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"Right of Publicity Law Meets Social Media"

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I. INTRODUCTION

Social media platforms allow individuals to publish and present their identities to larger audiences than ever before. As users continue to reveal more of their identities in these online forums, and as commercial entities begin using these forums as promotional vehicles, the potential arises for new claims implicating the right of publicity. Although most publicity laws were written prior to the expansive growth of social media, the basic framework across these laws—meant to protect an individual’s exclusive right to the commercial value of his or her identity without infringing on another individual’s constitutional rights—can continue to serve this function even within the ambit of social media. The rise of social media does not require a revision of publicity laws on the state level; however, it does mean that different aspects of right of publicity claims will gain more prominence. In addition, although web-based social media sites are unbounded and operate across state lines, gaps exist with regard to certain states' publicity laws and there can be stark differences in the ways various states address publicity issues. Therefore, conflict of laws questions will become more important—where not previously defined by contract—in addressing the now frequent intersection of social media and publicity rights.

II. THE RIGHT OF PUBLICITY

The right of publicity is an intellectual property right and branch of unfair competition law that protects against the unauthorized use of an individual's identity. The right is not governed by federal statute, but is recognized in just over half the states through both state statute and/or common law. The right of publicity's origins can be traced to the right of privacy,¹ a personal right² that Samuel D. Warren and the future U.S. Supreme Court Justice Louis D. Brandeis described as "the right to be let alone."³

In comparison to the right of privacy, the right of publicity is a property right and might be described as "the right to control and profit from how you are known." The term "right of publicity" was first coined by the Second Circuit in the seminal case *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* when it distinguished between professional baseball players’ privacy rights from their commercial rights to grant a company the exclusive right to use their photographs on baseball cards.⁴ In this respect, the right of publicity emphasizes not only protection against the unauthorized use of an individual's identity, but also, grants an individual the exclusive right to control and profit from commercial use of his or her identity. As a property right, the right can be transferred or licensed, and in many states, can even survive the individual’s death.⁵

Since the Second Circuit first named the right, noting its distinct commercial nature, the right of publicity has been widely adopted and codified.⁶ The elements necessary to establish a right of publicity claim vary by state. Under most state laws the plaintiff must prove that: (1) the challenged use actually identifies the individual (who must be an actual living or dead person and not an entity); (2) the challenged use is commercial in nature and harms the individual's right of publicity interests; and (3) the individual has standing to bring suit over the right of publicity either as the wronged individual, or as an exclusive licensee, heir, etc.⁷ Although most states require these basic

elements in order to bring a right of publicity claim, there are inconsistencies across the states with regard to, for example, whether the state recognizes a post-mortem right,⁸ the term of post-mortem rights,⁹ the statute of limitations for bringing a claim,¹⁰ and the different tests for potential defenses.¹¹

III. SOCIAL MEDIA AND THE RIGHT OF PUBLICITY: NOT BUSINESS AS USUAL, BUT NOT GOING OUT OF BUSINESS

By operating as commercial platforms for their users' identities, online social networks and other social media applications clearly implicate the right of publicity and furthermore, publicity laws already in place stand poised to address the novel legal issues arising from these technological innovations. Still, the rise of social media does not mean business as usual for right of publicity claims. First, new types of claims have been and will continue to be filed, simply because, for example, it was not possible to "Twitterjack"¹² someone ten years ago. Furthermore, different elements of a right of publicity claim have and will continue to become more contested. The element of identifiability can vary drastically from state to state,¹³ and has thus become a source of debate with regard to the appropriate expansiveness of this factor in traditional media contexts such as television commercials.¹⁴ However, in the context of social media, the use of someone's profile picture from Facebook or the act of assuming a celebrity's name on Twitter meets even the most narrow test for whether the use identifies an individual. Instead, with the multitude of users turning to these platforms to express themselves, quickly clicking "I Agree" to extensive use contracts, the factors of commerciality and consent are becoming more contested in publicity rights cases implicating the social media platforms themselves as well as individual and commercial social media users.

A. "I Agree": Blanket Terms of Use and Implied Consent

The proposed settlement in *Fralely v. Facebook, Inc.*, the class action suit against Facebook for its Sponsored Stories feature,¹⁵ reflects Facebook's most recent privacy debacle.¹⁶ Directly implicating the right of publicity, this suit demonstrates that the contractual issue of consent, in the context of a social media platform's agreement terms, is a necessary and contentious prerequisite to an actionable right of publicity claim. Furthermore, the proposed settlement hints at both the future for terms of use agreements on other social networking sites, and also the form that right of publicity litigation may increasingly take to ensure this transition to more reasonable contractual agreements.

1. Sponsored Stories

On January 25, 2011 Facebook launched the Sponsored Stories feature on all its members' pages.¹⁷ The feature was set up as opt-out only and had been automatically enabled for all members.¹⁸ Sponsored Stories functioned by creating customized paid advertisements, starring its own users, based on the user's activity on the site. For example, if John Doe "liked" Wal-Mart, anyone within his network of "friends" might see his profile picture featured underneath a Wal-Mart logo on the right side of the page—the portion where advertisements appeared.¹⁹ Described as "a trusted referral" and thus dubbed "the Holy Grail of advertising" by Facebook founder and CEO Mark

Zuckerberg,²⁰ the plaintiffs who filed a class action suit against Facebook based on Sponsored Stories instead described this feature as, ““a new form of advertising which drafted millions of [Facebook members] as unpaid and unknowing spokespersons for various products,”” and thus, as a violation of their rights of publicity.²¹

Facebook had clearly used its members’ names and pictures. Furthermore, the plaintiffs were able to point to statements made by Facebook’s CEO Mark Zuckerberg and its COO Sheryl Sandberg that friend endorsements have more than double the value of a generic advertisement, with much of Facebook’s revenue coming in the form of advertisements.²² Therefore, the plaintiffs could prove they had been identified and that the use of their identities benefitted Facebook commercially—commercial gain of which the plaintiffs themselves were being deprived. Facebook, however, contended that the right of publicity claim could not stand because the use was authorized: the users agreed to Facebook’s Terms of Use when they initially joined, could control who saw the content based on their privacy settings, could choose not to take the types of actions that resulted in a Sponsored Story, and could opt-out on a “story” by “story” basis.²³ The trial court did not rule on whether Facebook’s terms of use constituted authorization of users’ pictures in paid advertisements, only stating that it remained a disputed issue of fact.²⁴ The court did allow the suit to survive Facebook’s motions to dismiss.²⁵

2. *The Proposed Settlement*

Before the issue of consent could be resolved, on June 20, 2012, the parties filed a proposed class action settlement with the court. The terms, if accepted, would force Facebook to amend its privacy policies and pay \$10 million to leading organizations in the fields of online advertising, privacy, and safety, \$10.3 million in attorney’s fees and costs, and \$12,500 to each of the three class representatives—not to mention potentially cost Facebook over \$100 million in lost advertising revenue.²⁶ The most relevant proposed amendments require Facebook to make clear in its terms that users are granting Facebook permission to use their names and likenesses in Sponsored Stories.²⁷ The settlement agreement includes language, which Facebook must “substantially” adopt, that more clearly implicates a license of one’s publicity rights, namely: “*This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information.*”²⁸ Furthermore, the proposed settlement also requires Facebook to create a mechanism where users can opt-out of this feature more easily by being able to determine what actions and content have been displayed in Sponsored Stories and then control what types of actions or content they would like to appear in Sponsored Stories in the future.²⁹ The settlement also contains multiple provisions for users under the age of eighteen, including the requirement that Facebook further develop its Family Safety Center to explain how advertisements on Facebook work.³⁰ Facebook must make the proposed changes within six months of the settlement and, in order to ensure more informed consent among users, must keep the changes in place for two years.³¹ It remains to be seen whether the court will approve these terms.

3. *Terms of Use and Consent Going Forward*

The proposed settlement does not eliminate the Sponsored Stories feature

altogether; instead, it makes Facebook's terms more transparent and therefore user consent more explicit. Still, a 2006 survey found that the twenty-three percent of Facebook users who had actually read the site's privacy policy were not more likely to understand the implications of the terms.³² This, combined with Facebook's track-record of rolling out new privacy-infringing features with less than visible notice to its users,³³ leaves the issue of whether this type of commercial use is authorized unsettled. If the settlement is accepted, users will gain a small victory in enforcing their publicity rights with regard to this particular Sponsored Stories application; however, the waters of consent and use agreements more generally remain muddy and without any clarifying precedent.

Take, for example, Illinois' Right of Publicity Act, which requires you obtain written consent from the individual whose image or likeness you are utilizing for your commercial gain.³⁴ Does a single click on a box constitute *written* consent to pages of terms? At least one court suggests that a click can constitute written consent,³⁵ with many courts holding that these types of click through agreements more generally are valid as consent, so long as users have notice that the click constitutes acceptance of these specific terms.³⁶ However, the more relevant question in the *Fraleley* case consisted of whether that single click continues to constitute consent after Facebook amends its terms in order to profit from the newest, potentially privacy infringing, application. Facebook is only required to provide notice of amendments on their Site Governance Page and must allow users to comment on these changes.³⁷ Unless users have "liked" the Governance Page, they would likely not receive any notice of the changes on their own Facebook pages, nor are they required to review or re-accept the new terms, aside from their decision to continue using Facebook. Most courts today evaluate these types of agreements on the basis of notice: if it is not clear that the user is indeed accepting certain terms, where these terms are onerous to access or find, consent may be vitiated.³⁸ However, some courts hold that so long as users are on notice, even constructive notice, of the terms they are agreeing to either in proceeding to a site or in clicking an "I Accept" box, consent is valid and an enforceable contract is formed.³⁹ Facebook users are required to take further steps in order to determine if the terms have changed or to receive actual notice when the terms change. However, a court may charge users with being on constructive notice of these amended terms given their initial consent to terms that were easily accessible wherein it was clear that proceeding constituted acceptance of the terms, one of which included how Facebook could make amendments. As cases like *Fraleley v. Facebook* are settled out of court without precedential holdings, the answers to these questions about consent—although at their core contractual—remain dispositive factors for contention in any right of publicity claim.

Still, even without a binding precedent on the matter, the proposed settlement demonstrates a trend in users demanding more reasonable terms, more transparency, and more direct control over applications that threaten to infringe their publicity rights. In the past, Facebook users have resorted to virtual protests in response to privacy changes that expanded Facebook's ability to use an individual's information.⁴⁰ *Fraleley* demonstrates that a class action suit—brought within the purview of publicity laws already in place—can be an effective way to alter how social media platforms interact with their users'

information. As right of publicity suits based on social media platforms enter a new frontier in complex litigation, issues such as class certification arise as new factors litigants must consider and be prepared to address. Furthermore, this trend will be relevant for sites that have mimicked Facebook-like terms of use agreements or used similar programs to generate advertisements based on user content in an opt-out only fashion.⁴¹ The desire to avoid losing millions in a class action may encourage more expansive and faster change than user protest on its own could generate; however, it could also result in terms that mandate arbitration and even waive the right to class-wide arbitration.⁴² Still, it is important to note that, if the settlement is accepted, over 900 million active Facebook users⁴³ publicity rights will be better protected and improvements on other platforms may occur because of the structure of publicity laws already in existence.

B. Right of Publicity Actions Against Individual Social Media Users

The social media conglomerates themselves are not the only potential infringers in these new forums. Because social media platforms allow users to easily share information and create unique content, these platforms also facilitate a user's ability to share information while assuming the identity of another individual without his or her consent, namely in the form of fake profiles or false submissions. Armed with little more than an email address, a user can create a dating profile for his roommate as a joke or a fake Facebook profile for a celebrity as a parody. Although this activity on social networking sites involves the use and appropriation of another's identity, the commercial nature of this use becomes a crucial factor when individuals seek to invoke their publicity rights in these forums. Without a commercial component, the right of publicity would not be implicated, although the right of privacy may be.⁴⁴ Furthermore, aside from needing to prove the use is commercial and thus harms an individual's publicity rights, a range of defenses may also prevent a right of publicity claim in the name of ensuring freedom of expression under the First Amendment, or, due to immunities under the Communications Decency Act.

1. *The Issue of False Submissions*

Social media sites are easy to join. When Twitter first launched in 2006, one needed little more than an email address to create and assume any "handle" still available and begin tweeting.⁴⁵ This meant there was little means of verification to determine whether @BillClinton was the real Bill Clinton. Within two years of launching, Twitter instituted a system wherein it began verifying the accounts of celebrities, politicians, and corporate entities—namely those particularly vulnerable to fake accounts.⁴⁶ However, fake celebrity accounts still abound.⁴⁷ In 2009, a fake account for then St. Louis Cardinals manager Tony La Russa prompted a much-publicized suit implicating a claim of, among other things, a violation of his publicity rights based on a Twitterjacking that used both his name and his likeness (in the form of La Russa's picture taken after an arrest for driving under the influence).⁴⁸ Although La Russa made statements implying that Twitter had settled the suit out of court,⁴⁹ La Russa reportedly withdrew the suit, without Twitter paying money to him.⁵⁰

The fate of La Russa's lawsuit, at least with regard to the alleged violation of his publicity rights,⁵¹ demonstrates the potential difficulty in succeeding on a right of publicity claim based on new forms of expression in social media, even if they clearly utilize an individual's name or likeness. First, La Russa may have faced difficulty proving that a fake Twitter account with only a handful of tweets, four followers, and no apparent commercial purpose or intent was a commercial use of his name or likeness that harmed his publicity rights.⁵²

2. *The First Amendment*

Along these lines, La Russa would likely have met with the affirmative defense that the account was protected on First Amendment grounds.⁵³ The First Amendment is an affirmative defense to right of publicity claims if the use is an artistic rendering (based on a variety of tests that different courts use, including, for example, a transformative use test⁵⁴ and a balancing test⁵⁵), the use is a parody or critical comment,⁵⁶ or the use is political, newsworthy, or factually based.⁵⁷ The First Amendment enables Twitter followers to enjoy the tweets of such parodies as @chuck_facts or @notzuckerberg. In La Russa's case, the fake account explicitly stated in the user profile: "Bio parodies are fun for everyone," contained tweets referencing La Russa's arrest, and listed La Russa's website as the homepage for Mothers Against Drunk Driving⁵⁸— factors that likely would have weighed in favor of finding that the Twitter handle was being used primarily to parody the former manager as opposed to appropriating his identity in a commercial manner. Furthermore, La Russa's publicity claims may have been quickly dismissed under a state-based Anti-SLAPP statute (where SLAPP stands for "strategic lawsuit against public participation"⁵⁹), which provides an expedited process for dismissing claims involving the right of publicity or other laws if they are essentially brought to suppress speech and are without merit. Under the Anti-SLAPP statute in California, where La Russa filed his claims, a special motion to strike will be granted if the defendant shows her acts arose from activity protected by the First Amendment or equivalent rights under the California Constitution and, if that burden is met, if the plaintiff cannot show that it has a probability of prevailing on its claim.⁶⁰

3. *The Communications Decency Act*

Additionally, because he named Twitter as the defendant in the suit, La Russa would have run into the implications of the Communications Decency Act ("CDA") on state right of publicity claims. The CDA states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," and expressly preempts any state law to the contrary.⁶¹ Under the CDA, service providers that merely transmit content created by others are potentially immune from liability arising from their users' actions.⁶² However, this immunity that interactive computer service providers (ICSPs), such as Twitter, benefit from is limited by a provision that indicates the statute cannot limit or expand an intellectual property right.⁶³ The statute fails to define what "intellectual property right" means and there is currently a circuit split over whether, under the CDA, Twitter would be liable only for infringement of federal intellectual property rights, or instead, also be liable for its users' infringement of state-based rights,

such as the right of publicity.⁶⁴ La Russa's suit was filed in a California state court and the Ninth Circuit has interpreted the CDA to mean that ICSPs such as Twitter are immune from state law intellectual property claims.⁶⁵ With the actual impersonator likely judgment-proof, La Russa's state-based publicity claim may therefore have been a non-starter.

4. *A Sign that Current Right of Publicity Laws are Working*

Given the potential affirmative defenses of the CDA and the First Amendment, combined with the difficulty of demonstrating a fake Twitter account constitutes commercial use, it is unlikely this particular social media trend on the whole will be a ripe area for publicity rights claims. However, there are still particular circumstances wherein Twitterjacking could implicate publicity rights. Last year, a federal court in the Northern District of Illinois decided *Maremont v. Susan Fredman Design Group, Ltd.*, the first decision to implicate Twitter and the right of publicity.⁶⁶ In *Maremont*, the plaintiff was employed as the director of marketing, public relations, and e-commerce at an interior decorating company.⁶⁷ In that capacity, she wrote blog posts for the company's website, posting links to these stories on her personal Twitter and Facebook accounts.⁶⁸ After the plaintiff was in a car accident that prevented her from writing the promotional blog posts, co-workers began writing the blogs and continued to tweet the links from the plaintiff's personal Twitter account.⁶⁹ The plaintiff then sued the company for, among other things, violating her right of publicity by assuming her Twitter account.⁷⁰ Addressing the topic briefly, the court held that her right of publicity had not been violated because she could not prove "appropriation" of her name or likeness—a necessary element under Illinois' Right of Publicity Act.⁷¹ Instead, the court held that because the co-workers stated in their initial tweets that they were not the plaintiff, but instead were filling in for her due to her injuries, and because the plaintiff acknowledged and thanked her replacements once she resumed control of her Twitter account, there was no appropriation.⁷²

Both La Russa and Maremont's attempted suits demonstrate potential new types of claims implicating both social media forums and individuals' publicity rights. However, the availability of multiple defenses, the difficulty in proving commercial use, and the need to be able to prove certain state-specific factors like actual appropriation demonstrate potential hurdles to the viability of these claims. Still, the fact that these suits failed does not demonstrate any inadequacies in current right of publicity laws. Instead, they demonstrate that the laws, in most instances, have been drafted in ways so as not to stifle First Amendment rights, creative speech, protected parody, or even the authorized sharing of social media forums for promotional or commercial needs. The explosion in social networking sites marked a frontier in more democratic media forums. The trajectories of La Russa and Maremont's suits demonstrate that current right of publicity laws help ensure that users are free to continue to experiment with and innovatively contribute content to these platforms.

C. The Commercial Value of Using Social Media and the Potential for Right of Publicity Infringement

As evidenced by the previous section, social media platforms began and were first widely adopted as a way for individual users to connect with one another and share information and content. These platforms were not invented with businesses, corporations, or commercial enterprises in mind as the target customer or user. However, these types of entities have realized the potential in social media.⁷³ This decidedly commercial use of social media networks that revolve around identity thus creates a greater likelihood that unauthorized commercial use of users' identities will occur. Although the following trends in social media and media more generally—particularly as taken up by businesses and corporations—have not yet appeared in complaints, they demonstrate the potential for extensive future litigation on the infringement of publicity rights.

1. *Pinning*

Pinterest was launched in 2010 and allows users to “pin” images to boards, share these boards, and follow or comment on other users' boards.⁷⁴ A collection of digital collages of sorts, Pinterest raised some eyebrows when users realized the blanket indemnification clause making the individual user liable for infringement of any intellectual property right, including copyright or trademark infringement, and also infringement of an individual's right of publicity.⁷⁵ Unlike Facebook and Twitter where most content is user-generated, the majority of Pinterest photos are not created by users nor are they part of the Creative Commons, such that the potential for copyright and trademark infringement abounds.⁷⁶ However, this latest visual trend in social media also has the potential to implicate the right of publicity. Take, for example, a picture featuring a woman in a wedding dress that another user has “pinned” to one of her boards. If that user is a bride-to-be pinning the picture to a board dedicated to planning her wedding, it would be difficult to prove commercial intent or that the publicity rights of the featured individual had been damaged. However, if the user is instead a commercial entity, for example a bridal boutique, the intended use might indeed be for commercial purposes, where the featured individual's publicity rights have been infringed. Therefore, as Pinterest becomes not only a forum for the everyday user's creative collages, but also, a vehicle for corporate entities and commercial enterprises to partake in social media promotions through pinning and re-pinning,⁷⁷ these types of users especially must be aware of the risk that any pin has the potential to infringe on publicity rights.

It is worth noting that Pinterest—a forum based around visual images that most users do not own or generate—also creates the potential for a state right of publicity claim to be preempted by federal copyright law. When analyzing a copyright preemption claim in a right of publicity case, courts typically determine whether the identity is (1) fixed in a tangible medium and within the subject matter of copyright as defined in Section 102;⁷⁸ and (2) equivalent to the general copyright protections set out in Section 106⁷⁹ of the Copyright Act. Even if there is no “express preemption” under this test, the court may still consider if federal copyright law impliedly preempts the state right of publicity claim, for example if the plaintiff's publicity claim is an attempt to prevent the

defendant from fully exercising his or her copyright.⁸⁰ Consider again the example of the photograph featuring the woman in a wedding dress. If the photographer holds the copyright, but the photograph is re-pinned by a bridal boutique without permission from either the photographer or the featured woman, the woman's claim would likely not be pre-empted even though it is fixed in the form of a photograph, given that the woman featured has no rights under the Copyright Act and is not seeking to prohibit the photographer from full exercise of the copyright.⁸¹ The specific circumstances of each pin will therefore determine the potential for publicity rights infringement, and furthermore, the possibility that a viable right of publicity claim will be preempted on federal copyright grounds.

2. *#UnauthorizedEndorsementsViaHashtag*

Aside from the line between commercial and non-commercial use with regard to visual appropriation on Pinterest, the unique forms of communication that have developed on Twitter also present the potential for violations of individuals' publicity rights. The use of the hashtag (#), followed by any keyword or phrase (without any spaces), has become a way to efficiently communicate a specific topic or theme within a tweet. Twitter compiles the topics that are trending based on the most often hashtagged words or phrases and allows users to search for topics via hashtag. Certain fan bases have organized concerted efforts to help their favorite celebrity become the top trending topic on Twitter.⁸² The ability to combine a hashtag with a specific phrase and thereby potentially attract more attention to your tweet has the potential to implicate publicity rights if that phrase consists of an individual's name and the tweet originates from a commercial entity seeking to profit from the use of someone's identity within that tweet.⁸³ For example, suppose a local Miami restaurant that did not have an endorsement deal with LeBron James tweeted: "People who love our new product, like #LeBronJames, are champions." The tweet clearly identifies LeBron James by name wherein a legitimate contractual endorsement of this new product would be of commercial value. Although this type of claim has yet to arise in a reported case, and although the sheer number of tweets might make this type of potential violation difficult to police, this new means of communicating presents the potential for unauthorized endorsements—provided they are used in a commercial manner and not protected under the previously discussed defenses.

3. *The Third Dimension*

Finally, it appears that the right of publicity has moved beyond the pictures of Pinterest and the words hashtagged on Twitter and into the third dimension. Although not related to a social media platform, the use of holograms or similar visual images clearly implicates an individual's publicity rights—particularly when that individual is deceased and therefore more likely to be appropriated without his or her permission. In April of 2012, the deceased rapper Tupac Shakur was resurrected to perform on stage at the Coachella Music Festival alongside Snoop Dogg and Dr. Dre.⁸⁴ Although the drafters of the current publicity laws likely could not have foreseen this trend,⁸⁵ the existing laws are still capable of addressing the right of publicity issues this trend creates. As they stand today, a majority of state statutes and common law would recognize that, in order to place a famous decedent's image on stage at a paid venue, his estate must grant

permission for the use of his likeness,⁸⁶ and absent this permission, would be entitled to injunctive relief and damages—thus ensuring an individual's publicity rights in even these non-traditional forms of media.

IV. PRACTICAL TIPS

Although they may not be ready to invest in holographic technology, businesses and corporations are eagerly entering the social media arena. There are proactive measures these entities should consider taking in order to limit the possibility of infringing on individuals' publicity rights. First, corporate policies should be set for all those engaging in social media applications on behalf of the corporate or commercial entity. The individuals tasked with creating a buzz in 140 characters or piquing consumers' interests through pins likely will not be lawyers, and further the communications themselves, given the speed and frequency with which they are disseminated, may not be cleared by the legal department in advance. Therefore, it is imperative to ensure that the social media team is aware of the potential legal implications lurking in every hashtag or re-pin.

The legal team itself must also be prepared to address the implications of social media in their contractual negotiations. Although not all state laws require it, best practices would suggest that consent from users granting publicity rights be in writing, particularly given the interstate nature of social media. Along these lines, companies should not leave potential claims to the chance of today's patchwork of state publicity laws, instead including choice of law provisions within all endorsement contracts. Furthermore, contracts must now address the wider scope of media forums available. Companies should receive explicit consent to use an individual's identity on each of these forums, with explicit terms regarding the goods and services that can be associated with that individual, for example on a pin board or in a tweet or status update.

Finally, with regard to promotions geared toward individual consumers and social media users, companies should have in place procedures to ensure informed consent through agreements that have clear terms of use, which users can easily access and plainly understand as a license of their publicity rights. If, for example, a company wants to rely on a forum selection clause in an agreement, the user should easily be able to access those terms and understand that proceeding further constitutes acceptance of those terms. Furthermore, companies should consider incorporating verification procedures into their promotional campaigns in order to prevent false submissions and the potential publicity infringement issues arising from these submissions. Companies need to be prepared to take down false submissions as soon as they are alerted to them. On the whole, these types of proactive measures can help ensure a social media presence that increases profitability, not liability.

V. CONCLUSION

The cases, settlements, failed claims, and potential claims discussed demonstrate that, to a large degree, the current state-based right of publicity laws are capable of addressing the new legal challenges brought on by the dominance of social media,

although some gaps remain. Facebook may soon be more transparent with informing its users that they are licensing their right of publicity, expressions on the latest social network will continue to flourish, and companies will likely be more cognizant of the risks of infringement when joining the masses on these online forums. However, as right of publicity claims become centered on social media, so too do they become filled with federal issues such as constitutional defenses, statutory immunities, and the unbounded nature of social media sites themselves. The current state-based publicity laws offer a patchwork of rights that are improving, but that still leave individuals more vulnerable to right of publicity infringement within the sphere of social media. The companies looking to benefit from their own involvement in social media must therefore be more aware of the variances in the law and be proactive in setting the terms for how they participate online and interact with both their celebrity endorsers and individual customers in the ever-expanding web of available social media outlets.

¹ McCarthy, 1 *Rights of Publicity and Privacy* §1:7 (2d ed. 2011).

² *Fitch v. Voit*, 624 So.2d 542, 543 (Ala. 1993).

³ Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890).

⁴ *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

⁵ See e.g., Cal. Civil Code § 3344.1.

⁶ McCarthy, 1 *Rights of Publicity and Privacy* § 6:3 (2d ed. 2011).

⁷ See, e.g., *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 691-92 (9th Cir. 1998).

⁸ Compare *Shaw Family Archives v. CMG Worldwide*, 434 F. Supp. 2d 203, 207 (S.D.N.Y. 2006) (holding there is no post-mortem right of publicity in New York) with Cal. Civil Code § 3344.1 (recognizing post-mortem right of publicity in California).

⁹ Compare 765 Ill. Comp. Stat. Ann. §1075/30 (stating post-mortem right of publicity terminates fifty years after death) with Ind. Code § 32-36-1-8 (2002) (stating post-mortem right of publicity terminates one hundred years after death).

¹⁰ Compare *Blair v. Nevada Landing P'ship*, 369 Ill. App. 3d 318, 323 (2006) (applying one-year statute of limitations, although statute was silent, because prior common law right applied that limit) with *Christoff v. Nestle USA, Inc.*, 47 Cal. 4th 468, 471-74, (2009) (applying two-year statute of limitations where statute was silent).

¹¹ See e.g., *Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1448 (11th Cir. 1998) (discussing first sale doctrine as restricting scope of right of publicity claims under Alabama common law).

¹² Jillian Bluestone, *La Russa's Loophole: Trademark Infringement Lawsuits and Social Networks*. 17 Vill. Sports & Ent. L.J. 573, 573 n.5. (2010) (defining "twitterjacking" as a user registering the name of a celebrity and falsely making posts under that name).

¹³ Compare Ind. Code § 36-1-6 (2002) (stating use of "gesture" or "mannerisms" can serve to identify) with N.Y. Civ. Rights Law § 51 (McKinney 2011) (limiting identifiability to use of name, portrait, picture, or voice).

¹⁴ See *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512 (9th Cir. 1992) (rejecting petition for rehearing en banc, Kozinski, J. dissent) (arguing that Ninth Circuit holding that Samsung commercial featuring robot wearing blonde wig placed in front of game board violated Vanna White's right of publicity served to stifle innovation by overprotecting publicity rights and prohibiting commercial use that "simply...evoke[d] the celebrity's image in the public's mind.")

¹⁵ See *Fraley v. Facebook, Inc.*, 830 F.Supp.2d 785 (N.D. Cal. 2012); Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, *Fraley v. Facebook*, 2012 WL 2354653 (N.D. Cal. June 20, 2012) (hereinafter "Proposed Settlement").

¹⁶ See *Cohen v. Facebook, Inc.*, 2011 WL 5117164 (N.D. Cal. Oct. 27, 2011) (class action suit regarding Facebook's "friend finder" feature that was dismissed because plaintiffs failed to show cognizable harm that resulted from application that displayed that plaintiffs had used the feature but in a way visible only to plaintiffs' existing network of friends); Findings of Fact, Conclusions of Law, and Order Approving Settlement, *Lane v. Facebook, Inc.*, No. C 08-3845 (N.D. Cal. March 17, 2010) (class action settlement approval regarding Facebook's Beacon software that published information on Facebook regarding users' activity on other sites, such as Blockbuster, that had partnered with Facebook and was set by default for all users).

¹⁷ *Fraley*, 830 F. Supp. 2d at 791.

¹⁸ *Id.*

¹⁹ See *Id.* at 791-92.

²⁰ *Id.* at 792.

²¹ *Id.* (quoting Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss at 1, 2011 WL 7663488 (N.D. Cal. Aug. 1, 2011)).

²² *Id.* at 800.

²³ *Id.* at 805.

²⁴ *Id.* at 806.

²⁵ *Id.* at 815.

²⁶ Proposed Settlement, *supra* note 15, at 3-4.

²⁷ *Id.* at 3, 6.

²⁸ *Id.* at 6-7.

²⁹ *Id.* at 7.

³⁰ *Id.* at 7-8.

³¹ *Id.* at 3, 6.

³² James Grimmelmann, *Saving Facebook*, 94 Iowa L. Rev. 1137, 1182 (2009) (citing Alessandro Acquisti & Ralph Gross, *Imagined Communities: Awareness, Information Sharing, and Privacy on the Facebook*, in *Privacy Enhancing Technologies: Sixth International Workshop* 36, 54 (George Danezis & Philippe Golle eds., 2006), <http://privacy.cs.cmu.edu/dataprivacy/projects/facebook/facebook2.pdf>).

³³ See *supra* note 16.

³⁴ 765 ILCS §§ 1075/15; 1075/20; 1075/30; 1075/35.

³⁵ *In re RealNetworks, Inc., Privacy Litigation*, 2000 WL 631341, at *2-*4 (N.D. Ill. May 8, 2000) (applying Washington law and holding that click wrap license was sufficient to meet "in writing" requirement of the Federal Arbitration Act and the Washington Arbitration Act because terms could easily be printed or stored).

³⁶ See e.g. *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236-38 (E.D. Pa. 2007) (holding that because site warned user to carefully read terms, provided terms in scrolling format, and required users to manifest their assent by clicking that they accepted the terms, consent was valid and contract was formed).

³⁷ 14. Amendments, *Statement of Rights and Responsibilities*, Facebook, Inc., www.facebook.com/legal/terms.

³⁸ See *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) (holding customers had not consented to arbitration term because they did not have "reasonably conspicuous notice" of term that was "hidden below the 'Download' button" and only visible after they scrolled down the screen).

³⁹ See e.g., *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236-38 (E.D. Pa. 2007); *Cairo, Inc. v. Crossmedia Services, Inc.*, 2005 WL 756610, at *2 (N.D. Cal. April 1, 2005) (holding that visible display of site's name and logo, with visible notice that proceeding constituted acceptance of terms, with visible hyperlink to those terms constituted valid notice and proceeding constituted acceptance of those terms); *Ticketmaster Corp. v. Tickets.Com, Inc.*, 2003 WL 21406289, at *2 (C.D. Cal. March 7, 2003) ("[A] contract can be formed by proceeding into the interior web pages after knowledge (or in some cases, presumption knowledge) of the conditions accepted when doing so.").

⁴⁰ Louise Story and Brad Stone, *Facebook Retreats on Online Tracking*, N.Y. Times, Nov. 30, 2007, <http://www.nytimes.com/2007/11/30/technology/30face.html>.

⁴¹ Chris Morran, *Don't Want Your Online Dating Profile Being Used in Ads? Make Sure to Read All the Fine Print*, The Consumerist, March 29, 2012, <http://consumerist.com/2012/03/dont-want-your-online-dating-profile-being-used-in-ads-make-sure-to-read-all-the-fine-print.html>.

⁴² See e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

⁴³ Key Facts: Facebook Newsroom, Facebook, Inc., <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited June 24, 2012).

⁴⁴ Unlike the right of publicity, the right of privacy does not focus on commercial interests and can only be waived, not licensed or assigned. See *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir. 1984) (finding Hustler liable for invasion of privacy after its inadequate process used to verify consent resulted in magazine's use of nude pictures stolen from the plaintiff's house and subsequently submitted for publication); cf. *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985) (recognizing right of publicity violation that occurred based on Hustler's inadequate consent verification process when photographs plaintiff had consented for use in *Playboy* appeared in *Hustler* based on a forged release).

⁴⁵ See Andrew M. Jung, *Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Sites*, 86 Chi.-Kent L. Rev. 381, 400-01 (2011).

⁴⁶ *Id.* at 404 n.171; See also *FAQs About Verified Accounts*, Twitter, Inc., <http://support.twitter.com/groups/31-twitter-basics/topics/111-features/articles/119135-about-verified-accounts> (last visited June 24, 2012).

⁴⁷ See, e.g., @ThePresObama, Twitter, Inc., <http://twitter.com/#!/thepresobama> (last visited June 24, 2012).

⁴⁸ Complaint for Trademark Infringement, False Designation of Origin, Trademark Dilution, Cybersquatting, Misappropriation of Name, and Misappropriation of Likeness, *La Russa v. Twitter, Inc.*, No. 09-488101 (Cal. Super. Ct. May 6, 2009) (hereinafter "La Russa Complaint"); see also Bluestone, *supra* note 12, at 574-75; Dan Malachowski, "Username Jacking" in *Social Media: Should Celebrities and Brand Owners Recover From Social Networking Sites When Their Social Media Usernames are Stolen?*, 60 DePaul L. Rev. 223, 231-32 (2011); Jung, *supra* note 45, at 398.

⁴⁹ *Cardinals Manager La Russa, Twitter Settle Lawsuit*, USA Today, June 5, 2009, http://www.usatoday.com/sports/baseball/nl/cardinals/2009-06-05-larussa-twitter-lawsuit_N.htm.

⁵⁰ Notice of Dismissal of Complaint with Prejudice, *La Russa v. Twitter, Inc.*, No. 09-2503 (N.D. Cal. June 26, 2009) (dismissing complaint with prejudice and explicitly stating: "No payment was made by Twitter to La Russa in exchange for this dismissal.").

⁵¹ In his complaint, La Russa alleged eight causes of action, including: trademark infringement, false designation of origin, trademark dilution, cybersquatting, misappropriation of name, misappropriation of likeness, invasion of privacy, and intentional misrepresentation. Although the complaint does not explicitly include a right of publicity claim, the seventh cause of action for "Invasion of Privacy" addresses California Civil Code § 3344(a), California's right of publicity statute. La Russa Complaint, *supra* note 48. La Russa reportedly withdrew all these claims. Notice of Dismissal, *supra* note 50, at 1.

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- ⁵² La Russa Complaint, *supra* note 48, at Exhibit A; *see also* Bluestone, *supra* note 12, at 596-97; Jung, *supra* note 45, at 402-03.
- ⁵³ *See e.g.,* *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 968-69 (10th Cir. 1996) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) and stating that right of publicity claim implicated First Amendment because state based right “imposes restrictions on its right of free expression”).
- ⁵⁴ *See e.g.,* *Comedy III Productions, Inc. v. Gary Saderup, Inc.* 21 P.3d 797, 810 (Cal. 2001); *see also* *Kirby v. Sega of America, Inc.*, 144 Cal. App.4th 47, 50 (2006).
- ⁵⁵ *See ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 937-38 (6th Cir. 2003).
- ⁵⁶ *See e.g.,* *Cardtoons*, 95 F.3d 959.
- ⁵⁷ *See e.g.,* *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501 (N.Y. Sup. 1968); *New Kids on the Block v. News America Publishing, Inc.*, 745 F. Supp. 1540 (C.D. Cal. 1990), *aff'd* 971 F.2d 302 (9th Cir. 1992) (newspaper’s use of identities permitted).
- ⁵⁸ La Russa Complaint, *supra* note 48, at Exhibit A.
- ⁵⁹ *Whitney v. Playboy Entertainment Group*, 2006 WL 1494005, at *6 (Cal. Super. Ct. June 1, 2006).
- ⁶⁰ *Id.*; *See also* *Browne v. McCain*, 611 F. Supp. 2d 1062, 1067-73 (C.D. Cal. 2009); *Rezec v. Sony Pictures Entertainment, Inc.*, 116 Cal. App. 4th 135 (2004).
- ⁶¹ *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (quoting 47 U.S.C. §§ 230 (c)(1); (e)(3)).
- ⁶² *See Curran v. Amazon.com, Inc.*, 2008 WL 472433, at *11 (S.D. W.Va. Feb. 19, 2008).
- ⁶³ *Perfect 10*, 488 F.3d at 1118.
- ⁶⁴ *See* Rachel A. Purcell, *Is That Really Me?: Social Networking and the Right of Publicity*, 12 Vand. J. Ent. & Tech. L. 611, 620-28 (2011).
- ⁶⁵ *See Id.* (citing *Perfect 10*, 488 F.3d at 1118-19; *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1119 (9th Cir. 2003)); *but see* *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 692-93 (S.D.N.Y. 2009) (holding that ICSPs could be liable for infringement of state-based intellectual property rights under the CDA).
- ⁶⁶ *Maremont v. Susan Fredman Design Group, Ltd.*, 2011 WL 6101949 (N.D. Ill. Dec. 7, 2011)
- ⁶⁷ *Id.* at *2-*3.
- ⁶⁸ *Id.*
- ⁶⁹ *Id.*
- ⁷⁰ *Id.* at *1.
- ⁷¹ *Id.* at *7.
- ⁷² *Id.*
- ⁷³ *See* Burson-Marsteller, *Global Social Media Check-up 2011* (study compiling information on social media use among companies on the *Global Fortune* 100 list, finding, among other things, that 72% of US companies used Twitter, IBM had 43 Twitter accounts in 2010 and 76 in 2011, and the average number of followers per corporate account increased by 241% from 2010 to 2011).
- ⁷⁴ What is Pinterest?, Pinterest, <http://pinterest.com/about/> (last visited June 24, 2012).
- ⁷⁵ Terms of Service, Pinterest, <http://pinterest.com/about/terms/> (last visited June 26, 2012) (stating that Pinterest users agree to post content that, among other things "will not violate any law or infringe the rights of any third party, including without limitation any Intellectual Property Rights..., publicity rights or rights of privacy" where the user also agrees "to indemnify and hold harmless Pinterest...from any claims, suits,

proceeding, disputes... arising out of or in any way related to (i) your access to or use of the Services or Pinterest Content, (ii) your User Content, or (iii) your breach of any of these Terms"; *see also* Josh Block, *IP Law: Lawyer: Why I Deleted My Pinterest Boards*, Bloomberg.com, March 22, 2012, <http://www.bloomberg.com/news/2012-03-22/ip-law-lawyer-why-i-deleted-my-pinterest-boards-audio.html>.

⁷⁶ *See* Josh Block, *IP Law: Lawyer: Why I Deleted My Pinterest Boards*, Bloomberg.com, March 22, 2012.

⁷⁷ *See e.g.*, pinterest.com/wholefoods/; pinterest.com/southwestair/; pinterest.com/sonyelectronics/.

⁷⁸ Section 102 covers "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a).

⁷⁹ 17 U.S.C. § 106.

⁸⁰ *See Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1028-32 (3d Cir. 2008).

⁸¹ *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001) (finding plaintiffs' state right of publicity claims regarding use of their names and likenesses from photograph, which plaintiffs did not own rights to, within defendant's catalog selling clothing similar to that which plaintiffs were wearing in the photograph was not preempted by federal copyright law); *but see Laws v. Sony Music Entertainment, Inc.*, 448 F.3d 1134 (9th Cir. 2006) (finding plaintiff's state right of publicity claim regarding use of her licensed song within another song was preempted by federal copyright law).

⁸² Dan Fletcher, *Justin Bieber Fans Go to War with Twitter*, Time News Feed, May 17, 2010, <http://newsfeed.time.com/2010/05/17/justin-bieber-fans-go-to-war-with-twitter/>.

⁸³ *See Jung, supra* note 45, at 401-02.

⁸⁴ Tupac Hologram Snoop Dogg and Dr. Dre Perform Coachella Live, YouTube.com, <http://www.youtube.com/watch?v=TGbrFmPBV0Y> (last visited June 24, 2012).

⁸⁵ Mitchell Peters, *Estates Ready 'Holograms' of Elvis, Hendrix, Monroe & the Doors*, Billboard.com, June 12, 2012, <http://www.billboard.com/news/estates-ready-holograms-of-elvis-hendrix-1007299352.story#/news/estates-ready-holograms-of-elvis-hendrix-1007299352.story>.

⁸⁶ Danielle Mayoras and Andy Mayoras, *What Does Tupac's Hologram Mean for Other Celebrity Estates?*, Forbes, April 23, 2012, <http://www.forbes.com/sites/trilandheirs/2012/04/23/what-does-tupacs-hologram-mean-for-other-celebrity-estates/> (reporting administrator of Tupac Shakur's estate, his mother Afeni Shakur, was eager to authorize use of Tupac's likeness and that authorization was exchanged for a contribution to the Tupac Amaru Shakur Foundation).