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The Right of Publicity: A New Framework for Regulating Facial Recognition

Jason M. Shultz

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A NEW FRAMEWORK FOR REGULATING FACIAL RECOGNITION

Jason M. Schultz[†]

INTRODUCTION

With the rise of machine learning (ML) and its vast need for training data, numerous advocates, journalists, and scholars have chronicled the suspect, and often unsettling, ways in which internet and database scraping feeds these computational engines.[1] From influential early training datasets such as Labeled Faces in the Wild and ImageNet to the facial recognition (FR) efforts of companies such as Clearview AI, Amazon, Alphabet, Microsoft, and IBM, it has become standard practice to download billions of images wholesale from various online sites to train and build FR systems, including from popular sites such as Yahoo News, Facebook, Instagram, and LinkedIn. Other FR and photo-based companies such as Everalbum, Inc. allegedly tricked users into uploading photo albums that the companies then scanned to

[1] Kashmir Hill, *The Secretive Company that Might End Privacy as We Know It*, N.Y. TIMES (Nov. 2, 2021), https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html [https://perma.cc/936K-X2LM]; KATE CRAWFORD, ATLAS OF AI: POWER, POLITICS, AND THE PLANETARY COSTS OF ARTIFICIAL INTELLIGENCE 90–121 (2021); Kaiyu Yang et al., *Towards Fairer Datasets: Filtering and Balancing the Distribution of the People Subtree in the ImageNet Hierarchy*, *in* CONFERENCE ON FAIRNESS, ACCOUNTABILITY, & TRANSPARENCY 547–58 (2020), https://dl.acm.org/doi/pdf/10.1145/3351095.3375709 [https://perma.cc/963P-G5CL]; Inioluwa Deborah Raji & Genevieve Fried, About Face: A Survey of Facial Recognition Evaluation 1 (2021) (unpublished manuscript), https://arxiv.org/abs/2102.00813 [https://perma.cc/2ZRX-KE7K].

build their FR tools.[2] Hosting sites such as Flickr allow users to apply Creative Commons licenses for their photos in the spirit of copyright's free culture, only to later give them up as training grist for the FR mill.[3] Even amateur YouTube videos have been used as "research" for ML purposes under Google's Terms of Service, often without any effort to inform or educate users as to the implications of that designation.[4]

While those implementing FR technology argue that uploading photos serves as a proxy for permission to use them as common products of consumption, critics such as privacy scholar Helen Nissenbaum argue that such dramatic shifts in usage violate the "contextual integrity" of the initial upload permissions and privacy expectations.[5] Sharing photos with online communities is very different than training FR systems. The key question, however, is whether this context shift is legal. Despite the massive ongoing appropriation of personal images and the concerns it raises, very few legal or regulatory efforts have successfully stemmed the tide to date.[6] Claims of copyright by photo takers are likely to be found technologically "transformative" fair use.[7] Attempts at regulating FR have

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[2] *See* Press Release, Federal Trade Commission, FTC Finalizes Settlement with Photo App Developer Related to Misuse of Facial Recognition Technology (May 7, 2021), https://www.ftc.gov/news-events/press-releases/2021/05/ftc-finalizes-settlement-photo-app-developer-related-misuse [https://perma.cc/M7HF-DRWC].

[3] Michele Merler et al., Diversity in Faces 7 (Apr. 10, 2019) (unpublished manuscript), https://arxiv.org/pdf/1901.10436.pdf [https://perma.cc/UCH6-G48R]; *see generally* Matthew Sag, *Orphan Works as Grist for the Data Mill*, 27 BERKELEY TECH. L.J. 1503 (2012) (discussing how digitized works "provid[e] an important data source for research in" various technological areas).

[4] *See* Bernard Marr, *The Amazing Ways YouTube Uses Artificial Intelligence and Machine Learning*, FORBES (Aug. 23, 2019), https://www.forbes.com/sites/bernardmarr/2019/08/23/the-amazing-ways-youtube-uses-artificial-intelligence-and-machine-learning/?sh=686736e25852 [https://perma.cc/WHQ2-7HBA]; *see also Privacy Policy*, Google, https://policies.google.com/privacy?hl=en (last visited Mar. 17, 2023) ("Research and Development: Google uses information to improve our services and to develop new products, features and technologies that benefit our users and the public. For example, we use publicly available information to help train Google's language models and build features like Google Translate.").

[5] HELEN NISSENBAUM, PRIVACY IN CONTEXT 16–17 (2009).

[6] *See* Claire Garvie et al., *The Perpetual Lineup*, GEO. L. CTR. ON PRIV. & TECH. (2016), https://www.perpetuallineup.org/ [https://perma.cc/EBL9-HXRG]; Margot E. Kaminski & Jennifer M. Urban, *The Right to Contest AI*, 121 COLUM. L. REV. 1957, 1960 (2021); Erik Learned-Miller et al., *Facial Recognition Technologies in the Wild: A Call for a Federal Office*, ALGORITHMIC JUST. LEAGUE 3 (2020), https://assets.website-files.com/5e027ca188c99e3515b404b7/5ed1145952bc185203f3d009_FRTsFederalOffice May2020.pdf [https://perma.cc/DXW7-P2WT]; Russell Brandom, *How Should We Regulate Facial Regulation?*, VERGE (Aug. 29, 2018), https://www.theverge.com/2018/8/29/17792976/facial-recognition-regulation-rules [https://perma.cc/D8F2-7LBD].

[7] Amanda Levendowski, *How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem*, 93 WASH. L. REV. 579, 622–23 (2018); Mark Lemley & Bryan Casey, *Fair Learning*, 99 TEX. L. REV. 743, 745–46 (2021); Dan L. Burk, *Algorithmic Fair Use*, 86 U. CHI. L. REV. 283, 287 (2019). *But see* Amanda Levendowski, *Resisting Face*

largely been limited to stopping specific downstream implementations of FR (such as in local law enforcement or employment contexts) rather than addressing initial appropriation.[8] In addition, in the United States, the State Action doctrine poses challenges for constitutionally-based civil rights claims, especially when the appropriating company is a private corporation.[9] A consistent regulatory approach or framework remains elusive.

One claim that remains potentially powerful but relatively untested is the right of publicity (ROP). ROP claims have been brought in a few contemporary cases against FR companies, but their validity is still being determined.[10] Traditionally viewed as both a moral and economic right against

Surveillance with Copyright Law, 100 N.C. L. REV. 1015, 1048–49 (2022) (arguing against a finding of fair use when data mining is used for unethical or illegal purposes); Benjamin Sobel, *A Taxonomy of Training Data: Disentangling the Mismatched Rights, Remedies, and Rationales for Restricting Machine Learning*, *in* ARTIFICIAL INTELLIGENCE & INTELLECTUAL PROPERTY 230–36 (Reto Hilty, Jyh-An Lee & Kung-Chung Liu eds., 2020) (differentiating between nonexpressive and non-market-encroaching uses of copyrighted works in artificial intelligence training sets for FR systems vs. expressive and market-encroaching uses); Benjamin L. W. Sobel, *Artificial Intelligence's Fair Use Crisis*, 41 COLUM. J.L. & ARTS 45, 50 (2017) (arguing that data mining for content generation that is substantially similar or derivative of original works should not be found fair use).

    [8] *See* European Comm'n, Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, at 3, 21, 26, COM (2021) 206 final (Apr. 21, 2021); 820 ILL. COMP. STAT. ANN. 42/1–42/20 (West, Westlaw current through P.A. 102-1143 of the 2022 Reg. Sess.) (limiting use of video recording and artificial intelligence analysis of them in interviewing candidates for employment); *Ban Facial Recognition: Interactive Map*, FIGHT FOR FUTURE (2022), https://www.banfacialrecognition.com/map/ (gathering FR bans). It is worth noting that lawsuits under Illinois' Biometric Information Privacy Act (BIPA) are beginning to generate some success at reining in FR systems. However, because standing and jurisdiction in BIPA cases have been generally limited to Illinois state citizenship or residency, there are still questions as to what extent it can serve as an omnibus framework outside of Illinois. *See generally* Woodrow Hartzog, *BIPA: The Most Important Biometric Privacy Law in the US?*, *in* REGULATING BIOMETRICS: GLOBAL APPROACHES AND URGENT QUESTIONS 96 (Amba Kak ed., 2020); *In Big Win, Settlement Ensures Clearview AI Complies with Groundbreaking Illinois Biometric Privacy Law*, ACLU ILL. (May 9, 2022), https://www.aclu-il.org/en/press-releases/big-win-settlement-ensures-clearview-ai-complies-groundbreaking-illinois-biometric [https://perma.cc/ME8N-DLMQ]. Federal lawmakers have proposed several FR regulations, many in direct response to revelations of Clearview's conduct, none of which have been enacted into law. *See, e.g.*, Facial Recognition and Biometric Technology Moratorium Act of 2021, H.R. 3907, 117th Cong. § 1 (2021); Ethical Use of Facial Recognition Act, S. 3284, 116th Cong. § 2 (2020); National Biometric Information Privacy Act of 2020, S. 4400, 116th Cong. § 2 (2020); Fourth Amendment Is Not for Sale Act, S. 1265, 117th Cong. § 1 (2021).

    [9] Kate Crawford & Jason Schultz, *AI Systems as State Actors*, 119 COLUM. L. REV. 1941, 1958, 1963, 1971–72 (2019).

    [10] *See, e.g.*, *In re* Clearview AI, Inc. Consumer Priv. Litig., 585 F. Supp.3d 1111 (N.D. Ill. Feb. 14, 2022) (denying motion to dismiss multidistrict litigation ROP claims without ruling on the merits); *see also* Renderos v. Clearview A.I., No. RG21096898, 2022 WL 17326440 (Cal. Super. Ct. Nov. 18, 2022); *Fighting Facial Recognition Tech*, JUST FUTURES L., https://justfutureslaw.org/facial-recognition/ [https://perma.cc/22MG-PQ4J].

the exploitative use of one's photo, voice, or likeness in commercial advertising, ROP claims have a long and robust history of protecting individuals' images from inclusion in a range of commercial appropriations.[11] For example, in her groundbreaking book on the origins of American ROP lawsuits, Jessica Lake chronicles the ways in which women asserted ROP-style lawsuits against those that took their likenesses without permission as part of an emerging feminist movement for legal autonomy.[12] These early cases from the turn of the twentieth century challenged uses of visual capture technologies such as the lithograph and the photograph. ROP claims have now been brought in cases involving nearly every type of media outlet or device, including films, advertisements, action figures, baseball cards, animatronic robots, video game avatars, and even digital resurrection in film sequels.[13] Thus, the generalized principle that commercial entities should not be able to use new technologies to forcibly include and exploit the visual aspects of our individual likenesses provides a throughline to reach FR systems today.

This article develops this novel theory for applying ROP claims to FR systems and detail how the history and development of ROP claims, both statutory and common law, provide a robust framework for FR regulation. I argue that the history and evolution of ROP claims over the last century demonstrate they are well suited to impose logical theories of liability for entities that conduct mass image and identity appropriation activities, especially when such appropriation occurs as the result of new visual technology innovation. I also demonstrate how ROP claims provide a strong framework for balancing issues of informed consent and various public interest concerns, such as compatibility with copyright law and news reporting protected by the First Amendment. Properly adjudicated, ROP should ultimately play a significant role in the balanced and rational regulation of FR systems.

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[11] *See generally* JENNIFER ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD (2018) (discussing examples of ROP claims for the protection of individuals' images from a range of commercial appropriations).

[12] *See generally* JENNIFER LAKE, THE FACE THAT LAUNCHED A THOUSAND LAWSUITS: THE AMERICAN WOMEN WHO FORGED A RIGHT TO PRIVACY (2016).

[13] Kristopher Tapley & Peter Debruge, *'Rogue One': What Peter Cushings' Digital Resurrection Means for the Industry*, VARIETY (Dec. 16, 2016, 4:07 PM), https://variety.com/2016/film/news/rogue-one-peter-cushing-digital-resurrection-cgi-1201943759/ [https://perma.cc/2W97-UAVR].

I.   FR SYSTEMS AND THE NEED FOR MASSIVE IMAGE
          APPROPRIATION

Today's biometric identification systems are typically built through the massive appropriation of the visual likenesses of individuals.[14] For FR, these likenesses are often collected into so-called "training" datasets through automated programs that scour or "scrape" online networks, or in some cases, are provided by the owners of the networks themselves.[15] Direct informed consent is rarely, if ever, sought for such uses. Instead, automated software routinely extracts an individual's visual likeness from these photos, translates it into data (often in the form of one's facial geometry, sometimes called a "vector" or "faceprint"), and then uses that data to train FR machine-learning systems.[16]

Yet mass appropriation techniques were not always the default approach. In the early days of FR development, most images for datasets were compiled either through photoshoots, with full informed consent of participants, or through acquisition of government-provided "mugshots."[17] This was the case even in the nascent stages of FR system development in the 1960s; though these early versions of FR were not automated or nearly as powerful as today's technology—they still depended on the appropriation of individual images and likenesses. Despite this consistent need for images, the process for gathering these images was entirely different. For example, when creating one of the first foundational FR systems in 1968, Woody Bledsoe, a pioneer in artificial intelligence, used photos of men who agreed to have their photos taken by him and his research team.[18] The same was true for the FERET program, another early

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[14]   *See* Raji & Fried, *supra* note 1; Olivia Solon, *Facial Recognition's 'Dirty Little Secret': Millions of Online Photos Scraped Without Consent*, NBC NEWS (Mar. 12, 2019, 4:32 AM), https://www.nbcnews.com/tech/Internet/facial-recognition-s-dirty-little-secret-millions-online-photos-scraped-n981921 [https://perma.cc/446H-HPZG]; Kate Crawford & Trevor Paglen, *Excavating AI: The Politics of Images in Machine Learning Training Sets*, https://excavating.ai/; *see also* IAN GOODFELLOW ET AL., DEEP LEARNING 2–3 (2016).

[15]   Hill, *supra* note 1; Crawford & Paglen, *supra* note 14.

[16]   Similar extraction/appropriation happens for other biometric systems as well, including for voice. *See* Edward B. Kang, *Biometric Imaginaries: Formatting Voice, Body, Identity to Dat*a, 52 SOC. STUD. SCI. 581 (2022).

[17]   *See* Raji & Fried, *supra* note 1; Crawford & Paglen, *supra* note 14. It is worth noting that consent in the context of mugshots would also be suspect, especially as many of these photographs were taken without any notice that they would be used for future research on computer vision or FR.

[18]   Shaun Raviv, *The Secret History of Facial Recognition*, WIRED (Jan. 21, 2020, 6:00 AM), https://www.wired.com/story/secret-history-facial-recognition/ [https://perma.cc/MK88-PXWW].

government FR research project.[19] Like today's more controversial applications of FR technology, the FERET program was designed with law enforcement and surveillance applications in mind.[20] However, unlike its modern progeny, FERET relied on a database of images collected through controlled photographic sessions of consenting subjects.[21]

As Kate Crawford, a leading scholar in the field of AI, explains in *Atlas of AI*, the political economies of database construction changed dramatically as the internet evolved to provide cheap, searchable access to millions of images.[22] Now, dataset creation could be automated, allowing seminal efforts such as Labeled Faces in the Wild (2007) and ImageNet (2009) to become publicly available for broad use in the machine-learning community, including for purposes of "benchmarking" the accuracy and speed of computer vision systems in annual challenge competitions.[23] According to researchers Inioluwa Deborah Raji and Genevieve Fried, this dramatic shift in the methods of production for computer vision datasets resulted in subject consent falling drastically. During the "New Biometric" era that spanned 1996 through 2006, production was over 86 percent, whereas in the current era production fell to only 8.7 percent.[24] In this current era, we continue to see large-scale investment in scraping approaches, including such controversial examples as Clearview AI and IBM Diversity in Faces.[25]

Scraping has made FR systems much more powerful, allowing them to train on and search within exponentially larger datasets for matches with the potential for greater accuracy.[26]

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[19]   *See Face Recognition Technology (FERET)*, NAT'L INST. STANDARDS & TECH. (July 13, 2017), https://www.nist.gov/programs-projects/face-recognition-technology-feret [https://perma.cc/V6ME-WTJT].

[20]   *Id.*

[21]   *See id.*

[22]   CRAWFORD, *supra* note 1, at 106–09.

[23]   *Id.*

[24]   *BT/Research with IrisGuard Device Shows Iris Biometrics Work with Children Aged 4 to 11*, MEDIUM (Feb. 15, 2021), https://medium.com/paradigm-research/bt-research-with-irisguard-device-shows-iris-biometrics-work-with-children-aged-4-to-11-f368e75e7f64 [https://perma.cc/N2VC-LZJG]; *see* Raji & Fried, *supra* note 1.

[25]   Hill, *supra* note 1; Solon, *supra* note 14. It is worth noting that these and many other examples of biometric recognition are controversial for many reasons, including issues of bias and discrimination, privacy, and civil rights. *See* Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROC. OF MACH. LEARNING RSCH. 1, 1–2 (2018); Evan Selinger & Woodrow Hartzog, *The Inconsentability of Facial Surveillance*, 66 LOY. L. REV. 101, 103 (2019).

[26]   *See* Selinger & Hartzog, *supra* note 25, at 111; Dave Gershgorn, *Is There Any Way Out of Clearview's Facial Recognition Database?*, VERGE (June 9, 2021, 10:30 AM), https://www.theverge.com/22522486/clearview-ai-facial-recognition-avoid-escape-privacy [https://perma.cc/34SP-NB2Z].

The turn to scraping has also, importantly, led to an abandonment of the model of informed consent that underpinned early FR experiments.[27] Companies building and operating modern FR systems have standardized the mass appropriation of images, seemingly with complete disregard for any individual interests that might be implicated.[28]

Such nonconsensual mass appropriation practices raise a variety of ethical and legal concerns, from privacy and data protection to copyright and civil rights.[29] However, none of these approaches have gained sufficient political or legal traction to provide a robust regulatory framework for overseeing the building and operating of biometric identification systems, especially FR. The underexplored ROP offers exactly such an opportunity.

II. THE RISE OF THE ROP AS A FRAMEWORK FOR REGULATING MASSIVE NONCONSENSUAL IMAGE OR IDENTITY APPROPRIATION

As many scholars, including both Jennifer Rothman and William Proser, have noted, ROP claims emerged both at common law and in statutory form as the offspring of privacy claims.[30] Early cases such as Abigail Roberson's claim against the Rochester Folding Box Company for the unauthorized use of her facial likeness on twenty-five thousand lithographic advertisements in 1902, Paolo Pavesich's 1905 suit against the New England Life Insurance Company for the unauthorized use of his face in its photographic advertisement in the *Atlanta Constitution*, and Gabrielle Darley Melvin's claim against Dorothy Davenport Reid for the unauthorized telling of her story as part of a Hollywood film in 1925, are often written about as cases involving individuals who sought a private life, out of the

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[27] Olivia Solon, *Facial Recognition's 'Dirty Little Secret': Millions of Online Photos Scraped Without Consent*, NBC News (last updated Mar. 17, 2019, 11:25 AM), https://www.nbcnews.com/tech/internet/facial-recognition-s-dirty-little-secret-millions-online-photos-scraped-n981921.

[28] *See id.*

[29] *See* CRAWFORD, *supra* note 1, at 143–49; *see generally* Michael Veale & Frederik Zuiderveen Borgesius, *Demystifying the Draft EU Artificial Intelligence Act*, 22(4) COMPUT. L. REV. INT'L 97 (2021) (discussing how the EU Artificial Intelligence Act seeks to combat issues regarding data protection, privacy, and fundamental rights).

[30] ROTHMAN, *supra* note 11, at 3; William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960); Fairfield v. Am. Photocopy Equip. Co., 291 P.2d 194, 197 (Cal. Ct. App. 1955) (explaining that "[o]ne concept of the right of privacy is the right of a person to be free from unauthorized and unwarranted publicity"); *see also* SARAH E. IGO, THE KNOWN CITIZEN 34 (2018) (noting the ROP emerged as a response to "the potent trinity of press, photography, and publicity in the late nineteenth century").

public eye, but who were then later exposed via new media.[31] Yet even from these origins, the ROP was more than a "right 'to be let alone'" as Warren and Brandeis characterized it.[32] It encompassed more than the private-public distinction, which even at the turn of the century was becoming increasingly unstable.[33]

Early ROP claims also challenged the potential commercial exploitation and appropriation of one's identity, particularly appropriations enabled by new technologies on massive scales.[34] For example, in Roberson's case, we see both the new power of lithographic technology to capture her likeness, coupled with the emergent power of mass printing and distribution, to create twenty-five thousand copies of that likeness on paper.[35] Had an individual artist hand drawn Abigail Roberson's face on individual pamphlets, she still may have sued, but the scale of the harm and the level of concern among legal scholars and policymakers would have been dramatically different. That difference, in part, helped motivate the New York Legislature to codify the ROP as part of its privacy law in 1904, following Roberson's loss on appeal.[36]

Pavesich's case also involved innovation in visual appropriation technologies. There, the plaintiff sat for a portrait photograph in a commercial studio in downtown Atlanta.[37] Afterwards, the photographer surreptitiously sold the negative of the photo to an agent for the New England Life Insurance Company, who used it to print a photograph for the company's newspaper ad.[38] Such reuse of a photographic negative was quite novel for 1905. While the first negative was invented by French scientist Nicéphore Niépce in 1826,[39] until the 1870s, most negatives were "wet" glass plates, extremely fragile and only

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[31] Roberson v. Rochester Folding Box Co., 64 N.E. 442, 446 (1902); Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68 (Ga. 1905); Melvin v. Reid, 297 P. 91 (Cal. Ct. App. 1931).

[32] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (quoting 1 COOLEY, A TREATISE ON THE LAW OF TORTS 360 (2d ed. 1906)).

[33] ROTHMAN, *supra* note 11, at 78.

[34] Wendt v. Host Int'l, Inc., 125 F.3d 806, 811 (9th Cir. 1997) (declaring that "the protection of name and likeness from unwarranted intrusion or exploitation is the heart of the law of privacy") (citing Lugosi v. Universal Pictures, 603 P.2d 425, 431 (1979)); *see also* Robert C. Post & Jennifer E. Rothman, *The First Amendment at the Right(s) of Publicity*, 130 YALE L.J. 89, 116 (2020).

[35] SAMANTHA BARBAS, LAWS OF IMAGE: PRIVACY AND PUBLICITY IN AMERICA 48 (2015).

[36] ROTHMAN, *supra* note 11, at 24–25; LAKE, *supra* note 12, at 43.

[37] Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 69 (Ga. 1905).

[38] *Id.*

[39] *Niépce and the Invention of Photography*, MASON NICÉPHORE NIÉPCE, https://photo-museum.org/niepce-invention-photography/ [https://perma.cc/W34W-6UZY].

usable over a short period of hours.[40] It was not until the advent of "dry" silver gelatin glass negatives in 1873 and "flexible" nitrocellulose-nitrate negatives in 1889 that large-scale commercial photographic media became practically and economically viable.[41]

Advancement in printing technologies also facilitated the appropriation and exploitation of Pavesich's image. In the late 1890s, newspapers and other print media outlets reduced the costs of production significantly, allowing them to print photographs in stories and to advertise more easily and often. Advances in transportation and logistics technology also allowed publishers to distribute those images more easily and cheaply in their daily circulation to audiences in greater numbers and larger geographic regions.[42] For example, "national circulation of magazines rose from 18 million in 1890 to 64 million in 1905," while "[n]ewspaper readership increased 400 percent between 1870 and 1900," with the number of available newspapers doubling.[43] As readership and competition increased, publishers moved to vary their content beyond reporting on public figures and began to emphasize "'human interest' stories" from the lives of ordinary people.[44]

Increased demand, and the technological capacity to meet it, put immense pressure on publishers to acquire individual images to accompany their stories and appear in advertising. Yet most high-quality photography still required studio environments and equipment.[45] Madison Avenue-style firms and commercial modeling were decades away.[46] Portrait

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[40] *A Brief History of Glass Plate Photography*, TEX. STATE. UNIV. ARCHIVES, https://exhibits.library.txstate.edu/univarchives/exhibits/show/cen-tex-glass-plates/mystery-deliv/glass-plate-negs [https://perma.cc/6ENH-JW9Y].

[41] *Photographic Processes: 1839–1889*, DIV. RARE & MANUSCRIPT COLLECTIONS, https://rmc.library.cornell.edu/DawnsEarlyLight/exhibition/processes/ nitrocelulose_neg.html [https://perma.cc/U2YR-WR27]; *Glass Plate Negatives (1850s to 1920s)*, OR. STATE UNIV. (last updated Aug. 12, 2022), https://guides.library.oregonstate.edu/earlyphotoformats/glassplatenegatives [https:// perma.cc/5G97-FCZ3].

[42] Johanna Drucker, *Industrialization of Print*, *in* HISTORY OF THE BOOK, https://hob.gseis.ucla.edu/HoBCoursebook_Ch_9.html [https://perma.cc/4V2C-V4US] (noting that "[p]hotographic journalism did not make its way into mass circulation publication until the 20th century, even if photographic documentation, such as Matthew Brady's famous images of Civil War battlefields provide graphic evidence of historical events of the period. Techniques for reproduction of photography in mass printing processes were the subject of much experimentation in the 19th century, but were not fully successful until about the turn of the century."); *Early Documentary Photography*, METRO. MUSEUM OF ART, https://www.metmuseum.org/toah/hd/edph/hd_edph.html [https://perma.cc/923L-LRNN].

[43] BARBAS, *supra* note 35, at 10.

[44] *Id.*

[45] *Id.* at 48–49.

[46] *See id.* at 49.

photography, on the other hand, was extremely popular by the late nineteenth century.[47] Combined with the permanence of "dry" glass plate and nitrate negatives, a secondary market for images emerged, with photographers selling negatives and portraits to printers, junk shop owners, and vending machine purveyors.[48] Advertisers often bought or even stole images without the consent of photo subjects.[49] While celebrities were often the most sought-after images, these secondary markets included ordinary people, "individuals whose images were fungible and ubiquitous and who would be unlikely . . . to take action against the advertiser."[50]

These technological advances not only provided the means of mass appropriation but also accentuated the harm that each individual suffered. For example, had Pavesich's photographer been limited to a "wet" glass plate negative, it would have been nearly impossible to reuse his image in a mass market publication. And if printing and distribution technology had not improved or the *Atlantic Journal* had been operating more limited printing presses, the story of his lawsuit might have been much different. As Samantha Barbas notes, "Like a consumer product, Pavesich's photograph had become a fungible commodity that could be circulated wantonly in the marketplace."[51] And as the Supreme Court of Georgia held in Pavesich's case:

> The knowledge that one's features and form are being used for such a purpose, and displayed in such places as such advertisements are often liable to be found, brings not only the person of an extreme sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him.[52]

As such, Pavesich's claim that the *Atlantic Journal* insurance ad brought him "into ridicule before the world" can be seen as a story about both privacy and how new visual industry technologies substantially increase harms for misuse of one's likeness.[53]

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[47]   *Id.* at 46.

[48]   *Id.* at 48.

[49]   *Id.* at 50.

[50]   *Id.*

[51]   *Id.* at 61.

[52]   Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 80–81 (Ga. 1905), *quoted in* Barbas, *supra* note 35, at 61.

[53]   Barbas, *supra* note 35, at 61; *see also id.* ("[T]he case was a necessary response to the unprecedented development in our times of the apparatus of publicity [that] has rendered it immensely more formidable than it was before to persons to whom publicity is abhorrent." (quoting *The Right of Privacy*, N.Y. Times, Apr. 23, 1905, at 8) (alteration in original)). Thus, even in 1905, commentators were linking the need for a

Reid's cinematic retelling of Melvin's story also fits this pattern. There, Reid produced a Hollywood film based on newspaper clippings and court documents about Melvin's alleged past as a sex worker and murder suspect.[54] Had Reid merely produced a single live performance reenacting these alleged events on stage, it is uncertain whether Melvin would have known or cared about it. Any alleged harm from exploitation or appropriation would have been minimal. However, in 1925, the newly instigated, technologically driven Hollywood Studio System was on the rise and hungry for content.[55] As the Studio System's capacity to produce and distribute films nationwide grew rapidly, the supply of stories and scripts lagged behind.[56] Film producers such as Reid looked to other media, such as newspapers or court records, for sources that too often were ultimately appropriated and exploited. Hence, when Reid found the news story about Melvin, it provided the content she needed to help meet Hollywood's insatiable demand.[57]

These new capacities for exploitation, brought about by advances in the technologies of the day, played a significant role in the rise of the ROP claims filed at the time. Since then, the ROP evolved alongside numerous mass appropriation technologies, imposing liability on innovations in print journalism, photography, microphones, motion pictures, television, video games, and even baseball cards.[58] In each case, the development of these new technologies changed and challenged an individual's ability to control how their identity could be used, and the ROP responded.

ML's current hunger for data has been growing for decades, with image data driving and magnifying the growth of

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strong ROP to the "unprecedented development" of technologies that could accelerate and intensify the appropriation of individual likenesses.

[54] Melvin v. Reid, 297 P. 91, 91 (Cal. Ct. App. 1931).

[55] DOUGLAS GOMERY, THE HOLLYWOOD STUDIO SYSTEM: A HISTORY 25 (2005).

[56] *See* BARBAS, *supra* note 35, at 97–98.

[57] *See* Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204–06 (1954) (explaining how the ROP failed to keep up with "tremendous strides" in technological advancements during the rapid expansion of the advertising, television, film, and radio industries); O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941); *see also* ROTHMAN, *supra* note 11, at 68–71 (discussing the film industry's influence on ROP development).

[58] *See, e.g.*, Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (holding that the ROP applies to images of baseball players included as novelty gifts in chewing gum); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578–79 (1977) (holding that ROP applies to a news broadcast of a performance); Eastwood v. Super. Ct., 198 Cal. Rptr. 342, 347 (Ct. App. 1983) (holding that the ROP applies to periodical covers and telecasts); Keller v. Elec. Arts Inc., 724 F.3d 1268, 1279 (9th Cir. 2012) (holding that the ROP applies to likenesses used as video game avatars).

computer vision and other fields.[59] As demand for images outpaced supply technologies, ML researchers turned to unauthorized mass appropriation mechanisms such as scraping and clickworker labeling practices.[60] While ML consumption takes place in a world of mathematical models and million-image datasets, its economics are almost identical to prior ROP cases where new technologies enabled mass consumption of images at a rate that exceeded consent-based supply. Biometric identification systems, especially FR, produce similar supply and demand dynamics—dynamics that the ROP traditionally helped discipline by imposing liability where commercial actors are tempted to do an end-run around consent of the individuals they exploit.

III.   THE ROP FRAMEWORK FOR REGULATING FR

ROP claims vary from state to state and between their common law form and statutory implementations. However, most can be distilled down to the following elements: (1) "the defendant's use of the plaintiff's identity[,] (2) the appropriation of" that identity to the defendant's advantage, "(3) lack of consent[,] and (4) resulting injury."[61] While some states and statutes limit the scope of actionable exploitation to particular advantages, such as advertising, many have expansive concepts of "commercial misappropriation," such as in California, or "for the purposes of trade" in Virginia and New York.[62]

A.   *Three Ways that FR Uses an Individual's Likeness or Identity*

For the first ROP element to be satisfied, courts must find that FR systems "use" an individual's likeness or identity. This can occur in at least three distinct ways: (1) the use of one's image to train a FR system, (2) the association of one's image with one's identity within the FR systems, and (3) display of

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[59]   *See* CRAWFORD, *supra* note 1, at 96.

[60]   *Id.* at 95; *see also* MARY L. GRAY & SIDDHARTH SURI, GHOST WORK: HOW TO STOP SILICON VALLEY FROM BUILDING A NEW GLOBAL UNDERCLASS (2019).

[61]   *See, e.g.*, Stewart v. Rolling Stone LLC, 105 Cal. Rptr. 3d 98, 111 (Ct. App. 2010), *as modified on denial of reh'g* (Feb. 24, 2010) (quoting Eastwood v. Sup. Ct., 198 Cal. Rptr. 342, 347 (Ct. App. 1983); Newcombe v. Adolf Coors Co., 157 F.3d 686, 692 (9th Cir. 1998); *see also In re* Clearview AI, Inc. Consumer Priv. Litig., 585 F. Supp. 3d 1111, 1127–30 (N.D. Ill. 2022), *23–33 (comparing Virginia, California, and New York ROP common law and statutory ROP claims against Clearview AI).

[62]   ROTHMAN, *supra* note 11, at 25; *In re Clearview AI, Inc. Consumer Priv. Litig.*, 585 F. Supp. 3d at 1127–30.

one's image or retrieval of one's identity in response to a request for matching.

1. Use of One's Image to Train a FR System

On a purely factual level, it might seem odd to even question whether a FR system "uses" someone's image in its training process if it is one of the millions scraped and ingested. After all, the whole point of FR systems is to use one or more prior images of a person to identify them in subsequent novel photos. Prior images are literally the grist for the ML mills that manufacture the logics of FR identification.[63] Without prior images, FR systems would not exist. Traditionally, ROP claims are predicated on uses that are visually apparent to human eyes, such as appearing in advertising, newspapers, on television and in movies, or as avatars in video games. The "publicity" of the person has typically been conceptualized with a human public as the audience. Yet, as algorithmic systems become more prominent and powerful agents in our society, the law has moved quickly to recognize that the actions such systems take on behalf of those who build or buy them can have as much of an impact on legal rights as human actors.[64] So just as a company might "use" an individual's image to train internal human personnel (such as security guards or customer service representatives) to recognize that individual at a later time or place, the use of individuals' images to train algorithmic systems for similar purposes can be treated similarly in a ROP analysis. This approach is supported by the Restatement of the Law of Unfair Competition, which defines "for purposes of trade" to include uses that appear "in advertising the user's goods or services, or are placed on merchandise marketed by the user, or *are used in connection with services rendered by the user*."[65]

Moreover, just as human observation of an image can qualify as "use" for ROP purposes, so too should the various ways that computers "see" us as well. The field of computer vision has existed as a subfield of computer science since at least the

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[63] CRAWFORD, *supra* note 1, at 96; *see supra* note 3 and accompanying text.

[64] *See* RASHIDA RICHARDSON ET AL., AI NOW INST., LITIGATING ALGORITHMS 2019 US REPORT: NEW CHALLENGES TO GOVERNMENT USE OF ALGORITHMIC DECISION SYSTEMS 3 (2019), https://ainowinstitute.org/litigatingalgorithms-2019-us.pdf [https://perma.cc/9LP2-STXA]; *see generally* Crawford & Schultz, *supra* note 9 (arguing that courts should adopt a form of state action doctrine that would apply to vendors of AI systems that make governmental decisions).

[65] *See* RESTATEMENT (THIRD) OF THE LAW OF UNFAIR COMPETITION § 47 (AM. L. INST. 1995) (emphasis added).

1960s.[66] Over the decades, thousands of papers have been published and numerous systems have been built with the sole purpose of trying to help computers see images, including images of people.[67] For example, the canonical computer vision training dataset ImageNet has an entire category for "People," which contains hundreds of subcategories filled with images and labels, all entirely devoted to training computer vision systems to identify human faces.[68] In fact, the majority of images produced today are never seen by humans and only processed by machines.[69] Use of individual images to assist this process, especially for commercial purposes, falls squarely within the concept of "use" for ROP purposes.[70]

2. Association of One's Image with One's Identity[71]

The next category of use is also one traditionally associated with ROP claims, albeit again traditionally with human audiences in mind. FR systems are built on the premise that previously unseen images can be identified and then associated with a known individual's identity. Similarly, ROP claims have not only been successfully brought against the nonconsensual use of images but of identities as well—even identities where the individual's name or image is entirely absent from the ultimate moment of identification. For example, almost twenty years ago, the Ninth Circuit held that Samsung violated Wheel of Fortune host Vanna White's ROP when it displayed an image of a robot with her uniquely identifying

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[66] T.S. Huang, *Computer Vision: Evolution and Progress*, *in* 19 CERN SCH. OF COMPUT., PROCEEDINGS (C.E. Vandoni ed., 1996), https://cds.cern.ch/record/300250 [https://perma.cc/E4KP-JJAW].

[67] Junyi Chai et al., *Deep Learning in Computer Vision: A Critical Review of Emerging Techniques and Application Scenarios*, 6 MACH. LEARNING WITH APPLICATIONS 1, 2 (2021).

[68] Crawford & Paglen, *supra* note 14.

[69] Trevor Paglen, *Invisible Images (Your Pictures are Looking at You)*, NEW INQUIRY (Dec. 8, 2016), https://thenewinquiry.com/invisible-images-your-pictures-are-looking-at-you/ [https://perma.cc/EQ23-NR25].

[70] Both trademark and copyright have also struggled with the question of whether machine-driven actions constitute "volitional acts" or "uses" that would give rise to liability. *See* James Grimmelmann, *Copyright for Literate Robots*, 101 IOWA L. REV. 657, 670–71 (2016); *see also* Graeme B. Dinwoodie & Mark D. Janis, *Confusion Over Use: Contextualism in Trademark Law*, 92 IOWA L. REV. 1597, 1658–57, 1663–64 (2007) (discussing the challenges of new technologies to the term "use"); Stacey L. Dogan & Mark A. Lemley, *Grounding Trademark Law Through Trademark Use*, 92 IOWA L. REV. 1669 (2016) (responding to Dinwoodie & Janis' discussion).

[71] *See generally* Zahra Takhshid, *Data as Likeness*, GEO. L.J. (forthcoming 2023) (arguing that an individual's personal data is an aspect of that person's unique digital identity and thus covered by the tort of appropriation of likeness).

characteristics in an advertisement.[72] The corporation defended its conduct by arguing that the robot did not include White's name or an *exact* image of her. But the court explained that ROP claims are not limited to those specific types of appropriations.[73] Rather, the ROP "does not require that appropriations of identity be accomplished through particular means to be actionable."[74] The court then upheld her claim, noting that Samsung had gone out of its way to make sure the robot possessed traits uniquely and recognizably associated with White: a blond wig in the style of her hair, an evening gown in her typical fashion, and the appearance of turning letters on a game board that closely resembled the Wheel of Fortune set.[75] Indeed, when reviewing these attributes, the court specified, "Vanna White dresses like this, turns letters, and does this on the Wheel of Fortune game show. She is the only one."[76] In other words, it was the fact that Samsung had used White's *unique* identifying characteristics for commercial benefit that triggered the ROP violation. Yet despite this thirty-year precedent recognizing the protected nature of such characteristics, FR companies use unique identifying characteristics of an individual's face or likeness—through faceprints or facial geometry templates in their datasets—to identify individuals for commercial benefit.[77]

Identity is so protected that appropriation can even be established through one's association with objects. For example, in *Motschenbacher v. R.J. Reynolds Tobacco*, the Ninth Circuit held that a television commercial using a photograph of the plaintiff driving a racecar was a violation of his ROP, even though neither the plaintiff's face nor physical features were visible in the photograph.[78] Because the racecar was uniquely associated with Lothar Motschenbacher, a famous professional race car driver, the use of the car's photo was sufficient to

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[72]   White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397–99 (9th Cir. 1993).

[73]   *Id.* at 1398.

[74]   *Id.*

[75]   *Id.* at 1399.

[76]   *Id.* at 1399.

[77]   Another major Ninth Circuit ROP case to make this point also involved robots. In *Wendt v. Host International*, the Ninth Circuit held that a jury could reasonably conclude that animatronic robots made to resemble the plaintiff actors from the television show "Cheers" were sufficiently "like" them to violate their rights of publicity. Wendt v. Host Int'l, Inc., 125 F.3d 806, 809–10 (9th Cir. 1997). Both *White* and *Wendt* support a broad ROP to prevent the appropriation of one's identity even without a display of actual visual likenesses. Further still, both support the contention that the mere fact that a representation is recognizably identifiable with a specific individual is enough to substantiate a ROP claim.

[78]   Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir. 1974).

implicate Motschenbacher's ROP. Similarly, FR systems often use an individual's photo to create a unique faceprint or face template for later identification. That faceprint or template, just like Motschenbacher's race car, has the sole purpose of identifying an individual to further the commercial interest of the FR company and its customers, even if the original photo is no longer actively used or displayed by the system.

Appropriation of identity can also occur through use of other biometric identifiers, such as one's voice. In *Midler v. Ford Motor Co.*, the Ninth Circuit held that the defendant's use of a Bette Midler "sound-alike" in a commercial constituted a violation of Midler's ROP.[79] Because the properties of her voice were distinctly recognizable, the use of an impersonator still violated Midler's ROP and her autonomy in controlling how qualities uniquely associated with her were exploited. Again, it was the identifiability of the individual that the court found central to the actionability of the ROP claim. Since then, other courts have followed this logic. The Central District of California in *Brophy v. Almanzar* held that the displaying of an individual's "unique and distinctive" back tattoo qualified as use of his identity even though his name and face were never shown.[80] In *Winter v. DC Comics*, the California Supreme Court held that even though their names and faces were changed, comic book characters with long white hair, albino features, and distinctive hats were similar enough to plaintiffs to show a prima facie case of appropriation.[81] In *Kirby v. Sega of America, Inc.*, the lead singer of the 1990s retro-funk band "Deee-Lite" sued videogame maker Sega for appropriating her "unique public identity" as part of a character from an alien invasion dance game.[82] In affirming that there were triable issues of fact as to identity appropriation, the court found that the videogame character's "facial features, . . . clothing, hair color and style, and use of certain catch phrases are sufficiently reminiscent enough of [plaintiff's] features and personal style to suggest imitation."[83] Similar biometric identifiers were also at issue in three videogame avatar cases involving amateur athletes and rock

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[79] Midler v. Ford Motor Co., 849 F.2d 460, 463–64 (9th Cir. 1988).

[80] Brophy v. Almanzar, No. SACV 17-01885-CJC (JPRx), 2019 WL 10837404, at *8 (C.D. Cal. Aug. 22, 2019).

[81] Winter v. DC Comics, 69 P.3d 473, 477–79 (Cal. 2003) (sustaining prima facie case of appropriation of identity but remanding back to trial court on question of whether comic books at issue were entitled to First Amendment protection under the *Comedy III* test for transformation).

[82] Kirby v. Sega of Am., 50 Cal. Rptr. 3d 607, 609–12 (Ct. App. 2006).

[83] Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607, 613 (2006).

stars.[84] These biometric identifiers are no different from the faceprints or facial geometry templates that FR companies use every day in their commercial ventures.

The holdings in these cases are examples of courts applying the ROP to a broad range of unique identifying features, rather than one specific feature. Whether via a robot, a racecar, a soundalike, or something else, courts have protected individuals' identifiable qualities from exploitation by companies for profit.[85] When FR systems engage in similar appropriations of identity, they too are subject to ROP claims. Biometrics are, by definition, the measurement of individuals' unique attributes, and thus recognizable and identifying of the individuals themselves.[86]

3. Display of One's Image or Retrieval of One's Identity in Response to a Request for Matching

Finally, there is the output of the FR system. When a "match" is made, FR systems will typically output an official image and identification of the likely subject. The display of these images and associated information not only relies on the uses identified above but also constitutes its own independent use as an output for consumption by the FR system customer. Customers purchase FR systems for these outputs, so without them, the entire commercial value of the system would be dramatically diminished.[87] Thus, such outputs constitute a third violation of individuals' ROP.

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[84] *In re* NCAA Student-Athlete Name & Likeness Litig., 724 F.3d 1268 (9th Cir. 2012) (unauthorized use of college football players' traits in video game avatars); Hart v. Elec. Arts, Inc., 717 F.3d 141 (3d Cir. 2013) (unauthorized use of college football players' traits in video game avatars); No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397 (Ct. App. 2011) (unauthorized computer-generated avatar depiction of rock band used to play other bands' songs in video game).

[85] *See* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 832–37 (6th Cir. 1983) (finding that marketing a portable toilet with Johnny Carson's recognizable *Tonight Show* introduction—"Here's Johnny"—was actionable under Michigan's ROP despite never mentioning his name or including an image of him).

[86] *See Biometrics*, DEP'T HOMELAND SEC. (last updated Dec. 14, 2021), https://www.dhs.gov/biometrics [https://perma.cc/SRH9-RA44]. This would also address some of the concerns about the ongoing harm of FR systems, as each "search" would constitute an additional ROP violation, whether or not the search produced a particular individual's image as the result, given that any target image would need to be checked against all known (and appropriated) identities to ensure the "accuracy" that companies like Clearview AI promise to their customers.

[87] Oddly, some courts have suggested that the ROP does not apply to uses of likenesses where the likeness itself is or is a part of the product, rather than an advertisement for a product. *See* Brooks v. Thomson Reuters Corp., 21-cv-01418-EMC, 2021 WL 3621837, at *10 (N.D. Cal. Aug. 16, 2021) ("[R]ight of publicity cases involve the unauthorized use of someone's–typically a celebrity's–name or likeness *in commercial advertisings or promotions*.") (emphasis in original). Such cases are directly

B.   *Commercial Appropriation of Images and Identities Is the Core Business Model for Most FR Companies*

The second element of a ROP claim is proof that the appropriation was to the defendant's commercial advantage. The profitability of FR technology lies in its ability to recognize a person's face in photos or videos the system never processed before. To do this accurately, the system must be trained on those very same faces from prior photos or videos. Clearview's algorithm, for example, uses the faces in photos it scrapes by extracting biometric facial data from the images and converting that data into vectors based on facial geometry, sometimes called "faceprints."[88] In other words, without a person's likeness, the system cannot produce the vectors necessary to identify them in subsequent visual images. Likenesses are the system's lifeblood. At least two courts have denied Clearview's attempt to dismiss claims under Virginia, New York, and California ROP laws for these reasons.[89]

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at odds with more authoritative precedents and thus, presumptively wrongly decided. *See, e.g.*, Comedy III Prods. v. Gary Saderup, Inc. 25 Cal. 4th 387, 391–410 (2001) (ROP applied to drawings of the Three Stooges sold on t-shirts and prints); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (ROP applied to broadcast of daredevil's act); Lugosi v. Universal Pictures, 25 Cal.3d 813, 823 (1979) (ROP applied to film and merchandise using an actor's name and likeness); James v. Screen Gems, Inc., 344 P.2d 799 (Cal. App. 1959) (ROP applied to television show portraying the life and likeness of a celebrity). There are some states, such as Illinois, that appear to have a narrower definition of "commercial" uses which specify only uses in conjunction with "public use or holding out of an individual's identity (i) on or in connection with the offering for sale or sale of a product, merchandise, goods, or services; (ii) for purposes of advertising or promoting products, merchandise, goods, or services; or (iii) for the purpose of fundraising." *See* Huston v. Hearst Commc'ns, No. 21-cv-1196, 2022 WL 385176, at *2 (C.D. Ill. Feb. 7, 2022) (citing 765 ILL. COMP. STAT. ANN. 1075/5; Dobrowolski v. Intelius, Inc., No. 17 CV 1406, 1447, 1519, 2018 WL 11185289, at *3 (N.D. Ill. May 21, 2018)); *see also* Nieman v. Versuslaw, Inc., No. 12-3104, 2012 WL 3201931, at *2, *4 (C.D. Ill. Aug. 3, 2012) (dismissing claim under the IRPA because plaintiff's identity was "not being held out or used to entice anyone to buy a product"). As one district court recently held, "the Illinois legislature meant to limit the term 'commercial purposes' to situations where a person's identity is used to promote a 'separate product,' or 'some other product,' apart from the person's identity itself." Lukis v. Whitepages Inc., 542 F. Supp. 3d 831, 838 (N.D. Ill. Oct. 27, 2020) (quoting *Dobrowolski*, 2018 WL 11185389, at *3); Thompson v. Getty Images (US), Inc., 2013 WL 3321612, at *2 (N.D. Ill. July 1, 2013). But these limitations are specific to those states and not to general ROP claims brought under expansive laws like those in California.

    [88]   Kathleen Foody & Matt O'Brien, *Face-Scanner Clearview Agrees to Limits in Court Settlement*, ASSOCIATED PRESS (May 9, 2022), https://apnews.com/article/technology-business-social-media-chicago-lawsuits-fc4f9029 76aecdd38b1eca48694c8faa; Hill, *supra* note 1.

    [89]   Renderos v. Clearview AI, Inc., No. RG21096898, 2022 WL 17326440 (Cal. Super. Ct. Nov. 18, 2022); *In re* Clearview AI, Inc. Consumer Privacy Litig., 585 F. Supp. 3d. 1111 (N.D. Ill. Feb. 14, 2022) (denying Clearview's Motion to Dismiss Virginia, California, and New York ROP claims because plaintiffs successfully alleged Clearview profited from the unconsented use of their likenesses for "purposes of trade").

The commercial advantages of mass image appropriation are also influenced by the network effects of the image database in which they reside. Companies like Clearview have made explicit their intention to have multiple photos of every single person in the world in their database in order to improve the accuracy of their system.[90] Much as having a complete collection of images and identities for sports stars in trading card sets or as avatars in videogame rosters adds to the holistic commercial value of those products, the addition of any single photo or face to an FR system adds value in terms of alleged accuracy, completeness, and commercial success.[91]

This network-driven digital commercialization model has been emphasized recently in various ROP-dependent industries. For example, the Major League Baseball (MLB) Players Association recently negotiated a clause in its new collective bargaining agreement making it illegal for MLB or any of its teams to sell or license any player's personal biometric data without the player's consent.[92] And Getty Images announced the launch of an "Enhanced Model Release" form that will include "personal and biometric data."[93] These efforts, like so many ROP-related evolutions, began with those on the path toward celebrity. But as the history of identity appropriation technologies shows us, the rights and claims raised by celebrity cases implicate us all.

For example, in *No Doubt v. Activision Publishing, Inc.*, the California Court of Appeals found that the entire business model of Activision's Band Hero game was predicated on the

[90] Drew Harwell, *Facial Recognition Firm Clearview AI Tells Investors It's Seeking Massive Expansion Beyond Law Enforcement*, WASH. POST (Feb. 16, 2022, 12:47 PM), https://www.washingtonpost.com/technology/2022/02/16/clearview-expansion-facial-recognition/ (noting Clearview AI's claim to be on track to have one hundred-billion photos in its database, the equivalent of fourteen photos for each of the roughly seven-billion people on the planet).

[91] *See* Kirby v. Sega of Am., 50 Cal. Rptr. 3d 607, 612–14 (Ct. App. 2006); *supra*, note 83 and accompanying text.

[92] Kate Kaye, *AI Could Help College Baseball Players Reach the Majors, but With Little Control over Their Biometric Data*, PROTOCOL (Apr. 7, 2022), https://www.protocol.com/enterprise/baseball-intel-ai-athlete-biometric [https://perma.cc/5LZF-EPEB] ("For college players like Thompson and Washington Jr. as well as pro athletes throughout sports, the use of data showing how their bodies move, breathe, sleep and recover from injury is becoming commonplace."); *see also* Skyler Hicks, *Navigating the Sports Biometrics Boom*, NAT'L L. REV. (July 31, 2022), https://www.natlawreview.com/article/navigating-sports-biometrics-boom ("If biometric data can reveal a player's distinctive traits or mannerisms, the right of publicity might protect the player from the unconsented commercial use of such player's likeness.").

[93] Press Release, Getty Images, Getty Images Launches Industry-First Model Release Supporting Data Privacy in Artificial Intelligence and Machine Learning (Mar. 22, 2022), https://investors.gettyimages.com/news-releases/news-release-details/getty-images-launches-industry-first-model-release-supporting.

performance of specific musicians playing the music.[94] When Activision contracted with No Doubt to appear in the game, it went so far as to require contractually that band members agree to participate in an all-day motion-capture photography session at Activision's studio "so that the appearances, movements, and sounds of the band members could be realistically reproduced in the game."[95] The ROP violation occurred, however, when Activision "unlock[ed]" the ability for players to use the No Doubt avatars to perform songs by other bands.[96] Activision even hired actors to impersonate the No Doubt band members in additional motion-capture photography sessions in order to recreate the appropriate movements for the performances of the songs by other bands.[97] These specific unauthorized biometric captures were central to the court's conclusion that a ROP violation occurred, as they were a key aspect of Activision's videogame business model.

In *Hart v. Electronic Arts, Inc.*, identity appropriation was similarly central to the business model and inherent value of the product.[98] There, the videogame company Electronic Arts created avatars for hundreds of NCAA football players and took care to make sure they were only identified by number and position but not by name or face.[99] Yet each avatar came with preset biometric attributes, such as height, weight, speed, agility, and passing ability, that were in many cases identical, or similar to, the plaintiff players.[100] In upholding the players' ROP claim, the court noted,

> In no small part, the *NCAA Football* franchise's success owes to its focus on realism and detail—from realistic sounds, to game mechanics, to team mascots. This focus on realism also ensures that the "over 100 virtual teams" in the game are populated by digital avatars that resemble their real-life counterparts and share their vital and biographical information.[101]

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[94]   No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397 (Ct. App 2011).

[95]   Jordan M. Blanke, *No Doubt About It—You've Got to Have Hart: Simulation Video Games May Redefine the Balance Between and Among the Right of Publicity, the First Amendment, and Copyright Law*, 19 B.U. J. SCI. & TECH. L. 26, 31 (2013) (citing *No Doubt*, 122 Cal. Rptr. at 402).

[96]   *No Doubt*, 122 Cal. Rptr. at 402, 405.

[97]   *Id.*

[98]   Hart v. Elec. Arts, Inc., 717 F.3d 141 (3d Cir. 2013).

[99]   *See id.* at 146.

[100]   *Id.* (noting, for example, that in the 2006 version of NCAA Football, the Rutgers quarterback is from Florida, wears jersey number thirteen, is six foot two inches tall, weighs 197 pounds, wears a left wristband and had speed, agility, passing accuracy, and passing strength metrics similar to named Plaintiff Hart's 2005 statistics).

[101]   *Id.*

Similarly, FR companies owe their success to appropriating and exploiting images and vital biographical information from millions of individuals, including both those well-known and those whose careers were unmemorable or inconsequential.

C.   *The Nonconsensual Nature of Mass Image Appropriation for FR*

The third element of a ROP claim is consent. In many jurisdictions, consent to use a person's likeness does not need to be express or in writing. Instead consent "may be implied from the consenting party's conduct and the circumstances of the case."[102] Even a plaintiff's "manifested action or inaction," such as agreeing to appear on a red carpet at a public event, can constitute consent for ROP purposes.[103] However, general consent to use an online service does not provide specific consent for ROP purposes if the appropriation at issue is not a foreseeable part of using the service.[104] Even users directly uploading photos for one purpose (such as online storage) have been found to withhold consent for other purposes, such as training FR systems.[105]

Again, the *No Doubt* case is instructive on this point, where ROP consent to play one's own songs in a music videogame was found insufficient to authorize the use of one's identity and likeness to play other bands' songs.[106] Simply put,

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[102]   *See, e.g.*, Jones v. Corbis Corp., 815 F. Supp. 2d 1108, 1113 (C.D. Cal. 2011), *aff'd*, 489 F. App'x 155 (9th Cir. 2012) (citing Newton v. Thomason, 22 F.3d 1455, 1461 (9th Cir. 1994)).

[103]   *Id.* at 1114.

[104]   *See* Cohen v. Facebook, Inc., 798 F. Supp.2d 1090, 1096 (N.D. Cal. 2011) (holding that users did not consent to the use of their identity for commercial purposes using Facebook's "Friend Finder" service because the terms of service were too ambiguous to find specific consent).

[105]   Pratt v. Everalbum, Inc., 283 F. Supp. 3d 664, 667 (N.D. Ill. 2017) ("[O]ne can consent to the use of his or her identity for one purpose but not another."); *see also* Trannel v. Prairie Ridge Media, Inc., 987 N.E.2d 923, 931 (Ill. App. Ct. 2013) (finding that plaintiff's consent for certain purposes related to a contest entry did not extend to other uses of likeness for commercial purposes). It is also worth noting that there is an emerging effort in the biometric identification industry to move away from nonconsensual image appropriation, either through renewed efforts at consent or through the production of "synthetic" images for training purposes that are not linked to specific individuals. *See* Frank Hersey, *Tech5 Commits to 'Consent-Based' Images for Facial Recognition Algorithm Training Databases*, BIOMETRICUPDATE.COM (Feb. 9, 2022, 12:22 PM), https://www.biometricupdate.com/202202/tech5-commits-to-consent-based-images-for-facial-recognition-algorithm-training-databases [https://perma.cc/5DRP-LAQ9]; Tyler Choi, *Synthetic AI Startup Raises $17M to Train Facial Recognition with Digitally-Rendered People*, BIOMETRICUPDATE.COM (Apr. 29, 2022, 1:26 PM), https://www.biometricupdate.com/202204/synthetic-ai-startup-raises-17m-to-train-facial-recognition-with-digitally-rendered-people [https://perma.cc/2BJ5-PH3S].

[106]   No Doubt v. Activision Publ'g, 122 Cal. Rptr. 3d 397, 401–06, 412, 415 (Ct. App. 2011).

context matters.[107] Contrast this with *Perkins v. LinkedIn Corp.*, where in order to send invitation emails to their users' contacts, LinkedIn gathered explicit consent to collect user's Gmail contacts, showed users matches between their contacts and all LinkedIn users, and then asked users to "invite some people" and "[s]tay in touch with [the user's] contacts" not yet on LinkedIn before sending invitation emails on behalf of the user.[108] The court found that these steps, including the explicit requests for permission, combined to provide ROP consent.[109]

Of course, as many have noted, we live in a digital world where consent is often simply "a click away," coupled with lengthy Terms of Service that are rarely read and monumental power imbalances between users and powerful online platforms.[110] So one might ask what use is an individual or collective ROP against Facebook, Amazon, or Google, when those platforms can simply leverage access to essential online services in return for complete assignment of our ROP for biometric recognition?

While this is certainly a challenge for any framework attempting to regulate new technologies, courts in ROP cases have been particularly sensitive to notice and context in their consent rulings to date.[111] For example, the court in *No Doubt* could have found implied consent to perform any song once the band members licensed their ROP for their own songs, but instead it read the consent provisions of the license narrowly.[112] Moreover, unlike most online contractual matters, it is possible that courts could consider the ROP's protection of biometric data more properly akin to laws protecting health information and medical procedures in terms of consent.[113] For example, in the case of *Moore v. Regents of California*, plaintiff James Moore sued to share in the profits of an invention made with his DNA, claiming both that the doctors who operated on him "converted" his cells as property and violated their fiduciary duty to him by failing to gain his informed consent to exploit his cell line for commercial research.[114] While his conversion claim was dismissed, the California Supreme Court upheld his fiduciary

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[107]   *See* NISSENBAUM, *supra* note 5, at 3–10.

[108]   Perkins v. LinkedIn Corp., 53 F. Supp. 3d 1190, 1214–15 (N.D. Cal. 2014).

[109]   *Id.* at 1215 (finding that LinkedIn's disclosures were "clear enough to alert [p]laintiffs" of the ensuing use of their names, and that a reasonable person who saw such disclosures and continued was consenting to the emails).

[110]   *See* Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 463 (2006).

[111]   *See* No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397 (Ct. App. 2011).

[112]   *Id.* at 405–12.

[113]   Special thanks to Jessica Silbey for this insight and connection.

[114]   Moore v. Regents of Univ. of Cal., 793 P.2d 479, 480–81 (Cal. 1990).

claim because of the lack of informed consent.[115] While the ROP does not create any similar duties, it has a similar interest in protecting bodily autonomy and dignity. This could well lead courts to decide that ROP consent standards should align with those of medical research rather than traditional arm's-length business transactions and be read more narrowly with context in mind. Either way, the ROP consent framework is a significant barrier to third party FR companies who use scraping or other mass appropriation means.

Finally, even in cases where online Terms of Service or other click-through consent mechanisms might facially suggest consent, scholars such as Woody Hartzog, Evan Selinger, and Nancy Kim argue that these mechanisms should still be rejected, given the magnitude of the risk and harm posed and the strong evidence that few, if any, users ever actually read those documents.[116]

D.   *Emotional Harm, Damage to One's Dignity, and Unjust Enrichment*

The last element of ROP claims requires courts to assess questions of harm and appropriate remedies. When considering these questions, the history and context of how ROP claims emerged is once again instructive. Born out of the right of privacy, the ROP protects people under several theories of harm. First, it aims to mitigate "the indignity and mental trauma incurred when one's identity is widely disseminated in an unpermitted commercial use."[117] As Mark McKenna noted, the connection between an unpermitted commercial use and indignity suffered can be attributed to every person's right to autonomy "[b]ecause the things with which individuals choose to associate reflect the way they wish to be perceived, unauthorized use of one's identity in connection with products or services threatens to define that individual to the world."[118] While this

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[115] *Id.* at 147; *see also* REBECCA SKLOOT, THE IMMORTAL LIFE OF HENRIETTA LACKS (2010) (chronicling the massive commercial research success of the HeLa cell line despite the absence of consent from Henrietta Lacks, the patient from whom the cells were removed).

[116] Woodrow Hartzog & Evan Selinger, *The Inconsentability of Face Surveillance*, 66 LOYOLA L. REV. 101, 107–08 (2019); NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS, 125–26 (2019).

[117] J. Thomas McCarthy & Roger E. Schechter, *The Rights of Publicity & Privacy* § 1:7 (2d ed. 2023); *see also* J. Thomas McCarthy & Roger E. Schechter, *The Rights of Publicity & Privacy* § 4:45 (2d ed. 2008).

[118] Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 294 (2005); *see also* RESTATEMENT (THIRD) OF UNFAIR

rationale is primarily applicable to uses like advertising or endorsements, the realization that one's image and identity are included in an FR system without consent could be equally unnerving.[119] For example, activist singer Tom Waits successfully sued potato chip maker Frito-Lay for using a similar sounding voice in an advertisement on both economic and moral grounds (such as his objection to mass market consumer capitalism).[120] And basketball star Kareem Abdul-Jabbar successfully sued General Motors for running an advertisement that featured footage of him playing college basketball under his prior name, Lew Alcindor, because of his religious and moral objections to the use of that name.[121] This aligns with the ROP's historical role in protecting ordinary people vulnerable to the new technologies of media and industrial commercialization.

In addition to emotion and indignity-based harms, the US Supreme Court has held that ROP claimants can recover for unjust enrichment of the defendant.[122] This rationale, akin to property-like approaches such as those in intellectual property regimes like patent and copyright, suggests that the mere fact that a defendant somehow profits from the use of the likeness is enough to constitute harm, even if the plaintiff does not—and perhaps even would not—seek to exploit it themselves.[123] This is particularly poignant in California, where a 1984 amendment to the state's ROP statute expanded the prohibited uses of likeness.

COMPETITION § 46 cmt. c. (1995) ("Like the right of privacy, the right of publicity protects an individual's interest in personal dignity and autonomy.").

[119] Dan Solove & Danielle Citron, *Privacy Harms*, 102 B.U. L. REV. 793, 837, 842 (2021); Post & Rothman, *supra* note 34, at 93–124 (identify four distinct ROP interests: the right of performance, the right of commercial value, the right of control, and the right of dignity).

[120] *See* Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1103 (1992) (applying ROP protection to singer with moral and aesthetic objections to advertising including harm due to "humiliation, embarrassment, and mental distress") (citing Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 n.11 (1974)).

[121] *See* Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 415 (9th Cir. 1996) (recognizing emotional injuries under the ROP, such as people believing plaintiff had "abandoned his current name and assume[d] he ha[d] renounced his religion").

[122] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977) (quoting Harry Kalven, Jr., *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966)). ROTHMAN, *supra* note 11, at 64 ("[P]rivacy claims were increasingly described as encompassing injuries to the feelings of private individuals . . . , while the right of publicity was focused on the economic harms."); Lugosi v. Universal Pictures, 603 P.2d 425, 437 (Cal. 1979) (Bird, J., dissenting) ("The appropriation of [identity] . . . intrudes on interests distinctly different than those protected by the right of privacy.").

[123] ROTHMAN, *supra* note 11, at 79–80, 86; *In re* Clearview AI Inc Consumer Priv. Litig., 585 F. Supp. 3d 1111, 1127 (N.D. Ill. 2022) (denying Clearview AI's motion to dismiss because plaintiffs had successfully alleged under Virginia ROP law sufficient injury due to the fact that "[i]n Virginia, one holds a property interest in one's name and likeness") (citing Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 364 (Va. 1995)).

Before the amendment, the statute allowed "recovery of damages by any living person whose name, photograph, or likeness has been used for commercial purposes without his or her consent."[124] The legislature removed "for commercial purposes" and added "in any manner, on or in products, merchandise, or goods."[125] This change expanded protection for individuals who could make a claim under the broad language in the amended statute.[126]

While somewhat disparate, these various approaches to recognizing ROP harms provide a proportional and sensible framework, both for compensation and deterrence. This forces commercial FR companies to consider the costs of nonconsensual appropriation and encourages frameworks for affirmative consent—resetting the default to opt out and the affirmative step to opt *in*, subject to context-specific consent, compensation, and control over downstream uses.[127]

IV.   THREADING THE NEEDLE BETWEEN PROTECTING IDENTITIES AND PUBLIC INTEREST CONCERNS

Of course, no right is without exceptions or limitations. Courts have struggled to define the exact limits of the ROP, both in terms of a prima facie case and scope, as well as where it conflicts with other doctrines, such as with copyright law, where the act of appropriation may overlap with the reproduction, distribution or display of a photo, or with First Amendment-oriented concerns, such as documentary filmmaking or news reporting.[128]

A.   *ROP Claims Against FR Companies Sit Comfortably Alongside Copyright Claims*

While the ROP is a separate and distinct claim from copyright, there has been considerable litigation and scholarship

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[124] Comedy III Prods. Inc. v. Gary Saderup, Inc., 21 P.3d 797, 799 (Cal. 2001).

[125] *Id.* at 799–800. The California legislature appeared particularly concerned about the commercial exploitation of the likeness of noncelebrities. First, the statutory right as enacted in 1971 provided a "concrete remedy for the little man" whose likeness "lacked 'commercial value on the open market'" and who "often could not prove damages under the common law." Miller v. Collectors Universe, Inc., 159 Cal. App. 4th 988, 1002 (2008). Statutory damages were increased in a 1984 amendment, and remain today as a "simple, civil remedy for the injured individual." *Id.* (quoting assembly members' letters to the governor regarding the statute).

[126] *See* Eric Farber, *U-La-La, What's Happened to Our California Right of Publicity?*, 11 CHAP. L. REV. 449, 451 (2008).

[127] ROTHMAN, *supra* note 11, at 7 ("The right of publicity has an important and powerful core insight . . . that we should have some control over how others use our names and likenesses.").

[128] *See* ROTHMAN, *supra* note 11, at 168.

that considers how and where they overlap, with courts and commentators attempting to distinguish when ROP law governs a person's likeness independently from the copyright in the photographic work where it appears versus where federal copyright and state ROP laws conflict under a preemption analysis.[129]

Such distinctions are critical to understanding and assessing whether and how ROP claims against FR systems are complementary to or competitive with copyright claims. As Professor Amanda Levendowski and others suggest, the prima facie case for copyright infringement against FR companies is fairly strong, with the evidence of mass copying of photos easily admitted by the companies themselves.[130] In this sense, copyright claims against FR systems are to some degree coextensive with ROP claims in that they both target the misappropriation of data used in training and operating FR systems. However, the types of data, misappropriation, and harm are distinct. For copyright, the misappropriation is the copying of the fixed photographic *creative* works with the alleged resulting harm being that, at scale, such copying could undermine economic incentives to create such works.[131] For the ROP, the misappropriation is the extraction of the facial likeness and identity *within the photograph*, the conversion of that unique biometric likeness and identity into geometries, vectors or other patterns, and their subsequent commercial exploitation.[132] Notably ROP harms include economic damage to one's own reputation or self-commercialization but also emotional, mental, and other noneconomic harms related to dignity, control, and autonomy, interests that US copyright law does not recognize and to some degree eschews.[133] In particular, US copyright law traditionally disavowed noneconomic harms, with limited exceptions.[134] On the other hand, ROP law has paid

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[129] *Id.*; 17 U.S.C. § 301.

[130] *See* Amanda Levendowski, *Resisting Face Surveillance with Copyright Law*, 100 N.C. L. REV. 1015, 1044, 1065 (2022); *see also, e.g.*, Sasha Lekach, *A Facial Recognition Company Dug Up Billions of Photos from Facebook and Beyond*, Mashable (Jan. 18, 2020), https://mashable.com/article/clearview-ai-facial-recognition-nyt ("Clearview claims it only uses publicly available images . . . so according to the company it's all good.").

[131] *See* Amanda Levendowski, *How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem*, 93 WASH. L. REV. 579, 594–95, 597, 599 (2018).; *see also* 17 U.S.C. § 106 (1), (5).

[132] *See supra* Section III.A.1–3 (discussing FR uses of likeness and identity).

[133] *See generally* Post & Rothman, *supra* note 34 (outlining four primary torts to include the rights of dignity, performance, commercial value and control).

[134] *See* Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 263–69 (2009); The Visual Artists Rights Act of 1990 (VARA),17 U.S.C. § 106A.

especially close attention to protecting dignitary rights, as the *Waits* and *Abdul-Jabbar* cases demonstrate.

Beyond the prima facie case, the two doctrines also diverge significantly in terms of how the courts balance the proprietary interests of rightsholders with the public interest concerns of secondary users. In copyright, for nearly three decades, the fair use doctrine has served as the major test for balancing the interests of content rightsholders with its twin constitutional goals of promoting creativity and technological innovation. As early as the 1992 case of *Sega v. Accolade*, courts recognized that unauthorized access to prior copyrighted works is sometimes reasonable or even necessary to promote various procopyright policies, such as additional creativity, innovation, or competition.[135] In that case, software maker Accolade was allowed to copy Sega's videogame console code without authorization because it enabled it to produce subsequent noninfringing videogames that were compatible with Sega's console and actively competed with Sega's games in the marketplace.[136] Similar decisions occurred in other cases involving access to copyrighted works that allowed for technologically "transformative" uses, such as improving the quality of image, book, or news search results and enhancing plagiarism-detection software.[137]

In each of these cases, plaintiffs asserted individual or class action-based claims that mass appropriation of copyrighted material for the purposes of training and building algorithmic systems violated the exclusive rights of copyright owners. However, consistently, courts ruled in favor of technology companies, primarily on the grounds of fair use. While the analysis in each case was fact specific, courts generally found that the mass appropriation of copyrighted material for nonconsumptive or nonaesthetic purposes, such as training an algorithm, did not interfere with the direct financial interests or incentives of copyright owners, which are generally oriented

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[135] Sega v. Accolade, 977 F.2d 1510, 1514 (9th Cir. 1992) (holding that unauthorized access to Sega Genesis videogame console code was fair use when necessary to further innovation and competition by competitors).

[136] *Id.* at 1523–24; *see also* Sony v. Connectix, 203 F.3d 596 (9th Cir. 2000) (holding that unauthorized access to Sony PlayStation console and game code was fair use when necessary to further innovation and competition by competitors).

[137] *See e.g.*, Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 174 (2nd Cir. 2018); Authors Guild v. Google, Inc., 721 F.3d 132 (2nd Cir. 2015); Authors Guild v. HathiTrust, 755 F.3d 87 (2nd Cir. 2014); A.V. v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009); Perfect 10, Inc. v. Amazon, Inc., 508 F.3d 1146 (9th Cir. 2007); Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).

around producing creative or aesthetic outputs.[138] Courts in fact have found this mass appropriation added to the social benefits of technological advancement, something that the Constitution contemplates in the so-called "IP clause"—Article I, § 8, Clause 8.[139] Specifically, courts consistently found that technology companies can use copyrighted works as "grist for the mill" to train or improve capacity or efficiency of their algorithmic systems as part of copyright's goal of promoting innovation.[140] The ROP, on the other hand, does not, at least historically, require any balancing with technological innovation policy goals. If anything, the history and policies behind the doctrine's evolution demonstrate that as new appropriation technologies emerge, no matter how powerful or socially beneficial, the importance of enforcing ROP claims remains. In these ways, ROP claims and copyright claims comfortably sit side-by-side, allowing ROP claims to regulate FR systems even where copyright might steer clear.

Notwithstanding these copyright-specific doctrinal and policy concerns, it is worth considering whether the policy interests in advancing science and innovation more broadly might potentially outweigh ROP violations, especially in the context of fields such as ML and AI, where the need for training data, including biometric data, might be quite pronounced. For example, while it is certainly possible for companies such as Clearview, Amazon, Facebook, and IBM to gather individually informed ROP consent when using likenesses to build their FR systems, one can certainly understand that, from their perspectives, it might appear far more efficient to simply scrape the photos en masse from online sources.

Yet while such efficiency arguments are familiar across technology policy debates, especially in the context of digital copyright claims, they are weaker in the context of ROP, as the history and application of the ROP has continuously shown that technological progress cannot justify mass appropriation of ROP likenesses. If it did, ROP claims would have already fallen in the

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[138] Matthew Sag, *The New Legal Landscape for Text Mining and Machine Learning*, 66 J. COPYRIGHT SOC'Y OF THE USA 291 (2019).

[139] U.S. CONST. art. I, § 8, cl. 8.

[140] *See* Sag, *supra* note 3, at 1505. It is worth noting that this debate is still not settled. Several scholars have started to question this approach by the courts. *See supra* note 7 and accompanying text. For example, Amanda Levendowski argues that the purpose of FR, for example, is not to further technological innovation but to cause social harm via surveillance. Levendowski, *supra* note 7, at 1029. Benjamin Sobel argues that while training ML systems generally could be considered technological progress, using those systems to produce derivative aesthetic works, even artificial intelligence-generated ones, would require a different analysis and possibly be infringing. Sobel, *Artificial Intelligence's Fair Use Crisis*, *supra* note 7, at 73–74.

wake of scientific or technological advances in, for example, photography, the printing press, radio, television, movies, and videogames. To the contrary, the ROP has remained a robust claim in the wake of unprecedented innovation in these areas to help tame the mass appropriation of likenesses by these technologies. While ML and artificial intelligence technologies offer potential advances of their own, it is hard to see how those advances justify scaling back the ROP when no other major innovations have in last two centuries.

B.   ROP Claims Against FR Systems Do Not Significantly Impede First Amendment Interests in Information Sharing

Instead of balancing the ROP with concerns of inhibiting technological progress, courts have instead primarily focused on balancing ROP claims with concerns about access to information. Specifically, courts have focused on balancing claims that might impinge on First Amendment-oriented interests, such as news reporting or sharing facts about individuals as part of meaningful public discussion. For example, one of the most famous ROP cases, *Zacchini v. Scripps-Howard Broadcasting*, involved the television broadcast of a "human cannonball" circus act on the evening news.[141] Hugo Zacchini—the cannonball in question—sued the news station for broadcasting all fifteen seconds of his act, claiming that by doing so, it unjustly appropriated his professional identity for commercial gain. The news station defended itself on First Amendment grounds, claiming that it was simply exercising its rights as the press to report on local happenings, one of which was Zacchini's act at the nearby fairgrounds.

The Supreme Court of Ohio, hearing the case on appeal, agreed with the news station, holding that since the reporting of the act was "newsworthy," the station was within its rights to broadcast it.[142] But the US Supreme Court reversed, claiming that because the ROP was akin to a property right, appropriation, even for news-related purposes, was extremely disfavored. As Rothman notes, the Court was particularly concerned about the ability of new broadcast technologies to fully appropriate Zacchini's "entire act," with the majority expressing worries that by "rejecting Zacchini's claim, even in the context of a news broadcast, would mean that the news and

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[141]   Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 562 (1977).
[142]   *Id.* at 574; *see also* ROTHMAN, *supra* note 11, at 139–41.

others could broadcast an entire play, boxing match, song, or symphony without permission" under the pretext of news reporting.[143] One justice went so far as to state at oral argument that the issue was "reproduction" rather than "reporting."[144] While plays, songs, and symphonies would also be covered by copyright law, it would not include any protection for individual performers unless they were copyright owners.[145]

Doctrinal juxtaposition aside, the core of the Court's concern centered on the mass appropriation capabilities of local television reporting, especially when paired with the power of new network distribution models widely available in 1977.[146] Subsequent courts have drawn similar lines to protect speech-related interests, often characterizing them as "newsworthiness" or "public affairs" to protect the ability of reporters, documentary filmmakers, artists, and other speakers to create artworks or explore matters of public interest while at the same time leaving ample room for ROP claims against less public-minded appropriators.[147] Despite the *Zacchini* Court's attempt to balance First Amendment concerns, questions about the approach still

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[143]   ROTHMAN, *supra* note 11, at 141.

[144]   *Id.*

[145]   17 U.S.C. § 1101; 18 U.S.C. § 2319A (this is still the case in the United States except for violations of the antibootlegging statute). Note that in other countries, such performance rights do receive some protection from those jurisdictions that have acceded to the WIPO Performance and Phonograms Treaty. *See Summary of the WIPO Performances and Phonograms Treaty (WPPT)*, WORLD INTELL. PROP. ORG. (1996), https://www.wipo.int/treaties/en/ip/wppt/ [https://perma.cc/8TUW-ZTNJ].

[146]   *See* CHARLES L. PONCE DE LEON, THAT'S THE WAY IT IS: A HISTORY OF TELEVISION NEWS IN AMERICA 12 (2015) ("The real pioneer was KTLA in Los Angeles. Run by Klaus Landsberg, a brilliant engineer, KTLA established the most technologically sophisticated news program of the era. Employing relatively small, portable cameras and mobile live transmitters, its reporters excelled in covering breaking news stories, and it would remain a trailblazer in the delivery of breaking news throughout the 1950s and 1960s. . . . Most local stations offered little more than brief summaries of wire-service headlines, and the expense of film technology led most to emphasize live entertainment programs instead of news. Believing that viewers got their news from local papers and radio stations, television stations saw no need to duplicate their efforts. Not until the 1960s, when new, inexpensive video and microwave technology made local newsgathering economically feasible, did local stations, including network affiliates, expand their news programming."); *see also* Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918) (holding the mass appropriation of uncopyrightable "hot news" information by wire services using new transmission technology to be illegal); Shyamkrishna Balganesh, *"Hot News": The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 442 (2011).

[147]   Dora v. Frontline Video, Inc., 18 Cal. Rptr. 2d 790, 792 (Ct. App. 1993) (holding that the makers of a state history documentary featuring a noncelebrity plaintiff were constitutionally protected against liability). The exception also includes subsequent advertising of those protected works. *See* De Havilland v. FX Networks, LLC, 230 Cal. Rptr. 3d 625, 639 (Ct. App. 2018) ("[U]se of a person's name and likeness to advertise a novel, play, or motion picture concerning that individual is not actionable.") (quoting Seale v. Gramercy Pictures, 949 F. Supp. 331, 336 (E.D. Pa. 1996)); Brown v. Showtime Networks, Inc., 394 F. Supp. 3d 418, 439 (S.D.N.Y. 2019) (using plaintiff's likeness to advertise a First Amendment-protected movie was not misappropriation).

arise. For example, in his *Samsung v. White* dissent, Judge Kozinski expressed deep concern that overprotecting the ROP could be harmful to creativity and new forms of culture and expression, such as parodies or other commentaries.[148]

FR system companies, however, are not news reporters, filmmakers, or artists. Nor do they produce new forms of culture or expression. It is the commercial extraction of the individual's likeness and identity which is the goal, not commentary or some new creative storytelling about them. Therefore, at least in the context of FR cases, neither news reporting nor creative First Amendment concerns are implicated as Kozinski feared.

Another tension within ROP cases is the balance between protecting individual identities from exploitation and allowing otherwise lawful access to information about an individual. For example, in one of the earliest cases about baseball cards, *Haelen Laboratories v. Topps Chewing Gum*, the Second Circuit Court of Appeals held that an individual baseball player's image on a baseball card fell within the scope of the player's ROP.[149] Yet subsequent cases have held that exchanging information about sports players, such as their statistical performance, is protected by the First Amendment as an exchange of facts related to the long tradition of sports reporting and the historical and community interest in public discussion of sports statistics. For example, in *Gionfriddo v. Major League Baseball*, the California Court of Appeals held that Major League Baseball had a right to air publicly available "factual data concerning the players, their performance statistics, and verbal descriptions and video depictions of their play . . . as mere bits of baseball's history" that were protected by the First Amendment.[150] The court also held that such uses were not commercial speech as they were not part of selling a product.[151] As with other ROP considerations, the *Gionfriddo* court emphasized that "the nature of the precise information conveyed and the context of the communication" matters "to determine the public interest in the expression."[152] The court then concluded that "[b]alancing plaintiffs' negligible economic interests against the public's enduring fascination with

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[148]   White v. Samsung Elecs., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (denial of petition for rehearing and rejection of suggestion for rehearing en banc) (Kozinski, J., dissenting) ("Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.").

[149]   Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

[150]   Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 314 (Ct. App. 2001).

[151]   *Id*. at 317.

[152]   *Id*. at 314.

baseball's past, we conclude that the public interest favoring the free dissemination of information regarding baseball's history far outweighs any proprietary interests at stake."[153]

For FR companies, again, there is no equivalent First Amendment interest. For one, almost all commercial FR companies conduct the proprietary training of their algorithms and the internal algorithmic matching of images and identities completely under the veil of corporate secrecy and as far away from public discussion or scrutiny as possible. Thus, these activities would not be subject to any "public affairs" exemption, as the exemption "protect[s] only the act of publishing or reporting" factual data.[154] Moreover, even when FR companies share outputs with customers, the output is, fundamentally, the commercial product that the customer purchased and certainly not part of any public "enduring fascination" with leisure activities.

Additionally, the individual identities appropriated to build FR systems do not take on any public meaning or become part of a public debate. As the California Supreme Court explained in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*:

> [b]ecause celebrities take on public meaning, the appropriation of their likenesses may have important uses in uninhibited debate on public issues, particularly debates about culture and values. And because celebrities take on personal meanings to many individuals in the society, the creative appropriation of celebrity images can be an important avenue of individual expression.[155]

The millions of images appropriated by FR companies are not part of any public meaning or any specific debates about culture and values. When a company merely replicates

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[153] *Id.* at 318; *see also* Daniels v. FanDuel, Inc., 109 N.E.3d 390, 398 (Ind. 2018) (holding that use of athlete statistics for fantasy sports sites was protected on First Amendment's "newsworthy" grounds); C.B.C. Distrib. & Mktg. v. Major League Baseball, 505 F.3d 818 (8th Cir. 2007); CBS Interactive v. Nat'l Football League Players Ass'n, 259 F.R.D. 398 (D. Minn. 2009); Montana v. San Jose Mercury News, 40 Cal. Rptr. 2d 639 (Ct. App. 1995); Jordan M. Blanke, *No Doubt About It—You've Got to Have Hart: Simulation Video Games May Redefine the Balance Between and Among the Right of Publicity, the First Amendment, and Copyright Law*, 19 B.U. J. SCI. & TECH. L. 26 (2013).

[154] *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1282 (9th Cir. 2013) (rejecting defendant's First Amendment defense by distinguishing its use of identities in a video game from cases involving a documentary, newspaper photograph, and other reference sources).

[155] Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 397 (2001); *see also id.* at 404–05 (applying a "transformative" test in "public meaning" cases to determine whether the appropriated use involves sufficient new qualities or artistic expression to receive First Amendment protection from ROP claims).

individuals' exact "physical characteristics," such use is not subject to First Amendment protections.[156]

CONCLUSION

Massive nonconsensual appropriation of individual images and identities are the lifeblood of FR systems and at the heart of the business model of many biometric companies. Like visual innovations in myriad industries before them—from photography to newspapers to television to movies to videogames—FR producers who engage in nonconsensual mass appropriation exploit millions of likenesses commercially. Given the history and doctrinal evolution of the ROP, it provides a robust and much-needed framework for regulating these actors and the systems they have forged out of our images and identities.

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[156] *In re NCAA Student-Athlete Name & Likeness*, 724 F.3d at 1276; No Doubt v. Activision Publ'g, 122 Cal. Rptr. 3d 397, 411 (Ct. App. 2011) (finding ROP violations where digital avatars of plaintiffs were "literal recreations").