
RUMOR HAS IT THAT NON-CELEBRITY GOSSIP WEB SITE OPERATORS ARE OVERESTIMATING THEIR IMMUNITY UNDER THE COMMUNICATIONS DECENCY ACT

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“Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery.”¹

I. INTRODUCTION

Imagine a beautiful afternoon on a college campus in the United States. One student, Jane Doe, is walking to her first class of the day. Strolling across the green, well-manicured lawns, her mind is focused on upcoming assignments and plans for the weekend. Before reaching her first class, the student notices a crowd of people, including her friends and fellow classmates, gathering around a public bulletin board on campus. Her serene afternoon is shattered when she sees a large sign on that the bulletin board that reads: “Jane Doe is a whore!”²

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¹ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

² See Richard Morgan, *A Crash Course in Online Gossip*, N.Y. TIMES, Mar. 16, 2008, at ST7 (discussing how the former Web site, JuicyCampus, allowed posts about the “biggest slut on campus” or “the most promiscuous sorority sister”); Sunny Hostin, *Online Campus Gossips Won’t Show Their Faces*, CNN.COM, Apr. 11, 2008, <http://edition.cnn.com/2008/CRIME/03/17/sunny.juicy/index.html> (discussing the experience of a college freshman who had been targeted on a gossip Web site). See generally College ACB, <http://www.collegeacb.com> (last visited Feb. 12, 2009) (allowing users to post gossip anonymously).

The student runs through the crowd of onlookers and tries to tear down the sign, but soon realizes that, despite her best efforts, she cannot.

The sign is affixed to the bulletin board permanently. As her eyes swell with tears, the student notices that the crowd is growing and overhears people discussing whether the statement is true. Looking for help, the student contacts the owners of the bulletin board, begging the owners to remove the sign or at least disclose who posted it, but they refuse. Frustrated, the student threatens to sue the bulletin board owners for defamation. The owners scoff at her threats and explain that they actually are protected by federal law and are not required to remove the sign. Although this may sound like a nightmare, it is happening with greater frequency on American college campuses, albeit on online bulletin boards rather than physical ones.

Simply put, anonymous college gossip has left the bathroom wall and gone online.³ Much of the gossip is posted anonymously,⁴ leaving the subjects of the gossip with little legal recourse. The operators of such non-celebrity gossip Web sites are immune from state tort claims arising from third party content under section 509 of the Communications Decency Act of 1996 ("CDA").⁵ Unless the plaintiff can establish that the operator of a site where third parties can post anonymous messages actually created or developed the content, the CDA shields the operator from claims arising from third party content.⁶ However, the CDA does not shield operators from a claim of misappropriation of intellectual property posted on their Web sites, regardless of who contributed the infringing content.⁷

Recent cases have clarified that intellectual property violations by Web site operators include violations of both federal *and* state intellectual property laws—including violations of the right of publicity.⁸ This may allow the target

³ Richard Morgan, *Juicy Campus: College Gossip Leaves the Bathroom Wall and Goes Online*, IHT.COM, Mar. 18, 2008, <http://iht.com/articles/2008/03/18/arts/gossip.php> [hereinafter Morgan, *College Gossip Leaves the Bathroom Wall*].

⁴ See College ACB, Frequently Asked Questions, <http://www.collegeacb.com/sb.php?school=general&page=faq#isanon> (last visited Feb. 12, 2009) [hereinafter College ACB FAQ] ("Is this site really anonymous? Yes. No one can use this site to figure out who you are. Nor can anyone use this site to figure out which posts you have made."); Gossip Report, Frequently Asked Questions, <http://www.gossipreport.com/faq.html> (last visited Feb. 12, 2009) [hereinafter Gossip Report FAQ] ("Q: Can other members figure out who I am? A: You can remain anonymous GossipReport.com will not disclose any members' e-mail addresses nor do we ask for your real name.").

⁵ See Communications Decency Act of 1996, Pub. L. No. 104-104, sec. 509, § 230(c), 110 Stat. 56, 137 (codified as amended at 47 U.S.C. § 230(c) (2000)); *infra* Part III.

⁶ *Id.* § 230(c)(1)–(2).

⁷ *Id.* § 230(e)(2).

⁸ See, e.g., *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008) (finding enforcement of federal and state intellectual property laws preserved under section 230(e) of the CDA); *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 413–14

of gossip to prove that the online gossip uses his or her image in a commercial manner, thereby allowing the individual to file a claim against the Web site operator regardless of the operator's role in the creation of the content.

This Comment examines the potential liability for non-celebrity gossip Web site operators despite their CDA immunity. Part II identifies several non-celebrity gossip Web sites and describes the public's reaction to them. It further demonstrates that despite their claims to the contrary, some gossip Web sites operators' actions may actually violate the CDA. Part III analyzes the CDA, its underlying policies, and how the courts have interpreted it. Part IV examines the growth and development of the right of publicity and the elements necessary to establish a prima facie claim for violation of the right.

Part V discusses the possibility that gossip Web site operators may violate an individual's right of publicity. Finally, Part VI concludes that while non-celebrity gossip Web site operators enjoy broad immunity for content provided by third parties under the CDA, the immunity is not absolute if confronted with a violation of an individual's right of publicity.

II. THE GROWTH OF NON-CELEBRITY GOSSIP WEB SITES: "GOSSIP LEAVES THE BATHROOM WALL AND GOES ONLINE"⁹

Celebrity gossip has become a part of American culture.¹⁰ Seeing celebrities' faces plastered on magazines in grocery stores, on entertainment news shows, and on Internet gossip sites is a common occurrence.¹¹ As a possible reaction to this celebrity gossip overkill, non-celebrity gossip Web sites are increasingly more common.¹² As one Web site operator explained, "[p]eople want to know

(S.D.N.Y. 2001) (refusing to limit the intellectual property exception to pre-1996 situations). *Contra* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118–19 (9th Cir. 2007) (defining "intellectual property" as only "federal intellectual property" absent a more specific statutory definition, which would not include a likeness as intellectual property).

⁹ Morgan, *College Gossip Leaves the Bathroom Wall*, *supra* note 3.

¹⁰ Amy Henderson, *Media and the Rise of Celebrity Culture*, OAH MAGAZINE OF HISTORY, Spring 1992, at 49, available at <http://www.oah.org/pubs/magazine/communication/henderson.html> (documenting the shift in American culture from a focus on character to a focus on personality and how celebrity status became a "measure of success" in a personality-based culture).

¹¹ See Press Release, Pew Research Ctr. for People & the Press, *Bush Veto Draws Large Audience: Too Much Celebrity News, Too Little Good News* (Oct. 12, 2007), available at <http://people-press.org/report/362/too-much-celebrity-news-too-little-news> (finding that forty percent of Americans believe celebrity news receives too much attention from the media); Mary McCarthy, *Celebrity Gossip Magazines: Best in Print, Best on the Web*, Oct. 23, 2007, http://celebrities.suite101.com/article.cfm/celebrity_gossip_magazines (listing top celebrity news magazines and Web sites); LovetoKnow.com, *Top 10 Celebrity Gossip Web Sites*, <http://lovetoknow.com/top10/celebrity-gossip.html> (last visited Feb. 16, 2009).

¹² Kelly Heyboer, *Psst! Rumor Has It Gossip Websites Hit Home*, STAR LEDGER (N.J.), June 22, 2008, at 1 ("[A] growing number of websites are offering a place for anonymous

about their neighbors. . . . [not] Britney Spears.”¹³ Growing in both number and popularity, non-celebrity gossip Web sites have become places for neighbors, classmates, and coworkers to gossip anonymously about each other with few consequences.¹⁴ Unsurprisingly, these sites have become “replete with sophomoric comments; rude, lewd speech; and nasty, puerile insults.”¹⁵ The negative effects of these sites on communities, especially college campuses, have been felt across the country.¹⁶ Students have suffered from the revelation of the proverbial skeletons in their closets.¹⁷ Female students have reported harassment, both online and in real life,¹⁸ and many students feel the posting of their name or likeness on these Web sites has affected their job prospects through no fault of their own.¹⁹

The popularity of non-celebrity gossip Web sites has steadily increased

users to post stories, gossip and rumors about average people.”); Susan Kinzie, *Juice, the Whole Juice and Nothing but the Juice*, WASH. POST, Oct. 30, 2008, at B01 (noting that one popular non-celebrity gossip Web site, JuicyCampus, had nearly 50,000 individual visitors during September 2008). However, despite the exponential growth of such sites, JuicyCampus, one of the largest non-celebrity gossip sites, officially shut down on February 5, 2009. Posting of JuicyCampus to Official JuicyCampus Blog, A Juicy Shutdown, <http://www.juicycampus.blogspot.com> (Feb. 4, 2009, 11:47 EST). The founder and chief executive of JuicyCampus, Matt Ivester, blames “these historically difficult economic times” for the drastic fall in advertising revenue leading to the site’s demise. *Id.*

¹³ Heyboer, *supra* note 12 (quoting Nik Richie, blogger for TheDirty.com).

¹⁴ *See id.*; Kinzie, *supra* note 12.

¹⁵ Posting of Greg Lukianoff to Huffington Post, Breaking News: Offensive and Untrue Material Discovered on the Internet!, http://www.huffingtonpost.com/greg-lukianoff/breaking-news-offensive-_b_94314.html (Mar. 31, 2008, 16:47 EST).

¹⁶ *See, e.g.*, Morgan, *A Crash Course in Online Gossip*, *supra* note 2 (reporting that a post about a Yale University student’s past participation in gay pornography devastated the student); *see also* Kinzie, *supra* note 12 (discussing the concerns of college students about future employers relying on gossip Web site postings when considering candidates).

¹⁷ *See* Morgan, *A Crash Course in Online Gossip*, *supra* note 2 (reporting that a Yale University student’s past participation in gay pornography became the subject of a post and was seen by nearly twenty percent of the students within a few days).

¹⁸ Hostin, *supra* note 2 (reporting that one girl’s entire college experience could be “tainted” after seeing gossip about her posted on JuicyCampus); Eamon McNiff & Ann Varney, *College Gossip Crackdown: Chelsea Gorman Speaks Out*, ABC News, May 14, 2008, <http://abcnews.go.com/2020/Story?id=4849927> (reporting that gossip on JuicyCampus reported one female student’s rape—an experience unknown to most of her friends); Martha Neil, *Yale Students Unmask Anonymous Critics; Legal Careers at Risk*, ABAJOURNAL.COM, July 31, 2008, http://www.abajournal.com/news/yale_students_unmask_anonymous_critics_legal_careers_at_risk [hereinafter Neil, *Yale Students*] (noting that female law students have been harassed and possibly rejected for jobs because of online postings).

¹⁹ *See, e.g.*, Morgan, *A Crash Course in Online Gossip*, *supra* note 2 (discussing a public relations student concerned postings about her will make finding a job more difficult); Neil, *Yale Students*, *supra* note 18 (reporting that one student lost his job because of his association with AutoAdmit, a law school discussion board, although he may not have posted anything on the Web site).

since their inception.²⁰ Internet gossip browsers now have several options when deciding what type of non-celebrity gossip they would like to read as many non-celebrity gossip Web sites categorize their gossip by subject, city, or college campus.²¹ Depending on the Web site, a typical gossip post includes the name of the target of the gossip, the person's location or college, a statement or story about him or her, and on occasion a photograph of the person.²² Other users can post replies to this gossip, usually adding even more salacious content.²³ The anonymous nature of these Web sites allows gossipers to post lewd, salacious, and defamatory information about others.²⁴ In some instances, the site operators even join the fun, adding their own original content to users' gossip.²⁵

In light of the potential negative consequences of being named on a gossip Web site, a question arises: What can individuals do if they find themselves the subject of a defamatory post? The reply from the Web site operators: Nothing.²⁶ The site operators are aware of the broad protection from liability for defamation under the CDA. The legal sections of these Web sites explain to the user that the site operator cannot be held responsible for the content gener-

²⁰ See Heyboer, *supra* note 12. At the time of its closure, JuicyCampus had "expanded to more than 500 campuses across the US." See A Juicy Shutdown, *supra* note 12.

²¹ See, e.g., College ACB, *supra* note 2 (allowing users to post and comment on any topic in university specific forums and to sort the posts by topic); The Dirty, <http://www.thedirty.com> (last visited Feb. 11, 2009) (allowing people to post pictures and comments according to colleges, cities, or subject matter); Gossip Report, <http://www.gossipreport.com> (last visited Feb. 11, 2009) (allowing users to create profiles anonymously for other people and allowing people to search by name, city, school, or by tags); USAGoneDirty.com, <http://www.usagonedirty.com/usa/> (last visited Feb. 11, 2009) (allowing users to post pictures and comments according to their universities).

²² See The Dirty, *supra* note 21 (allowing users to post names of individuals, what college they attend, pictures, and gossip); Gossip Report, *supra* note 21 (allowing users to create profiles of other people, using the other person's pictures and personal information); see also discussion *infra* Part III.C (detailing information about each gossip site).

²³ See College ACB, *supra* note 2 (allowing users to reply to post); The Dirty, *supra* note 21 (allowing users to comment on posts); Gossip Report, *supra* note 21 (allowing users to "Add Gossip" to a profile); see also *infra* Part III.C.2.

²⁴ See Kinzie, *supra* note 12 (noting that users post "rumors about sex, drugs, college life and sex."); Lukianoff, *supra* note 15 (claiming that posts alleging "sexual promiscuity, illegal behavior, and having a 'loathsome' . . . disease" are per se liable if false).

²⁵ See, e.g., The Dirty, Club Thrust, Nov. 11, 2008, <http://www.thedirty.com/?p=54245> [hereinafter Club Thrust] (showing a post of the Dirty's site operator, Nik Richie, commenting, "Let me guess . . . not out of the closets yet. -nik" under a user posted photograph of men in sleeveless shirts and cowboy hats).

²⁶ See, e.g., The Dirty, Kochran Kardashian, Nov. 12, 2007, <http://www.thedirty.com/?p=1226> (displaying an e-mail from the Dirty's attorney explaining the Dirty is not liable for defamatory statements of others and unwilling to remove a posted photograph at the pictured's request); USAGoneDirty.com, Terms of Service, <http://www.usagonedirty.com/usa/terms.php> (last visited Feb. 11, 2009) (explaining that the Web site is not responsible or liable for third-party content).

ated by a third party, and the operator is under no duty to remove the posted gossip.²⁷ The site operators capitalize on and exploit their CDA immunity in order to make a profit regardless of the ramifications that the anonymous gossip has on others, leaving victims frustrated and angry.²⁸

This sense of frustration, among other things, has turned university administrators and student government associations into the most vocal proponents of banning campus access to anonymous gossip Web sites.²⁹ Undeterred by free speech concerns,³⁰ opponents on college campuses feel that the “destructive dialogue” that these sites allow encourages cowardly gossipers to undermine and distract from the main goal of college universities: to provide an education.³¹ Moreover, opponents of the gossip sites feel that these sites “encourag[e] people to be the worst versions of themselves,” spewing hateful speech and hiding behind the sites’ anonymity.³² Opponents of non-celebrity gossip sites also argue that the hateful speech posted on the sites can incite violence among students in the real world.³³ For these reasons, several university

²⁷ The Dirty, FAQs, http://thedirty.com/?page_id=301 (last visited Feb. 11, 2009) [hereinafter *The Dirty FAQ*]

3. Someone posted a false story/comment about me! Isn't that defamation?

Again, since this is not a first year law school class, we won't bore you with the long version, but you need to understand a couple of import concepts about defamation.

....

[E]ven if someone posts a comment which is false and defamatory, you cannot sue The Dirty for publishing it. Why? Because of a special law called the Communications Decency Act, 47 U.S.C. § 230(c)(1).

Id.

²⁸ See *id.*; cf. *The Dirty*, Kochran Kardashian, *supra* note 26.

²⁹ See Morgan, *A Crash Course in Online Gossip*, *supra* note 2; Andy Canales, *SGA Responds to Juicy Campus Decision*, THE GRAPHIC (Pepperdine U.), Feb. 7, 2008, available at <http://graphic.pepperdine.edu/perspectives/2008/2008-02-07-sga.htm>; Lien Hoang, *CCSC Debates Possible Ban of Gossip Web Site*, COLUMBIA SPECTATOR ONLINE EDITION, Mar. 3, 2008, <http://www.columbiaspectator.com/2008/03/03/ccsc-debates-possible-ban-gossip-web-site>.

³⁰ Canales, *supra* note 29 (“[O]n-campus Internet is a service provided by a private . . . institution; therefore, the university reserves the right to limit the content that is viewed on its grounds, in much the same way it limits its library’s content . . .”).

³¹ See *id.* (discussing Pepperdine’s Student Government Association vote to ban Juicy-Campus because of the threat it posed to the community); Michael Murphy, *Juicy Campus Blocked at Certain Campuses*, MARQ. TRIB. (Marq. U.), Nov. 25, 2008, available at <http://media.www.marquetttribune.org/media/storage/paper1130/news/2008/11/25/News/Juicy.Campus.Blocked.At.Certain.Campuses-3560432.shtml> (reporting that Tennessee State University blocked access to JuicyCampus on its own network and quoting an official as stating, “[i]t did not represent the environment we are in.”).

³² Morgan, *A Crash Course in Online Gossip*, *supra* note 2; see Hoang, *supra* note 29.

³³ Hoang, *supra* note 29. At a community meeting at Columbia University regarding the sites, one student remarked, “If I were a member of the gay male community, and I already felt ostracized or uncomfortable with my orientation, I might be tempted to bring a gun to school and shoot all of my fellow students’ after seeing this [non-celebrity gossip] Web site.” *Id.* (quoting Jessica Aldridge, a Columbia University student).

administrators and student government associations have taken action to block access to these sites from campus networks.³⁴

Some commentators favor simply ignoring these gossip sites, rather than using university resources to restrict access and providing more free press for the sites.³⁵ The greatest concerns of students and advocates are free speech principles and the efficacy of a ban on the sites.³⁶ In their view, the universities' concerted efforts towards censorship create a policy at odds with a traditional university goal: facilitating the free flow of speech and ideas.³⁷ Specifically, this proposed censorship creates a dangerous precedent by allowing administrators and student governments to protect their student bodies from content that they find offensive or objectionable.³⁸ Furthermore, some students doubt the efficacy of any proposed ban on the gossip sites because restricting access on campus does not prevent students from accessing the sites through off-campus Internet service providers.³⁹ Finally, at least one commentator argues that because these gossip Web sites have the "same factual accuracy as 'For a good time call Andy' scrawled on a bathroom stall," they should be treated accordingly by students, administrators, and potential employers.⁴⁰

These non-celebrity gossip Web sites have received a great deal of publicity both on and off campus.⁴¹ As a result of the attention and the public outcry, lawmakers and law enforcement officials are now working to shut them down permanently.⁴² These "virtual bathroom walls"⁴³ have drawn the ire of lawmak-

³⁴ See, e.g., Canales, *supra* note 29 (reporting that the Pepperdine Student Government Association voted to recommend a ban of JuicyCampus to the university's administration); Hoang, *supra* note 29; Murphy, *supra* note 31 (reporting that Tennessee State University banned JuicyCampus).

³⁵ Lukianoff, *supra* note 15; see Morgan, *A Crash Course in Online Gossip*, *supra* note 2 (reporting that Austin Maness, drafter of the Pepperdine student government resolution, suggested the resolution was a mistake because "it only increased students' awareness of [the gossip Web sites]"). However, some students support the gossip sites. Hostin, *supra* note 2 ("Thousands of students from across the country have written in to request that their campus be added [to JuicyCampus]." (quoting a publicist for JuicyCampus)).

³⁶ Hoang, *supra* note 29; Lukianoff, *supra* note 15.

³⁷ See Hoang, *supra* note 29; Lukianoff, *supra* note 15.

³⁸ See Hoang, *supra* note 29; Lukianoff, *supra* note 15.

³⁹ See Neil Connolly, *SGA Pushes Ban of Juicy Campus Web Site*, W. COURIER (W. Ill. U.), Dec. 12, 2008, <http://media.www.westerncourier.com/media/storage/paper650/news/2008/12/12/News/Sga-Pushes.Ban.Of.Juicy.Campus.Web.Site-3578806.shtml>; Hoang, *supra* note 29.

⁴⁰ Lukianoff, *supra* note 15.

⁴¹ See, e.g., Kinzie, *supra* note 12; Hostin, *supra* note 2; McNiff & Varney, *supra* note 18; Canales, *supra* note 29.

⁴² See Heyboer, *supra* note 12 (explaining that in early 2008 the attorney general of New Jersey subpoenaed the operators of JuicyCampus and that "[o]ther states . . . have followed New Jersey's lead and opened investigations into [JuicyCampus]").

⁴³ Martha Neil, *Prosecutor Explains Possible Case Against JuicyCampus*, ABAJOURNAL.COM, May 19, 2008, http://www.abajournal.com/news/prosecutor_explains_possible_

ers and law enforcement officials, not for their possibly defamatory content, but for potential violations of consumer protection laws,⁴⁴ as well as for not following their own rules and standards set forth in their terms of service.⁴⁵ After complaints of student harassment, the Attorneys General of both New Jersey and Connecticut began investigating at least one of these Web sites—JuicyCampus—for misrepresenting its terms of service to users by allowing hateful, racist, and defamatory speech to be posted without any oversight or removal.⁴⁶ These two state investigations seem to be the beginning of a trend

case_against_juicycampus/ [hereinafter Neil, *Possible Case Against JuicyCampus*] (quoting from 20/20 (ABC television broadcast May 16, 2008)).

⁴⁴ Kinzie, *supra* note 12 (“Connecticut Attorney General, Richard Blumenthal, said . . . that his office is investigating JuicyCampus for possible consumer deception, fraud or misleading statements.” He said, “They said in their terms of service that they would not tolerate harassing, threatening messages, when in fact they certainly are doing so.”); Chris Rizo, *AG Brown Asked to Investigate Campus Gossip Site*, LEGALNEWSLINE.COM, Apr. 9, 2008, <http://www.legalnewsline.com/news/210631-ag-brown-asked-to-investigate-campus-gossip-site>.

⁴⁵ Kinzie, *supra* note 12; Martha Neil, *Another State AG Probes JuicyCampus Gossip Website*, ABAJOURNAL.COM, Mar. 25, 2008, http://www.abajournal.com/news/another_state_ag_probes_juicycampus_gossip_website/ [hereinafter Neil, *AG Probes JuicyCampus*]; Neil, *Possible Case Against JuicyCampus*, *supra* note 43; *cf.* JuicyCampus’s User Conduct Guidelines.

JUICYCAMPUS RESERVES THE RIGHT, BUT DISCLAIMS ANY OBLIGATION OR RESPONSIBILITY, TO REMOVE ANY CONTENT THAT DOES NOT ADHERE TO THESE GUIDELINES, IN ITS SOLE DISCRETION.

You agree not to use the Site to:

(a) violate or solicit the violation of any applicable local, state, national or international law. Among other things, and without limiting the generality of the foregoing, you agree not to post Content that is obscene or that violates laws relating to sexually explicit material, that infringes the rights of any third party (including intellectual property and privacy or publicity rights), that is defamatory, or that constitutes hate speech under applicable law. . . .

JuicyCampus, Terms-Condition, <http://www.juicycampus.com/posts/terms-condition> (last visited Feb. 11, 2009).

⁴⁶ Neil, *AG Probes JuicyCampus*, *supra* note 45. Because JuicyCampus founder Matt Ivester has closed down the site, the status of these investigations and other pending lawsuits against JuicyCampus is unclear. See Justin Pope, *Juicy Campus, Home to Nasty School Gossip Dries Up*, ABCNEWS.COM, Feb. 5, 2009, <http://abcnews.go.com/US.wirestory?id=6812897>; Posting of JuicyCampus to Official JuicyCampus Blog, Shutdown FAQs, <http://www.juicycampus.blogspot.com/2009/02/shutdown-faqs.html> (Feb. 4, 2009, 11:41 EST) [hereinafter JuicyCampus Shutdown FAQs]. Posts to JuicyCampus are no longer available, and JuicyCampus claims it will not release its posters Internet Protocol addresses—which can lead to the identification of the poster—without a “lawful subpoena.” JuicyCampus Shutdown FAQs, *supra*. JuicyCampus directs those wishing to find college gossip to former competitor College ACB. *Id.* While perhaps the most well-known gossip site no longer exists, Web site operators are wagering the desire for online, college-campus gossip remains. Similar gossip Web sites are now being created to fill the void left by JuicyCampus. See College ACB, *supra* note 2; College Trash Talk, <http://www.collegetrashtalk.com> (last visited Feb. 12, 2009). The difference now is that these sites are “juicer, nastier, naughtier, and much . . . more sexier [sic] than the original” College

among state officials.⁴⁷

Are non-celebrity gossip Web sites worried about these investigations? Hardly. JuicyCampus deemed these investigations “absurd,”⁴⁸ and site operators are quick to remind lawmakers of their CDA immunity from civil suits arising from anonymous defamatory gossip.⁴⁹ The Attorney General investigations have not yet resulted in criminal charges partially because of the immunity Congress granted to providers of interactive computer services under the CDA.⁵⁰

However, operators’ claims about their immunity under the CDA⁵¹ are insufficient to actually protect them; operators’ conduct must be of the type specifically protected by the CDA.⁵² Site operators should reevaluate whether their own actions regarding the operation of their Web sites makes them “responsible . . . for the creation or development” of the content included on their sites and therefore not beneficiaries of CDA immunity.⁵³ Moreover, in light of recent legal decisions finding service providers were not immune from liability for violating intellectual property laws—including state-created laws⁵⁴—operators should ascertain whether the content posted on their site could constitute a violation of an individual’s right of publicity.

Trash Talk, Where JuicyCampus Leaves Off, <http://www.collegetrashtalk.com/index.php/press> (last visited Feb. 12, 2009).

⁴⁷ See Neil, *AG Probes JuicyCampus*, *supra* note 45 (noting that at least one California lawmaker is calling for the California Attorney General to start an investigation into JuicyCampus).

⁴⁸ Martha Neil, *JuicyCampus on “Absurd” AG Probes: We Don’t Have to Enforce Our Rules*, ABAJOURNAL.COM, Mar. 27, 2008, http://www.abajournal.com/news/juicycampus_on_absurd_ag_probes_we_dont_have_to_enforce_our_rules/ [hereinafter Neil, *Absurd AG Probes*]; see JuicyCampus Shutdown FAQs, *supra* note 46 (affirming that JuicyCampus was not shut down to legal trouble and that its “services and policies have always been well within the law.”).

⁴⁹ E.g., The Dirty FAQ, *supra* note 27.

⁵⁰ Neil, *AG Probes JuicyCampus*, *supra* note 45 (reporting that JuicyCampus is under investigation); Heyboer, *supra* note 12 (reporting that the owners of JuicyCampus were subpoenaed by the New Jersey Attorney General and explaining that JuicyCampus is protected by the CDA). Courts have determined that Web site operators are interactive computers services for the purpose of immunity granted by the CDA. *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007).

⁵¹ E.g., The Dirty FAQ, *supra* note 27; The Dirty, Kochran Kardashian, *supra* note 26; USAGoneDirty.com, Terms of Service, *supra* note 26.

⁵² See, e.g., *Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*, 418 F. Supp. 2d 1142 1147–49 (D. Ariz. 2005) (explaining that the CDA only protects Web site operators if they do not aid in creating the content); see also 47 U.S.C. § 230(c) (2000) (establishing that providers of interactive computers services will not be treated as a publisher for “information provided by another information content provider”—a third party).

⁵³ 47 U.S.C. § 230(f)(3).

⁵⁴ See *Doe v. Friendfinder Network Inc.*, 540 F. Supp. 2d 288, 299, 302–03 (D.N.H. 2008); see also 47 U.S.C. § 230(e)(2)–(3).

III. THE COMMUNICATIONS DECENCY ACT OF 1996 AND ITS EFFECTS ON NON-CELEBRITY GOSSIP WEB SITES

During the 1990s, while the Internet was a burgeoning form of communication, Congress sought to promote its use.⁵⁵ Additionally, Congress attempted to ease the Internet's transition from a form of media on the fringe of society to a form that is generally available for the information, education, and entertainment of all Americans.⁵⁶ Consistent with these goals, and to promote the overall development of the Internet, Congress enacted the Communications Decency Act of 1996.⁵⁷ One of the law's goals is to foster and encourage the "vibrant and competitive free market" on the Internet⁵⁸ by immunizing Web site operators from suit for the activities of third party posters.⁵⁹

A. Congressional Policy and Immunities Granted Under the CDA

Congress enacted the CDA in reaction, in part, to *Stratton Oakmont, Inc. v. Prodigy Services, Co.* in 1995.⁶⁰ Prodigy, a provider of an interactive computer service, operated and maintained a financial discussion board where users could post and discuss information relating to the financial markets.⁶¹ In 1994, an anonymous user posted disparaging remarks about the business practices of the plaintiff, Stratton Oakmont, an investment banking firm.⁶² Stratton Oakmont filed suit against Prodigy for libel.⁶³ Ordinarily, a publisher of a defamatory comment is liable.⁶⁴ However, Prodigy claimed that it was a distributor, not a publisher, and thus was not liable for defamation.⁶⁵ Yet because Prodigy

⁵⁵ See Communication Decency Act of 1996, Pub. L. No. 104-104, sec. 509, § 230(a)(1), (3), 110 Stat. 56, 138 (codified as amended at 47 U.S.C. § 230) (recognizing the usefulness of the Internet and establishing policies in order to promote its growth and achieve greater access for all Americans with as little governmental regulation as possible).

⁵⁶ *Id.*

⁵⁷ *Id.* § 230(b)(1).

⁵⁸ *Id.* § 230(b)(2). See generally § 230(b) (establishing the other goals as promoting the development of the Internet, encouraging the development of technologies that maximize the Internet, empowering parents to restrict access to objectionable content, and ensuring vigorous enforcement of federal obscenity, stalking, and harassment laws).

⁵⁹ *Id.* § 230(c).

⁶⁰ *Stratton Oakmont, Inc. v. Prodigy Serv. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995), *superseded by statute*, Communication Decency Act of 1996, Pub. L. No. 104-104, sec. 509, § 230, 110 Stat. 56; *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) ("Congress enacted § 230 [of the CDA] to remove the disincentives to selfregulation [sic] created by the *Stratton Oakmont* decision.").

⁶¹ *Stratton Oakmont*, 1995 WL 323710, at *1.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See RESTATEMENT (SECOND) OF TORTS §§ 558, 577 (1977).

⁶⁵ *Stratton Oakmont*, 1995 WL 323710, at *3-4.

had maintained some editorial control over its users' postings, such as the ability to delete postings, the court found that Prodigy was a publisher and therefore liable for content posted by third parties.⁶⁶ The potential chilling effect of this ruling was obvious: it left providers of interactive computer services with the choice of either monitoring and editing posts by third parties and therefore accepting some liability for the content of the postings, or not monitoring any posts by third parties no matter how objectionable content, thereby avoiding liability.⁶⁷

The CDA preempted the issue in *Stratton Oakmont* by immunizing from liability providers of interactive computer services that self-regulate content.⁶⁸ The CDA explicitly grants immunity to providers and users of interactive computers services: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."⁶⁹ If providers or users are not considered publishers, they cannot be liable for defamation.⁷⁰ To that end, Congress recognized that these computer service providers are in the best position to regulate the content on the Internet and that providers should be encouraged to self-regulate.⁷¹ Therefore, through this policy of encouraging self-regulation, Congress sought to promote innovation of computer services through the elimination of a service provider's possible state tort liability arising from information posted by third parties.⁷²

Despite the broad language of the CDA, the immunity granted to providers of interactive computer services is not without limits. For instance, the statute specifically reserves the application of intellectual property law⁷³ because of

⁶⁶ *Id.* *4-5 ("[Prodigy]'s conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability . . .").

⁶⁷ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) ("Under [the *Stratton Oakmont*] holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher.").

⁶⁸ 47 U.S.C. § 230(c) (2000); *Zeran*, 129 F.3d at 331 ("The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. . . . In this respect, § 230 responded to . . . *Stratton Oakmont* . . .").

⁶⁹ 47 U.S.C. § 230(c)(1).

⁷⁰ RESTATEMENT (SECOND) OF TORTS § 558.

⁷¹ Adam M. Greenfield, *Despite a Perfect 10, What Newspapers Should Know About Immunity (and Liability) for Online Commenting*, 4 I/S: J.L. & POL'Y INFO. SOC'Y 453, 461-62 (2008). However, despite the broad immunity granted to providers of interactive computer services, the CDA does not remove liability from the actual information content provider, who is generally the anonymous third party whose content instigated the lawsuit. *Zeran*, 129 F.3d at 330 ("None of [the language in the CDA] means, of course, that the original culpable party who posts defamatory messages would escape accountability.").

⁷² Greenfield, *supra* note 71, at 461-62.

⁷³ 47 U.S.C. § 230(e)(3).

the ease with which intellectual property laws could be subverted through the use of the Internet.⁷⁴

The broad language of the CDA has led to difficult interpretation and application by the courts, often forcing them to draw the line between behavior constituting responsible “creat[ion] or develop[ment]” of content on the part of service providers and irresponsible behavior of a “creat[or] or develop[er]” resulting in liability.⁷⁵

B. Judicial Interpretation of the CDA

Congress enacted the CDA in order to foster “diversity of political discourse, . . . cultural development, and . . . intellectual activity” available to Americans through the Internet “with a minimum . . . government regulation.”⁷⁶ Since enactment, courts have been receptive to the broad, sweeping immunity that Congress granted to providers of interactive computer services.⁷⁷ Litigation serves to define and refine certain aspects of the CDA and to distinguish those activities that are protected from those that are not.⁷⁸ Aside from affirming the CDA, courts have distinguished applicability between information content providers and providers of communications services, as well as affirmed that the CDA has no effect on intellectual property law.

1. Recognition and Reaffirmation of the CDA’s Broad Immunity

Actions in which the defendant claims the CDA as a defense often involve the plaintiff attempting to hold the defendant, typically a provider of an interactive computer service, liable for defamatory or harassing speech provided by a third party.⁷⁹ A defendant service provider is immune from liability under the CDA “if: (1) [the defendant] is a provider or user of an interactive computer service; (2) the claim is based on information provided by another information

⁷⁴ See generally Dale M. Cendali, Charlotte E. Forssander & Ronald J. Turiello, Jr., *An Overview of Intellectual Property Issues Relating to the Internet*, 89 TRADEMARK REP. 485, 485–92 (1999) (discussing ways the Internet has contributed to increased infringement of intellectual property laws).

⁷⁵ 47 U.S.C. § 230(c)(1), (f)(3); see *infra* Part III.B.2 (examining when interactive computer service providers’ conduct exposes them to liability although normally they would be immune under the CDA).

⁷⁶ 47 U.S.C. § 230(a)(3)–(4).

⁷⁷ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (finding interactive computers service provider America Online immune under the CDA for suit for defamation); *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 414–15 (1st Cir. 2007) (reaffirming *Zeran*); *infra* Part III.B.1.

⁷⁸ See *infra* Part III.B.2.

⁷⁹ See, e.g., *Universal Commc’n Sys., Inc.*, 478 F.3d at 414–15; *Zeran*, 129 F.3d at 328.

content provider; and (3) the claim would treat [the defendant] as the publisher or speaker of that information.”⁸⁰ When a court determines that all three of the elements have been satisfied, the defendant is immune under the CDA from defamation suits spurred by the postings of third parties.⁸¹

In an early case involving the CDA, *Zeran v. America Online, Inc.*, the defendant invoked the CDA as an affirmative defense to a defamation claim.⁸² Zeran’s claim arose when an anonymous America Online (“AOL”) user posted false statements to an online message board, leading to severe harassment of Zeran.⁸³ Zeran sued AOL, claiming AOL was liable as the publisher of defamatory, third-party content.⁸⁴

On an appeal from the grant of summary judgment by a U.S. district court, the Court of Appeals for the Fourth Circuit held that the CDA protected AOL because it was a provider of interactive computer services.⁸⁵ The court determined that this scenario was the quintessential situation that Congress envisioned when enacting the CDA’s immunity provision and dismissed Zeran’s claim.⁸⁶ The court reaffirmed Congress’s recognition that if interactive computer service providers were forced to restrict or eliminate speech to avoid liability, it would create an “obvious chilling effect” on speech.⁸⁷ The court noted the concerns of free speech outweigh the imposition of state tort liability

⁸⁰ *Universal Commc’n Sys., Inc.*, 478 F.3d at 418; see 47 U.S.C. § 230(c)(1).

⁸¹ See *id.* at 418–22 (finding that all three elements were met, and therefore CDA immunity applied); see also *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 n.6, 1164–65 (9th Cir. 2008) (concluding that Roommates.com was not entitled to immunity because it provided content “in part,” despite being an interactive computer service provider); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328–30 (concluding that CDA immunity applied because AOL was an interactive computer service provider, the defaming content was provided by a third party, and America Online was being treated as a publisher of the information); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 294–95, 298 (D.N.H. 2008) (concluding that state-law privacy actions were barred by the CDA because the plaintiff was “seek[ing] to hold the defendants liable as the publisher . . . of information provided by another content provider”); *Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*, 418 F. Supp. 2d 1142, 1148–49 (D. Ariz. 2005) (declining to dismiss a claim based on CDA immunity because the defendants had not addressed issues concerning whether they had helped to create or develop the information content).

⁸² *Zeran*, 129 F.3d at 329.

⁸³ *Id.* The anonymous user posted a message that offered “offensive and tasteless” t-shirts regarding the domestic terrorist attack on the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma. *Id.* Zeran’s home phone number was listed as the contact number for the t-shirts, which led to Zeran receiving “a high volume of calls, comprised primarily of angry and derogatory messages, but also including death threats.” *Id.*

⁸⁴ *Id.* at 329–30.

⁸⁵ See *id.* at 328, 330–35 & n.2.

⁸⁶ *Id.* at 330–35 (explaining Congress enacted the CDA to respond to *Stratton Oakmont, Inc. v. Prodigy Services Co.* and that the case at bar was similar to *Stratton Oakmont*).

⁸⁷ See *id.* at 331 (calling speech transmitted via interactive computer service “staggering” and “prolific”).

on providers of interactive computer services.⁸⁸

More recently, in *Universal Communication Systems, Inc. v. Lycos, Inc.*, the First Circuit⁸⁹ affirmed that the definition of “provider of an interactive computer service” includes service providers who do not directly connect their users to the Internet.⁹⁰ Unlike AOL in *Zeran*, Lycos did not provide users with access to the Internet—it merely operated a series of Web sites.⁹¹ Narrowing the limitation to include only interactive computer service providers who provide Internet access would undermine the Congressional intent and policy underlying the CDA.⁹² As established, Congress wanted to encourage self-policing by interactive computer service providers.⁹³

Other unclear definitions in the CDA have led courts to reevaluate the meaning of otherwise familiar words.⁹⁴ Most notably, courts have had opportunity to decide what behavior changes a service provider’s status from a mere provider of an interactive computer service to a provider of information content.⁹⁵ These cases hinged on the meaning of “responsible, in whole or in part, for the creation or development of information.”⁹⁶

⁸⁸ *Id.* (“Congress considered the weight of the speech interests . . . and chose to immunize service providers to avoid any such restrictive effect.”).

⁸⁹ In both cases the plaintiffs sought to hold an Internet service provider liable for third party defamatory content posted anonymously on online bulletin boards operated by the defendant Internet service provider. *See id.* at 414–16; *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997).

⁹⁰ *See Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419–22 (1st Cir. 2007), 478 F.3d at 419–22 (“Providing access to the Internet is, however, not the only way to be an interactive computer service provider. While such providers are specifically included [by the language of the CDA], there is no indication that the definition should be so limited.”).

⁹¹ *Id.* at 419.

⁹² *Id.* at 418–19.

⁹³ *See* discussion *supra* Part III.A (examining the intent of congress in enacting the CDA).

⁹⁴ *See, e.g., Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162–63, 1167 (9th Cir. 2008) (interpreting both “responsible” and “in part” as used in the CDA); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008) (discussing the proper interpretation of the word “any” as used in the CDA § (e)(2)).

⁹⁵ 47 U.S.C. § 230(f)(2)–(3); *see, e.g., Roommates.com*, 521 F.3d at 1162–63, 1164–67 (finding a Web site can be both a content provider and an interactive service provider if it helps to create the information); *Friendfinder Network*, 540 F. Supp. 2d at 29 (finding slight modifications or editorial control does not make a Web site a content provider); *Hy Cite Corp.*, 418 F. Supp. 2d at 1148–49 (indicating that too much editorial control and solicitation of posts may turn a Web site into a content provider). A provider of an “interactive computer service” is one who furnishes “any information service [or] system . . . that provides or enables computer access by multiple users to a computer server.” An “information content provider” is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(2)–(3).

⁹⁶ 47 U.S.C. § 230(f)(3); *Roommates.com*, 521 F.3d at 1162–63, 1167; *Friendfinder*

2. Distinguishing Between “Provider of an Interactive Computer Service” and “Information Content Provider”

The First Circuit noted in *Universal Communications, Inc.* that “[n]o amount of artful pleading can avoid” the fact that Congress intended to immunize message board operators from liability resulting from posts made by others, not to immunize online publishers from liability for publishing defamatory content.⁹⁷ To overcome a defendant’s use of the CDA as an affirmative defense, plaintiffs will often try to categorize the defendant, not as the immune “provider of an interactive computer service,” but as the potentially liable “information content provider.”⁹⁸ Thus, the courts had to decide what level of activity transforms a provider of an interactive computer service from a conduit for information into a creator or developer of content.⁹⁹

Courts have made it clear that the mere selection of information for removal or publication on a Web site is not sufficient to convert an interactive computer service provider into a creator or developer of information content;¹⁰⁰ it takes “something more substantial” than exerting minimal editorial control over the content.¹⁰¹ This result makes sense, as Congress intended to encourage interactive service providers to self-police¹⁰²—an activity that requires some level of control over the information provided by third parties through the service. However, where a service provider supplements a user’s posts with content or takes affirmative steps to induce its users to post content, a court will view that provider as both an interactive service provider and a provider of information content, making the provider liable for tort claims arising from that content.¹⁰³

In *Batzel v. Smith*, the Ninth Circuit had to decide whether a Web site operator’s minor alterations to a third party’s content prior to publication constituted

Network, 540 F. Supp. 2d at 299.

⁹⁷ *Universal Commc’n Sys.*, 478 F.3d at 418, 419–20.

⁹⁸ See, e.g., *Roommates.com*, 521 F.3d at 1162, 1164–66; *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003).

⁹⁹ See *Chicago Lawyers’ Comm’n for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671–72 (7th Cir. 2008); *Doe v. MySpace, Inc.*, 528 F.3d 413, 419–20 (5th Cir. 2008); *Universal Commc’n Sys.*, 478 F.3d at 419–21; *Batzel*, 333 F.3d at 1030–32; *Carafano*, 339 F.3d at 1124–25.

¹⁰⁰ See, e.g., *Batzel*, 333 F.3d at 1031; see also *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (arguing that Congressional intent in enacting the CDA was to immunize interactive service providers from suit for “the exercise of its editorial . . . function[.]”).

¹⁰¹ *Batzel*, 333 F.3d at 1031.

¹⁰² See 47 U.S.C. § 230(b), (c)(2) (2000); *supra* Part III.A (discussing the intent of Congress in enacting the CDA and its goal of encouraging self-regulation by interactive service providers).

¹⁰³ See *Roommates.com*, 521 F.3d 1163–65 (finding that a Web site that required users to make selections from options generated by the Web site operator was an information content provider).

“creation or development of information” under the CDA.¹⁰⁴ In this case, the defendant published portions of a third party’s allegedly defamatory e-mail on his Web site.¹⁰⁵ The plaintiff, Batzel, discovered the published e-mail and filed suit for damage to her reputation and loss of business, resulting from its publication.¹⁰⁶ A co-defendant, who was responsible for posting the allegedly defamatory material on the Internet, asserted the CDA as an affirmative defense.¹⁰⁷ The court found that the defendant may be immune under the CDA because “[t]he ‘development of information’ . . . means something more substantial than merely editing portions of an e-mail and selecting material for publication.”¹⁰⁸ This holding encourages more self-regulation on the part of interactive service providers by granting them immunity when they choose content for publication based on a policy of “inclusion or removal,” even permitting minor content edits.¹⁰⁹

Similarly, questionnaires that many Web sites require users to complete to use the Web site’s services also have led to definitional issues.¹¹⁰ Questionnaires are often used in creation of an online profile. Typically, profiles created for social networking¹¹¹ and online auction¹¹² Web sites where the information

¹⁰⁴ *Batzel*, 333 F.3d at 1031.

¹⁰⁵ *See id.* at 1021–22.

¹⁰⁶ *Id.* at 1022–23.

¹⁰⁷ *Id.* at 1021, 1026, 1030. The defendant, Cremers, sought protection from suit under California’s anti-SLAPP (Strategic Lawsuits against Public Participation) law, which protects citizens from lawsuits brought to deter the proper exercise of legal or political rights. *Id.* at 1023–24. However, the court looked to the CDA to determine if the defense could be successful. *Id.* at 1026.

¹⁰⁸ *Id.* at 1031. In a footnote, the court acknowledged that other courts have agreed with its finding that more than editorial decisions are required to constitute “development of information” under the CDA. *Id.* at 1031 n.18.

¹⁰⁹ *Id.* at 1032 (“The scope of the immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal . . . Congress could not have meant to favor removal of offending material over more advanced software that screens out the material before it ever appears.”).

¹¹⁰ *See, e.g.,* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1161–62 (9th Cir. 2008) (discussing a suit against Roommates.com for helping users “discriminate” by requiring them to complete a series of questions); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1121 (9th Cir. 2003) (discussing an action against the owners of Matchmaker.com for the creation of a fake profile, which was created by filling out a series of recommended questions); *see also* Doe v. MySpace, Inc., 528 F.3d 413, 415–417 (discussing plaintiffs attempt to hold MySpace liable because it was partially responsible for the content transmitted between two individuals).

¹¹¹ A social networking Web site is defined as “[a] Web site that provides a virtual community for people interested in a particular subject or just to ‘hang out’ together. Members create their own online ‘profile’ with biographical data . . .” PC Magazine, Encyclopedia, <http://www.pcmag.com/encyclopedia/> (search for “social networking site”) (last visited Jan. 28, 2009) Examples include MySpace and Facebook. *Id.*

¹¹² An online auction Web site is defined as one that uses “the Web to match buyers and sellers around the globe.” *Id.* (search for “online auction”). Examples include eBay, Ama-

collected is used to tailor the Web site to the user's specific interests or needs.¹¹³ Courts have dealt with several cases where the plaintiffs attempt to categorize the Web site owners and operators as "creators or developers" of the information contained within online profiles, which would make the owners or operators liable for the information within the user's profile.¹¹⁴ Courts have also recognized the infeasibility of forcing online service providers to monitor any and all posts on their Web sites prior to publishing the posts.¹¹⁵ Such a requirement likely would result in many sites shutting down or never being created, which would be inconsistent with the purpose of the CDA because it would inhibit the exchange of information over the Internet.¹¹⁶

In *Carafano v. Metrosplash.com, Inc.*, the plaintiff, a television actress, tried to sue the operators of a dating Web site for allowing an anonymous user to create a profile using her address and phone number, as well as photos of her taken from elsewhere on the Internet.¹¹⁷ The profile resulted in the plaintiff receiving harassing, threatening, and sexually explicit messages online, by phone, and by mail from users of the Web site.¹¹⁸ Shortly thereafter, the plaintiff filed suit against the Web site operators.¹¹⁹ On appeal,¹²⁰ the Ninth Circuit held that although the defendant's Web site provided a questionnaire,¹²¹ the content contained within the profile was a direct result of the user's responses to the questionnaire.¹²² The court reasoned that, consistent with the language of section 230 and its underlying policies, "so long as a third party willingly pro-

zon.com, and priceline.com. *Id.*

¹¹³ See, e.g., *Roommates.com*, 521 F.3d at 1161–62 (discussing how Roommates.com requires users to fill out a series of questions in order to help them find a compatible roommate); *Carafano*, 339 F.3d at 1121 (describing how Matchmaker.com requires users to fill out a detailed questionnaire and answer other questions to create a profile).

¹¹⁴ See, e.g., *Chicago Lawyers' Comm'n for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008) (seeking to hold an online classified Web site liable for discriminatory housing listings posted by users); *MySpace, Inc.*, 528 F.3d at 416 (seeking to hold a social networking site liable for allowing adults seeking sex to communicate with minors); *Carafano*, 339 F.3d at 1120–22 (seeking to hold an online dating Web site liable for allowing users to create a false profile of an actress).

¹¹⁵ See *Craigslist, Inc.*, 519 F.3d at 668–69; see also *Carafano*, 339 F.3d at 1124–25.

¹¹⁶ See 47 U.S.C. § 230(b) (2000).

¹¹⁷ *Carafano*, 339 F.3d at 1121–22.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1122.

¹²⁰ At trial, the District Court for the Central District of California found that the defendant service provider was not immune under the CDA because "the company provided part of the profile content," thus becoming an information content provider. *Id.* However, the court dismissed the claim on other grounds, resulting in the plaintiff's appeal. *Id.*

¹²¹ *Id.* at 1121. The questionnaire contained numerous multiple choice and essay questions ranging from the "innocuous" to the "sexually suggestive." *Id.*

¹²² *Id.* at 1124 (noting that the "selection of the content was left exclusively to the user" and that the defendant "was not responsible, even in part, for associating certain multiple choice responses").

vides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process¹²³ because any profile on the Web site lacks content until a third party completes the questionnaire provided.¹²⁴ Additionally, the Web site operators had nothing to do with essays, answers, and photographs provided by third parties as part of the profile-making process.¹²⁵ The court also noted that “[w]ithout standardized, easily encoded answers,” the Web site might not be able to offer the same degree of customer service and reasoned that allowing the site to operate with these tools furthered the goal of the CDA.¹²⁶

In the aforementioned cases, the courts noted that an interactive service provider is not liable for information willingly provided by a third party.¹²⁷ Based on this reasoning, it is logical to assume that a provider would be immune from liability for third-party users who complete questionnaires on their Web sites, which result in the commission of an illegal act. However, service provider liability regarding questionnaires turns on whether the provider required users to commit the illegal act. That was the central issue in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*.¹²⁸

In order to provide more compatible matches, the Roommates.com Web site¹²⁹ required its users to complete a lengthy online questionnaire in order to create a profile.¹³⁰ In addition to requiring standard information, such as name and e-mail address, Roommates.com required users to “disclose [their] sex, sexual orientation, and whether [they] would bring children to the household.”¹³¹ The site also provided users with an “Additional Comments” section that solicits any additional information from the users that they think would be useful in matching them with another user.¹³² All of this information was then compiled and displayed on the user’s profile page.¹³³ The Fair Housing Council of San Fernando Valley initiated a suit against Roommate.com, LLC (“Roommate”), alleging that the Web site operators violated federal and state antidis-

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 1125.

¹²⁷ *See id.* at 1124.

¹²⁸ 521 F.3d 1157, 1165 (9th Cir. 2008).

¹²⁹ The business entity uses the singular “Roommate.com,” but the Web site uses the plural “www.roommates.com.” *Id.* at 1161 n.2. Roommates.com provides roommate-matching services, pairing those seeking to rent out spare rooms with those who have rooms to rent. *Id.* at 1161.

¹³⁰ *Id.* at 1161–62.

¹³¹ *Id.* at 1161.

¹³² *Id.*

¹³³ *Id.* at 1165. The profiles display the user’s sex, sexual orientation, and most other information that the user supplied when creating his or her profile. *Id.* Users seeking a roommate could search the profiles based on those criteria. *Id.*

crimination housing laws by allowing users to limit their housing search based on discriminatory fields such as sex or familial status.¹³⁴

While the Ninth Circuit noted that Roommate's users may supply information to complete their user profiles, the court stated that "the fact that users are information content providers does not preclude Roommate from *also* being an information content provider by helping 'develop' at least 'in part' the information in the profiles."¹³⁵ The court held that because Roommate created the questions and required users to answer them to use the site, Roommate became a developer of the profile.¹³⁶ The court further found that Web site's questionnaire and search capability rose beyond that of "*neutral tools*" because the search method available on the site was not based on "*user-defined criteria*," but was in fact based on illegal search criteria.¹³⁷ Thus, the court found that the site's questionnaire, search engine, and e-mail alerts constituted conduct outside the scope of the CDA's immunity for interactive service providers.¹³⁸

The court did, however, note that the site's operators retained CDA immunity for information provided in the "Additional Comments" section of the questionnaire, even though subscribers may have entered discriminatory comments.¹³⁹ This distinction between the two sections of Roommate's Web site is important because it underscores the Ninth Circuit's message to interactive computer service providers: "If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune."¹⁴⁰

Requiring users to input illegal content is not the only way that a service provider can be transformed into a content provider. Inducing users to provide content for a site with promises of compensation can make the site's operator "responsible . . . for the creation or development" of the user-provided content

¹³⁴ *Id.* at 1162 & n.4, 1169–70.

¹³⁵ *Id.* at 1165.

¹³⁶ *Id.* at 1165–67. The court also found that Roommate was the "information content provider" as to the questions and can claim no immunity for posting them on its website" *Id.* at 1164.

¹³⁷ *Id.* at 1169 (analogizing Roommate's behavior to non-online illegal housing practices).

This is no different from a real estate broker in real life saying, "Tell me whether you're Jewish or you can find yourself another broker." When a business enterprise extracts such information from potential customers as a condition of accepting them . . . the enterprise is responsible . . . for developing that information.

Id. at 1166.

¹³⁸ *See id.* at 1166, 1172.

¹³⁹ *Id.* at 1173–74; accord Chicago Lawyers' Comm'n for Civil Rights Under Law, Inc. v. Craigslist, Inc. 519 F.3d 666, 671–72 (7th Cir. 2008) (reasoning that Craigslist was immune under the CDA because it provided users with neutral tools and that nothing in its service "induces anyone to . . . express a preference for discrimination").

¹⁴⁰ *Roommates.com*, 521 F.3d at 1175.

and liable for it as well.¹⁴¹ In *Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*, the Arizona District court grappled with this very issue.¹⁴²

Under the guise of consumer advocacy, the defendants created badbusinessbureau.com that allowed consumers to air their grievances about companies or individuals.¹⁴³ The creators of badbusinessbureau.com asked consumers to post “Rip-off Reports,”¹⁴⁴ and offered the possibility of compensation for those “Rip-off Reporters” who contributed honest, quality reports over a period of time.¹⁴⁵ In addition to publishing the complaints of its users, the Web site operators also “produce[d] editorials and create[d] titles to the Rip-off Reports posted by users.”¹⁴⁶

After reviewing several reports on badbusinessbureau.com, the plaintiff, Hy Cite Corporation, filed suit against the Web site, alleging defamation among other counts.¹⁴⁷ The defendant operators asserted the CDA as an affirmative defense, making the central issue whether the defendant’s activity rose to the level of becoming a developer or creator of the alleged defamatory content.¹⁴⁸ The court held on summary judgment that the defendant’s publishing of “original content” within the Rip-off Reports, including the comments and titles for the reports, coupled with promises of future compensation for its reporters made the Web site operators responsible for the creation or development of information.¹⁴⁹ Therefore, the operators were not immune under the CDA.¹⁵⁰

Assuming that these cases are consistently decided, the courts have struck a very fine line between qualifying for immunity under the CDA and being liable for defamatory content.

Congress intended to treat the Internet differently from traditional forms of communication such as newspapers, radio, and television.¹⁵¹ Under the CDA,

¹⁴¹ See *Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*, 418 F. Supp. 2d 1142, 1145, 1149 (D. Ariz. 2005).

¹⁴² *Id.* at 1148–49. The *Hy Cite Corp.* opinion was a ruling on the propriety of a motion to dismiss. *Id.* at 1147.

¹⁴³ *Id.* at 1145. The defendants’ Web site describes itself as a vehicle for consumers to file complaints and reports about business that have “rip[ped] off consumers.” *Id.*

¹⁴⁴ “Rip-off Reports” detailed the user’s complaint against a company or individual. *Id.*

¹⁴⁵ The court explained that “Rip-off Reporters” are those who investigated businesses and were encouraged to contact the site operators for tips and advice. *Id.* Once the “reporter” has demonstrated a level of quality work over a period of time, the defendants considered the user for compensation. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1145–46.

¹⁴⁸ *Id.* at 1147–49.

¹⁴⁹ *Id.* at 1149.

¹⁵⁰ *Id.*

¹⁵¹ *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003); *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998).

providers of interactive computer services are granted immunity for information published by them, but created or developed by a third party.¹⁵² However, “[t]he Communications Decency Act was not meant to create a lawless no-man’s-land on the Internet.”¹⁵³ As established above, Web site operators may lose immunity if they are responsible for the creation or development of content on their sites. Additionally, interactive computer service providers also may be liable for infringing on the intellectual property of others.¹⁵⁴

3. *The CDA Does Not Immunize Service Providers for Violations of Intellectual Property Laws*

A recent and pertinent example of the effect of the misappropriation of intellectual property and its effect on CDA immunity is the case of *Doe v. Friendfinder Network, Inc.*¹⁵⁵ In this case, the plaintiff discovered an unauthorized, unwanted, and sexually explicit profile, containing her information as well as a nude photograph that resembled her posted by an anonymous user of the defendant’s Web sites.¹⁵⁶ Upon this discovery, the plaintiff contacted the defendant, Friendfinder Network, Inc. (“Friendfinder”), who then removed the profile.¹⁵⁷ However, despite the removal of the profile from the Web site itself, slightly altered portions of the profile—including the photograph—surfaced through the Internet on unaffiliated sites in the form of advertisements known as “teasers.”¹⁵⁸ Due to the continued pervasiveness of the Internet ads, the plaintiff filed suit alleging intentional infliction of emotional distress and damage to her reputation, seeking both monetary and injunctive relief.¹⁵⁹ The de-

¹⁵² See 47 U.S.C. § 230(c) (2000); *Universal Commc’n Sys., Inc. v. Lycos, Inc.* 478 F.3d 413, 419 (1st Cir. 2007); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003); see also *Batzel*, 333 F.3d at 1026–29.

¹⁵³ *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008).

¹⁵⁴ See 47 U.S.C. § 230(e)(2); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008).

¹⁵⁵ 540 F. Supp. 2d 288 (D.N.H. 2008).

¹⁵⁶ *Id.* at 292. Friendfinder Network, Inc. operated several Web sites, including Adult-FriendFinder.com, a site where members can complete profiles in order to meet other members interested in sex and swinging. *Id.* at 291. The profile using plaintiff’s information sought “Men or Women for Erotic Chat/E-mail/Phone Fantasies and Discreet Relationship.” *Id.* at 292.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 291–293. The modifications were minor and generally involved just a change in the plaintiff’s age. *Id.* at 292 n.3. The teaser advertisements posted on unrelated Web sites directed Internet traffic, through hyperlinks, to one of the defendant’s Web sites. *Id.* at 293. The court notes that by directing traffic to the defendant’s Web sites, the teaser allegedly increased Friendfinder’s profitability. *Id.*

¹⁵⁹ See *id.* at 293. With regard to the injunctive relief, the plaintiff sought an injunction “requiring the defendants to notify the public of the circumstances giving rise to the appear-

defendant sought to dismiss the claims under CDA.¹⁶⁰

In analyzing the defendant's claim, the New Hampshire District Court found that the CDA barred the plaintiff's state law claims for defamation.¹⁶¹ Due to the CDA immunity, the court dismissed the plaintiff's claims of defamation and intentional infliction of emotional distress.¹⁶² However, the court shrewdly noted that the plaintiff had a claim for a violation of her right of publicity,¹⁶³ a state-created intellectual property right, which according to this court was left unaffected by the CDA.¹⁶⁴ Therefore, the court refused to grant the defendant's motion to dismiss the plaintiff's right of publicity claim.¹⁶⁵

Importantly, this holding affirmed that computer service providers may be liable for misappropriation of intellectual property rights under state law. Specifically, interactive computer service providers might be held liable if they or their users violate an individual's right of publicity by profiting from the plaintiff's image or likeness. Applying this reasoning to non-celebrity gossip Web sites, operators could be held liable if the plaintiff establishes a link between use of the individual's likeness and profit of the Web site. Operators should review the content posted to their Web site to verify that it is not used in commerce and therefore violative of the right of publicity. If the targeted individuals can be identified from the information listed about them on the Web site, and the content is used for a commercial purpose, the plaintiff likely will have a valid claim against the gossip Web site operators for violating their rights of publicity. This holding begs the question whether Congress intended the CDA to immunize Web site operators from such claims.

ance of the profile on their websites." *Id.*

¹⁶⁰ *Id.* at 291.

¹⁶¹ *See id.* at 293–98 (holding that Friendfinder's encouragement of anonymous postings and a questionnaire comprised of a "pre-set menu of sexual responses" did not put Friendfinder outside the immunity typically granted to interactive computer service providers by the CDA).

¹⁶² *Id.* at 306–07.

¹⁶³ *Id.* at 302–04. The defendants in this case took issue that the plaintiff had not stated a claim for violation of her right of publicity, but the court was unmoved by their argument. *Id.* at 303–04 & n.16.

¹⁶⁴ *See id.* at 299–300 (noting that if Congress intended for the CDA to preempt state-created intellectual property laws, but not federal ones, they would have used the word "federal" in 47 U.S.C. § 230 (e)(1) instead of the word "any"). *Contra* Perfect 10, Inc. v. CCBill, LLC, 488 F.3d 1102, 1118–19 (9th Cir. 2007) (reasoning that the CDA immunized service providers from state intellectual property claims).

Because material on a website may be viewed across the Internet, and thus in more than one state at a time, permitting the reach of any particular state's definition of intellectual property to dictate the contours of this federal immunity[, which] would be contrary to Congress's expressed goal of insulating the development of the Internet from the various state-law regimes.

Id. at 1118.

¹⁶⁵ *Friendfinder Network*, 540 F. Supp. 2d at 306–07.

C. Potential Liability under State Tort Law for Non-celebrity Gossip Web Site Operators

Among the goals of the CDA's immunity provisions are to allow parents to protect their children from "inappropriate online material"¹⁶⁶ and to "deter and punish . . . obscenity, stalking, and harassment by means of computer."¹⁶⁷ Despite these goals, some Web site operators—including operators of non-celebrity gossip Web sites—are using this immunity to circumvent the underlying Congressional intent, allowing hateful and harassing speech to flourish on their Web sites with little or no oversight.¹⁶⁸ These Web site operators generally do not edit or modify the content posted by their users and avoid traditional state tort liability for defamation under the CDA's broad immunity. However, despite their claims of immunity under the CDA, the editorial comments provided by some of these operators may cause the Web site to cross the line from providers of an "interactive computer service" to providers of "information content," putting the Web site operator outside the scope of immunity under the CDA.¹⁶⁹

A Web site operator is immune from a claim under state tort law if: the defendant "is a provider or user of an interactive computer service"; and "the claim is based on information provided by another information content provider."¹⁷⁰ Generally, non-celebrity gossip Web sites meet the definition of a provider of an interactive computer service. The definition is broad and includes online message boards;¹⁷¹ non-celebrity gossip sites are online forums that are analogous to message boards.¹⁷² Therefore, unless a potential plaintiff

¹⁶⁶ 47 U.S.C. § 230(b)(4) (2000).

¹⁶⁷ *Id.* § 230(b)(5).

¹⁶⁸ *See, e.g.*, *The Dirty*, Kochran Kardashian, *supra* note 26. ("In this situation, because [the Dirty] is an 'interactive website', even if a user were to post a defamatory comment about you, [the Dirty] is entirely immune from any lawsuit based on those comments because of a federal law called the Communications Decency Act, 47 U.S.C. § 230.")

¹⁶⁹ 47 U.S.C. § 230(c)(1), (f)(2)–(3); *Hy Cite Corp. v. badbusinessbureau.com*, L.L.C., 418 F. Supp. 2d 1142, 1149 (D. Ariz. 2005).

¹⁷⁰ *Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007).

¹⁷¹ 47 U.S.C. § 230(f)(3) (defining an interactive computer service provider as one "that providers or enables computer access by multiple users to a computers service, including specifically a service or system that provides access to the Internet."); *see Universal Comm'n Sys.*, 478 F.3d at 419 (extending the definition of a "provider of an interactive computer service" to include those providers who do not grant its users access to the Internet, but merely operate Web sites); *Batzel v. Smith*, 33 F.3d 1018, 1030 (9th Cir. 2003) (reasoning "interactive computer service" is more than just providers of access to the Internet and the CDA extends immunity to "users" of a service); *Carafano v. Metrosplash.com*, 339 F.3d 1119, 1123 (9th Cir. 2003) (noting that most courts have adopted "a relatively expansive definition of 'interactive computer service.'").

¹⁷² Online forums that are "discussion group[s] on the Web about a particular topic." *PC Magazine*, *supra* note 111 (search for "forum"). Forums include posts by individual users,

can prove that the defendant has created or developed at least some portion of the information comprising the basis of the claim, the plaintiff's state tort claim is barred by the immunity granted under the CDA.¹⁷³

A potential plaintiff against a non-celebrity gossip Web site would have to determine whether the information was "provided by another."¹⁷⁴ If the Web site operator is considered to be the provider of the content, the CDA immunity does not apply.¹⁷⁵

The plaintiff must demonstrate that the service provider's actions rise to the level of creation or development of content, which would make the service provider an information content provider and liable for any defamatory information content.¹⁷⁶ However, there is no bright-line test for what action changes a provider of an interactive computer service into an information content provider.¹⁷⁷ Nonetheless, courts have held that supplementing and editing the third party content beyond "minor edits"¹⁷⁸ and inducing users to provide information with promises of future compensation¹⁷⁹ are actions outside the scope of CDA immunity. Because the operators of non-celebrity gossip Web sites edit and monitor content to varying degrees, their potential liability varies accordingly. Applied to three different non-celebrity gossip Web sites, this premise yields different results.

as well as "all the extras people expect from Web pages, including images, videos and downloads." *Id.* Non-celebrity gossip Web sites invite users to post gossip and allow other users to post replies or comment on the original post, operating in the same manner as a standard online message board. *See, e.g.,* College ACB, *supra* note 2; The Dirty, *supra* note 21.

¹⁷³ *See Hy Cite Corp.*, 418 F. Supp. 2d at 1142 (holding that dismissal was inappropriate because of the possibility that the Web site operator contributed enough to be an information content provider).

¹⁷⁴ *See Universal Commc'n Sys.*, 478 F.3d at 418.

¹⁷⁵ 47 U.S.C. § 230(c)(1) (2000); *Carafano*, 339 F.3d at 1123 ("Under the statutory scheme, an 'interactive computer service' qualifies for immunity so long as it does not also function as an 'information content provider' . . ."); *see also Universal Commc'n Sys.*, 478 F.3d at 418 (noting that defendant interactive computer service providers are immunized from a state law claim when the information giving rise to the claims is "provided by another information content provider").

¹⁷⁶ *See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1172–74 (9th Cir. 2008) (finding the operators of Roommates.com liable for content that they assisted in creating and immune for content they did not create or assist in creating).

¹⁷⁷ *See id.* (McKeown, J. dissenting). One can be both a "provider of an interactive computer service" and an "information content provider" simultaneously. *See id.* at 1162 (majority opinion).

¹⁷⁸ *See Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003); *cf. Hy Cite Corp.*, 418 F. Supp. 2d at 1149 (finding that editorial comments, titles, original content, and inducements for content by a Web site operator might be enough to convert the operator into a creator or developer of content).

¹⁷⁹ *Hy Cite Corp.*, 418 F. Supp. 2d at 1149.

College ACB¹⁸⁰ allows users to submit gossip about their classmates anonymously.¹⁸¹ Users post gossip on the site and other users are allowed to view, reply, vote for, or comment on the original post.¹⁸² The site operator does not edit the posts nor does it promise to monitor the postings actively.¹⁸³ However, College ACB encourages its users to report any posts that are objectionable or violate its terms of use—the operators may then delete the post.¹⁸⁴ Thus, the College ACB operator's inaction renders the site a mere conduit for the campus gossipers to post their information.

Courts have held that a service provider's monitoring or lack of monitoring of information posted by third parties does not make the service provider an "information content provider."¹⁸⁵ It follows, then, that College ACB likely would not be held as an information content provider and that claims against College ACB would likely be based on information provided by one of its users, another information provider. Therefore, College ACB and similar sites likely would be protected by the CDA from tort liability in state law arising from its users' postings.

By contrast, a gossip site whose operators supplement its users' postings with their own content may face potential liability because such action could render the operators as creators or developers of the content.¹⁸⁶ To constitute

¹⁸⁰ College ACB has replaced JuicyCampus as the most prominent college gossip site since JuicyCampus ceased operations for financial reasons. See A Juicy Shutdown, *supra* note 12; JuicyCampus Shutdown FAQs, *supra* note 46. College ACB "is quickly becoming the central hub of college campuses around the country, giving students the freedom to voice their opinion, ask questions and ask questions about any facet of college life." Posting of College ACB to Official Blog for CollegeACB.com, College ACB Press Release, <http://collegeacb.blogspot.com/2009/02/collegeacb-pressrelease.html> (Feb. 5, 2009 12:57 EST) [hereinafter College ACB Press Release].

¹⁸¹ College ACB FAQ, *supra* note 4 (explaining College ACB "stands for College Anonymous Confession Board. It's a forum open to discuss almost any topic with other members of the campus community.").

¹⁸² See College ACB, General ACB, <http://www.collegeacb.com/sb.php?school=general> (last visited Feb. 20, 2009).

¹⁸³ College ACB, Terms of Use, <http://www.collegeacb.com/sb.php?school=general&page=terms> (last visited Feb. 22, 2009). The operator states "it is impossible for [the operator] to review messages" and although the operator has the ability to remove "objectionable messages," the operator will only do so after it has "determine[d] that removal is necessary." *Id.* The site further reminds users that it is "not responsible for the contents of any message." *Id.*

¹⁸⁴ *Id.*; see also College ACB FAQ, *supra* note 4; College ACB Press Release, *supra* note 180 (noting that College ACB utilizes a "user-moderation button" allowing for a level of self-regulation by users and the operator that was not available on sites like JuicyCampus).

¹⁸⁵ See *Universal Commc'n Sys. Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123–25 (9th Cir. 2003); *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997).

¹⁸⁶ *Compare Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (deciding to find the

“development of information” under the CDA, the operator must do something “more substantial than merely editing portions of [the content] and selecting material for publication.”¹⁸⁷

The operator of the Dirty,¹⁸⁸ Nik Richie, may be considered an “information content provider” and an “information service provider” because of the original content that he adds to users’ gossip postings. Nik Richie allows users to post gossip and photographs on his Web site.¹⁸⁹ However, unlike College ACB, Richie—self-described as “the first ever reality blogger”¹⁹⁰—not only serves as a conduit for the information, but also often provides editorial comments beneath the user-provided photograph and gossip.¹⁹¹ Further, Richie’s editorial comments are distinguishable from the slight edits at issue in *Batzel v. Smith* because Richie does more than “select and make minor alterations” to his users’ information; he adds entirely new, original content.¹⁹²

Richie’s activity more closely resembles the editorial comments added by the Web site operator in *Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*¹⁹³ In *Hy Cite*, the court found that where the defendant Web site operator adds its own original content to third-party posts, the Web site operator may be an information content provider.¹⁹⁴ Like the defendant in *Hy Cite*, Nik Richie may be an “information content provider” because he adds his own editorial comments to third-party provided content. Because the content is not created by another, but by Richie himself, he may not receive CDA immunity for his comments and, thus, may expose himself to potential tort liability for claims based on the content that he provides.

Promises of future compensation to users can also verge on “development” of information, exposing site operators to liability for the user-created content.¹⁹⁵ The operators of the non-celebrity gossip Web site, Gossip Report,¹⁹⁶

Web site operator an information content provider because it only made minor edits), *with Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*, 418 F. Supp. 2d 1142, 1149 (D. Ariz. 2005) (finding that the CDA may not apply to a Web site operator because the operators contributed to the content, including adding titles to user generated posts, generating some content in the posts, and allegedly soliciting individuals to submit posts for compensation).

¹⁸⁷ *Batzel*, 333 F.3d at 1031.

¹⁸⁸ The Dirty is a non-celebrity gossip Web site whose users can post photographs with captions that they upload themselves and categorize their gossip by city or college campus. The Dirty, *supra* note 21.

¹⁸⁹ Dirty Submit, http://www.thedirty.com/?page_id=32876 (last visited Feb. 11, 2009).

¹⁹⁰ The Dirty, *supra* note 21.

¹⁹¹ See, e.g., Club Thrust, *supra* note 25 (displaying the comment of Richie, “Let me guess... not out of the closets yet. –nik” under a user posted photograph of men in sleeveless shirts and cowboy hats).

¹⁹² *Batzel*, 333 F.3d at 1031.

¹⁹³ *Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*, 418 F. Supp. 2d 1142, 1145–46 (D. Ariz. 2005).

¹⁹⁴ *Id.* at 1149.

¹⁹⁵ *Id.*

may also not qualify for CDA immunity due to the prospect of compensation for users of the site, Gossip Report promises three different forms of compensation to its users—cash, prizes, and “G Money.”¹⁹⁷ Hence, the users who provide entertaining content and encourage others to use the Web site may receive compensation.¹⁹⁸ As in *Hy Cite*—where the court found that the defendant was possibly an information content provider because it offered to pay third-party posters for content—Gossip Report makes promises of future compensation in the form of both money and merchandise.¹⁹⁹ Thus, a court could hold its operators responsible for the creation or development of the user-provided information on Gossip Report.

In short, because of immunity under the CDA, a defendant Web site operator normally is not liable for the content of information created by a user, even if the information is defamatory or libelous.²⁰⁰ However, in order to receive the protection, a service provider must adhere to his or her role as a service provider. If the service provider adds additional content to the site or induces users to create content with promises of compensation, then these actions may warrant treatment of the service provider as an information content provider, making the provider liable for any defamatory content.

Therefore, to be protected by the CDA, non-celebrity gossip Web site operators must ensure that they act as providers of an interactive computer service—neutral conduits for information—and not as the creators or developers of the content.²⁰¹ Once the plaintiff has established that the defendant service provider is responsible for the creation or development of the content on which the claim is based, the defendant may then be liable for that content, even when it is posted by a third party.²⁰² However, if the plaintiff has a claim for a violation of intellectual property laws—specifically the right of publicity—who pro-

¹⁹⁶ A description of the site’s purpose and use appears on its homepage: “On GossipReport.com you can anonymously talk about anyone you want. Instead of creating a profile about yourself, you can create a profile about someone else.” Gossip Report, *supra* note 21.

¹⁹⁷ Gossip Report FAQ, *supra* note 4. Student users have the option of earning \$500 by recruiting the most other students to join Gossip Report. *Id.* Additionally, the operators compensate users with “G Money” if they provide gossip entertaining enough to be tagged as “Hot and Juicy, Funny, or True,” by inviting others to join Gossip Report, or providing additional information upon logging into the site. *Id.* Finally, users who attend “Gossip Parties” are eligible to win “free drinks, free GossipReport.com merchandise, and a chance to win cool prizes!” *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Compare *Hy Cite*, 418 F. Supp. 2d at 1149 (finding that the inducement of compensation for posts may possibly lead to liability), with Gossip Report FAQ, *supra* note 4 (inducing users to encourage others to join and post with prizes, cash, and other compensation).

²⁰⁰ See *supra* Part II.A (discussion of the CDA and the immunities it grants).

²⁰¹ See *supra* Part III.B.2.

²⁰² See *supra* Part III.B.2 (an examination of when interactive computer service providers’ conduct exposes them to liability although normally they would be immune under the CDA).

vided the infringing content may be irrelevant.²⁰³

IV. THE RIGHT OF PUBLICITY: SHOULD NON-CELEBRITY GOSSIP SITE OPERATORS CARE?

To understand the applicability of the right of publicity to the immunity provision of the CDA, an understanding of the right is required. First, the genesis of the right is explained, and then, an examination of the interpretation and adoption of the right follows.

A. Right of Publicity: A Historical Perspective

The right of publicity stems from the right to privacy,²⁰⁴ originating specifically from Warren and Brandeis's argument for every person's inherent right "to be let alone."²⁰⁵ Since 1950, various courts and commentators have molded and shaped the right of publicity.²⁰⁶ Today, the right of publicity is recognized as "the inherent right of every human being to control the commercial use of his or her identity."²⁰⁷

Over a century ago, in response to an increasingly invasive press and aggressive advertising techniques, Brandeis and Warren attempted to define the scope and breadth of one's right to privacy.²⁰⁸ Brandeis and Warren specifically focused on one's right "to be let alone," believing that human beings have an inherent right to privacy.²⁰⁹ However, the right "to be let alone" did not directly

²⁰³ See 47 U.S.C. § 230(e)(2) (2000); *supra* Part III.B.3.

²⁰⁴ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). [I]n addition to and independent of that right of privacy . . . , a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross," *i.e.*, without an accompanying transfer of a business or of anything else. . . . This right might be called a "right of publicity."

Id.; Thomas Phillip Boggess V, *Cause of Action for an Infringement on the Right of Publicity*, in 31 CAUSES OF ACTION 121, § 2 (2d ed. 2006).

²⁰⁵ Warren & Brandeis, *supra* note 1, at 195 ("Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone.'").

²⁰⁶ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578–79 (1977) (holding the First and Fourteenth Amendments are not a bar to recovery for suits based on the right of publicity); Boggess, *supra* note 204, § 2 (explaining that Professor Nimmer created the idea that the right of publicity should really be categorized under the umbrella of unfair competition rather than privacy and Professor Prosser's tort theory of the right of publicity was included in the Restatement (Second) of Torts).

²⁰⁷ J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2004).

²⁰⁸ Warren & Brandeis, *supra* note 1, at 195 ("Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life . . .").

²⁰⁹ *Id.*

address the issue of how celebrities—or those who put themselves in the public sphere—could prevent the unauthorized commercial use of their images.²¹⁰ Consequently, courts often reached inconsistent holdings based on similar fact patterns.²¹¹

In 1953, Judge Frank “coined the term ‘right of publicity’ to start a break away from thinking of all [the celebrity] cases under the terms and theory of the right to privacy.”²¹² This new “right of publicity” concept initially recognized a pecuniary value in the use of an individual’s image.²¹³ Moreover, Judge Frank specifically noted the different nature of claims brought by a celebrity, as compared to claims brought by an ordinary individual, reasoning that celebrities must suffer more than just “bruised feelings” to be entitled to damages:

For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.²¹⁴

The right of publicity developed slowly and inconsistently “[l]ike a statue emerging from a formless block of stone.”²¹⁵ In 1977, the Supreme Court first addressed the right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.* In *Zacchini*, the defendant (“Scripps”) used Zacchini’s image in a news broadcast, as opposed to a commercial advertisement.²¹⁶

Zacchini was hired to perform a human cannonball routine at a county

²¹⁰ MCCARTHY, *supra* note 207, § 1:38 (explaining plaintiffs had to frame their causes of action as “hurt feelings,” and celebrities whose images were commonly used would have a difficult time proving indignity over the use of their image).

²¹¹ *See, e.g.,* O’Brien v. Pabst Sales Co., 124 F.2d 167, 170 (1941) (holding that the plaintiff, a famous football player waived his right to privacy by “constantly seeking and receiving” publicity and, therefore, was not entitled to any damages on his claim that his image was used to promote beer without his consent); *but cf.* Edison v. Edison Polyform Mfg. Co., 67 A. 392, 395 (N.J. Ch. 1907) (holding the defendant, Edison Polyform, liable for using Thomas Edison’s name and image without consent).

²¹² Boggess, *supra* note 204, §2; *see* Haelan Labs., Inc. v. Topps Chewing Gum, Inc. 202 F.2d 866, 868 (2d Cir. 1953) (“[I]n addition to and independent of that right of privacy . . . , a man has a right in the publicity value of his photograph This right might be called a ‘right of publicity.’”).

²¹³ *Haelan Labs., Inc.*, 202 F.2d at 868.

²¹⁴ *Id.*

²¹⁵ MCCARTHY, *supra* note 207, §1:39.

Despite this increasing trend toward recognizing a distinct right to control the commercial exploitation of one’s name and likeness, the development of this right has been spasmodic. This is in part a consequence of courts adjudicating claims which might be categorized as invasions of plaintiff’s right of publicity as privacy claims.

Lugosi v. Universal Pictures, 603 P.2d 425, 439 n.14 (Cal. 1979) (Bird, C.J., dissenting)

²¹⁶ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563–64 (1977).

fair.²¹⁷ During a performance, Zacchini asked a Scripps reporter to not record the spectacle.²¹⁸ The reporter initially granted Zacchini's request, but returned the next day and filmed his performance.²¹⁹ That evening, nearly the entire act was broadcast on the eleven o'clock news for public viewing.²²⁰ Zacchini argued that the dissemination of his "entire act" violated his right of publicity and as a result, Scripps was liable for damages.²²¹ Scripps argued that it was immune from such claims under the First and Fourteenth Amendments.²²²

The Supreme Court ultimately held that the rebroadcast of the entire human cannonball routine violated Zacchini's right of publicity and the First and Fourteenth Amendments did not protect Scripps from litigation in this instance.²²³ The majority emphasized that "neither the public nor [Scripps] will be deprived of the benefit of [Zacchini's] performance as long as his commercial stake in his act is appropriately recognized."²²⁴ This suggests the potential violation of the right of publicity cannot be a broadcast of the "entire act" without compensation.²²⁵ Importantly, however, the Court distinguished Scripps' broadcast of the "entire act" from a report containing only the "newsworthy" information regarding Zacchini's act.²²⁶ Thus, the Court in *Zacchini* not only recognized the state-law created right to privacy, but it also carved out the "newsworthy" exception to the right to privacy.²²⁷

²¹⁷ *Id.* Zacchini claimed the performance was a secret family act, consisting of him being shot from a cannon into a net. *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 564.

²²⁰ *Id.* at 564 & fn.1.

²²¹ *Id.* at 564-65.

²²² *Id.* (detailing Scripps movement for summary judgment, which the trial court granted and Supreme Court of Ohio affirmed, explaining Scripps could only violate Zacchini's right of publicity if the station intended to "appropriate [the clip] . . . for some non-privileged private use" or to injure Zacchini).

²²³ *See id.* at 578. The Court reasoned the protection of one's right to publicity "is grounded in the . . . image." *Id.* at 575-76. However, the Court did note that the fostering of creative performing rewards the public. *Id.* at 576-77.

²²⁴ *Id.* at 578.

²²⁵ *See id.* at 574-75 (noting that the Zacchini's right of publicity would not prevent Scripps from reporting only the "newsworthy" facts about his performance, but distinguishing the broadcast of Zacchini's entire human cannonball performance without his consent by analogizing it to an unauthorized broadcast of a copyrighted film or play in its entirety).

²²⁶ *See id.*; *see also id.* at 580-81 (Powell, J., dissenting) (lamenting the "entire act" analysis for fear that provides no clear precedent to follow and may lead to news media self-censorship or lower standards in news media, thus depriving the public of a valid, protected source of information).

²²⁷ *See MCCARTHY, supra* note 207; *Zacchini*, 433 U.S. at 574-75, 578 (1977) (stating that the right of publicity does not prevent the media from reporting "newsworthy facts" about the plaintiff's act, but clarifying that the First and Fourteenth Amendments to the U.S. Constitution do not immunize the media when broadcasting "a performer's entire act without his consent").

As demonstrated by *Zacchini*, the right of publicity can conflict with First Amendment protections. Based on these protections, courts continue to uphold the “newsworthy exception,” allowing the news media to use an individual’s name and likeness where that same use in the commercial context would be prohibited.²²⁸

While courts were defining the scope and breadth of the right of publicity and distinguishing it from the right to privacy, scholars and other commentators similarly differentiated this new right from its origins in the right to privacy.²²⁹ Specifically, scholars have sought to justify the existence of the right of publicity on different grounds from the right to privacy.²³⁰ Some argue that the “human identity” is itself an inherent property right of all individuals.²³¹ In the context of anonymous non-celebrity gossip Web sites, the individual’s property right is essentially eradicated when an anonymous third party can usurp an individual’s identity; display it online anonymously in a negative, untrue, context; and leave the individual without legal recourse against those who operate the site.²³²

As one commentator puts it, “[i]f the overall picture of an individual’s character is made up of the messages conveyed by her associational decisions, then unauthorized use of her identity interferes with her autonomy because the third party takes at least partial control of the meaning associated with her.”²³³

Non-celebrity gossip Web sites are exactly the type of unauthorized exploi-

²²⁸ Alicia M. Hunt, Comment, *Everyone Wants to Be a Star: Extensive Publicity Rights for Noncelebrities Unduly Restrict Commercial Speech*, 95 Nw. U. L. REV. 1605, 1609–10 (2001).

Courts have acknowledged that the right of publicity clashes with the First Amendment, and as a result, courts have carved out a “newsworthiness” exception into the right of publicity, which broadly permits the media to use people’s names and photos without liability. Generally speaking, however, commercial advertisements are not afforded [the same] protection

Id. (citations omitted).

²²⁹ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995) (explaining that Professor William Prosser authored an analysis of the torts of privacy in the 1960s; a work so influential, his discussion of the right of publicity was later included in the Second Restatement of Torts). The discussion continues today among modern academics. *E.g.*, Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1181 (2006) (distinguishing the right of publicity by its justification on morality and economic efficiency grounds, which are justifications closer to copyright and trademark law than that of the right to privacy); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 282 (2005) (noting that unauthorized use of an individual’s image interferes with that person’s autonomy by removing personal choice).

²³⁰ See, *e.g.*, Dogan & Lemley, *supra* note 229, at 1181; McKenna, *supra* note 229.

²³¹ *E.g.*, MCCARTHY, *supra* note 207, § 2.2 (explaining that the right of publicity is a recognition of a person’s identity, which is unique and worth protecting).

²³² *E.g.*, McKenna, *supra* note 229, at 282.

²³³ *Id.*

tations that serve to distort others' perceptions of an individual through no fault of that individual. Although an anonymous photograph of an individual may be a true representation of that individual, the third party, hiding behind his or her anonymity, often posts the photograph in a misleading and negative context that serves to embarrass or humiliate the photographed.²³⁴

Still others believe that the right of publicity is justified by economic principles, noting the inherent inefficiency of someone using statements made about or by a celebrity—even if true—for personal gain or commercial profit without authorization.²³⁵

These three justifications for the right of publicity are similar to those of several other legal rights; in particular, the right not to have one's trademark infringed, the right not to have one's copyright violated, and the right not to be defamed are similar.²³⁶ While these areas are distinct and do not directly apply to the right of publicity,²³⁷ these areas establish that the legal concept behind a right to publicity is valid and accepted.

B. Modern Acceptance of Publicity As a Right

The right of publicity is a state law doctrine; therefore, its acceptance and application vary among the twenty-four jurisdictions that recognize it.²³⁸ Although the general purpose of the doctrine—to protect one's image from being commercially exploited without consent—remains constant, the specific elements of the prima facie case differ slightly among jurisdictions.²³⁹ Perhaps in

²³⁴ See, e.g., Club Thrust, *supra* note 25.

²³⁵ Dogan & Lemley, *supra* note 229, at 1184 (“[U]nless we centralize control over valuable resources such as fame, they will suffer from overuse and ultimately lose all their value.”)

²³⁶ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

[T]he State's interest in permitting a “right of publicity” is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment. . . . [T]he State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.

Id.

²³⁷ See MCCARTHY, *supra* note 207, § 3:8 (explaining the right of publicity depends on a third party being able to “identify” the plaintiff; while the test for trademark infringement hinges on a “likelihood of confusion” by the prospective customer or audience; and a successful defamation claim requires that plaintiff to prove that the defendant's allegedly false statement were “of and concerning” the plaintiff), 17 U.S.C. § 102(a)–(b) (2006) (establishing that copyright law only serves to protect “original works of authorship fixed in any tangible medium of expression” and specifically excludes ideas, concepts, methods of operation, and other intangibles). See RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46–49 (1995).

²³⁸ See MCCARTHY, *supra* note 207, § 1:3; Boggess, *supra* note 204, § 5.

²³⁹ Boggess, *supra* note 204, § 5. For example, Colorado recognizes the tort of invasion

reaction to the patchwork of definitions and standards across the states, the recent trend in the state and federal courts has been to follow the model *prima facie* elements outlined in the Third Restatement of Unfair Competition (“Restatement”).²⁴⁰ The Restatement outlines the elements of the *prima facie* case, which require the plaintiff to establish

(1) *Validity*. Plaintiff owns an enforceable right in the identity or persona of a human being; and

(2) *Infringement*.

(A) Defendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant’s use; and

(B) Defendant’s use is likely to cause damage to the commercial value of that persona.²⁴¹

Although the elements of the *prima facie* standard for the right of publicity seem fairly straightforward, courts have varied in their interpretation and treatment of them.²⁴²

1. Validity: Plaintiff Has an Enforceable Right in the Identity or Persona of a Human Being

Only twenty-four states recognize the right of publicity, and not all of them grant that right to everyone.²⁴³ Courts generally recognize that a celebrity has the right to control the commercial exploitation of his or her identity.²⁴⁴ How-

of privacy by misappropriation, which requires a showing that “(1) the defendant used the plaintiff’s name or likeness; (2) the use of the plaintiff’s name or likeness for the defendant’s own purposes or benefit, commercially or otherwise; (3) the plaintiff suffered damages; and (4) the defendant caused the damages incurred.” *Id.* (citing *Joe Dickerson & Assoc., LLC v. Dittmar*, 34 P.3d 995 (Colo. 2001)). The Kentucky variation on the right of publicity recognizes the right for every individual, but requires some showing that the individual’s identity actually “has commercial value.” *Cheatham v. Paisano Publications, Inc.*, 891 F. Supp. 381, 386 (W.D. Ky. 1995). In contrast, Pennsylvania recognizes that the right of publicity “grants a person an exclusive right to control the commercial value of his name and likeness and to prevent others from exploiting that value without permission.” *Bogges, supra*. Put another way, in Pennsylvania, the right of publicity applies to both celebrities and noncelebrities alike. *Id.* (paraphrasing from both *Apple Corps. Ltd. v. Button Master, P.C.P., Inc.*, 1998 WL 126935 (E.D. Pa. 1998); and *Fanelle v. Lojack Corp.*, 2000 WL 1801270 (E.D. Pa. 2000)).

²⁴⁰ *Bogges, supra* note 204, § 5; *see, e.g.*, *C.B.C. Distrib. & Mktg. Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 827 (8th Cir. 2007) (discussing the Missouri Supreme Court’s use of the Restatement).

²⁴¹ *MCCARTHY, supra* note 207, § 3:2 (citations omitted); *see* RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46–49.

²⁴² *See* *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481 (3d Cir. 1956) (stating that “consistency is a rare jewel” in the process of courts “working out the development of a new common law right”).

²⁴³ *See* *Bogges, supra* note 204, § 5.

²⁴⁴ *See* *Henley v. Dillard Dep’t Stores*, 46 F. Supp. 2d 587, 590 (N.D. Tex. 1999) (recog-

ever, in the case of a non-celebrity, courts are split; they disagree as to whether the persona or identity of a non-celebrity has any commercial value.²⁴⁵ The majority view is that an individual's celebrity status goes only to the issue of damages, while the minority holds that non-celebrities do not have an enforceable right of publicity.²⁴⁶ The prima facie case would thus be different depending on the jurisdiction.

In a majority jurisdiction, the court recognizes that all people have an enforceable right of publicity and that its purpose is to protect "the relatively unknown to the world famous" from commercial exploitation.²⁴⁷ Because the celebrity plaintiffs have the opportunity to recover for both commercial damage to their reputation and for hurt feelings, the majority view extends this principle to all people equally: "noncelebrities, foreign celebrities, and celebrities who refuse to trade on their name ought equally to be able to prevent confusing or diluting uses of their names and likenesses."²⁴⁸ The majority view recognizes that even the identity of a virtually unknown individual can have at least some nominal commercial value, which is proven by the defendant's commercial exploitation of the individual's identity or persona.²⁴⁹

On the other hand, the minority view is that non-celebrities do not have an enforceable right of publicity.²⁵⁰ The logic behind this view is that "[b]ecause the right of publicity rests on the idea of damage to property of demonstrated economic worth, it does not extend to the misappropriation of a person's name or likeness when that person has not previously exploited these attributes in some commercial manner."²⁵¹ Therefore, under the minority view, a non-celebrity plaintiff does not have an enforceable right because there is no commercial loss associated with non-celebrities; they are not entitled to recover for merely hurt feelings under a claim for a violation of their rights of publicity.²⁵²

nizing value in a celebrities name and the celebrity has the right to control and profit from the commercial use); *cf.* *Hillerich & Bradsby Co. v. Christian Bros., Inc.*, 943 F. Supp. 1136, 1139–40 (D. Minn. 1996) (discussing celebrity endorsements).

²⁴⁵ *See, e.g.*, *Fanelle v. Lojack Corp.*, 2000 WL 1801270, at *11 (E.D. Pa. 2000) ("Inherent in the act of a defendant using a person's name, identity, or persona in a commercially advantageous manner is the presumption that the identity has commercial value. . . . [The court is] convinced that the right of publicity resides in every person, not just famous and infamous individuals."); *cf.* *Pesina v. Midway Mfg. Co.*, 948 F. Supp. 40, 42 (N.D. Ill. 1996) ("The plaintiff claiming the infringement of this right must show that, prior to the defendant's use, the plaintiff's name, likeness, or persona had commercial value.").

²⁴⁶ *See* MCCARTHY, *supra* note 207, § 4:14–15.

²⁴⁷ *Onassis v. Christian Dior-N.Y., Inc.*, 472 N.Y.S.2d 254, 260 (N.Y. Sup. Ct. 1984).

²⁴⁸ *Dogan & Lemley, supra* note 229, at 1211.

²⁴⁹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995); MCCARTHY, *supra* note 207, § 4:17.

²⁵⁰ MCCARTHY, *supra* note 207, § 4:15.

²⁵¹ Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1591 n.78 (1979).

²⁵² MCCARTHY, *supra* note 207, § 4:15; *accord* RESTATEMENT (THIRD) OF UNFAIR COM-

The minority jurisdictions believe that a non-celebrity plaintiff's recovery is best obtained through either a claim for the invasion of privacy or unjust enrichment.²⁵³

2. *Infringement on an Individual's Right of Publicity*

Assuming a jurisdiction recognizes the ability of a non-celebrity to recover on a right of publicity claim, the plaintiff must demonstrate infringement upon the right. To do so, the plaintiff must establish that he or she is identifiable from the use by the defendant and that the defendant's use of the image is likely to cause damage to the plaintiff.

a. Plaintiff Is Identifiable from Defendant's Unauthorized Use of His or Her Image

After an individual establishes an enforceable right of publicity, the plaintiff must then prove that the defendant (1) without consent (2) used a characteristic of his or her identity in a manner from which (3) plaintiff was identifiable.²⁵⁴ Generally, a plaintiff can demonstrate identifiability through the entirety of the defendant's use, pointing to any and all aspects of the plaintiff's identity that the defendant employed.²⁵⁵ Whether the aspects of an individual's identity actually "identify" the plaintiff is determined by their association with the plaintiff and may vary depending on the facts and circumstances of the case.²⁵⁶

First, the plaintiff must establish that the defendant used his or her identity without consent.²⁵⁷ On the whole, whether the plaintiff consented to the defendant's use of his or her image is a clear-cut issue and easily determined by the

PETITION § 46 cmt. b.

²⁵³ MCCARTHY, *supra* note 207, §§ 4:15, 4:16 n.12.

²⁵⁴ MCCARTHY, *supra* note 207, § 3:2; *see* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b.; *accord* *Prima v. Darden Rest., Inc.*, 78 F. Supp. 2d 337, 349 (D.N.J. 2000).

²⁵⁵ *See, e.g.*, *Ali v. Playgirl, Inc.* 447 F. Supp. 723 (S.D.N.Y. 1978) (holding that a combination of the likeness used, the context of the likeness, and the caption for the likeness sufficiently identified the plaintiff); *Henley v. Dillard Dep't Stores*, 46 F. Supp. 2d 587, 591-95 (N.D. Tex. 1999) (finding a play on words using the plaintiff's name sufficiently identified the plaintiff); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 137 (Wis. 1979) (finding a nickname identified the plaintiff); *Negri v. Schering Corp.*, 333 F. Supp. 101, 104-05 (S.D.N.Y. 1971) (holding a forty-year-old photograph still identified the plaintiff).

²⁵⁶ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (stating aspects of a person's identity may identify them "only if they are so closely and uniquely associated with the identity of a particular individual that their use enables the defendant to appropriate the commercial value of the person's identity.")

²⁵⁷ *Id.* § 46; *Bogges*, *supra* note 204, § 12.

trier of fact.²⁵⁸

Second, after establishing that the defendant did not have permission to use the plaintiff's identity in a commercial manner without consent, the plaintiff must prove that some aspect of his or her identity or persona²⁵⁹ was used.²⁶⁰ Courts generally accept the use of any particular aspect of a person's persona as long as the unique characteristics "are so closely and uniquely associated with the identity of a particular individual that [the defendant's] use enables the defendant to appropriate the commercial value of the person's identity."²⁶¹

The most common and obvious infringement on the right of publicity involves the use of an individual's distinguishable name, photograph, or other likeness.²⁶² Often, shrewd defendants will use very subtle aspects that link to the plaintiff's identity in order to avoid liability.²⁶³ However, although each instance taken individually would not be sufficient to infringe on the plaintiff's right of publicity, several understated characteristics taken in combination may be sufficient to identify the plaintiff and infringe on his or her right of publicity.²⁶⁴ This flexibility in the courts' approach allows the plaintiff to draw from

²⁵⁸ Boggess, *supra* note 204, §12. The issue of consent can become more complicated when there has been a previous working relationship between the defendant and the plaintiff in the form of a license or release form. In those situations, issues of scope of the release of license and timing become pivotal. *Id.* The resolution of those two issues often determines whether the plaintiff had actually consented to the defendant's use. *See id.*; *cf.* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867-68 (2d Cir. 1953) (holding that the defendant's liability partially turned on whether the plaintiff's licensing contracts expired).

²⁵⁹ MCCARTHY, *supra* note 207, § 4:46 ("The term 'persona' is increasingly used as a label to signify the cluster of commercial values embodied in a personal identity as well as to signify that human identity 'identifiable' from defendant's usage.").

²⁶⁰ MCCARTHY, *supra* note 207, § 3:2; RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-47.

²⁶¹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d.

²⁶² *See* Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 292, 304 (D.N.H. 2008) (finding that the defendant Web site operator may have violated the plaintiff's right of publicity when her image was used in advertising without her consent); *see also* Ali v. Playgirl, Inc. 447 F. Supp. 723 (S.D.N.Y. 1978) (finding that a portrait similar to Muhammad Ali could be identified as Ali); Beverly v. Choices Women's Med. Ctr., Inc., 587 N.E.2d 275, 278 (N.Y. 1991) (finding that the a calendar containing customer satisfaction testimonials and distributed to potential clients was for advertising purposes and the unauthorized use of the plaintiff's image within it constituted a violation of her right of publicity); Cohen v. Herbal Concepts, Inc., 472 N.E.2d 307 (N.Y. 1984) (stating the plaintiff must be recognizable in the advertisement for a valid claim for infringement of an individual's right of publicity); Henley v. Dillard Dep't Stores, 46 F. Supp. 2d 587, 594-95 (N.D. Tex. 1999) (concluding the use of a musician's name in an advertisement without his consent could violate his right of publicity).

²⁶³ *See, e.g.,* Ali, 447 F. Supp. at 726-27 (finding that the plaintiff's right of publicity was violated when the defendant, through a combination of the likeness used, the context of the likeness, and the caption for the likeness, plaintiff's persona was identifiable).

²⁶⁴ *Id.*

the entirety of the defendant's use in order to make the claim.²⁶⁵ Yet, the lack of clear precedent in this area creates an additional burden for the plaintiff to overcome.²⁶⁶ Further, in every case, whether an aspect of a persona is properly attributable to an individual hinges on identifiability.²⁶⁷

Because the right of publicity involves the wrongful appropriation of another's identity for commercial use, the third element of the prima facie case requires that the use of the identity must identify the plaintiff.²⁶⁸ Although case law has not created a clear definition of what constitutes identifiability,²⁶⁹ it is clear that the use must be more than an incidental or coincidental similarity.²⁷⁰ The issue then becomes how many of those who were exposed to the publicity can identify the plaintiff from the defendant's use.

No specific method exists to determine the requisite level of recognition necessary for the plaintiff to be identified, and the determination is often based on the facts of each individual case.²⁷¹ For celebrities, this requisite level of recognition can be established through a poll or survey of those exposed to the defendant's use of the plaintiff's identity.²⁷² By contrast, in the case of non-celebrities, courts seem to require more than identifiability by the plaintiff and family members.²⁷³ Once the plaintiff establishes the defendant's use identifies

²⁶⁵ See *id.* at 736–28.

²⁶⁶ See *Groucho Marx Productions, Inc. v. Day & Night Co.*, 689 F.2d 317 (2d Cir. 1982) (finding that the use of plaintiff's movie characters without consent in a commercial manner is insufficient to violate the plaintiff's right of publicity); *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 452–53 (S.D.N.Y. 2008) (finding candy company's creation and commercial use of cartoon characters dressed in the plaintiff's "signature costume" did not constitute a "portrait or picture" because "[m]erely evoking certain aspects of another's character or role does not violate" an individual's right of publicity).

²⁶⁷ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995).

²⁶⁸ *Id.*; MCCARTHY, *supra* note 207, § 3:2.

²⁶⁹ See *Henley v. Dillard Dep't Stores*, 46 F. Supp. 2d 587, 594–95 (N.D. Tex. 1999) (explaining that "there are many ways a plaintiff can be identified in a defendant's use," and the plaintiff's identifiability "will probably not be a disputable issue in the majority of meritorious Right of Publicity cases.").

²⁷⁰ *E.g.*, *Hooker v. Columbia Pictures Indus., Inc.*, 551 F. Supp. 1060, 1063 (N.D. Ill. 1982) (finding the plaintiff not identified by the similarity in name between the plaintiff, a famous wood sculptor, and the defendant's creation of the same name, a television character in a fictional "police drama").

²⁷¹ *Cf.* Boggess, *supra* note 204, §6 (providing several cases that determined whether the plaintiff was identifiable through several different methods).

²⁷² *E.g.*, *Henley*, 46 F. Supp. 2d at 595 (explaining that the plaintiff used survey results where respondents to the survey were asked, if based on the advertisement at issues, they believed the plaintiff endorsed the product); *Pesina v. Midway Mfg. Co.*, 948 F. Supp. 40, 42 (N.D. Ill. 1996) (stating the defendant determined identifiability by surveying video game users and asking whether the plaintiff could be identified as the model for a character in the video game).

²⁷³ See, *e.g.*, *Brauer v. Globe Newspaper Co.*, 217 N.E.2d 736 (Mass. 1966) (holding plaintiff was not legally identifiable where the only people able to identify plaintiff were those familiar with the actual taking of the photograph); MCCARTHY, *supra* note 207, § 3:20

the plaintiff, the number of people who can identify the plaintiff affects the degree and type of remedy to which he or she is entitled.²⁷⁴ If identifiability is established, the plaintiff must show damage was suffered as a result of the use.

b. Defendant's Commercial Use of Plaintiff's Image Is Likely to Cause Damage to Plaintiff

In order to infringe on the plaintiff's right of publicity, the defendant must use the plaintiff's persona for commercial or trade purposes in a manner that would likely cause damage to its commercial value.²⁷⁵ In deciding whether a defendant's use of the plaintiff's identity is commercial, courts must balance the right of publicity against the broader Right of Free Speech granted by the First Amendment.²⁷⁶

The classic illustration of the use of an individual's identity for commercial or trade purposes is the use of the individual's likeness to advertise the defendant's good or service.²⁷⁷ However, "the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction" is not considered a commercial use.²⁷⁸ To determine whether a defendant's use is truly commercial and therefore limited by constitutional balancing between free speech and property rights, courts generally look to the informational content of the use and balance it against the content's commercial attraction.²⁷⁹ The underlying motive of the publisher is a consideration; courts can look to

("There must be some de minimis rule to filter or screen out the frivolous cases where only the plaintiff and a few sympathetic relatives and friends can see any connection between [the] defendant's use and plaintiff"). *But see, e.g., Parnell v. Booth Newspapers, Inc.*, 572 F. Supp. 909, 912–13 (W.D. Mich. 1983) (holding there was a triable issue of fact where friends, family, and acquaintances could identify plaintiff from an altered photograph); *Cohen v. Herbal Concepts, Inc.*, 472 N.E. 2d 307, 308 (N.Y. 1984) (holding there was an issue of identifiability where the husband and father of the plaintiffs could identify them from "back view" photos used in advertisements).

²⁷⁴ See MCCARTHY, *supra* note 207, § 3:20.

²⁷⁵ RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46, 49 (1995).

²⁷⁶ See Boggess, *supra* note 204, §§ 22–24.

²⁷⁷ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 & cmts. a–b; *see, e.g., Ali v. Playgirl, Inc.* 447 F. Supp. 723, 726–27 (S.D.N.Y. 1978) (stating unauthorized use of an individual's picture could be considered a commercial use unless the image was used in connection with the news); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008) (finding the use of an online profile identifying the plaintiff for advertisements and "teasers" as a commercial or trade purpose sufficient enough to overcome the burden necessary to survive a motion to dismiss); *Henley v. Dillard Dep't Stores*, 46 F. Supp. 2d 587, 596–97 (N.D. Tex. 1999) (discussing the difference between incidental use and commercial use).

²⁷⁸ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47.

²⁷⁹ See MCCARTHY, *supra* note 207, § 3:46; Dogan & Lemley, *supra* note 229, at 1217–20; *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 & cmts. b–c.

whether the publisher used the persona “for the value associated with it.”²⁸⁰ That an item is sold commercially also weighs in this consideration, but it is not dispositive.²⁸¹ Otherwise, newspapers, magazines, and books would fall outside the scope of the informative and entertaining speech that the Constitution protects.²⁸²

A recognized “newsworthy” exception serves as a First Amendment protection; it includes both “descriptions of actual events” and “articles concerning political happenings, social trends, or any subject of public interest.”²⁸³ This includes factual information regarding public officials and other public figures.²⁸⁴ Though broadly defined, the newsworthy exception is easily distinguishable from a use in advertising or trade purposes. An individual’s likeness is used “‘for advertising purposes’ if it appears in a publication which, taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service.”²⁸⁵ The image or likeness is used for trade purposes when the use does “not really pertain[] to matters of public interest,” including uses “afflicted with substantial falsification.”²⁸⁶ Essentially, if the image does not relate to the article or if the “article is an advertisement in disguise,” including cases where the “plaintiff’s photograph, when juxtaposed with an article, could reasonably have been viewed as falsifying or fictionalizing [the] plaintiff’s relation to the article,” then the use of an individual’s identity is for a commercial or trade purpose.²⁸⁷

For example, if a publisher used a photograph of a public figure on the cover of the magazine that contained an article about the plaintiff, the use would generally be protected by the Constitution as newsworthy, noncommercial speech.²⁸⁸ However, if the same publisher used the public figure’s image with-

²⁸⁰ *Henley*, 46 F. Supp. 2d at 592–93.

²⁸¹ *Davis v. High Soc’y Mag. Inc.*, 457 N.Y.S.2d 308, 313 (N.Y. App. Div. 1982). *Dogan & Lemley*, *supra* note 229, at 1217.

²⁸² *Dogan & Lemley*, *supra* note 229, at 1217.

²⁸³ *Messenger v. Gruner + Jahr Printing & Publ’g*, 727 N.E.2d 549, 552 (N.Y. 2000).

²⁸⁴ *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–45 (1974). In *Gertz*, the Supreme Court discussed what, aside from running for public office, rendered an individual a public figure:

For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Id. at 345.

²⁸⁵ *Beverly v. Choices Women’s Med. Ctr., Inc.*, 587 N.E.2d 275, 278 (N.Y. 1991).

²⁸⁶ *Davis v. High Soc’y Mag., Inc.* 457 N.Y.S.2d 308, 314 (N.Y. App. Div. 1982).

²⁸⁷ *Messenger*, 727 N.E.2d at 553.

²⁸⁸ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. a.

out consent solely for the purpose of increasing the sales of a magazine issue without newsworthy information about the public figure without consent, the defendant would have likely violated the public figure's right of publicity.²⁸⁹ The publisher's actions would be even more likely to violate an individual's right of publicity when the image is that of someone who is not a public figure. That is, because information about a person who is not a public figure, whether accurate or not, is not inherently newsworthy.²⁹⁰ Therefore, a publisher who uses images of non-celebrities without permission in a commercial context outside the protection of the newsworthy exception has likely violated the right of publicity of those individuals.

With the use of an individual's image established as the final piece of a prima facie claim, the full prima facie case may be summarized. First, the plaintiff must verify that he or she has legal grounds to file such a claim, including whether or not the jurisdiction recognizes the right.²⁹¹ Next, the plaintiff must prove that the defendant, without permission, used aspects of his or her identity in such a manner that he or she is identifiable from the defendant's unauthorized use.²⁹² Finally, the plaintiff has to demonstrate that the defendant's use was for commercial purposes and does not fall within the newsworthy exception or is otherwise protected.²⁹³ Once the plaintiff has established these elements, he or she can both obtain an injunction prohibiting further exploitation of the plaintiff's identity and recover monetarily from the defendant.²⁹⁴

This right of publicity might provide some protection for non-celebrities

²⁸⁹ See *id.* § 47 & cmts. b–c.

²⁹⁰ See *Davis*, 457 N.Y.S.2d at 313 (“[I]t has been recognized that certain publications are of public interest and, therefore, protected, even if not strictly concerned with news The question in such cases is whether the public interest aspect of the publication is merely incidental to its commercial purpose.”); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (“The use of a person’s identity primarily for the purpose of communicating information or expressing ideas is not generally actionable However, if the name or likeness is used solely to attract attention to a work that is not related to the identified person, the user may be subject to liability.”); *cf.* *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 344–45 (1974) (noting in the context of defamation that there is a distinction between public and private individuals, in that the former has subjected himself to the public’s scrutiny and society has an interest in knowing about his or her activities).

²⁹¹ See *infra* Part V.B.1 (discussing whether a potential plaintiff may file a claim for violation of right of publicity).

²⁹² See *infra* Part IV.B.1 (discussing how a plaintiff would prove the defendant used the plaintiff’s identity).

²⁹³ See *infra* Part IV.B.2.b (discussing whether the defendant’s use of plaintiff’s identity is actually commercial in nature).

²⁹⁴ *Bogges*, *supra* note 204, § 37. The standard remedy for infringement of one’s right of publicity is an injunction preventing the defendant from continuing to use the plaintiff’s identity in an unauthorized manner; but, where a plaintiff can prove a specific amount, monetary relief is available. See *id.*

who find themselves the subject of anonymous gossip online. The operators of non-gossip Web sites may be liable for a violation of non-celebrities' rights of publicity, even though the content is almost exclusively published by a third party. Whether an individual actually has a case depends on the amount of information about him or her provided on the Web site and the ability to establish that their identity is used for a commercial or trade purpose.

V. POTENTIAL LIABILITY OF NON-CELEBRITY GOSSIP WEB SITE OPERATORS FOR CLAIMS BASED ON A VIOLATION OF AN INDIVIDUAL'S RIGHT OF PUBLICITY

Unquestionably, the CDA relieves computer service providers from state tort liability arising from information provided by an outside information content provider, whereas their print, radio, and television counterparts would be liable.²⁹⁵ However, Congress did not want to encourage the use of the Internet as a tool for violating intellectual property laws.²⁹⁶ To that end, Congress included an explicit exception to the CDA's immunity: violations of intellectual property law.²⁹⁷

Non-celebrity gossip Web site operators are fully aware of this exception to their otherwise robust immunity, and many warn their users not to violate federal intellectual property laws as well as provide procedures to remove infringing content.²⁹⁸ However, a growing number of courts have found that Web site operators that violate state-created intellectual property rights—including the right of publicity—receive no immunity under the CDA.²⁹⁹ Hence, Web site operators likely are liable for the content that infringes on an individual's right

²⁹⁵ See *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003); *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998); see also 47 U.S.C. § 230(c) (2000).

²⁹⁶ See 47 U.S.C. § 230(e)(2).

²⁹⁷ *Id.*

²⁹⁸ See, e.g., *GossipReport.com, Terms and Conditions and Privacy Policy*, <http://www.gossipreport.com/terms.html> (last visited Feb. 20, 2009); *USAGoneDirty.com, Terms of Service*, *supra* note 26. The legal sections, terms of service, and user agreements that Web site operators supply specifically prohibit infringement of copyright and trademark laws and also include a general catchall phrase prohibiting users from violating any other intellectual property rights. See, e.g., *GossipReport.com, Terms and Conditions and Privacy Policy*, *supra*; *USAGoneDirty.com, Terms of Service*, *supra*.

²⁹⁹ See *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008) (disagreeing with the Ninth Circuit's interpretation that the intellectual property exception of the CDA applies to only federal intellectual property rights); *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 413–14 (S.D.N.Y. 2001) (refusing to limit the CDA intellectual property exclusion to those situations and laws enacted at the time of the passage of the CDA in 1996). *Contra Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118–19 (9th Cir. 2007) (defining "intellectual property" in the CDA as "federal intellectual property" because of the CDA's stated goal of removing constraints related to the multiple jurisdictions of state laws).

to publicity, even if the content was provided by a third party and even though the operator took no part in its creation or development.³⁰⁰ Various federal courts have held interactive computer service providers may be liable for third party violations of the plaintiff's right of publicity.³⁰¹ These rulings potentially expose non-celebrity gossip site operators to liability from which they were previously insulated. The following section explores non-celebrity gossip Web site operators' potential liability arising from a claim based on a violation of an individual's right of publicity.

A. Establishing an Individual's Identifiability on a Non-celebrity Gossip Web Site

Once the plaintiff has established that the defendant's use was unauthorized, the plaintiff must then demonstrate that he or she is identifiable from the defendant's use.³⁰² Courts have accepted that individual aspects of a plaintiff's image may establish identifiability so long as they are "closely and uniquely associated" with the plaintiff in light of the facts surrounding the claim.³⁰³ Initially, courts found an infringement of the plaintiff's right of publicity in cases where the defendant used the plaintiff's photograph,³⁰⁴ but as the right developed, courts have found even more tenuous connections can violate the right of publicity. These more tenuous connections include the use of the plaintiff's name and biographical information³⁰⁵ or references to an individual's per-

³⁰⁰ See, e.g., *Friendfinder Network*, 540 F. Supp. 2d at 302–04 (“[W]hile protecting third-party intellectual property rights no doubt presents some challenges for service providers . . . those challenges would appear to be simply a cost of doing business on-line.”); *Gucci Am.*, 135 F. Supp. 2d at 415–17 (finding that the CDA does not immunize Web site operators from valid claims for infringement of state intellectual property rights). See also 47 U.S.C. § 230(e)(2).

³⁰¹ See, e.g., *Friendfinder Network*, 540 F. Supp. 2d at 302–04; *Gucci Am.*, 135 F. Supp. 2d at 412–17.

³⁰² Boggess, *supra* note 204, § 35; see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 & cmt. d (1995); MCCARTHY, *supra* note 207, § 3:20.

³⁰³ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d; see Boggess, *supra* note 204, § 6.

³⁰⁴ See, e.g., *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 869 (2d Cir. 1953) (finding that a right to publicity exists where the defendant used a photograph for a commercial purpose without consent).

³⁰⁵ See, e.g., *Henley v. Dillard Dep't Stores*, 46 F. Supp. 2d 587, 590–91, 594–95 (N.D. Tex. 1999) (finding that there was no need to use the actual full name as long as the phrase used was sufficient to identify the plaintiff in light of the circumstances); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282–83 (D. Minn. 1970) (holding that the use of plaintiff's name and statistical information in a commercial context even though the information was available to the public was enough to identify the plaintiff); *Palmer v. Schonhorn Enter., Inc.*, 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967) (finding that the use of a name and biographical data can be sufficient to identify someone).

sona.³⁰⁶ Because courts have not established a clear precedent defining how many and what specific type of aspects of the plaintiff's image are necessary for identifiability, the plaintiff's difficulty in overcoming this burden will vary depending on the Web site against which the plaintiff has filed suit.

For instance, the Dirty's use of photographs, coupled with an individual's university, and often accompanied by at least a partial name and other identifying details provide potential plaintiffs with significant evidence of identifiability.³⁰⁷ These aspects of the individual's image should be sufficient to "identify" this individual within the meaning of the right of publicity.³⁰⁸

Comparatively, Gossip Report takes identifiability a step further. On GossipReport.com, users create profiles about others in order to gossip about them.³⁰⁹ Subsequently, other users can then search for a person by name or by category in order to read any gossip posted about them.³¹⁰ The entire premise of making a profile for someone else on this site is to allow other users to identify and gossip about that person.³¹¹ The use of an individual's name, photograph, and other biographical information likely would allow users to identify an individual for the purposes of his right of publicity.³¹²

The final significant non-celebrity gossip Web site, College ACB, allows its users to post gossip to the site and classify the gossip by college campus, anonymously.³¹³ Users of College ACB, cannot post photographs,³¹⁴ so to bring a claim against its operators, possible plaintiffs would likely have to be identified by full name and other identifying information.³¹⁵ Where an anonymous gossiper uses an individual's name in the title of the posting and includes references to that person's school, activity, and social circle, it is more likely that the individual can be identified.³¹⁶

The more aspects of the plaintiff's life posted on the Web site, the more probable it is that the plaintiff will be identifiable from the posted content. Sites such as the Dirty and Gossip Report allow users to post photographs of others and include specific biographical information about them.³¹⁷ When the

³⁰⁶ See *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 726–28 (S.D.N.Y. 1978) (finding plaintiff was identifiable from use of his nickname as well as facial features and hairstyle unique to him).

³⁰⁷ See *The Dirty*, *supra* note 21; *supra* Part IV.B.2.a.

³⁰⁸ See *supra* Part IV.B.2.a.

³⁰⁹ See *GossipReport.com*, *supra* note 21.

³¹⁰ See *id.* (displaying a "search field"); *GossipReport.com, FAQ*, *supra* note 4.

³¹¹ See *GossipReport.com*, *supra* note 21.

³¹² See *supra* Part IV.B.2.a.

³¹³ *College ACB FAQ*, *supra* note 4.

³¹⁴ *College ACB*, *supra* note 2.

³¹⁵ See *supra* Part IV.B.2.a (discussing the issue of identifiability).

³¹⁶ See *supra* Part IV.B.2.a.

³¹⁷ See *The Dirty*, *supra* note 21; *GossipReport.com*, *supra* note 21.

defendant uses the plaintiff's photograph and specific biographic information—such as their name—the plaintiff will easily be able to establish his or her identifiability.³¹⁸ Sites like College ACB, which do not include photographs of the person about whom the gossip is written, create a more difficult, but not impossible burden for potential plaintiffs.³¹⁹ Establishing that the plaintiff was identifiable from the defendant's use is only the first half of the plaintiff's claim for infringing on his or her right to publicity. The plaintiff must then establish that the defendant used the plaintiff's image for commercial purposes.³²⁰

B. Does Using an Individual's Likeness on a Non-celebrity Gossip Web Site Constitute a Commercial Use?

Although the plaintiff may be identifiable from the defendant's use of his or her image and persona, a defendant only violates a plaintiff's right of publicity when he or she uses the plaintiff's image or persona in a commercial context.³²¹ These sites rely on advertisements to generate revenue, and the number of users and visitors to a site drives advertisement sales, which in turn is reliant on the content of the site to draw new and return visitors.³²² Based on this business model, an argument can be made that unauthorized use of one's identity or persona on non-celebrity gossip sites constitutes a commercial use.

When deciding whether a defendant's use constitutes a commercial or trade purpose, the underlying motive of the publisher is a consideration.³²³ Whether the publisher sought profit or an increase in sales or distribution of the publication weighs strongly on the analysis, but it is not dispositive.³²⁴ Many publications, like newspapers and magazines, though operated for profit, serve the public interest by spreading legitimate news stories and other nonfiction information of public interest.³²⁵

Therefore, to distinguish a protected unauthorized use of an individual's image from a prohibited commercial exploitation, courts consider whether the overall use of the image in the publication actually serves as an advertise-

³¹⁸ See *supra* Part IV.B.2.a.

³¹⁹ College ACB, *supra* note 2.

³²⁰ See *supra* Part IV.B.2.b.

³²¹ See *supra* Part IV.B.2.b.

³²² See A Juicy Shutdown, *supra* note 12; GossipReport.com, Terms and Conditions and Privacy Policy, *supra* note 298, College ACB, Advertise, <http://college.acb.com/sb.php?school=general&page=advertise> (last visited Feb. 20, 2009); The Dirty, Advertise, http://www.thedirty.com/?page_id=17 (last visited Feb. 20, 2009).

³²³ *Henley v. Dillard Dep't Stores*, 46 F. Supp. 2d 587, 592–93 (N.D. Tex. 1999); *Davis v. High Soc'y Mag., Inc.*, 457 N.Y.S.2d 308, 313 (N.Y. App. Div. 1982).

³²⁴ *Davis*, 457 N.Y.S.2d at 313.

³²⁵ See *id.*; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmts. c–d (1995); *cf. Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574–75 (1977).

ment.³²⁶ Courts make this determination based on whether there is a “lack of a reasonable connection between the use [of the image] and a matter of public interest, or on a finding that the use contained substantial fictionalization or falsification.”³²⁷ If no connection exists or if the publication contains substantial inaccuracies, the use constitutes a commercial purpose.³²⁸

Turning to the three previously mentioned non-celebrity gossip Web sites, the use of others’ identities in order to gain increased profits likely constitutes a commercial use. To begin, despite that some site operators claim some nobler purpose in operating these Web sites,³²⁹ the fact remains that all of them receive money through advertisements, either directly on their Web site³³⁰ or indirectly through it.³³¹ The Web site operators depend on third parties to post sensational information in hopes of generating more traffic for their Web sites, creating a greater incentive for advertisers to promote their products or services on the sites. Furthermore, the increased traffic allows the operators to charge more for advertisements and, thus, generate more revenue.³³² True, the sites are not using people’s identities in advertisements for their own site, which takes this use outside the traditional examples of a commercial purpose.³³³ Nonethe-

³²⁶ See *Beverly v. Choices Women’s Med. Ctr., Inc.*, 587 N.E.2d 275, 278 (N.Y. 1991).

³²⁷ *Davis*, 457 N.Y.S.2d at 314.

³²⁸ See *id.*

³²⁹ See Gossip Report, WWGD?, <http://www.gossipreport.com/wwgd.html> (last visited Feb. 20, 2009) (“Gossipreport.com is a better way to do what everybody does. Gossip has been around for thousands of years; it’s how communities have shaped and policed their social behavior for centuries. In today’s online community Gossipreport.com serves the same purpose.”); College ACB Press Release, *supra* note 180 (“The College ACB . . . seeks to give students a place to vent, rant, and talk to college peers in an environment free from social constraints and about subjects that might otherwise be taboo.”). College ACB tries to separate itself from the former Juicy Campus by “consistently host[ing] a higher level of discourse—while still making room for occasional gossip,” rather than “foster[ing] superficial interactions, [which were] often derogatory and needlessly crude.” *Id.*

³³⁰ See College ACB, Advertise, *supra* note 322; The Dirty, Advertise, *supra* note 322.

³³¹ Gossip Report, Terms and Conditions, *supra* note 298 (explaining that advertising on the site may be provided through third-party advertisers).

³³² See CISCO SYSTEMS, INC., ADDRESSABLE ONLINE ADVERTISING: GENERATE NEW SERVICE PROVIDER REVENUE WHILE PROTECTING PRIVACY 2 (2009), available at http://www.cisco.com/en/US/solutions/collateral/ns341/ns523/solution_overview__c22-519980.pdf (explaining that currently online publishers who generate revenue through advertising are “most often” paid by an advertiser based on the “exposure of their message to a specific audience” and that traditionally “methodologies for improving ad placement have relied heavily on the tracking [of users’] web-browsing behavior”); WebsiteGear, Website Traffic & Revenue, Jan. 18, 2004, http://content.websitegear.com/article/revenue_traffic.htm (discussing that operators of content-based Web sites are more likely to rely on traffic to generate revenue through advertising on their Web site and noting that, when advertising rates are “low,” even an operator of a content-based Web site will have more difficulty); see also A Juicy Shutdown, *supra* note 12 (noting the founder of Juicy Campus attributed the recent demise of his non-celebrity gossip Web site primarily to a lack of revenue from advertising).

³³³ *E.g.*, *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 304 (D.N.H. 2008)

less, an unauthorized use of a user's identity to sell advertising space on a Web site also may constitute "some commercial purpose."³³⁴ The operators' unauthorized use of an individuals' identity or persona for a commercial purpose violates their rights to publicity when the plaintiff is identifiable from the use.

As noted above, the use of an individual's identity or persona by a publisher in order to achieve some financial gain is merely a factor that courts consider when determining if the use was for a trade or commercial purpose.³³⁵ If the published work serves a legitimate public interest, it may qualify for protection as newsworthy information.³³⁶ The publisher will be immune to claims of violation of the right of publicity even if the publisher gains some profit or increased distribution as a result.³³⁷ However, if the use is tainted by falsifications, the publisher loses the protection.³³⁸ Alternatively, if the individual, whose identity the gossip site operators uses, is a public figure³³⁹ or if the "individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues,"³⁴⁰ information about him or her fits squarely within the newsworthiness exception to the right of publicity.

(finding that using the plaintiff's image without consent to advertise the site may be a commercial use that violated the plaintiff's right of publicity); *Beverley v. Choices Women's Med. Ctr., Inc.*, 587 N.E.2d 275, 278 (N.Y. 1991) (finding that a calendar containing customer satisfaction testimonials distributed to potential clients was for advertising purposes and the unauthorized use of the plaintiff's image within it constituted a violation of her right of publicity).

³³⁴ See, e.g., *Audi AG v. D'Amato*, 469 F.3d 534, 536–41 (6th Cir. 2006) (finding that the defendant's continued selling of advertisements on his Web site that contained unauthorized reproductions of the plaintiff's trademark constituted a commercial use of the plaintiff's trademark even though the defendant included a disclaimer that stated that the plaintiff was in no way associated with the defendant's Web site).

³³⁵ See, e.g., *Davis v. High Soc'y Mag., Inc.*, 457 N.Y.S.2d 308, 313 (N.Y. App. Div. 1982).

³³⁶ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574–75 (1977).

³³⁷ See *Davis*, 475 N.Y.S.2d at 313.

³³⁸ See *Pagan v. N.Y. Herald Trib., Inc.*, 301 N.Y.S.2d 120, 123 (N.Y. App. Div. 1969).

Where a picture of an individual is published in a newspaper or magazine in connection with the presentation, without false or misleading material, of a matter of legitimate public interest to readers, and the picture bears a reasonable relationship to the presentation, the use of the picture in the publication is not actionable as a use for the purpose of advertising or trade within the prohibition of the statute unless the presentation is in effect an advertisement in disguise.

Id.; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmts. c–d (1995).

³³⁹ *Palmer v. Schonhorn Enter., Inc.*, 232 A.2d 458, 460 (N.J. Super. Ct. Ch. Div. 1967) ("A public figure has been defined as a person who, by his accomplishments, fame or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs and his character, has become a public personage."); see also *Douglas v. Hustler Mag.*, 769 F.2d 1128, 1139, 1141 (7th Cir. 1985) (finding that an actress was a public figure for rights of publicity purposes).

³⁴⁰ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

It is extremely difficult to argue that by attending a party, by cheating on your significant other, or by being well-known on campus,³⁴¹ an individual, who otherwise would not be considered a public figure, is elevated to such a level due to a classmate, a jealous ex, or a total stranger deciding to gossip about that individual on the Internet. Such an involuntary forfeiture of the right to control one's image and private information seems inconsistent with congressional intent in enacting the CDA.³⁴² Additionally, the proliferation of potentially defamatory gossip neither serves the public interest nor enhances legitimate use of the Internet. Moreover, as noted above, if the individual can prove that information surrounding the use of his or her identity is false, the potential immunity arising under the newsworthy exception would not apply.³⁴³

Therefore, if a plaintiff can demonstrate that a defendant misappropriated his or her identity for use in a commercial manner and the plaintiff is identifiable from that use, the plaintiff has a valid claim for infringement of his or her right of publicity.³⁴⁴ To demonstrate that a gossip Web site is using an individual's identity for a commercial purpose, the individual need only show that the Web site operator is gaining revenue through advertisements on the site³⁴⁵ and that the individual is not a public figure and the information itself does nothing to serve the public interest.³⁴⁶ Accordingly, any revenue-generating non-celebrity gossip Web site whose users' gossip identifies an individual is exposing the Web site operator to claims for violating the individual's right of publicity.

VI. CONCLUSION

Non-celebrity gossip Web site operators often claim that the CDA shields them from liability for lawsuits arising from their users' content.³⁴⁷ Although

³⁴¹ These examples can be easily found on any of the non-celebrity gossip sites; in the interest of not facilitating the spread of gossip, the specific comments will not be reproduced here. However, a cursory search of College ACB, the Dirty, or Gossip Report will uncover a large number of examples. *See, e.g.*, College ACB, *supra* note 2; The Dirty, *supra* note 21; GossipReport.com, *supra* note 21.

³⁴² *Cf.* 47 U.S.C. § 230(b) (2000) (identifying encouraging free market competition, supporting technological advances, and enforcing of criminal laws as policies of the United States in relation to the internet).

³⁴³ *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47.

³⁴⁴ *See id.* § 46.

³⁴⁵ *See supra* Part V.A; *cf.* Audi AG v. D'Amato, 469 F.3d 534, 539–41 (6th Cir. 2006) (finding that the defendant's continued sales of advertisements on his Web site that contained unauthorized reproductions of the plaintiff's identifiable trademark constituted a commercial use of the plaintiff's trademark even though the defendant included a disclaimer that stated that the plaintiff was in no way associated with the defendant's Web site).

³⁴⁶ *See supra* Part V.B.

³⁴⁷ *See, e.g.*, The Dirty, Kochran Kardashian, *supra* note 26 (explaining the CDA pro-

the CDA does provide immunity in most cases, these Web site operators' actions are sometimes outside the expansive scope of CDA immunity. Moreover, some of the third party content published on these Web sites violates individuals' intellectual property rights, namely the right of publicity.

The CDA provides interactive computer service providers with extensive immunity from state tort claims based on third-party content.³⁴⁸ However, this immunity is not without its limits: the CDA does not shield service providers from claims based on intellectual property violations, including the right of publicity.³⁴⁹ Thus, when the published third party gossip identifies the subject of the gossip—either by name, photograph, other biographical information, or some combination thereof—and the gossip Web site generates revenue through advertising, this commercial use violates the individual's right of publicity, and CDA immunity does not apply.

fects the Dirty against potential claims arising out of content posted by third parties).

³⁴⁸ 47 U.S.C. § 230(c) (2000).

³⁴⁹ *Id.* § 230(e)(2).