1-1(a) (noting that section was added by a bill passed in 2002).

127. IND. CODE § 32-36-1-1(a).

128. See *id.* at § 32-36-1-8(a).

129. See 765 ILL. COMP. STAT. 1075/30(b) (2010).

er, it illustrates a shift in the prevailing legal reasoning from functionalism to formalism.<sup>130</sup> Courts and commentators began to see the right of publicity as concerned less with remedying an injury to feelings and more with controlling commercial interests a celebrity has in his or her likeness.<sup>131</sup> As such—the thinking went—publicity rights are assignable and are based on a right to exclude; therefore, they must be “property” rights; and since they are property rights, they must also have all the other characteristics of traditional property rights.<sup>132</sup> To the extent that a person had the right to sell or keep the right and exploit the commercial value in a persona as he saw fit, courts saw no reason why the “property” in a persona could not exist after death.<sup>133</sup> After all, they reasoned, property is inheritable so a right of publicity should also be inheritable.<sup>134</sup>

Yet, there were reasons why this property syllogism did not make sense. For one, if considering property from the “bundle of rights” perspective, a logical fallacy is apparent. It does not necessarily follow that if the right of publicity has some of the sticks in the property bundle, it has to have all the other sticks as well. As two scholars note, “[i]nterestingly, it seemed to have never occurred to [some property theory advocates] that one could have assignability without all the other traditional attributes of property.”<sup>135</sup> Even the esteemed Melville Nimmer seemed to have framed the issue as an “all or nothing choice” between a personal privacy-based tort and a property-based right of publicity.<sup>136</sup> Furthermore, the property syllogism creates a false choice at odds with the evolution of the right of publicity from privacy rights. In so far as the right of publicity was forged in *Haelan* simply to conform the law to common practices in the sports and entertainment industries, a syllogistic jump to an absolute property-based approach in favor of descendibility is a stretch.

Formalistic expansion of the right of publicity to a full-fledged property right also raises a host of potential Pandora’s box-type problems. Should publicity rights be considered marital property upon divorce or as property in a bankruptcy estate?<sup>137</sup> Also, if the right of publicity is considered purely property, should it now be subject to adverse possession or Fifth Amend-

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130. See Westfall and Landau, *supra* note 27, at 83–87.

131. For an example of such formalism in action, see *Price v. Hal Roach Studios*, 400 F.Supp. 836, 843–44 (S.D.N.Y. 1975). See also, e.g., Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1127–29 (1980).

132. See Westfall and Landau, *supra* note 27, at 83–86.

133. See *id.*

134. See *id.*

135. *Id.* at 82.

136. *Id.*

137. For a discussion of these issues see generally *id.* at 99–117.

ment government takings? Or should rights to a persona enter the public domain like a generic trademark would when such a persona becomes so much a part of everyday life that it no longer simply identifies the celebrity but functions as a broader metaphor or symbol?<sup>138</sup> These questions are ultimately outside the scope of this note, but they illustrate the danger of letting the property syllogism run rampant.

### III. SPECIAL PROBLEMS FOR EXISTING LEGAL DOCTRINES PRESENTED BY SOCIAL NETWORKING WEBSITES

Other problems arise when the right of publicity is applied in cyberspace, particularly to social networking websites like Facebook, MySpace, and Twitter. These problems can be illustrated by considering the factual background presented by the *La Russa v. Twitter* lawsuit. The suit raised a California statutory right of publicity claim<sup>139</sup> regarding a fake Twitter account designated as <@TonyLaRussa> and purporting to belong to the plaintiff baseball manager.<sup>140</sup> The account featured a picture of La Russa,<sup>141</sup> but the picture chosen was a mugshot stemming from La Russa's 2007 DUI arrest in Florida.<sup>142</sup> The Twitter page header exclaimed, "Hey there! TonyLaRussa is using Twitter."<sup>143</sup> The page's "profile" section listed the account holder's name as "Tony La Russa" and his location as a vulgar quip involving St. Louis Cardinals star Albert Pujols.<sup>144</sup> "La Russa's" webpage is listed as "http://madd.org"<sup>145</sup>—the home page for Mothers Against Drunk Driving, apparently another reference to La Russa's 2007 DUI. And as a subtle hint to its phoniness, the profile states "Bio Parodies [sic] are fun for everyone."<sup>146</sup> At the time La Russa was assembling his complaint, the account had a mere three posts, four "followers," and was not "following" any other Twitter accounts.<sup>147</sup> With this factual

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138. See Zoe Argento, *Applying Genericide to the Right of Publicity*, 10 VAND. J. ENT. & TECH. L. 321, 322–24 (2008) (using the example of calling someone an "Einstein" to imply that the person is intelligent, rather than to identify the person with Albert Einstein).

139. The suit also raised various other related claims. See *supra* note 21 and accompanying text.

140. See La Russa complaint, *supra* note 21 at 3.

141. *Id.* at Exhibit A.

142. See Jerry Crasnick, et al., *Cardinals Manager Arrested for DUI in Florida*, ESPN.COM (Mar. 22, 2007), <http://sports.espn.go.com/mlb/news/story?id=2807935>. This page has an embedded video that shows La Russa's mugshot and the picture matches the one used in the @TonyLaRussa account.

143. La Russa complaint, *supra* note 21, at Exhibit A. The "Hey There! [account name] is using Twitter" language is standard for every individual Twitter page.

144. See *id.*

145. *Id.*

146. *Id.*

147. *Id.* The process of "following" Twitter accounts is akin to subscribing to the account and being forwarded any new messages posted to the account. See *What is Following? #NewTwitter*, TWITTER,

situation in mind, a deeper investigation into social networking websites—and the legal lacunae in which they often fall—is in order.

*A. Why Do Social Networking Websites Matter to Celebrities?*

As a threshold matter, it is worth considering what is at stake for celebrities in Cyberspace. After all, some have observed that “[w]hile there has been a raging debate . . . about whether [publicity rights] should exist at all, the stakes involved in the general debate ultimately seem low.”<sup>148</sup> Thus, with seemingly so little at issue, even outside the virtual world, it begs the question: Why would celebrities care about what goes on with their personas on social networking websites? Most apparent is the matter of economics—it is already well established that the persona of a celebrity can be commercially valuable.<sup>149</sup> Celebrities undoubtedly have a financial incentive to control all the commercial facets of their persona, including those facets on the Internet, so that they can profit from their persona to the fullest extent. In order to increase brand value and marketability, celebrities would want to make sure that they have the option of utilizing social networks to reach potential fans or customers of products the celebrity endorses. The Internet is a very powerful marketing tool—one that a celebrity can use to market himself, and ultimately increase the value of his persona.

Similarly, a celebrity could want to control online usage of his persona to prevent the unjust enrichment of third parties hoping to capitalize on the web traffic that the celebrity’s name or likeness could produce. Especially if celebrities have not taken proactive steps to create an official online presence, a fair amount of Internet traffic seeking authorized celebrity websites may stumble upon unauthorized, fake pages. Third parties can register accounts and make profits from ad revenue or spam advertising, or even try to defraud visitors through phishing scams, computer viruses, or spyware.<sup>150</sup> Even on websites like Twitter that do not support banner ads or pop-up ads, it would be easy for someone to link to a more robust website that did support those revenue streams.<sup>151</sup> True web addresses can be hid-

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<http://support.twitter.com/groups/31-twitter-basics/topics/146-new-twitter/articles/226661-what-is-following-newtwitter> (last visited Oct. 16, 2010).

148. Westfall and Landau, *supra* note 27, at 118.

149. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1098, 1102–06 (9th Cir. 1993) (upholding a jury award of over \$2 million to singer Tom Waits for a voice appropriation claim under California law).

150. See Stephanie Chen, *Facebook, Twitter Users Beware: Crooks Are a Mouse Click Away*, CNN (Oct. 19, 2009), <http://www.cnn.com/2009/CRIME/10/19/social.networking.crimes>.

151. *Id.*

den in unassuming hyperlinks, so unsuspecting visitors can be duped into visiting pages that may ultimately generate revenue for the site's owner.<sup>152</sup>

Additionally, various reasons justify celebrity interest in online personas from a non-economic perspective. Some celebrities value social networks as ways to directly connect to fans and interact with their adoring public. And celebrities may also want to utilize social networks as a way to advance their own charitable interests and causes, or in the case of politicians, their political motives.<sup>153</sup> Social networks provide an easy way for politicians to inform average voters about policy issues and to foster grassroots participation in some of those issues.<sup>154</sup> Therefore, it would be important for a celebrity or politician to try to make sure that third parties are not spreading misinformation. Similarly, any celebrity or politician likely would want to avoid having his or her name associated with activities or people of which they do not approve. This desire is similar to Brandeis and Warren's "right to be left alone" articulated in 1890<sup>155</sup> that is at the foundation of the right of privacy and the early right of publicity. Further, it has its place in the more modern right of publicity doctrine as well.<sup>156</sup>

### *B. The Structure and Features of Social Networking Websites Create Unique Problems for Publicity Rights*

Going beyond the motives celebrities have for protecting their personas on social networking websites, examining the structure of such sites shows just how easy it can be for anonymous third parties to infringe on publicity rights. The major social networking websites merely require a

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152. *Id.* See also, Brennon Slattery, *Will Facebook's \$711 Million Antispam Win Matter?*, PC WORLD, Oct. 30, 2009, <http://www.pcworld.com/article/181060/> (discussing spamming as a "lucrative business" and mentioning lawsuits by Facebook and MySpace against internet spammers with jury verdicts totaling almost a combined \$2 billion). Twitter has recently allowed users to embed photos and videos into posted messages. Michal Lev-Ram, *New Twitter Overhaul Adds Photos and Video*, CNNMONEY.COM (Sept. 15, 2010), [http://money.cnn.com/2010/09/14/technology/twitter\\_revamp](http://money.cnn.com/2010/09/14/technology/twitter_revamp). Such new features could give would-be scammers the ability to directly post commercial content or advertisements, or provide more enticing content upon which users can click and be directed away to another website.

153. See, e.g., Jason Chaffetz, *Freshman Rep: Social Media is 21st Century Route to Victory*, CNN (Oct. 29, 2009), <http://www.cnn.com/2009/POLITICS/10/29/chaffetz.social.media> (Utah Congressman discussing his use of social networks, especially Twitter, to connect to his electorate and share policy views).

154. See *id.*

155. See *supra* note 30 and accompanying text.

156. See, e.g., *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 706 (Ga. 1982) (justifying the extension of the right of publicity to include post-mortem rights, in part because the heirs of Martin Luther King, Jr. decided that all commercial exploitation of Dr. King's likeness was "unflattering and unfitting").

valid email address as a prerequisite to creating an account.<sup>157</sup> With free email hosting services like Gmail, Hotmail, and Yahoo Mail, any would-be infringer could create an account quickly and without having to divulge any personal information. Twitter in particular only requires a new user to create a unique username and assign it a password.<sup>158</sup> Users can then fill out biographical information and pick a profile picture. But with a quick Google image search, a would-be infringer has easy access to pictures of the celebrity of their choice.<sup>159</sup> Copyright-savvy impersonators can even obtain no-cost Creative Commons-licensed photos free from the copyright protection normally granted to a photographer.<sup>160</sup> All of this anonymous dealing makes it much harder to identify perpetrators than in historical right of publicity cases where, for example, a likeness is used in an advertisement for a company or on a product easily traceable to a manufacturer.<sup>161</sup>

The search feature built into Twitter is another point of contention. It allows users to search for names in Twitter accounts or even phrases or words used in user Tweets.<sup>162</sup> This makes infringement even more enticing because an infringer can use a feature called a “hashtag,” which is a form of electronic labeling that helps organize messages by topic.<sup>163</sup> An infringer could “tag” a message by placing a popular celebrity’s name next to a “#” symbol (which activates the hashtag for whatever word or words fol-

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157. See, e.g. *Create an Account*, TWITTER, <https://twitter.com/signup> (last visited Oct. 15, 2010) (requiring merely a name, username, user-created password, and email to create a new account); FACEBOOK, <http://www.facebook.com/> (last visited Oct. 15, 2010) (requiring name, email, user-created password, gender, and birthday to create a new account). Facebook also has a convenient link to “Create a Page for a celebrity, band or business” on its home page. See *id.* This seems to require even less information. See *Create a Page*, FACEBOOK, <http://www.facebook.com/pages/create.php> (last visited Oct. 15, 2010) (requiring a “Page name” and certification that the creator is the “official representative” of the celebrity and has the celebrity’s permission to create the page).

158. See *Create an Account*, *supra* note 157.

159. Such a search is possible at <http://images.google.com>.

160. Creative Commons-licensed photos can be found using the website flickr, a part of the Yahoo! digital empire. See *Explore/Creative Commons*, FLICKR, <http://www.flickr.com/creativecommons/> (last visited Oct. 15, 2010) (also listing brief summaries of the types of licenses available). More information about the Creative Commons project can be found at the Creative Commons project website. See *About*, CREATIVE COMMONS, <http://creativecommons.org/> (last visited Oct. 15, 2010).

161. For example, in *White*, the ad in question was unquestionably for Samsung products. *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992).

162. See TWITTER, <http://www.twitter.com> (last visited Oct. 15, 2010) (also featuring a scrolling section of “Top Tweets” and “Trending Topics”). Twitter has also partnered with both Google and Microsoft to provide additional search capabilities. Josh Tyrangiel, *Bing vs. Google: The Conquest of Twitter*, TIME (Oct. 22, 2009), <http://www.time.com/time/business/article/0,8599,1931532,00.html>. Microsoft’s Bing.com displays Twitter updates in real-time, including listing the “Hottest Topics on Twitter,” which usually include celebrities. See *Bing Social*, BING, <http://www.bing.com/social> (last visited Oct. 15, 2010).

163. See Ben Parr, *How To: Get the Most Out of Twitter #Hashtags*, MASHABLE (May 17, 2009), <http://mashable.com/2009/05/17/twitter-hashtags/>. Hashtags can be used for any word or phrase—not just names—and require merely placing a “#” symbol directly before the word or phrase to be tagged. See *id.*

lows the symbol) inside the body of a Tweet—a Tweet which can originate from even obviously non-celebrity accounts—and draw traffic to the rest of the message via the searchable tag. Since a hashtag denotes the topic, but not the originator of a Tweet, hash-tagging a Tweet codes the message as relating to—but not necessarily written by—the tagged celebrity. Hashtags are easily searchable through Twitter itself, and Microsoft’s <bing.com> even aggregates, in real-time no less, the most-used tags and topic trends.<sup>164</sup>

A tagged message could then function like spam advertisements since it could contain a separate hyperlink to just about anything and need not actually have to relate in any way to the tagged topic or person. For example, such Tweets can include a popular celebrity’s name in a hashtag (e.g. #LadyGaga)—thus getting the Tweet noticed by search engines or topic trend aggregators—but also contain links to outside web pages that either force viewers to download malicious software, allow viewers to buy products, or generate revenue for each viewing of a banner ad. And the mere fact that Tweets and any outside pages they link to are easily accessible on the Internet—with its worldwide reach—makes the potential for infringement more widespread than typical right of publicity cases dealing with regional advertisements in magazines or on the radio, or products on local store shelves.

Typical situations of “twitterjacking”<sup>165</sup> pose another problem in most jurisdictions because they do not involve any economic benefit for the infringer other than the *de minimis* effects of simply controlling the rights to a fake celebrity account. By way of example, the account in the *La Russa* suit was not set up for profit<sup>166</sup> and does not seem to have linked to any websites aside from the Mothers Against Drunk Driving homepage. So plaintiffs in jurisdictions that treat the right of publicity as a strict property right would have a hard time applying the right of publicity to Twitter-

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164. See Tyrangiel, *supra* note 162. There are many other sites that also quickly track hashtag topics and trends, and may even include the text of the actual Tweets using popular tags. See Parr, *supra* note 163 (noting such sites as “Hashtags.org,” “Twubs,” and “Whats the Trend?”).

165. For examples of “twitterjacking,” see *supra* notes 14–19 and accompanying text. See also, e.g., Joshua Rhett Miller, ‘Twitterjacking’ – Identity Theft in 140 Characters or Less, FOX NEWS (May 1, 2009), <http://www.foxnews.com/story/0,2933,518480,00.html>.

166. I was contacted prior to writing this note by an acquaintance of mine who happened to be the creator of the fake La Russa Twitter page. He/she explained the motive behind the fake Twitter page and told me that as a fan of the Chicago Cubs, arch-rival of La Russa’s St. Louis Cardinals, he/she simply wanted to have fun with the Cubs-Cardinals rivalry as well as condemn La Russa for what the impersonator believed was a failure to be a positive role model after La Russa’s DUI arrest. Telephone Interview with Creator of @Tony\_La\_Russa Twitter account (June 9, 2009). And in the impersonator’s defense, it is puzzling why the day after La Russa’s DUI arrest, his fans gave him a standing ovation prior to the start of the scheduled Cardinals game (and before La Russa issued any sort of apology for the incident). See Crasnick, *supra* note 142.

based impersonation that was not at least attempting to sell something or spam page visitors.<sup>167</sup> And in a state that follows the basic common-law right of publicity typified by the common law of Georgia, a plaintiff could try to argue that a fake Twitter account existed “for the defendant’s benefit” in that it attracted web traffic to the defendant’s account or a subsequent hyperlinked external website. But such a benefit would most likely be nebulous and ultimately minimal since the defendant would not be identified to take credit for the account, nor would he be trying (or able) to turn much of a profit with it.<sup>168</sup> Therefore a plaintiff would have difficulty satisfying the last prong of the tort: proving that he suffered any quantifiable injury as a result of the page. It may be true that a plaintiff in California could argue that an infringement falls under California Civil Code Section 3344(a)’s broad “uses another’s name . . . [or] photograph . . . in any manner” language, and could thus collect at least the statutory minimum of \$750, attorney’s fees, and costs of suit.<sup>169</sup> But it remains to be seen whether courts would accept such an attenuated claim.

Further confounding matters, instances of Twitterjacking may not be obvious examples of parody. The account in *La Russa* vaguely alluded to its true satirical nature by stating in its “profile” section, “bio parodies [sic] are fun for everyone.” Another page impersonating sports broadcaster Chip Caray simply has a line of text as part of its background “wallpaper” that says that Turner Broadcasting (Caray’s employer) “can’t take jokes but they sure know how to hire them.”<sup>170</sup> Some are even less obvious about being a parody: a fake page for hockey player T.J. Oshie was even “Veri-

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167. Such situations would include the fake Tony La Russa Twitter account, as well as any accounts merely set up for the purpose of parody or satire.

168. See, e.g., Amanda Bronstad, ‘Twitterjacking’ Lawsuits Face Obstacles, NAT’L LAW J. (Aug. 17, 2009), [available at](http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202433062719) <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202433062719>. Plus, as discussed *infra* in Section IV, regardless of the benefit of attracting web traffic to a parody or satire, the satire or parody could be protected by the First Amendment.

169. See CAL. CIVIL CODE § 3344 (West 2010). Nevada has a similar statute that allows for minimum damages even if no actual damages are proven. See NEV. REV. STAT. §§ 597.770–597.810 (2009) *Hetter v. Eighth Judicial Dist. Court*, 874 P.2d 762, 765 (Nev. 1994) (stating purpose of minimum floor of damages in Nevada statute is deterrence).

170. See *Account of @notchipcaray*, TWITTER, <http://www.twitter.com/notchipcaray> (last visited Oct. 15, 2010). This account was apparently originally <@ChipCaray> until TBS had Twitter remove the site. See *id.* (Oct. 13, 2009, 11:59 AM) (“If you’re looking for @chipcaray, I’m right here! I added the ‘not’ because it makes it funner [sic]”). The account’s posts are humorously in the style of Caray’s actual baseball broadcast commentary, often playing on the use of Caray’s pet phrase “fisted” and his propensity to discuss seemingly irrelevant or tautological statistics. See, e.g., *id.* (Oct. 16, 2009, 9:46 AM) (“Interesting note about [Los Angeles Dodgers pitcher] Clayton Kershaw last night, he threw first pitch pitches to 23 of 23 batters”). As with the @notchipcaray account, users have started using words like “not” or “fake” to precede the spoofed name to make accounts appear more obviously as a parody, thus hopefully avoiding Twitter’s account removal policies.



fied”<sup>171</sup> and approved by Twitter as Oshie’s real, official Twitter account.<sup>172</sup>

*C. Current Legal Approaches Have Limited Application to Social Network-based Impersonation*

All of these factual issues make online celebrity impersonation difficult to address through current legal approaches; it does not easily fall into existing categories of cognizable legal harms or exceptions. Privacy law would be a good place to begin, but it quickly becomes obvious that it is a poor fit. Prosser grouped privacy tort law into four causes of action, consisting of “appropriation,” his conceptualization of the right of publicity, plus the following: 1) “intrusion,” i.e., the unreasonable and offensive interference with the solitude or seclusion of another; 2) “public disclosure of private facts,” i.e., the publication of private, truthful information about another that gives offensive publicity to this information; 3) and “false light” invasion of privacy, i.e., the presentation of information to the general public in such a manner as to convey a false and offensive impression of the individual.<sup>173</sup> From this scheme it is easy to see how celebrities would have difficulty utilizing any of the generalized privacy doctrine. As noted by courts addressing the waiver defense discussed previously,<sup>174</sup> celebrities would have a hard time demonstrating an intrusion into their solitude or seclusion if they are constantly in the public eye. And the more they deliberately utilize technology like personal websites, blogs, video diaries, or other forms of social networking, the more they allow or contribute to real-time intrusion into their private lives and intentionally disclose private facts to the public.

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171. In the “Account Verification” process, which is Twitter’s initial response to impersonation (aside from simply removing claimed fake accounts), Twitter reviews accounts and places a symbol and the words “Verified Account” in the profile section of the page. See *About Verified Accounts*, TWITTER, <http://support.twitter.com/groups/31-twitter-basics/topics/111-features/articles/119135-about-verified-accounts> (last visited Oct. 15, 2010) (discussing the “Verified Account” feature, the “Verified Account badge” and listing frequently asked questions about Twitter impersonation). Some sort of independent verifying factor, like a celebrity’s official website linking to or discussing the Twitter account, is necessary to support official verification. See *Not Playing Ball*, TWITTER BLOG (June 6, 2009), <http://blog.twitter.com/2009/06/not-playing-ball.html> (official Twitter blog post discussing verification process as an “experiment” that will “begin with public officials, public agencies, famous artists, athletes, and other well known individuals at risk of impersonation”).

172. See Dirk Hoag, *When is ‘Verified’ Not Really Verified? When it’s a Twitter ‘Verified Account’ for T.J. Oshie*, ON THE FORECHECK (Oct. 7, 2009, 11:57 AM), <http://www.ontheforecheck.com/2009/10/7/1074769/when-is-verified-not-really> (featuring screen capture of fake, yet “Verified,” account before it was removed by Twitter).

173. See Prosser, *supra* note 68, at 401–07; Westfall and Landau, *supra* note 27, at 80. This formulation was also adopted by the Second Restatement of Torts. See RESTATEMENT (SECOND) OF TORTS § 652A (1977).

174. See *infra* Section I, *supra* notes 39–41 and accompanying text.

False light invasion of privacy is a closer fit, but it is still not ideal. There may not be much truly false information portrayed when a Twitter account incorporates a celebrity's actual picture and accurate biographical information. And, even if the material attributed to the celebrity is false, the law generally requires that the material be *highly* offensive to a reasonable person.<sup>175</sup> Many of the instances of twitterjacking would not rise to such a level of offensiveness, especially in so far as they are merely jocular impersonations that mimic a celebrity's real mannerisms or style. This sort of application of privacy torts illustrates why one scholar notes that the right of publicity "was created not so much from the right of privacy as from frustration with it."<sup>176</sup>

Similarly, traditional types of intellectual property may appear workable, but are ultimately wanting. As discussed in the following section of this note, some copyright principles ultimately may be useful to the issue of social network impersonation. However, federal copyright law by itself is an ineffective avenue. First and foremost, a celebrity would not be able to copyright his name or likeness. Neither aspect of a persona is a work of authorship, as required by the Copyright Act,<sup>177</sup> since there is no real "author" in copyright terms. And even assuming for the sake of argument that they were such works, names and likenesses are uncopyrightable facts and lack the requisite originality and creativity necessary for a copyright,<sup>178</sup> regardless of the "creative" ways that celebrities may go about garnering fame and fortune or the "creative" personas that celebrities may adopt. The Copyright Act also requires fixation in a tangible medium of expression,<sup>179</sup> and it is a stretch to say that a person's physical appearance is fixed on a "medium of expression." And this fixation requirement, as the *Midler* court noted, excludes voices from copyright protection.<sup>180</sup> Copyright protection would only apply if a name or likeness (or voice) was somehow used as part of a work. But even in that instance, the copyright protection would attach to the work itself, not to the name or likeness, which would be considered underlying, unprotectable "facts."<sup>181</sup>

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175. See RESTATEMENT, *supra* note 173, at § 652E.

176. Madow, *supra* note 56, at 167.

177. See The Copyright Act of 1976, 17 U.S.C. § 102(a) (2006).

178. See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991) (discussing the originality and creativity requirements inherent in copyright law).

179. 17 U.S.C. § 102(a). See also *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 675 (7th Cir. 1986) (noting that "fixation" would occur when a person's likeness is recorded on video tape, but an unrecorded likeness is *per se* not fixed in a tangible form).

180. See *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988). Voices would be protected if they were recorded, but in such an instance, the copyright protection would attach to the recording, not the underlying voice.

181. See *Feist*, 499 U.S. at 344–47 (discussing the exclusion of facts from copyright protection).

Some cases have looked to copyright law when names and likenesses are fixed in a tangible medium of expression like a video recording,<sup>182</sup> but in such cases, there is a real likelihood of copyright law preempting state right of publicity claims.<sup>183</sup> And, if copyright law preempts a right of publicity claim, the right of publicity claim would be nullified, thus leaving a celebrity plaintiff—who almost certainly would not own any part of the copyright in the underlying work—without any legal recourse.<sup>184</sup> If there is no preemption, copyright can still create some tension with the right of publicity that is very difficult to resolve—particularly when someone other than a plaintiff claiming the right of publicity infringement owns the copyright to the material at the foundation of the infringement. Generally, an actor does not lose the right to control the commercial exploitation of his likeness merely by portraying a fictional character.<sup>185</sup> Considering the wide latitude given to the “right to evoke” in California, it is conceivable that a celebrity famous for a particularly stylized or recognizable character in a movie<sup>186</sup> could sue to prevent use of that celebrity’s persona in subsequent movies, promotional products, or advertisements, even though an entity like a movie studio or writer would own the copyright to the movie and the character.<sup>187</sup> On this very topic, Ninth Circuit Judge Kozinski has won-

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182. See, e.g., *Baltimore Orioles*, 805 F.2d at 674–75 (finding baseball players’ claimed right of publicity in their performances on the diamond is preempted by federal copyright law when the performances are recorded on video tape for simultaneous broadcasts of live games).

183. See, e.g., *id.*; *Ahn v. Midway Mfg. Co.*, 965 F. Supp. 1134, 1137–38 (N.D. Ill. 1997) (copyright in video game preempts right of publicity claim by one of the actors after whom one of the game’s characters was modeled); but see *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003–05 (9th Cir. 2001) (finding federal copyright law does not preempt a California right of publicity claim regarding a likeness fixed in a photograph and later reproduced in a clothing catalog).

184. See, e.g., *Ahn*, 965 F. Supp. at 1137–38.

185. In fact, courts rarely discuss this point, and instead seem to assume it as given. See, e.g. *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 810 (9th Cir. 1997) (addressing right of publicity of based on fictional portrayal of television characters).

186. Logically, the more an actor’s portrayal merges his personality or mannerisms with the character portrayed, such that it is hard to separate the actor from the character portrayed, the actor would have a stronger claim to part of that character. The sort of ultra-stylized (and likely career-making) characters that come to mind would be something like Anthony Hopkins’s portrayal of “Hannibal Lecter,” Jim Carrey as “Ace Ventura,” or the often-imitated Arnold Schwarzenegger as a “Terminator” robot.

187. It would be theoretically possible that an actor could bring a right of publicity action to prevent the release of the actual movie featuring his performance. However, this sort of actor/studio conflict would usually be avoided with an appropriate clause in the actor’s contract that assigned the actor’s publicity right to the studio for the purposes of the movie. Regardless, commercial uses of a character from a movie separate from the promotion of the movie itself have led to litigation. Such a claim arose in a suit by Dustin Hoffman over the use in a magazine advertisement of an altered photograph of Hoffman’s famous portrayal of the cross-dressing main character in the movie “Tootsie.” See *Hoffman v. Capital Cities/ABC, Inc.* 33 F.Supp.2d 867, 870–71 (C.D. Cal. 1999), *rev’d on other grounds*, 255 F.3d 1180, 1189 (9th Cir. 2001). Hoffman would not have the copyright to the character or in the movie itself because presumably any contribution he made to the movie would be considered a “work for hire” under the Copyright Act. See 17 U.S.C. § 101 (2006) (“A ‘work made for hire’ is . . . a work specially

dered, “Can Warner Brothers exploit Rhett Butler without also reminding people of Clark Gable? Can Paramount cast Shelley Long in The Brady Bunch Movie without . . . treading on Florence Henderson’s right of publicity? How about Dracula and Bela Lugosi? Ripley and Sigourney Weaver? Kramer and Michael Richards?”<sup>188</sup>

Other realms of intellectual property law lead to much the same result. The *La Russa* complaint raised issues of trademark infringement and unfair competition under the Lanham Act,<sup>189</sup> which take a different approach than right of publicity claims. In fact, trademark law, which traditionally was designed to protect consumers, is at odds with the very purpose of personality rights, which are designed to protect individuals *from* consumers.<sup>190</sup> However, trademark and unfair competition claims are likely to be weak or non-existent for most celebrities.

An action for trademark infringement under section 32 of the Lanham Act requires registration of a valid trademark,<sup>191</sup> which is unlikely for many because registration is difficult when celebrity is fleeting and is not enough to establish sufficient trade usage.<sup>192</sup> And normally, a mark cannot be registered if it “is primarily merely a surname.”<sup>193</sup> Furthermore, both trademark infringement and unfair competition claims under the Lanham Act require previous use of the mark in commerce for liability to attach.<sup>194</sup> This requirement would usually necessitate previous use of an aspect of a persona in conjunction with a specific product or line of products,<sup>195</sup> and it

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ordered or commissioned for use . . . as part of a motion picture. . . .”) Also, in another California case, George Wendt and John Ratzenberger, two stars of the television show “Cheers,” brought a right of publicity claim regarding an advertisement with animatronic robots that evoked their characters “Norm” and “Cliff” in the show. *Wendt v. Host Int’l, Inc.*, 125 F.3d at 809. Interestingly enough, the defendant actually got a license from Paramount Pictures, the owner of the “Cheers” copyright, to portray “Norm” and “Cliff.” *See Wendt v. Host Int’l, Inc.*, 197 F.3d 1284, 1285 (9th Cir. 1999) (Kozinski, J., dissenting).

188. *Wendt*, 197 F.3d at 1286 (Kozinski, J., dissenting).

189. *La Russa* complaint, *supra* note 21.

190. *See* William McGeeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105, 1146 (2009).

191. *See* Lanham Act § 32, 15 U.S.C. § 1114 (2006) (“Any person who shall, without the consent of the registrant use in commerce any reproduction . . . of a registered mark . . . shall be liable in a civil action by the registrant . . .”).

192. The practical effect of the requirement for trade usage under the Lanham Act is that the person seeking registration must already have associated his persona with goods or services that are used in commerce—meaning a putative registrant cannot merely register his name by itself. *See id.* § 1051(a) (application for registration requiring applicant to specify “the goods in connection with which the mark is used” and certifying that the mark “is in use in commerce”).

193. *Id.* § 1052(e)(4).

194. *See id.* § 1114, 1125.

195. *See, e.g.* *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 812 (9th Cir. 1997) (unfair competition claim under Lanham Act § 43(a) discussed in terms of using a likeness to falsely suggest sponsorship or approval of a commercial product); *Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.* 737 F.Supp. 826, 833 (S.D.N.Y. 1990) (claim brought under Lanham Act § 32 after musical group called the “Fat Boys”

is unlikely that mere online impersonation would be a similar “use in commerce.” Similarly, general unfair competition claims would not apply in the majority of cases because the “infringer” is rarely driven by profit motives, and thus fails to create a competitive situation with the celebrity.<sup>196</sup> The Third Restatement of Unfair Competition has an analogous view, as it finds liability only when a person’s identity is used “for purposes of trade,”<sup>197</sup> which requires use of a persona in advertisement or a placement of a name or likeness on merchandise.<sup>198</sup>

At first glance, the anti-cybersquatting section of the Lanham Act<sup>199</sup> could potentially apply to impersonation on social networking websites. The law protects against registration of a celebrity-themed “domain name”<sup>200</sup> and an argument could be made that since Facebook and Twitter accounts are given their own web addresses, social networks fall within the law’s purview. However, a personalized URL from a social networking account page is really under the domain name of the social network (like Twitter.com or Facebook.com), and thus a social network account’s web address likely would not even satisfy the “domain name” requirement. Furthermore, even if social network account’s URL is considered a “domain name,” the law requires an attempt to sell a domain name for profit in order for liability to attach.<sup>201</sup> Thus, a putative defendant would not be liable for simply using an identity to increase web traffic to a particular social networking account.

#### IV. POSSIBLE SOLUTIONS OR: HOW WE CAN LEARN TO STOP WORRYING AND LOVE THE RIGHT OF PUBLICITY

Each of the aforementioned causes of action can address a slice of the problem of celebrity impersonation on social networking websites, but none get to the crux of the issue. When celebrity impersonation on social networking websites (or anywhere else on the Internet, for that matter) moves away from advertising or selling products to entertainment, satire, or

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registered their name in conjunction with products such as clothing and toys and the defendant used “look-alikes” to advertise its product).

196. See Moore, *supra* note 25, at 9; see also Nimmer, *supra* note 39, at 210–12 (noting that unfair competition torts are generally unhelpful in preventing non-commercial uses of personas).

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

198. *Id.* at § 47.

199. 15 U.S.C. § 8131 (Supp. 2008).

200. The Lanham Act defines a “domain name” as “any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet.” *Id.* § 1127 (2006). The main anti-cybersquatting protection appears in 15 U.S.C. 8131.

201. See 15 U.S.C. § 8131(1)(A) (Supp. 2008).

hero-worship, it travels into an apparent legal no-man's land. The right of publicity stands the best chance of being a holistic solution, but not without a bit of tweaking.

A. *Putting the Privacy Back in Publicity Law*

One possible solution would be to make the right of publicity more responsive to privacy concerns, and less to economics. Warren and Brandeis formed the embryonic right of publicity as a way to deal with new advances in technology that exploited celebrity personas for unauthorized (by the celebrity, at least) public consumption.<sup>202</sup> In the 1890s, the problematic new technology was photography and advances in newspaper printing.<sup>203</sup> Today we have the same concerns with the Internet and all that it has spawned, including powerful search engines, super-portable computers, wi-fi, and phones with web browsers. It is ironic that we are now, as were Warren and Brandeis in the 1890s, faced with the emergence of new technology that allows for the public to traffic in celebrity personas more quickly and easily than ever before. Framing the right of publicity with a greater privacy component allows the right to function more as a deterrent, and less as a mechanism for economic compensation. In turn, this allows the right to be more responsive to situations where any sort of commercial advantage gained by an infringer from the celebrity persona is *de minimis*, as well as situations where the celebrity wishes merely to avoid having his name or likeness associated with objectionable material, and thus desires to, in the words of Warren and Brandeis, simply “be let alone.”

While modern case law would seem to firmly consider the right of publicity as a property right, a shred of privacy still remains.<sup>204</sup> After all, the right of publicity in New York has been pushed back into privacy law (thus technically overruling *Haelan*),<sup>205</sup> the traditional common-law right of publicity exists in some states and provides liability when use is merely to the defendant's “advantage,” and statutory law in states like California

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202. See Warren and Brandeis, *supra* note 30, at 194–96.

203. *Id.* at 195.

204. There have even been occasional courts willing to justify decisions under privacy-like reasoning. See, e.g. *Tellado v. Time-Life Books, Inc.* 643 F.Supp. 904, 914 (D.N.J. 1986) (reasoning that under *Zacchini v. Scripps-Howard Broadcasting Co.*, even some non-commercial uses of a likeness may create liability, even if “compensation would seem even more compelling where the use is solely commercial”); *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004, 1012 (N.Y. App. Div. 1981); see also *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982). Privacy justifications for the right of publicity have gained more traction in academic commentary. See, e.g., Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 386 & n.6 (1999).

205. See *Stephano v. News Group Publ'ns*, 474 N.E.2d 580 (NY 1984).

and Nevada include minimum damage awards that could provide a remedy when infringement is not commercially quantifiable.

Some may criticize the hybrid privacy/property formulation as doing away with the economic justification inherent in the right.<sup>206</sup> But such a criticism ultimately falls short since a celebrity's economic interest would still be protected in cases where it is truly at issue. If a putative defendant is actually trying to profit from a plaintiff's persona, under a hybrid formulation the plaintiff would still be able to recover for all of the defendant's unauthorized commercial gain and would simply be able to claim a larger amount in damages. The advantage of a partially privacy-based approach is that if a defendant were not trying to profit from a famous persona, celebrity victims would still have a remedy.

This hybrid approach is also faithful to *Haelan's* (and even Warren and Brandeis') eminently functionalist framework. And to the extent that formalist reasoning has made the right of publicity stray from its roots and raise more issues than it solves, this re-conceptualization would return the right to a more steady footing. For as scholars have warned, as applied to the right of publicity, "The formalist constructs of legal reasoning may eventually create out of their actions a Frankenstein bearing little resemblance to the founder's carefully considered functionalist purposes."<sup>207</sup>

*B. Controlling Celebrity Over-protection: Where Prior First Amendment Tests Fail, a Modified "Fair-Use" Defense May Succeed*

Admittedly, this suggested hybrid approach could still have some of the inherent flaws of the right of publicity as it now stands. Much of the commentary on the right of publicity centers around the idea that courts, especially the Ninth Circuit, have expanded the right so much that it risks subsuming other rights<sup>208</sup> or that it may expand unchecked without a strong enough countervailing principle to reign in its corpulence.<sup>209</sup> Striking the right balance between the right of publicity of a celebrity and the richness of the public domain is important. As Judge Kozinski noted in his *White v. Samsung* dissent, "Intellectual property rights aren't free: They're imposed at the expense of future creators and of the public at large. . . . This is why

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206. See Pessino, *supra* note 37, at 104–05.

207. Westfall and Landau, *supra* note 27, at 123.

208. One would have to look no farther than the Ninth Circuit itself for such a critique. Judge Kozinski is an ardent believer that the right of publicity tramples on copyright law. See *White v. Samsung Elec. Am., Inc.* 989 F.2d 1512, 1514–17 (9th Cir. 1993) (Kozinski, J., dissenting).

209. See Westfall and Landau, *supra* note 27, at 95 ("[T]here is no logical countervailing principle to halt the right from spreading to reach indicia of identity that were previously thought to be beyond the scope of the right").

intellectual property law is full of careful balances between what's set aside for the owner and what's left in the public domain for the rest of us."<sup>210</sup>

### 1. The Various First Amendment Tests

Therefore in order to prevent the right of publicity from becoming overprotective and simultaneously allow for culturally valuable parodies or satire, a countervailing principle is needed. And since the Internet poses difficult problems for right of publicity doctrine, such a principle needs to work in cyberspace. In other non-Internet contexts, courts have tried to use the free speech protection of the First Amendment as such a countervailing principle. The allure of applying this approach to the Internet is apparent since cyberspace is the quintessential zone of creativity and free expression. But courts have in general struggled with how to apply free speech principles to the right of publicity.<sup>211</sup>

One initial attempt used an "actual malice" test<sup>212</sup> that seemed very similar to the requirements of the false light invasion of privacy tort. Under such a test, a plaintiff "must demonstrate by clear and convincing evidence that [the defendant] intended to create the false impression in the minds of its readers that when they saw the [work] they were seeing the [original image or likeness]."<sup>213</sup> However, this test made First Amendment protection troublingly easy: if a defendant unknowingly misled readers or warned viewers that it was not trying to mislead, the defendant would be protected.<sup>214</sup>

As an alternative, the Supreme Court of California created a "transformative test" that turns on "whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation."<sup>215</sup> It applied that test in *Comedy III Productions, Inc. v. Gary Saderup, Inc.* and ultimately decided that a drawing realistically depicting "the Three Stooges" and later used on clothing was not "transformative" enough to justify First Amendment protection.<sup>216</sup> Later, the Sixth Circuit used a variation of the "transformative test" to hold that a realistic painting of golfer Tiger Woods at Augusta National Golf

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210. *White*, 989 F.2d at 1516 (Kozinski, J., dissenting).

211. See Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 488-98 (2003).

212. See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001).

213. *Id.* at 1186-87. See also *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997) (originating, but not very clearly enunciating, the "actual malice" test).

214. See Andrew Koo, *Right of Publicity: The Right of Publicity Fair Use Doctrine - Adopting a Better Standard*, 4 BUFF. INTELL. PROP. L.J. 1, 12, 16 (2006).

215. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001).

216. *Id.* at 800-01, 811.



Club conveyed enough expressive content because it “does not capitalize solely on a literal depiction of Woods,” but instead uses “a collage of images in addition to Woods’s image which are combined to describe, in artistic form, a historic event in sports history and to convey a message about the significance of Woods’s achievement in that event.”<sup>217</sup>

This test has been criticized as being too vague or narrow to provide useful guidelines.<sup>218</sup> And, when the test relies on the word “transformative,” it uses the same sort of terminology used by courts in the analysis of the first factor of the standard “fair use” defense test in copyright law.<sup>219</sup> In fact, the *Comedy III* court relied on *Campbell v. Acuff-Rose Music, Inc.*—one of the landmark copyright fair use decisions—when formulating its test.<sup>220</sup> Mixing terms in this way may cause confusion between the two doctrines as to how much, if at all, they should overlap. But more importantly, this test is flawed because it would make it easy for potential infringers to simply add some sort of artistic or creative aspect to even a clearly commercial use of a celebrity name or likeness to get protection. Applied to online celebrity impersonation the test could create a strange paradox: the more aspects of a persona that an infringer weaves into a creative, fictional narrative, the more the infringer is protected. While this is true to a certain extent of the fair-use defense in copyright law, even copyright law places limits on how much “borrowing,” even in a creative way, is too much.<sup>221</sup>

Another court suggested what it called a “predominant purpose” test.<sup>222</sup> This test allowed First Amendment protection when the predominant purpose of a product or work is not to exploit the commercial value of a persona, but is to make an expressive comment on or about a celebrity.<sup>223</sup> But the test would be at odds with the theoretical underpinnings of publicity law. The Prosser-esque common-law right of publicity, for example, treats some non-economic use of a celebrity likeness as infringement, as do some states, commentators, and occasional judges.<sup>224</sup> Thus, while the test was adopted in Missouri, it does not seem to have much portability to other

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217. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003).

218. See Koo, *supra* note 214, at 16–17.

219. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (discussing analysis of first factor of “fair use” test in 17 U.S.C. § 107); *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 141–43 (2d Cir. 1998) (contrasting “transformative” as used for describing derivative work copyrights and as used in the “fair use” analysis).

220. *Comedy III*, 21 P.3d at 808.

221. See, e.g., *Warner Bros. v. RDR Books*, 575 F.Supp.2d 513, 546–48 (S.D.N.Y. 2008).

222. See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (taking the test from Lee, *supra* note 211).

223. *Id.*

224. See *supra* notes 204–05 and accompanying text.

jurisdictions. The test also suffers from line-drawing problems and is over-protective of celebrities when applied to artists that make a living selling their art—the test would always favor the celebrity and stifle the artist.<sup>225</sup>

## 2. Borrowing a “Fair Use” Defense From Copyright Law

The health of the public domain deserves a sharper foil for the interests of celebrities than the diffuse First Amendment protection used by courts. Thus, many scholars have advocated that a modified fair use defense be imported into the right of publicity.<sup>226</sup> In copyright law, the fair use analysis looks to four factors: 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the protected work; (3) the amount and substantiality of the portion used in relation to the protected work as a whole; and (4) the effect of the use upon the potential market for or value of the protected work.<sup>227</sup> Such a defense could not be brought untouched to the right of publicity mainly because copyright, created from a desire to promote and protect creative expression, is fundamentally a different animal with different goals than the right of publicity.<sup>228</sup>

One commentator has proposed a test that instead weighs “1) [the] nature of the individual’s celebrated status; 2) the purpose and character of the use of the individual’s identity; and 3) the potential effect of the use on that individual’s identity.”<sup>229</sup> Framed in this way, the first prong of the copyright fair use test corresponds to the second prong of the right of publicity test; the second prong of the copyright test corresponds with the first prong of the right of publicity test; and the fourth prong of the copyright test is equivocated to the third prong of the right of publicity test. The third prong of the copyright test is omitted, presumably to account for the absence of the copyright concept of a *de minimis* use in right of publicity jurisprudence.

By looking to the effects of an infringement, and playing such effects against the infringer’s purpose, this test would prevent the chilling of crea-

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225. See Michael S. Kruse, *Missouri’s Interfacing of the First Amendment and the Right of Publicity: Is the “Predominant Purpose” Test Really that Desirable?*, 69 MO. L. REV. 799, 815 (2004).

226. See, e.g., Koo, *supra* note 214, at 18–23; Stephen R. Barnett, *The Right of Publicity Versus Free Speech in Advertising: Some Counter-Points to Professor McCarthy*, 18 HASTINGS COMM. & ENT. L.J. 593, 604–05, (1996); Randall T.E. Coyne, *Toward a Modified Fair Use Defense in Right of Publicity Cases*, 29 WM. & MARY L. REV. 781, 815–20 (1988).

227. The Copyright Act of 1976, 17 U.S.C. § 107 (2006).

228. See Dogan & Lemley, *supra* note 41, at 1164 (noting that copyright aims are utilitarian, focusing on incentivizing creativity in authors, while celebrities need no such legal incentive to become famous).

229. Koo, *supra* note 214, at 21.

tivity in advertising, as well as be able to protect the commercial value of a persona, as appropriate. Non-commercial, expressive, uses of a persona that a plaintiff deems detrimental to his overall image could still be allowed, depending on the balance of the factors. And, if non-commercial uses have enough of a negative impact on a persona's value, the use could be prevented. Thus, the test would fit more squarely in jurisdictions that protect against non-economic uses of names and likenesses and in the hybrid publicity/privacy approach advocated above.

This modified-fair use test would also apply fairly well to the sorts of Internet-based right of publicity infringement scenarios mentioned in the preceding sections of this note. Using a celebrity name as a hashtag in order to draw attention to a specific Tweet, and then linking the same Tweet to an unrelated, profit-generating website, is a use of a celebrity's name that is hard to justify as acceptable. On the other hand, the parodic use of Tony La Russa's identity in the situation that led to the *La Russa* lawsuit is much more easily protectable. Not surprisingly, applying the modified-fair use test leads to desirable results in each of the aforementioned instances.

In the words of the modified fair-use test's creator, the first factor of the test tries to "determine the purpose of the use and then whether that purpose was to profit strictly on the individual's good will or deliberately mislead consumers to create a false impression."<sup>230</sup> The factor also considers "how the individual is known and to what capacity to the public, in relation to how the individual's identity is used."<sup>231</sup> Thus, the further the use of the celebrity's person is from the individual's public notoriety, the more likely it is that "the user is being unjustly enriched by the good will of the individual."<sup>232</sup>

The hypothetical hashtag example is pretty clearly commercial since it would be trying to drive Internet traffic to other websites where the infringer could profit from advertising or spamming. Plus, this sort of use would ultimately be unrelated to the celebrity and is a classic case of unjust enrichment by capitalizing on name-recognition. Therefore, the factor weighs heavily against finding fair use. In contrast, the *La Russa* example did not have any real commercial aspects, and is more clearly seen as a playing off of historical situations that led to La Russa's status as a celebrity like his job as manager of the St. Louis Cardinals and his DUI arrest, thus soothing any fears of unjust enrichment. Therefore, the factor weighs for finding fair use of Tony La Russa's name and likeness.

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230. *Id.*

231. *Id.*

232. *Id.*

The second factor of the test is similar to the “transformative test” used by the *Comedy III* court and looks to whether a use is sufficiently transformative enough “to manifest the user’s own artistic expression.”<sup>233</sup> In the hashtag example, there is nothing really added to the name to transform it into any sort of artistic expression—the use of the name is merely an attention-grabbing banner for other, unrelated content. However, for Twitter parodies like the La Russa account, the substance of the tweets and the overall act of impersonation would be more transformative the more rich the parody.<sup>234</sup> Therefore the second factor weighs against finding fair use in the former situation, and for finding fair use in the latter.

Finally, the third factor of the modified-fair use test looks to the commercial effects of a use on the celebrity’s identity.<sup>235</sup> In both the hashtag and La Russa parody examples, there is an arguable amount of damage done to the subject celebrity’s commercial interests in as much as either infringement could prevent the celebrity from utilizing Twitter in the same way for his own financial gain. If either example is controversial or offensive enough, it could cost a celebrity sponsorship or endorsement opportunities, or dilute a celebrity’s endorsement value. That sort of damage could weigh against finding fair use in both scenarios. But, at least in the La Russa situation, the strength of the first and second factors could overcome the third factor and allow for a successful fair use defense. And if a celebrity parody is detrimental enough (or not clearly a parody), perhaps weighing the factors would lead to the conclusion that a statutory minimum damages amount (with or without an injunction) is, where available, the appropriate remedy, rather than a more drastic judgment against the infringer. This gives the test flexibility and allows for parodic or satirical expression, as well as some protection for personae.

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233. *Id.* at 21–22.

234. And, in a copyright context at least, the Supreme Court considers that parody can easily be “transformative.” See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“Suffice it to say now that parody has an obvious claim to transformative value . . .”). Note though that a parody does not ultimately need to be “good” or “funny” or “successful” to gain First Amendment protection in other legal contexts. See *id.* at 582–83; see also *Yankee Publ’g Inc. v. News Am. Publ’g, Inc.*, 809 F.Supp. 267, 280 (S.D.N.Y. 1992) (Trademark case noting that “First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed”).

235. Koo, *supra* note 214, at 22.

C. *The Problems of Personality Rights in Cyberspace Call for a Federal Right of Publicity Statute*

As a final note, it is worth reexamining the idea of creating a federal right of publicity statute.<sup>236</sup> As an initial hurdle, such a statute would not be as easily justified as the federal copyright and patent laws, as the constitution has a clause regarding the promotion of the useful arts and sciences,<sup>237</sup> but not the names and pictures of our favorite cultural icons. Congress could arguably justify a statute under its Commerce Clause power.<sup>238</sup> The right of publicity is at least comfortably considered a quasi-economic right with demonstrable economic and commercial value. Considering the emerging problems presented to the right of publicity by the Internet, a federal statute makes more and more sense. To this day, some states still do not have publicity rights, and those that do can vary widely. A federal statute could harmonize rules to help provide more predictability and consistency. The Internet is not a state-by-state product, unlike an advertisement targeted at a specific area or a publication with limited circulation. In fact, social networking websites are *designed* to connect people living all over the country—their value and their appeal lies in large part in their ability to reach across state lines. And, more so than ever before, technology makes celebrities national cultural products. Celebrities are not all California movie stars or New York high-society types anymore—they can be average people living average lives in any part of the country and achieve instant fame as, say, the next YouTube viral video sensation. Thus, it is nonsensical that a right of publicity claim involving Internet content, equally viewable in a state with robust publicity rights and a state without,<sup>239</sup> could be subject to completely opposite results on liability because of the fortuity of where a lawsuit is ultimately brought. It is ultimately beyond the scope of this note to suggest how exactly a federal right of publicity statute should read. However, some of the aforementioned re-conceptualization could certainly be implemented.

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236. For a more detailed discussion of this topic, *see generally, e.g.*, Richard S. Robinson, *Preemption, the Right of Publicity, and a New Federal Statute*, 16 *CARDOZO ARTS & ENT. L.J.* 183, 199–207 (1998).

237. U.S. CONST. art. I, § 8, cl. 8.

238. *See* Robinson, *supra* note 236, at 202 n.130.

239. It is interesting to note that Puerto Rico has refused to recognize the right of publicity in any form. *See Guedes v. Martinez*, 131 F.Supp.2d 272, 278 (D.P.R. 2001). Thus, in an example of the strange results that may occur to right of publicity cases involving Internet content, one court went so far as to grant an injunction “limited to United States territories, excluding Puerto Rico.” *See Bosley v. Wildwett.com*, 310 F.Supp.2d 914, 935 (N.D. Ohio 2004).

## CONCLUSION

In spite of its widespread use and ubiquitous connection to modern life, the Internet can still be a legal frontier zone. This point is illustrated by looking at how intellectual property, privacy, and unfair competition laws fail to solve problems of unauthorized uses of celebrity personas on social networking websites. The right of publicity has the best chance to be a satisfactory solution to such online problems, but is still not a perfect fit for the job.

The right of publicity is, as are many common-law creations, a legal chimera. Raised through functionalist legal reasoning, it came of age under expansive, formalist reasoning. It now largely finds itself an economic property right; yet, its privacy background is hard to escape. Sometimes the right of publicity just “works” better as a right “to be let alone.” And sometimes, notably when assignability is concerned, or when celebrity “branding” is at issue, privacy concepts throw a metaphorical wrench in the works. Therefore, as Prosser once opined, it ultimately does not make much sense to try to shoehorn the right of publicity into a “privacy” or a “property” box. In fact, a hybrid privacy/property conceptualization of the right could achieve more reasonable results by not foreclosing on either the privacy or commercial interests implicated with a given unauthorized use of a persona, especially when that use is in cyberspace.

A proper control mechanism for the recent rapid expansion of publicity rights would also lead to more reasonable results in right of publicity cases. A federal right of publicity statute is a start: it could help even out the law across jurisdictions, and not only set limits on celebrity protection, but also provide some protection where states had been reluctant to do so in the past. But some sort of countervailing interest in the public domain is ultimately required to balance out often expansive celebrity protection. In order to prevent the over-protection of celebrity interests, some courts have also looked to various schemes of First Amendment protection for would-be infringers, with mixed results. But, the flaws in these tests are highlighted when applied to the Internet. A modified fair use defense borrowed from copyright law would help prevent over-protection of celebrities and foster creative expression on celebrity-themed topics.

