

# NEW IMPRESSIONS: DEFINING AND DESIGNING A RIGHT OF PUBLICITY FOR THE DIGITAL COMMERCIAL LANDSCAPE\*

## I. INTRODUCTION

Right of publicity and privacy law scholar Jennifer Rothman locates the origins of the right of publicity—a tort that, broadly, “covers appropriation of one’s name or likeness”<sup>1</sup>—in a world-changing technological development: the camera.<sup>2</sup> With the emergence of personal photography, people began to discover, to their horror, that their images were discreetly captured in public and then disseminated without their knowledge.<sup>3</sup> The confluence of easier personal photography and newspaper journalism, which led to “crop[s] of unseemly gossip”<sup>4</sup> ripe for public consumption, was the animating issue behind Samuel Warren and Louis Brandeis’s development of the right to privacy.<sup>5</sup> One woman who discovered that her portrait was used in a flour advertisement without her permission “was made sick, and suffered a severe nervous shock, . . . and compelled to employ a physician” by the incident.<sup>6</sup> She sued for “injury . . . to her ‘good name.’”<sup>7</sup> After she prevailed at trial and on appeal, the New York Court of Appeals ruled against her, outraging the public.<sup>8</sup> This led to the creation and passage of the first right of publicity statute in the United States, which is still in place today.<sup>9</sup>

Over a century later, these problems are still commonly addressed by the courts. Karen Hepp is a news anchor for the popular *Good Day Philadelphia* morning show on the local Fox station in Philadelphia, FOX 29.<sup>10</sup> In a city where news anchors are local

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1. 1 ANNE GILSON LALONDE, GILSON ON TRADEMARKS § 2B.03[01] (118th rev. ed. 2024).
2. JENNIFER ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 12–20 (2018).
3. ROTHMAN, *supra* note 2, at 13.
4. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).
5. *Id.* at 195–97; ROTHMAN, *supra* note 2, at 20.
6. ROTHMAN, *supra* note 2, at 22–24 (quoting *Roberson v. Rochester Folding-Box Co.*, 65 N.Y.S. 1109, 1109 (Sup. Ct. 1900)).
7. *Id.* at 24 (quoting *Roberson*, 65 N.Y.S. at 1109).
8. *Id.* at 24–25 (citing *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902)).
9. *Id.* at 25; N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2024).
10. *Hepp v. Facebook*, 14 F.4th 204, 206 (3d Cir. 2021); *Karen Hepp, Co-Anchor*, FOX 29, <https://www.fox29.com/person/h/karen-hepp> [<https://perma.cc/7ZUU-NBYW>] (last visited Apr. 11, 2025).

celebrities, Hepp is a locally well-known and famous personality.<sup>11</sup> In 2018, Hepp's coworkers alerted her to a concerning development: A candid photograph of her at a convenience store was being used to advertise adult-targeted websites.<sup>12</sup> The origins of the photograph are mysterious; Hepp did not know how it was taken, when it was taken, where it was taken, or how it became public.<sup>13</sup> The photograph did not show Hepp in her capacity as a news anchor and it did not identify her by name.<sup>14</sup> Hepp sued the websites that displayed the photograph under Pennsylvania's right of publicity law.<sup>15</sup>

Hepp alleged that her image was misappropriated for use in online advertising on social media and other websites.<sup>16</sup> These advertisements customize content for specific audiences based on information collected through social media sites, cookies, pixel tracking, and other activity tracking technologies.<sup>17</sup> These practices are designed to generate more views, otherwise known as "impressions," and add value for companies by increasing the likelihood that an advertisement will reach someone likely to buy the product or service.<sup>18</sup> In other words, these advertisements derive their value from how effectively they target the people who view them.<sup>19</sup> These targeting practices echo a fundamental underpinning of the right of publicity: value in the view of the perceiving audience.<sup>20</sup>

Section 230 of the Communications Decency Act (CDA) ("Section 230") governs the legal liability of websites for content generated or posted by third parties, including

11. See *Hepp*, 14 F.4th at 206; Regina Medina, *Anchor Has Dropped on Philly's TV News 'Celebrities,'* PHILA. INQUIRER (May 20, 2011, 3:01 AM), [https://www.inquirer.com/philly/news/20110520\\_Anchor\\_has\\_dropped\\_on\\_Philly\\_s\\_TV\\_news\\_celebrities\\_.html](https://www.inquirer.com/philly/news/20110520_Anchor_has_dropped_on_Philly_s_TV_news_celebrities_.html) [<https://perma.cc/V94X-8TFV>] (detailing the "celebrity" tabloid culture around local Philadelphia news anchors).

12. *Hepp*, 14 F.4th at 206.

13. *Id.*

14. See Eriq Gardner, *Is a Famous Face a Form of Intellectual Property?*, HOLLYWOOD REP. (June 18, 2021, 8:15 AM), <https://www.hollywoodreporter.com/business/business-news/news-anchors-fight-facebook-sag-aftra-1234968110/> [<https://perma.cc/P4ZB-LQ8Z>].

15. *Hepp*, 14 F.4th at 207.

16. *Id.* at 206.

17. Leslie K. John, Tami Kim & Kate Barasz, *Ads That Don't Overstep: How To Make Sure You Don't Take Personalization Too Far*, HARV. BUS. REV. (Jan.–Feb. 2018), <https://hbr.org/2018/01/ads-that-dont-overstep> [<https://perma.cc/4X4G-VQU3>]; see also Lesley Fair, *What Vizio was Doing Behind the TV Screen*, FTC Business Blog (Feb. 6, 2017), <https://www.ftc.gov/business-guidance/blog/2017/02/what-vizio-was-doing-behind-tv-screen> [<https://perma.cc/YSA5-QNVD>] (describing non-consensual pixel-tracking technology in smart televisions that became the subject of a Federal Trade Commission complaint against the company Vizio, which ended in settlement).

18. See Jamia Kenan, *Reach vs. Impressions vs. Engagement: What's the Difference?*, SPROUT SOCIAL (Feb. 20, 2024), <https://sproutsocial.com/insights/reach-vs-impressions/> [<https://perma.cc/D27L-FZXB>] (explaining that impressions are the "total number of times your content is displayed," while "reach" is how many individuals view the content).

19. See John et al., *supra* note 17.

20. See David Tan, *Affective Transfer and the Appropriation of Commercial Value: A Cultural Analysis of the Right of Publicity*, 9 VA. SPORTS & ENT. L.J. 272, 282–85 (2010) [hereinafter Tan, *Affective Transfer*] (discussing "associative value" in right of publicity actions); DAVID TAN, *THE COMMERCIAL APPROPRIATION OF FAME: A CULTURAL ANALYSIS OF THE RIGHT OF PUBLICITY AND PASSING OFF* 134 (2017) [hereinafter TAN, *APPROPRIATION OF FAME*].

advertisers.<sup>21</sup> It generally provides broad immunity from legal liability for third-party content, but it contains an exception for content that is intellectual property: “Nothing in [Section 230] shall be construed to limit or expand any law pertaining to intellectual property.”<sup>22</sup> Karen Hepp was able to maintain a right of action because the Third Circuit decided that the intellectual property carve-out applied to state intellectual property law as well as federal law.<sup>23</sup> In the Southern District of New York, however, a similar plaintiff was not so lucky; the court determined that the right of publicity was *not* intellectual property, but a privacy tort under New York law.<sup>24</sup> Section 230 immunity thus applied to the third-party websites who were defendants in the case, regardless of whether the intellectual property exception applied to state law.<sup>25</sup> The ultimate fate of these and other cases, depended on whether the courts viewed the right of publicity as privacy or intellectual property, based on varying state statutes.<sup>26</sup>

State laws and statutes are divided as to whether the right of publicity is protected under privacy law or intellectual property law.<sup>27</sup> Courts have thus differed in their application of Section 230 immunity to right of publicity actions against websites for third-party content.<sup>28</sup> Right of publicity actions that fall under intellectual property law have also received varying treatment based on whether the exception was applied to state law, while claims under privacy law have generally resulted in the defendant being granted Section 230 immunity.<sup>29</sup>

This Comment explores the right of publicity as both intellectual property and privacy action to reach a more equitable construction of the right of publicity in digital spaces than the one that led to the outcomes seen in *Hepp v. Facebook* and *Ratermann v. Pierre Fabre USA, Inc.*<sup>30</sup> Section II of this Comment gives an overview of the history of right of publicity law and how it has been applied, from its origins as a tort sounding in privacy to its current form, and how it has interacted with Section 230. Section III analyzes courts’ decisions in *Hepp*, *Ratermann*, and *Fry v. Ancestry.com Operations Inc.*,<sup>31</sup> and proposes that one might reconcile them in a federal right of publicity by adopting the *Fry* court’s reasoning that the value in the right of publicity derives from the viewer’s recognition of a persona in misappropriated content.

Section III then examines the circuit split on the state law issue and the attendant problems with forum shopping and inefficiency, as well as the lack of uniformity of

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21. 47 U.S.C. § 230.

22. *Id.* § 230(e)(2).

23. *Hepp v. Facebook*, 14 F.4th 204, 210–12 (3d Cir. 2021).

24. *Ratermann v. Pierre Fabre USA, Inc.*, 651 F. Supp. 3d 657, 670 (S.D.N.Y. 2023).

25. *Id.*

26. *See Hepp*, 14 F.4th at 210–12; *Ratermann*, 651 F. Supp. 3d at 670.

27. *See* Jennifer E. Rothman, *Rothman’s Roadmap to the Right of Publicity*, RIGHT OF PUBLICITY ROADMAP [hereinafter Rothman, *Roadmap*], <https://rightofpublicityroadmap.com/> [https://perma.cc/C7MP-X8J7] (last visited Mar. 2, 2025).

28. *See, e.g., Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007); *Hepp*, 14 F.4th 204; *Ratermann*, 651 F. Supp. 3d at 668–70. Section 230 immunizes websites from third-party content, but it contains an exception to this immunity for “any law pertaining to intellectual property.” 47 U.S.C. § 230(e)(2).

29. *See, e.g., Perfect 10*, 488 F.3d 1102; *Hepp*, 14 F.4th 204; *Ratermann*, 651 F. Supp. 3d at 668–70.

30. *Hepp*, 14 F.4th 204; *Ratermann*, 651 F. Supp. 3d 657.

31. *Fry v. Ancestry.com Operations Inc.*, No. 22-CV-140, 2023 WL 2631387 (N.D. Ind. Mar. 24, 2023).

right of publicity law in the United States. It explains the importance of commercial value in the right of publicity, from what it derives, and what it means for the future of the action as intellectual property. It then applies this analysis to the digital space to clarify Section 230 liability under this standard. Ultimately, this Comment contends that the right of publicity should be federally codified as a framework of “targeted” audience value based on recognition of personae that could be consistently applied across jurisdictions, granting fairer and more uniform results.<sup>32</sup> This would better accommodate the realities of online advertising, which is frequently targeted based on micro-audiences’ preferences and perceptions, and would provide a consistent answer as to whether Section 230 immunizes websites from right of publicity actions.

## II. OVERVIEW

The modern right of publicity is commonly understood either as a privacy action or an intellectual property action.<sup>33</sup> This dual understanding has been described as the “two branches” of the right of publicity—a right protecting the person’s privacy and a right protecting the person’s profits from her persona.<sup>34</sup> These branches are subject to statutory and common law protections under most states’ laws,<sup>35</sup> but there is no federal law of the right of publicity except for analogous protections under trademark law provided by the Lanham Act.<sup>36</sup> The Lanham Act provides that trademarks are not registrable if they “consist[] of or comprise[] a name, portrait, or signature identifying a particular living individual except by his written consent.”<sup>37</sup> It provides additional protections for celebrities under its false endorsement provisions, which allow a cause of action for “allegedly misleading commercial use by others.”<sup>38</sup> These protections are roughly analogous to the right of publicity;<sup>39</sup> however, courts have recognized the right of publicity as “broader than the protections offered by the Lanham Act . . . [and] protect[ing] a greater swath of property interests.”<sup>40</sup> These property interests might be in names, likenesses, identities, or personae, depending on the jurisdiction.<sup>41</sup> However, the tort’s historical roots in privacy law are still visible in some jurisdictions.<sup>42</sup>

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32. See *infra* Part III.B.2.

33. 4 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES § 22:34 (4th ed. 2023).

34. *Id.*

35. See Rothman, *Roadmap*, *supra* note 27. Note that different states protect the right of publicity under privacy or intellectual property actions, but the types of actions available, and whether they are protected under common law or statute, vary widely across jurisdictions. See *id.*

36. ALTMAN & POLLACK, *supra* note 33.

37. 15 U.S.C. § 1052(c).

38. *Parks v. LaFace Records*, 329 F.3d 437, 445–46 (6th Cir. 2003).

39. See Jennifer Rothman, *Navigating the Identity Thicket: Trademark’s Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271, 1278–81, 1296–1300 (2022).

40. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 158 (3d Cir. 2013). See also *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 925–26 (6th Cir. 2003), for a discussion of Lanham Act false endorsement claims and their relation to the torts of misappropriation of celebrity personae.

41. Theodore Z. Wyman, *Causes of Action for Infringement of Right of Publicity*, 112 CAUSES OF ACTION 2D 97 §§ 4, 12 (2024).

42. *Id.* §§ 3–4.

Part II.A of this Section reviews the origins of the right of publicity as Dean William L. Prosser's "privacy by appropriation" tort, which focused on privacy rights more than property rights. Part II.B examines the right of publicity as applied to the digital sphere and how it interacts with the intellectual property carve-out to Section 230, which broadly provides websites with legal immunity for third-party content they host. Part II.B.1 illustrates what happens to right of publicity actions when websites are a direct party and not a third party. Parts II.B.2 and II.B.3 describe the settled circuit law before *Hepp*, which held that the Section 230 intellectual property exception did not apply to state right of publicity law. Part II.B.4 examines the Third Circuit's decision to split from this law in *Hepp*. Part II.B.5 uses the Southern District of New York's decision in *Ratermann* to illustrate the fate of right of publicity actions against third parties in jurisdictions where it is a privacy right.

#### A. *Origins of the Right of Publicity*

The right of publicity first emerged as a "privacy by appropriation" tort in Dean Prosser's four torts of privacy, which blended privacy rights in a person's name, image, and likeness.<sup>43</sup> This privacy by appropriation tort was roughly analogous to the right of publicity in that it dealt with unconsented use and "exploitation of attributes of the plaintiff's identity."<sup>44</sup> Dean Prosser enumerated an additional "false light in the public eye" tort, in which an individual's identity is used without consent in a false endorsement or some other public campaign that injures that individual's reputation.<sup>45</sup> It is unlikely that either of these torts would have appeared in Brandeis and Warren's original formulation of the right to privacy.<sup>46</sup>

Dean Prosser also acknowledged that the right of publicity contained elements of a property action.<sup>47</sup> Although such a formulation was "justified" according to Dean Prosser, he was skeptical of the possible spread of this concept.<sup>48</sup> Nevertheless, Dean Prosser considered the connection between "appropriation" and intellectual property.<sup>49</sup> He speculated that it was granting individuals a species of intellectual property right, like a trademark for their own selves that was far more extensive, and less legally temperate, than those traditionally extended to corporate entities.<sup>50</sup> Dean Prosser emphasized that he did not necessarily disagree with recent developments like these in

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43. 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 1:23; *see also* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 401 (1960).

44. MCCARTHY & SCHECHTER, *supra* note 43, § 1:23; Prosser, *supra* note 43, at 401.

45. Prosser, *supra* note 43, at 398–401.

46. *Id.* at 398, 401.

47. *See id.* at 406–07.

48. *Id.* (writing that only a Second Circuit decision—*Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953)—had addressed this formulation at the time of writing and that California had declined to follow it in the common law as of 1960).

49. *Id.* at 423.

50. *Id.* ("As for the appropriation cases, they create in effect, for every individual, a common law trade name, his own, and a common law trade mark in his likeness. They confer upon him rights much more extensive than those which any corporation engaged in business can expect under the law of unfair competition. These rights are subject to the verdict of a jury. And there has been no hint that they are in any way affected by any of the limitations which have been considered necessary and desirable in the ordinary law of trade marks and trade names.").

privacy law, and he urged moderation in future application and creation of the law, which he suggested was mutating into something far beyond the original right of privacy.<sup>51</sup>

Dean Prosser paved the way for the concept, but the *Restatement (Second) of Torts* ("Second Restatement") did not adopt the violation of the right of publicity as an official tort; instead, it laid out a vaguer concept: "appropriation privacy."<sup>52</sup> This concept was described as "analogous to a property right," but the Second Restatement did not take a firm stance on whether the right of publicity sounded more in privacy or property.<sup>53</sup> The *Restatement (Third) of Unfair Competition* ("Third Restatement") adopted the Second Restatement's "appropriation" language but asserted that because the Prosser formulation ignored economic harms in favor of "injury to solitude or personal feelings," celebrity plaintiffs tended to be unfairly denied recovery under the privacy theory, which should thus be set aside.<sup>54</sup>

The Third Restatement also expressed frustration with the wide variation in injury type and cause of action in state right of publicity law and teased out a distinction between the right to privacy and the right of publicity based on whether the harm was to the person or commercial interests.<sup>55</sup> The Third Restatement was leery of restricting the right of publicity to celebrities and recognized that "less well-known plaintiffs" may also suffer commercial harm.<sup>56</sup> The Third Restatement instead hinges injury on whether the plaintiff is recognizable in the material at issue: "[I]n the case of an alleged visual likeness, the plaintiff must be reasonably identifiable from the photograph or other depiction. . . . [This] is a question of fact."<sup>57</sup> If the plaintiff's name has been misappropriated, "the name as used by the defendant must be understood by the audience as referring to the plaintiff."<sup>58</sup> It also drew specific comparisons to trademark and copyright law, suggesting an intellectual property dimension to the action.<sup>59</sup>

Nevertheless, it included state statutes sounding in both intellectual property and privacy, indicating an unwillingness to take a stance on whether the action truly belonged to one area of the law or another that persists today.<sup>60</sup> There is currently no federal right of publicity statute, and the area is instead governed by various state statutes and common law.<sup>61</sup> Some states, like New Jersey, lack statutory laws of the

51. *Id.*

52. MCCARTHY & SCHECHTER, *supra* note 43, § 1:24.

53. RESTATEMENT (SECOND) OF TORTS § 652A cmt. b (AM. L. INST. 1977); *see also* MCCARTHY & SCHECHTER, *supra* note 43, § 1:24 ("In § 652C, the Restatement authors never mentioned the term 'right of publicity,' but tentatively blended together concepts of both 'privacy' and 'publicity' . . .").

54. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46(b) (AM. L. INST. 1995).

55. *See id.*

56. *Id.*

57. *Id.* § 46(d).

58. *Id.*

59. *See id.* § 46(g), (i).

60. *Id.* § 46 Statutory Note (including both New York's statute, which has long been held to sound in privacy, and California's statute, which famously sounds in property); *id.* § 45 Reporters' Note (including the classic property case, *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993) (Kozinski, J., dissenting)).

61. *See* 3 ANNE GILSON LALONDE, GILSON ON TRADEMARKS § 12.06 (118th rev. ed. 2024).

right of publicity and instead recognize actions under the common law.<sup>62</sup> States generally have statutory rights of publicity, which define the right with similar language but place the right in different legal categories: intellectual property or privacy.<sup>63</sup>

*B. Section 230, the Digital Space, and the Right of Publicity: A Complex Relationship*

Section 230 provides immunity for third-party “provider[s] or user[s] of an interactive computer service” from civil liability for moderating content or making it available to other users.<sup>64</sup> This means that websites like Facebook cannot be held liable for content generated by users, which provides an extremely broad liability shield for social media websites.<sup>65</sup> Section 230 was created in response to a rash of legal actions against third-party content hosts in the 1990s.<sup>66</sup> The primary purpose of the act was to limit obscene and pornographic content online, but provisions related to this policy were struck down in *Reno v. ACLU*.<sup>67</sup> However, the law contains various exceptions to this broad immunity, including what is known as the “intellectual property law exception”<sup>68</sup>: “Nothing in this section shall be construed to limit or expand any law

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62. See, e.g., *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 151 (3d Cir. 2013) (“New Jersey law therefore recognizes that . . . an individual’s ‘name, likeness, and endorsement carry value and an unauthorized use harms the person both by diluting the value of the name and depriving that individual of compensation.’” (quoting *McFarland v. Miller*, 14 F.3d 912, 919 (3d Cir. 1994))). Indiana law also “recognize[s] a common law tort of invasion of privacy that includes the tort of appropriation of name or likeness” that is not preempted by its statutory right of publicity. Jennifer E. Rothman, *Rothman’s Roadmap to the Right of Publicity: Indiana, RIGHT OF PUBLICITY ROADMAP*, [https://rightofpublicityroadmap.com/state\\_page/indiana/](https://rightofpublicityroadmap.com/state_page/indiana/) [https://perma.cc/RGD5-JLAU] (last visited Apr. 28, 2025).

63. See, e.g., 42 PA. STAT. AND CONS. STAT. ANN. § 8316(a) (West 2025) (“Any natural person whose name or likeness has commercial value and is used for any commercial or advertising purpose without the written consent of such natural person or the written consent of any of the parties authorized in subsection (b) may bring an action to enjoin such unauthorized use and to recover damages for any loss or injury sustained by such use.”); N.Y. CIV. RIGHTS LAW § 50–51 (McKinney 2025) (“Any person whose name, portrait, picture, likeness or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using such person’s name, portrait, picture, likeness or voice, to prevent and restrain the use thereof. . . .” (footnote omitted)); IND. CODE ANN. § 32-36-1-8(a) (West 2024) (“A person may not use an aspect of a personality’s right of publicity for a commercial purpose during the personality’s lifetime or for one hundred (100) years after the date of the personality’s death without having obtained previous written consent from a person specified in section 17 of this chapter.”).

64. 47 U.S.C. § 230(c)(1)–(2).

65. See generally JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019) (explaining the dimensions and ramifications of this broad “privacy shield”).

66. See *id.* at 45–65 (providing a description of the legislative background and history of Section 230, as well as the case that created it: *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)) (citing interviews with Ron Wyden & Chris Cox, Reps., U.S. House of Reps. (2017)).

67. 521 U.S. 844, 885 (1997); see also KOSSEFF, *supra* note 65, at 71–76 (explaining the legislative history of the CDA and the *Reno* decision).

68. See, e.g., *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1045 (9th Cir. 2019) (holding that the intellectual property exception does not apply to false advertising claims).

pertaining to intellectual property.”<sup>69</sup> In practice, the consequences of this exception in right of publicity actions have varied with different fact patterns and jurisdictions.<sup>70</sup> The following sections explain why, and how those differences indicate broader problems with the current formulation of the right of publicity.

#### 1. The Right of Publicity for Direct Parties: Where Section 230 Does Not Apply

*Fry* provides a guidepost for the possible direction the right of publicity might take for direct use of an ordinary, noncelebrity person’s likeness, although it deals with a website as a direct infringer rather than as a third party.<sup>71</sup> The popular genealogy website Ancestry.com had stored a facsimile of a yearbook in which the photographs of the plaintiff appeared on its website, which was available to public users and subscribers.<sup>72</sup> The plaintiff himself did not subscribe to Ancestry.com and he had never used it.<sup>73</sup> However, Ancestry.com used images of the plaintiff from that yearbook to advertise to his classmates.<sup>74</sup> Ancestry.com’s targeted advertising process showed visitors yearbook photos that could match their query after a search and showed the visitor a pop-up teasing more information about the people in the search results.<sup>75</sup> It would then continue to send emails to the visitor with “teasing hints” of information about the people in the search results, accompanied by that person’s name and picture.<sup>76</sup> Ancestry.com also used free trials of its full services as a marketing tactic, during which all records and information on a person on Ancestry.com could be searched.<sup>77</sup>

The Northern District of Indiana held that Ancestry.com could not claim broad immunity as a content provider under Section 230 because the speech at issue was “commercial speech not in furtherance of the public interest,” and the content at issue was not generated by a third-party user, but by Ancestry.com itself for advertising purposes.<sup>78</sup> The court also wrote that the plaintiff’s right of publicity was protected by Indiana’s right of publicity statute because his likeness had commercial value.<sup>79</sup> However, the court characterized Fry’s assertion that his likeness was “intellectual property” as “confounding[,]” emphasizing that “a violation of [his] right to publicity” was sufficiently concrete harm to have standing without an injury to intellectual

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69. 47 U.S.C. § 230(e)(2).

70. Compare *Hepp v. Facebook*, 14 F.4th 204 (3d Cir. 2021) (holding that state right of publicity law fell under the intellectual property exception), and *Ratermann v. Pierre Fabre USA, Inc.*, 651 F. Supp. 3d 657 (S.D.N.Y. 2023) (holding that state right of publicity law did not fall under the intellectual property exception because New York statute was a privacy statute), with *Fry v. Ancestry.com Operations Inc.*, No. 22-CV-140, 2023 WL 2631387 (N.D. Ind. Mar. 24, 2023) (denying motion to dismiss claim that website was liable for direct infringement on plaintiff’s right of publicity when it used his image without persona to advertise its services because the misappropriation demonstrated that the image had commercial value).

71. *Fry*, 2023 WL 2631387.

72. *Id.* at \*1–2.

73. *Id.* at \*2.

74. *Id.*

75. *Id.* at \*1.

76. *Id.*

77. *Id.*

78. *Id.* at \*9.

79. *Id.* at \*6.

property.<sup>80</sup> The court consequently interpreted the right of publicity as sounding “in the nature of a property right,” but also acknowledged its roots as a privacy tort and that it was something different than “traditional[]” intellectual property.<sup>81</sup>

This interpretation of Indiana’s right of publicity statute, which the court described as “codif[ying] the common law right of publicity” in the state, was that it was something other than intellectual property law or a right to privacy.<sup>82</sup> Indiana’s right of publicity statute requires that the injured party in a right of publicity action is a “personality,” which necessitates some aspect of the person having “commercial value.”<sup>83</sup> Using this statutory commercial value requirement, the court rejected Ancestry.com’s argument that the plaintiff was not a “personality” for purposes of the statute because his name and likeness had no commercial value as a non-celebrity, writing, “Why else would Ancestry bother to include [Fry’s image] in its advertisements?”<sup>84</sup>

The court wrote that it had specifically adapted its reasoning in the commercial value analysis to a phenomenon often discussed in privacy law: targeted advertising.<sup>85</sup> In the court’s view, the commercial value of the plaintiff’s likeness was in its use as an advertising tool shown “to people who search for Mr. Fry and therefore are likely to know him” in order to more effectively “sell a product.”<sup>86</sup> The court also did not credit Ancestry.com’s argument that this had the potential to void the statute’s “commercial purpose” requirement for appropriation because the commercial purpose of the ad was separate from the value in the plaintiff’s likeness as a sales tool.<sup>87</sup> It instead insisted that its logic of “if someone has misappropriated the likeness, it has value” did not invite the collapsing of commercial value into *any* misappropriation (and, by extension, the collapsing of the right of privacy into an intellectual property).<sup>88</sup>

The court asserted that this was because public notoriety and recognition were linked with commercial value in the minds of consumers who know and recognize the injured party.<sup>89</sup> It also relied on the Second Restatement’s explanation that social standing could be misappropriated in right of publicity actions, arguing that targeted advertising similarly relies on the very specific networks and social capital of the targeted party.<sup>90</sup> The plaintiff’s image had commercial value among people who searched for him on Ancestry.com, while another, random image would not have the same commercial value to that audience.<sup>91</sup>

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80. *Id.* at \*3 (citing the concrete harm standard articulated in *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)).

81. *Id.* at \*4.

82. *Id.* (citing *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 394–95 (Ind. 2018)).

83. *Id.* at \*6 (citing IND. CODE ANN. § 32-36-1-8(a) (West 2024); and then citing § 32-36-1-6).

84. *Id.* at \*7.

85. *See id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652C cmt. c (AM. L. INST. 1977)).

91. *Id.*

Thus, the court held that because the plaintiff's "personality" had specific value to the people Ancestry.com was trying to reach through its advertising, it had commercial value in addition to a commercial purpose.<sup>92</sup> The court specified that its reasoning was meant to adapt to the "changing reality: that businesses increasingly leverage our closest and most precious connections online to sell products."<sup>93</sup> The commercial value in the plaintiff's likeness, and indeed the commercial value required by the Indiana statute, did not have to be objective or inherent.<sup>94</sup> Instead, one's image or likeness could be valuable in the context of one's network or internet bubble, but not to the public at large.<sup>95</sup> So long as the injury occurred in front of the smaller network, there was sufficient value to generate standing in right of publicity actions for commercial speech.<sup>96</sup>

## 2. Section 230's Intellectual Property Exception for Third Parties and the Right of Publicity

Actions against third-party digital platforms under the right of publicity face an additional barrier: Section 230, which provides broad immunity for websites from liability for third-party content posted on the site.<sup>97</sup> However, Section 230 contains various exceptions to this immunity, including an exception for intellectual property claims.<sup>98</sup> Section 230(e)(2) states that "[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property."<sup>99</sup> Although the Supreme Court has never addressed the meaning and scope of this exception,<sup>100</sup> the settled law among the higher courts—until 2021—was the Ninth Circuit's decision in *Perfect 10, Inc. v. CCBill LLC*.<sup>101</sup>

## 3. Right of Publicity Not Subject to Section 230 Immunity Under State Intellectual Property Law

The plaintiff in *Perfect 10* brought, among other actions, an action against a website for its third-party content under California's right of publicity law.<sup>102</sup> The plaintiff was a subscription-based website that hosted adult content.<sup>103</sup> Many of the people who appeared in that content "ha[d] signed releases assigning their rights of publicity to Perfect 10," and Perfect 10 also held registered copyrights and trademarks

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92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. 47 U.S.C. § 230(c)(2)(A)–(B).

98. *Id.* § 230(e)(2).

99. *Id.*

100. See John Paul A. Galgano, Note, *Tackling the Intangible: Why the Supreme Court Needs To Define Intellectual Property and What Facebook Stands To Lose (or Win)*, 37 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 340 (2023).

101. 481 F.3d 751 (9th Cir. 2007).

102. *Id.* at 757.

103. *Id.*

for the content and other parts of its website.<sup>104</sup> The defendants were an online video platform and an online billing service.<sup>105</sup> The plaintiff alleged that the defendants' clients infringed on its copyrights, trademarks, and its right of publicity under California law, among other claims.<sup>106</sup>

One issue on appeal was whether Section 230 immunized the defendants' website from state law intellectual property actions; the Ninth Circuit held that it did not and that Section 230's intellectual property exception only applied to federal intellectual property law.<sup>107</sup> The court reasoned that the complex universe of state intellectual property law, in comparison to the relative uniformity and simplicity of federal intellectual property law, would make compliance with an exception for state intellectual property law extraordinarily difficult for websites operating on a national scale.<sup>108</sup> This would have a chilling effect on the development of the internet and open websites to the vagaries of state law, contrary to Section 230's legislative purposes of spurring development and preventing state lawsuits against website providers.<sup>109</sup>

In its decision, the court did not address whether the right of publicity could be considered an intellectual property action.<sup>110</sup> This point would be moot because there is no federal right of publicity law and state right of publicity actions were unavailable under the decision.<sup>111</sup> This remained the only law in the area at the federal appellate level until the Third Circuit's decision in *Hepp*, but "[a] number of federal district courts outside of the Ninth Circuit . . . disagreed with *Perfect 10*" as to whether Section 230's intellectual property exception preempts state law.<sup>112</sup>

#### 4. The Third Circuit Splits from the Ninth

In 2021, the Third Circuit split from the Ninth Circuit on whether the intellectual property exception granted immunity from a state right of publicity claim in *Hepp*.<sup>113</sup> The plaintiff, Hepp, was a Philadelphia news anchor who had been photographed candidly and "without [her] knowledge or consent" in a convenience store in New York.<sup>114</sup> She was in the center of the image and clearly visible, but the photograph had not been taken in the place or context of her work.<sup>115</sup> The photograph spread online and

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104. *Id.*

105. *Id.* Notably, "[r]epresentatives of celebrities who [were] not parties to this lawsuit also sent notices of infringement to [the defendants]." *Id.*

106. *Id.*

107. *Id.* at 768.

108. *Id.* at 767–68.

109. *Id.* at 768.

110. *See id.*

111. *See id.*; GILSON LALONDE, *supra* note 61.

112. Matthew Bunker & Emily Erickson, *Of Circuit Splits, Dictionaries & Legal Essences: The Right of Publicity as "Intellectual Property,"* 29 UCLA ENT. L. REV. 1, 9–11 (2022) (first citing *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008); then citing *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009); and then citing *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409 (S.D.N.Y. 2001)).

113. *Hepp v. Facebook*, 14 F.4th 204, 206, 210 (3d Cir. 2021).

114. *Id.* at 206; *Hepp v. Facebook*, 476 F. Supp. 3d 81, 84 (E.D. Pa. 2020), *aff'd in part, vacated in part*, 14 F.4th 204.

115. *Hepp*, 14 F.4th at 206.

was used in advertisements for dating websites and erectile dysfunction treatment; it was also posted on Reddit.<sup>116</sup> A dating app used Hepp's image in advertisements on Facebook to entice the audience to "meet and chat with single women near you."<sup>117</sup> This image was not accompanied by Hepp's name but was instead the topic of general unsavory discussion.<sup>118</sup>

Hepp sued Facebook for violating her right of publicity under Pennsylvania's statutory and common law.<sup>119</sup> The Eastern District of Pennsylvania dismissed the lawsuit with prejudice, reasoning that Section 230's intellectual property exception did not apply to Hepp's state law claims and that all website defendants were therefore immune.<sup>120</sup> The trial court specified that it was persuaded by the Ninth Circuit's policy-based reasoning in *Perfect 10*, which it viewed as adopting the policy reasoning behind Section 230 better than the courts that had suggested a state law exception.<sup>121</sup>

The Third Circuit reversed, holding that because the plain text of the statute did not specify that the intellectual property exception only applied to federal law, the Ninth Circuit's policy-based holding in *Perfect 10* was incorrect.<sup>122</sup> It pointed to other provisions of Section 230, which specified exceptions that only applied to federal law, as evidence that if Congress had wanted the intellectual property exception to only apply to federal law, it would have written that into the statute.<sup>123</sup> The Third Circuit used the First Circuit's decision in *Universal Communication Systems v. Lycos*<sup>124</sup> to argue that the First Circuit's reasoning implicitly decided that the intellectual property exception applied to state law.<sup>125</sup> Therefore, including state intellectual property law in the intellectual property exception was not an impermissible interpretation of the law.<sup>126</sup> The court further decided that "[b]ecause trademark and the right to publicity are analogues, the legal definition including trademark also supports including the right of publicity as 'intellectual property.'"<sup>127</sup>

Hepp's right of publicity action was brought under Title 42 of the Pennsylvania Consolidated Statutes.<sup>128</sup> The action itself is the "[u]nauthorized use of name or likeness."<sup>129</sup> An action may be brought under the statute where "[a]ny natural person whose name or likeness has commercial value and is used for any commercial or

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116. *Id.* at 206–07.

117. *Id.* at 207.

118. *See id.*; Gardner, *supra* note 14.

119. *Hepp*, 14 F.4th at 207.

120. *Id.*; *see also* *Hepp v. Facebook*, 465 F. Supp. 3d 491, 499–501 (E.D. Pa. 2020), *rev'd in part, vacated in part*, 14 F.4th 204.

121. *Hepp*, 465 F. Supp. 3d at 500.

122. *Hepp*, 14 F.4th at 212.

123. *Id.* at 210–11.

124. 478 F.3d 413 (1st Cir. 2007) (holding that a company's dilution action against a message board provider for false and misleading content was not actionable under Florida law because it raised First Amendment issues even though it did not fall under Section 230 immunity).

125. *Hepp*, 14 F.4th at 209–10.

126. *Id.* at 211.

127. *Id.* at 214.

128. *Id.* at 207 (citing 42 PA. STAT. AND CONS. STAT. ANN. § 8316 (West 2025)).

129. 42 PA. STAT. AND CONS. STAT. ANN. § 8316 (West 2025).

advertising purpose without . . . written consent.”<sup>130</sup> The *Hepp* court acknowledged that the Pennsylvania statute requires a commercial value interest, which “is developed through the investment of time, effort, and money.”<sup>131</sup> Neither the Third Circuit nor the trial court addressed whether Hepp’s image in fact had commercial value sufficient for a right of publicity claim other than acknowledging that her persona’s “value depends on her ability to control the use of her likeness.”<sup>132</sup>

The dissent in *Hepp* acknowledged that state right of publicity law was far from uniform across jurisdictions, and because of this lack of uniformity and the unsettled nature of right of publicity generally, the majority’s decision could run counter to the original purpose of Section 230.<sup>133</sup> Because the right of publicity was so inconsistent under state law, the majority decision would also impose a severe burden on internet providers to comply with different state intellectual property laws and privacy laws in that area.<sup>134</sup> The dissent would, at most, expand the intellectual property exception to those areas of state intellectual property law that “are co-extensive with . . . federal [intellectual property] laws.”<sup>135</sup>

One of the chief cases cited by the Third Circuit in its decision is *Atlantic Recording Corp. v. Project Playlist*, in which the Southern District of New York concluded that Section 230’s intellectual property exception applied to both state and federal law.<sup>136</sup> The *Atlantic Recording* court’s reasoning was similar to the *Hepp* court’s: Under the “plain language” of the intellectual property exception, “any” law means any law—including state law.<sup>137</sup> The *Atlantic Recording* court disagreed with the defendant’s arguments that including state law in the intellectual property exception would contravene Section 230’s public policy of broad immunity for content providers and that the intellectual property exception preempted state laws inconsistent with the CDA.<sup>138</sup> It also opined that while state law might be inconsistent, this does not indicate that the statute was not meant to include it.<sup>139</sup> Therefore, plaintiffs in New York could successfully bring state law intellectual property actions against third-party internet content platforms.<sup>140</sup>

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130. *Id.* § 8316(a).

131. *Hepp*, 14 F.4th at 214 (quoting § 8316(e)).

132. *Id.* at 206, 215; *see also* *Hepp v. Facebook*, 465 F. Supp. 3d 491, 501 (E.D. Pa. 2020) (“In this Court’s view, construing § 230(e)(2) as preserving only federal intellectual property claims is most fitting because this interpretation simultaneously maintains broad immunity in line with the CDA’s stated congressional purpose. This preserves the scope of immunity within a predictable body of federal law as opposed to the diverse state law on the subject matter.” (citing *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1053 (9th Cir. 2019))), *rev’d in part, vacated in part*, 14 F.4th 204.

133. *Hepp*, 14 F.4th at 223–25 (Cowen, J., concurring in part and dissenting in part).

134. *Id.* at 221–22.

135. *Id.* at 226.

136. 603 F. Supp. 2d 690, 703–04 (S.D.N.Y. 2009), *cited in Hepp*, 14 F.4th at 210 (majority opinion).

137. *Id.* at 702–04.

138. *Id.* at 702.

139. *Id.* at 703–04.

140. *Id.* at 704.

### 5. Where the Right of Publicity Is a Privacy Right, Not Intellectual Property

Its decision in *Atlantic Recording* notwithstanding, in *Ratermann*, the Southern District of New York found that third-party internet content providers *were* immunized by Section 230 because the right of publicity is *not* intellectual property in New York.<sup>141</sup> It held that, because actions of right of publicity under New York law were encompassed by the state's civil rights code, they did not fall under Section 230's intellectual property exception regardless of whether the exception applied to state law.<sup>142</sup> The plaintiff in *Ratermann* was a model who had licensed her image and likeness to an Instagram advertising company called QuickFrame, the first defendant, but found that her likeness was "being used to promote the products of . . . Pierre Fabre," the second defendant.<sup>143</sup> The images appeared on several third-party e-commerce retailers' websites, including Amazon, Walmart, and Ulta, as well as in a brick-and-mortar Walgreens store; the plaintiff pursued actions against all these retailers as well.<sup>144</sup> Although the district court allowed the claims against Pierre Fabre to proceed,<sup>145</sup> it dismissed the claims against QuickFrame and Walgreens for failure to state a claim under the New York right of publicity statute.<sup>146</sup> The court reasoned that although Section 230 contains exceptions for "intellectual property law," it does not provide such an exception for violations of privacy rights stemming from third-party content.<sup>147</sup> Since the "gravamen of a claim under Sections 50 and 51 [of the New York Civil Rights statute] is a violation of the right to privacy," the court declined to decide whether Section 230's intellectual property exception applied to New York state law, as it had in *Atlantic Recording*.<sup>148</sup> The court specifically rejected the decisions in *Hepp* and *Perfect 10* as "inapposite" because they did not pertain to New York state law and argued that "*Hepp* reinforce[d] the conclusion that claims under Section[s] 50 and 51 are not 'intellectual property' claims for Section 230 purposes" because of its emphasis on the validity of state law.<sup>149</sup> Notably, there was no discussion of the *Atlantic Recording* decision in the court's opinion; discussion of these issues was limited to the circuit split with no acknowledgment of the court's role in creating that split.<sup>150</sup>

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141. *Ratermann v. Pierre Fabre USA, Inc.*, 651 F. Supp. 3d 657, 668–70 (S.D.N.Y. 2023).

142. *Id.*

143. *Id.* at 662–63.

144. *Id.*

145. *Id.* at 671–72.

146. *Id.* at 670–72.

147. *Id.* at 668–70; *see also* 47 U.S.C. § 230(c)(2)(A)–(B).

148. *Ratermann*, 651 F. Supp. 3d at 663, 668 n.3.

149. *Id.* at 668 n.3, 669 n.5.

150. *Compare id.*, with *Hepp v. Facebook*, 14 F.4th 204, 210 (3d Cir. 2021) ("The court held that 'if Congress wanted the phrase 'any law pertaining to intellectual property' to actually mean 'any federal law pertaining to intellectual property' it knew how to make that clear, but chose not to.'" (quoting *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 703–04 (S.D.N.Y. 2009))). It is curious that the Southern District of New York chose not to acknowledge its own previously stated views on the legal issue when discussing the circuit split.

### III. DISCUSSION

#### A. Problems with the Right of Publicity in the Digital Space

The differing results in *Fry*, *Perfect 10*, *Hepp*, and *Ratermann*<sup>151</sup> present an interesting question: If we accept that all the images at issue in these cases hold commercial value, should a claim's viability depend on whether the image was appropriated by a second or third party? Treating the right of publicity as a privacy action would indicate that the degree of separation *does* matter in the digital sphere. The cases classifying the right of publicity as intellectual property would render the question moot if Section 230's intellectual property exception applied to state law. However, jurisdictions that only recognize the exception for federal law would reach the same ultimate conclusion as right of privacy jurisdictions: that there is no actionable claim against third-party content hosts. The circuit split created by *Hepp* renders the intellectual property landscape of the right of publicity wildly inconsistent. It also diverges from the privacy construction of the right of publicity by hinging the availability of a right of action on whether there is commercial value in the persona.

If the *Hepp* decision ultimately stands, the area of law to which the right of publicity belongs—particularly concerning digital spaces—should be clarified. The inconsistencies raised in *Hepp*'s application of a federal statute to state law present risks of forum shopping, chilled speech, and judicial inefficiency.<sup>152</sup> However, the more interesting issue is that the right of publicity's chimerical nature is increasingly problematic in digital spaces where the application of Section 230's intellectual property exception to right of publicity actions has become very complicated.<sup>153</sup>

#### 1. Right of Publicity Statutes and Commercial Value

The courts in *Hepp* and *Ratermann* came to very different decisions based on their interpretations of their states' right of publicity statutes. The text of the New York right of publicity statute, however, is very similar to that of the Pennsylvania statute at issue in *Hepp*. New York's statute, under New York's Civil Rights Law Article 5,<sup>154</sup> states that:

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151. That is, findings of immunity or no immunity for websites in right of publicity claims depended on (1) whether the website was a third party, and (2) whether the state law right of publicity (a) fell under intellectual property or privacy and (b) was subject to Section 230. *See generally Ratermann*, 651 F. Supp. 3d 657; *Hepp*, 14 F.4th 204; *Fry v. Ancestry.com Operations, Inc.*, No. 22-CV-140, 2023 WL 2631387 (N.D. Ind. Mar. 24, 2023); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

152. *See, e.g., Ratermann*, 651 F. Supp. 3d at 669 n.5 ("But the court took pains to emphasize the 'narrowness' of its holding, most notably for present purposes stressing that it applied only to Pennsylvania law and that Pennsylvania's law 'is limited. For instance, it provides a right of publicity cause of action only for those whose valuable interest in their likeness is developed through the investment of time, effort, and money.'" (internal quotation marks omitted) (quoting *Hepp*, 14 F.4th at 214)); Bunker & Erickson, *supra* note 112, at 21–23 (detailing the wide variety of state laws and possible fact patterns for right of publicity claims); TAN, APPROPRIATION OF FAME, *supra* note 20, at 64 (explaining the high likelihood of forum shopping generated by the variety in state right of publicity laws).

153. *See Bunker & Erickson, supra* note 112, at 20–21 (discussing the expansion of potential infringing activity under the right of publicity, and how this makes protecting against liability more difficult for websites not covered by Section 230).

154. N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2025).

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait, picture, likeness, or voice of any living person without having first obtained the written consent of such person, or if a minor of [their] parent or guardian, is guilty of a misdemeanor.<sup>155</sup>

Both the Pennsylvania and New York statutes regulate commercial usage of a name or likeness without the consent of the depicted party.<sup>156</sup> The New York statute appears in Dean Prosser's *Privacy* article in which he developed his theory of the right of publicity as a privacy tort and which has been cited as a quintessential privacy right of action.<sup>157</sup> It protects any "person" whose image is misappropriated for commercial purposes and does not require that the image have monetary value.<sup>158</sup> Meanwhile, the Pennsylvania statute and others like it have reliably been held to be sound in intellectual property.<sup>159</sup>

Therefore, what makes one statute an intellectual property action and one a privacy action in these cases seems to be the requirement of commercial value for the name or likeness. The Pennsylvania statute requires a commercial value for a right of publicity action, but the New York statute does not.<sup>160</sup> The *Ratermann* court also leaned on historical judicial interpretations of the New York statute, which specifically disclaimed that the statute was designed to "fill gaps" in New York intellectual property law.<sup>161</sup> This is not inherently contradictory given that the *Hepp* holding only applied to Pennsylvania law,<sup>162</sup> but such a distinction draws an extremely fine line between which statutes provide Section 230 immunity for the right of publicity and which do not: depending on whether the statute requires commercial value.

## 2. The Individual as a Digital Business: Where the Self Ends and Property Begins in the Digital Space

The "commercial value" standard opens right of publicity actions to noncelebrity plaintiffs.<sup>163</sup> In an age where any person can become a celebrity overnight from a viral tweet, meme, or video, it makes sense that an action in right of publicity would be available where a defendant has misappropriated a person's content for their own commercial purposes. Commercial value's historical connection to intellectual property readings of the right of publicity invites courts to entertain the idea that a noncelebrity

155. *Id.* § 50.

156. *Id.* §§ 50–51; 42 PA. STAT. AND CONS. STAT. ANN. § 8316 (West 2025).

157. *See* Prosser, *supra* note 43, at 385.

158. N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2025).

159. *See* Fry v. Ancestry.com Operations Inc., No. 22-CV-140, 2023 WL 2631387, at \*7 (N.D. Ind. Mar. 24, 2023); *Hepp v. Facebook*, 14 F.4th 204, 213–14 (3d Cir. 2021).

160. *Ratermann v. Pierre Fabre USA, Inc.*, 651 F. Supp. 3d 657, 669 n.5 (S.D.N.Y. 2023) (citing *Hepp*, 14 F.4th at 213–14).

161. *Id.* (quoting *Gautier v. Pro-Football, Inc.*, 106 N.Y.S.2d 553, 561 (App. Div. 1951), *aff'd*, 107 N.E.2d 485 (N.Y. 1952)).

162. *Id.* ("But the court took pains to emphasize the 'narrowness' of its holding, most notably for present purposes stressing that it applied only to Pennsylvania law and that Pennsylvania's law 'is limited.'" (quoting *Hepp*, 14 F.4th at 214)).

163. *See* Dustin Marlan, *The Dystopian Right of Publicity*, 37 BERKELEY TECH. L.J. 807, 827, 851 (2022) ("From a transactional perspective, identity-holders, often celebrities, enter agreements to transfer their publicity rights to others, sometimes in exchange for vast compensation." (emphasis added)).

may have intellectual property rights in a potentially valuable likeness, should a party deem that likeness valuable.<sup>164</sup>

The concept of commercial value is malleable, as seen in *Fry*.<sup>165</sup> The lines between public and private personas are increasingly blurred in reality television and social media, and any ordinary person might become an influencer capable of monetizing personal social media posts. In this light, the intellectual property and privacy conceptions of the right of publicity might not be mutually exclusive, or even different, because commercial value has been expanded to apply to individuals who would previously have been considered private citizens.<sup>166</sup> After all, as the *Fry* court acknowledged, even the ordinary anonymous person's likeness may have commercial value; fame is far from an objective metric.<sup>167</sup>

Prosser's concept of "public attention" meant that the attention must exist before a right of action is asserted and "the defendant . . . cannot himself create a public figure."<sup>168</sup> However, this is precisely what the *Fry* court has done. It opened the courthouse doors for noncelebrities to prevail in direct right of publicity actions against digital platforms,<sup>169</sup> consistent with Prosser's somewhat democratic observation that "the appropriation cases . . . create in effect, for every individual, a common law trade name, his own, and a common law trade mark in his likeness."<sup>170</sup> By creating a sort of *res ipsa loquitur* standard for the commercial value of a persona in cases of commercial use and exploitation, the *Fry* court has potentially made any injured person a public figure.<sup>171</sup> The private sphere and the commercial zone have not only been blurred by the influencer economy; they have also been blurred by the courts. This opens the courthouse to right of publicity actions for noncelebrity individuals, in a development reminiscent of the right of publicity's origins as a right of privacy available to anyone.<sup>172</sup>

It is also important to note that the misappropriated image at issue in *Ratermann* was originally created in a commercial context, in the course of Ratermann's work as a model.<sup>173</sup> The *Hepp* and *Fry* courts would undoubtedly have no issue granting the plaintiff in *Ratermann* an intellectual property-based right of publicity action because

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164. See Nanci K. Carr, *Social Media and the Internet Drive the Need for a Federal Statute To Protect the Commercial Value of Identity*, 22 TUL. J. TECH. & INTELL. PROP. 31, 48 (2020) (acknowledging that social media has illustrated the value of "friend endorsements" by noncelebrities, illustrating the need for a federal right of publicity).

165. See *Fry v. Ancestry.com Operations Inc.*, No. 22-CV-140, 2023 WL 2631387, at \*6–7 (N.D. Ind. Mar. 24, 2023).

166. See Marlan, *supra* note 163, at 811–12.

167. *Fry*, 2023 WL 2631387, at \*6–7.

168. Prosser, *supra* note 43, at 411.

169. See *Fry*, 2023 WL 2631387, at \*6–7.

170. Prosser, *supra* note 43, at 423.

171. *Fry*, 2023 WL 2631387, at \*6.

172. See *supra* Part II.A for a discussion of the origins of the right of publicity. See also Mark Bartholomew, *The Political Economy of Celebrity Rights*, 38 WHITTIER L. REV. 1, 21–22 (2018) ("Rather than requiring proof of commercial value in the plaintiff's identity, courts have come to presume such value from the defendant's unauthorized use, a doctrinal change friendly to less-than-famous litigants." (citing 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY §§ 3:2, 4:7 (2d ed. 2016))).

173. *Ratermann v. Pierre Fabre USA, Inc.*, 651 F. Supp. 3d 657, 663 (S.D.N.Y. 2023).

of the image's clear commercial value.<sup>174</sup> However, because commercial value is not a component of the New York statute,<sup>175</sup> Ratermann's right of publicity claims against third parties were dismissed under Section 230.<sup>176</sup> The privacy conception of the right of publicity therefore only places culpability with the misappropriator and not any platform that hosts the misappropriator's content, reaching the same result that the Ninth Circuit reached in *Perfect 10*.<sup>177</sup> This directly contradicts more "democratic" recent developments in the right of publicity.

However, this Comment does not advocate for the treatment of commercial value as a "presumption" in a case where misappropriation of a persona has occurred.<sup>178</sup> Instead, it advocates for reading *Fry* as a creature of the age of microtargeted online advertising and applying its reasoning to a federal right of publicity built on value in the eyes of a specified perceiving audience.<sup>179</sup>

#### B. *Commercial Value, Intellectual Property, and the Right of Publicity: Clarifying Section 230 Liability*

A possible solution to this problem could be clarification of the definition of commercial value in a persona and how this commercial value fits into a right of publicity action. The line between commercial and noncommercial speech is already well-defined in right of publicity statutes, which generally forbid actions in the traditional areas of fair use.<sup>180</sup> However, the difference between the use of a persona with commercial value and the use of a persona that does not have commercial value is clearly blurrier, as demonstrated by *Fry*.<sup>181</sup> The *Fry* court's expansion of commercial value to likenesses of ordinary people within their social circles acknowledges the

174. *Hepp v. Facebook*, 14 F.4th 204, 206, 214 ("For instance, [the Pennsylvania right of publicity statute] provides a right of publicity cause of action only for those whose valuable interest in their likeness 'is developed through the investment of time, effort, and money.'"); *Fry*, 2023 WL 2631387, at \*\*6–7 ("Though precedent on the issue is not voluminous, the Court finds it fairly obvious that Mr. Fry's name and likeness have commercial value. Why else would Ancestry bother to include it in its advertisements?").

175. *Id.* at 668–70.

176. *Id.* Notably, the trial court dismissed Ratermann's right of publicity action against QuickFrame because she did not state a plausible claim that QuickFrame actually misappropriated the image. The court did not dismiss the right of publicity claim against Pierre Fabre because Ratermann successfully alleged misappropriation in fact but did dismiss her plea for exemplary damages because she could not prove that the misappropriation was "knowingly" done, a statutory requirement for those damages. *Id.* at 671–72.

177. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118–19 (9th Cir. 2007).

178. *Contra Bartholomew*, *supra* note 172, at 21–22 ("Rather than requiring proof of commercial value in the plaintiff's identity, courts have come to presume such value from the defendant's unauthorized use, a doctrinal change friendly to less-than-famous litigants." (citing 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* §§ 3:2, 4:7 (2d ed. 2016))).

179. *See TAN, APPROPRIATION OF FAME*, *supra* note 20, at 71, for the broad contours of the place of the "audience" recognition in the right of publicity: "Today, courts in different states usually agree that only individuals who are recognisable by the public from the alleged misappropriation may have any claim for an unauthorised use of identity; it is not sufficient that only the plaintiff knows that his or her persona has been used without consent." This Comment argues for extrapolating this broader theory to the world of online advertising.

180. *See, e.g., IND. CODE ANN. § 32-36-1-1(e)(1)–(4)* (West 2024).

181. *See Fry v. Ancestry.com Operations Inc.*, No. 22-CV-140, 2023 WL 2631387, at \*6–7 (N.D. Ind. Mar. 24, 2023); *TAN, APPROPRIATION OF FAME*, *supra* note 20, at 71.

tightening and increasing specificity of internet audience bubbles but fails to clarify whether this means the right of publicity has been democratized.<sup>182</sup> It provides no analytical benchmarks to determine where commercial value ends for targeted online advertising. It also fails to acknowledge that only some images, especially in the internet economy, have commercial value. An influencer's non-advertisement personal posts might still have value in terms of the attention they draw to their persona, which may later be extrapolated to advertising dollars because it helps their reputation and builds their following.<sup>183</sup>

Prosser worried that his "appropriation" tort might swallow the defamation tort entirely,<sup>184</sup> and it is apparent that the privacy and intellectual property conceptions of the right of publicity are becoming increasingly tangled. The *Fry* court's loosening of the commercial value standard indicates that the torts might even be merging. The Ninth Circuit's policy concerns about the right of publicity were perhaps more prescient than it realized, given that many personas' commercial value is now derived from user-generated content on third-party digital platforms.<sup>185</sup> However, there is a way to determine whether a likeness is intellectual property: determining whether the misappropriated content itself is commercial speech or personal speech and extrapolating its commercial value from the projected or actual value of that speech.

One might return to the image at issue in *Hepp* as an example. There, the image of Hepp was allegedly taken in a noncommercial setting without her knowledge.<sup>186</sup> The image was also not alleged to have been used in the capacity of Hepp's career as a public news anchor or the prospect of dating her *in her capacity as a celebrity*.<sup>187</sup> Instead, it was allegedly used to promote the availability of the broader category of "single women" on a dating site.<sup>188</sup> But does Karen Hepp have sufficient public recognition for commercial value to exist in her image outside the audience that watches and knows her—that is, outside of Philadelphia? Would her image be intellectual property outside of her news market or outside her former news markets in New York City and Connecticut? If commercial value is tied to public recognition, then whether a plaintiff has a right of action in cases like *Hepp* should depend on the locality and the plaintiff's level of notoriety in the eyes of those who viewed the

182. See *Fry*, 2023 WL 2631387, at \*7; *Fraleigh v. Facebook, Inc.*, 830 F. Supp. 2d 785, 800 (N.D. Cal. 2011) (finding that plaintiffs "identified a direct, linear relationship between the value of their endorsement of third-party products, companies, and brands to their Facebook friends, and the alleged commercial profit gained by Facebook," and thus stated an injury sufficient to grant Article III standing).

183. See Grace Greene, Comment, *Instagram Lookalikes and Celebrity Influencers: Rethinking the Right to Publicity in the Social Media Age*, 168 U. PA. L. REV. ONLINE 153, 179–80 (2020) (discussing influencers' right of publicity, derived from the commercial value of their likenesses).

184. Prosser, *supra* note 43, at 422–23.

185. See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) ("Because material on a website may be viewed across the Internet, and thus in more than one state at a time, permitting the reach of any particular state's definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress's expressed goal of insulating the development of the Internet from the various state-law regimes.").

186. *Hepp v. Facebook*, 14 F.4th 204, 206 (3d Cir. 2021).

187. See *id.* at 206–07; see also Second Amended Complaint, *Hepp v. Facebook*, No. 19-CV-4034-JMY, 2022 WL 2704601 (E.D. Pa. Feb. 12, 2022).

188. *Id.* at 207.

misappropriated material.<sup>189</sup> Taking these factors into account would keep actions available to plaintiffs who suffer reputational and financial harm, while encouraging plaintiffs whose images hold little public recognition in context to instead pursue a privacy action.

Social media website policies illustrate the workability of this paradigm. Instagram and TikTok now require paid promotion disclaimers on sponsored posts, while nonmonetized personal posts do not require a disclaimer.<sup>190</sup> YouTube videos of personal content can be monetized, but creators must have one thousand subscribers with either “4,000 valid watch hours in the last 12 months, or . . . 10 million valid public Shorts views in the last 90 days.”<sup>191</sup> The line that social media companies have set for commercial use of personal images is effectively a contract allowing endorsement on the site, which implies that the persona has sufficient public recognition to make the prospect of endorsement appealing for advertisers.<sup>192</sup> This hews closely to the traditional understanding of the right of publicity as a “celebrity” action, particularly with respect to misappropriation of the likeness for commercial purposes.<sup>193</sup> Monetized personal content is thus distinguished from nonmonetized personal content, which has no literal commercial value to the user regardless of its popularity.<sup>194</sup>

Incorporating notoriety into “monetizability,” and therefore commercial value, would narrow the availability of right of publicity actions, but it would also prevent

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189. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46(d) (AM. L. INST. 1995); TAN, APPROPRIATION OF FAME, *supra* note 20, at 71 (“[T]he ultimate issue is identifiability by the audience from the defendant’s use.”); *id.* at 99 (“Thus the relevant inquiry for identifiability ought to be: [I]s the plaintiff reasonably and readily identifiable by a more than de minimis number of people from the total context of the defendant’s use?” (emphasis omitted)); *id.* at 119–20 (“More recently, the California Court of Appeal affirmed that ‘[t]he critical question is [the plaintiff’s] ability to attract the attention and *evoke a desired response* in a particular customer audience’ and that the response is a kind of ‘*recognition value* generated by [the plaintiff].’” (alterations in original)); *id.* at 134 (“Drawing on the insights regarding the meaning transfer from the celebrity semiotic sign to the products that the sign is associated with, the relevant inquiry for the courts when evaluating whether an appropriation has taken place should be: [I]s the commercial benefit sought by the defendant directly and substantially connected to the associative value of the plaintiff’s identity?” (emphasis omitted)).

190. See *Disclosures 101 for Social Media Influencers*, FED. TRADE COMM’N (Nov. 2019), <https://www.ftc.gov/business-guidance/resources/disclosures-101-social-media-influencers> [<https://perma.cc/SMV9-2FW4>].

191. *YouTube Partner Program Overview & Eligibility*, YOUTUBE HELP, <https://support.google.com/youtube/answer/72851> [<https://perma.cc/KRW6-MRBT>] (last visited Apr. 28, 2025).

192. See *id.* (detailing a program to apply for “eligibility” to allow commercial sponsorship of individual content posted on the platform based on popularity, and thus potential realizable value of the persona and account that would be sponsored).

193. See, e.g., *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 836–37 (6th Cir. 1983); *Arenas v. Shed Media U.S. Inc.*, 881 F. Supp. 2d 1181, 1189 (C.D. Cal. 2011) (“If, as is probable, Govan mentions Arenas by name on *BWLA*, it will be in the context of his status as a famous basketball player. Consequently, Arenas is likely to prove the first two elements of commercial misappropriation.”), *aff’d*, 462 F. App’x 709 (9th Cir. 2011).

194. Of course, this does not take into account that personal images can be used to grow someone’s following. Emma Perot, *The Conflict Between the Copyright of Paparazzi and the Right of Publicity of Celebrities*, 30 TEX. INTELL. PROP. L.J. 121, 161 (2021).

confusion between intellectual property and privacy claims. Privacy torts would still be available to private citizens whose privacy is invaded by having their image misappropriated and spread across the internet. However, extra protection in the digital space should only be available, if at all, to those defendants whose image has commercial value on those platforms in its capacity as that image, because that is where the persona ceases to be personal and becomes a business.

The difference between images protected by intellectual property and images protected by privacy rights can be explained using a familiar, invasive, and modern phenomenon: paparazzi photographs.<sup>195</sup> Although the images are of the celebrity, whose right to privacy may have well been violated, photographers or their agencies hold the intellectual property rights to those images.<sup>196</sup> Since the late 2010s, there has been a spate of copyright infringement actions by photo agencies and paparazzi against celebrities who have reposted their photos on Instagram.<sup>197</sup> These actors might not naturally seem at odds; after all, the increased exposure offered by paparazzi photos increases the value of the celebrity's persona.<sup>198</sup> However, copyright holders' rights to specific works outweigh celebrities' rights to control their personas more broadly.<sup>199</sup>

Although these cases have settled out of court and have yet to go to trial, “[a]ssessing the commercial use of the photographs posted by celebrities is likely to be a contentious issue when [the issue] eventually goes to trial.”<sup>200</sup> This is because Instagram acts as a value-generating platform for many celebrities who might engage in paid advertising by wearing certain brands in paparazzi photographs, even if they do not attach the disclaimers required by the Federal Trade Commission (FTC).<sup>201</sup> Indeed, even a post that is unpaid but increases a celebrity's popularity, and therefore the value of paid posts, could be considered commercially valuable by a court.<sup>202</sup> If paparazzi photographs reposted on Instagram by the depicted celebrity were determined to be commercially valuable, copyright holders could argue that the use of the photographs was commercial and therefore not fair use.<sup>203</sup> Although Dr. Emma Perot is squeamish about granting celebrities a robust fair-use defense against paparazzi copyright claims, it seems sensible to draw the line where the FTC does: whether there was payment for a post.<sup>204</sup> In those cases, a copyright claim is still likely to outweigh a right of publicity claim where the copyrighted material was used in a post that has commercial value.<sup>205</sup>

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195. *Id.*

196. See Arunima Sharma, *The Copyright Tussle Between Paparazzi and Celebrities over Celebrity Photographs*, IP MATTERS (Jan. 21, 2022), <https://www.theipmatters.com/post/is-it-illegal-to-post-your-own-photograph-the-paparazzi-s-rights> [<https://perma.cc/R9QR-T83U>].

197. See Perot, *supra* note 194, at 131–37.

198. *Id.* at 128.

199. *Id.* at 130.

200. *Id.* at 160.

201. *Id.* at 160–61.

202. *Id.* at 161.

203. *Id.* at 160–61.

204. *Id.* at 160–62, 183.

205. See *id.* at 183. *Contra* Courtney Kim, Note, *Analyzing the Circuit Split over CDA Section 230(e)(2): Whether State Protections for the Right of Publicity Should Be Barred*, 96 S. CAL. L. REV. 449, 462 (2022) (“Though an argument that the state-based right of publicity is preempted by federal copyright law exists, most judicial decisions have rejected it. The Sixth and Ninth Circuits, as well as some district courts,

Therefore, paparazzi could bring actionable copyright claims where value is at stake, but not for posts made in the celebrity's capacity as a private person rather than a commercialized persona.<sup>206</sup>

Professor Jennifer Rothman has also examined the connections between trademark law and the right of publicity, arguing that trademark's origins in protecting an owner's identity and reputation with respect to her goods are similar to the modern right of publicity.<sup>207</sup> Although the two are often at odds, especially in cases of personal marks, she argues that "trademark law and the right of publicity can work in tandem to protect a person's commercial and personality-based interests" under a "trademark preemption analysis" where state right of publicity law would yield to federal trademark law in appropriate cases.<sup>208</sup> Where "courts haphazardly prioritize celebrities' publicity rights over creators' First Amendment rights," the uniformity and consistency that federal intellectual property law provides have become an appealing option.<sup>209</sup> Furthermore, this demonstrates that, for better or worse, the "value" conception of the right of publicity has superseded the privacy-based conception of rights to dignity and control.<sup>210</sup>

The Third Circuit thus erred when it held that the commercial "value [of Hepp's likeness in endorsements] depends on her ability to control the use of her likeness."<sup>211</sup> Control is only *one* aspect of the right of publicity—and it is not the primary one.<sup>212</sup> Although others have written that "[t]he right of publicity affords an individual commercial control of his or her persona,"<sup>213</sup> this does not equate to absolute control of the use of images of that persona. Under that definition, the commercial value of the plaintiff's likeness in *Fry* would rest in the plaintiff's ability to reserve it for his private circle and restrict it for his own purposes. But this reasoning sounds more like a privacy action than an intellectual property one; it does not involve commercial value at all, but instead reputational and dignitary harms.

Indeed, the *Fry* court found that the commercial value of the plaintiff's image came from its significance to those who perceived it, not from the plaintiff's ability to

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have concluded that [S]ection 301, the Copyright Act's explicit preemption clause, never preempts the right of publicity because the right of publicity is generally not equivalent to the rights protected by the Copyright Act." (footnote omitted)).

206. See Perot, *supra* note 194, at 182 ("The celebrity still has a strong right which can be deployed against unauthorized commercial uses of persona, even though she cannot use the copyright protected paparazzi photographs without infringing copyright.").

207. See Rothman, *supra* note 39, at 1278–81, 1296–1300.

208. *Id.* at 1277–78.

209. Marlan, *supra* note 163, at 810–11.

210. See Rothman, *supra* note 39, at 1340–42 (explaining dignitary publicity rights contra commercial publicity rights); e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (discussing the right to privacy as the freedom from government intrusion into sensitive personal affairs that are for the private individual to determine, which is a dignitary concern).

211. *Hepp v. Facebook*, 14 F.4th 204, 206 (3d Cir. 2021).

212. See Rothman, *supra* note 39, at 1340–42 (proposing that the right of publicity is composed of four "objectives": the market-based right of commercial value and right of performance, and the "personality-based" right of control and right of dignity).

213. E.g., Perot, *supra* note 194, at 145 (detailing First Amendment exceptions to the right of publicity, such as news, and the broad use of the transformative use test for expressive works in right of publicity cases).

control it.<sup>214</sup> This significance provides a new, more expansive definition of value that resolves some tensions between the personal and the commercial that are present in *Hepp*.<sup>215</sup> After all, if an image has significance in a commercial context because of *who* it represents, as it did in *Fry*,<sup>216</sup> it has commercial value because of the individual depicted. But if its significance does not derive from *whom* the persona depicted in the image is, but instead from other qualities like general attractiveness, its commercial value does not relate to the persona's commercial value. This is a serious problem when viewed in the light of the Third Restatement, which requires a showing of association between the persona at issue and the identity of the plaintiff.<sup>217</sup>

This refining of the role of commercial value could help clarify the applicability of the right of publicity in an age of widely disseminated photographs on the internet, the use of those photographs in monetized content, and increasingly specified networks of targeted advertising. However, asserting a right of publicity still necessitates an injury, which also might be hard to articulate in a case like *Fry* where the persona was given commercial value by the misappropriator, rather than by the person himself.<sup>218</sup> Framing this injury so that it is tied to the key component of most right of publicity actions—the commercial value of the persona—would bring the action in line with other intellectual property actions.

### 1. Unjust Enrichment as Misappropriation of Value

If federal right of publicity actions should depend on the commercial value of the persona and not control over that persona, the injury should not consist of a mere loss of control of the persona, which sounds strikingly similar to right of privacy actions.<sup>219</sup> Instead, the injury should constitute a loss or diminishment of the core of the right of publicity: the commercial value of what exactly was misappropriated in the context of the misappropriation itself.<sup>220</sup> This is not the same as simple misappropriation of a persona, which is the misappropriation generally at issue in right of publicity cases.<sup>221</sup> It is instead the misappropriation of the “associational” value of the identity for the

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214. *Fry v. Ancestry.com Operations Inc.*, No. 22-CV-140, 2023 WL 2631387, at \*7 (N.D. Ind. Mar. 24, 2023); cf. TAN, APPROPRIATION OF FAME, *supra* note 20, at 119–20 (noting that the California Court of Appeal has acknowledged that the plaintiff's “ability to attract the attention and *evoke a desired response* in a particular customer audience” is integral to the action (quoting *Christoff v. Nestlé USA Inc.*, 62 Cal. Rptr. 3d 122, 143 (Ct. App., 2007), *aff'd in part, rev'd in part*, 213 P.3d 132 (Cal. 2009))).

215. See, e.g., *Hepp*, 14 F.4th at 206–07 (detailing facts demonstrating that a misappropriated image of Hepp was taken while she was shopping in a private capacity, but describing her as a well-known television personality even in this private capacity).

216. See *Fry*, 2023 WL 2631387, at \*7.

217. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46(d) (AM. L. INST. 1995).

218. See *Fry*, 2023 WL 2631387, at \*7.

219. Tan, *Affective Transfer*, *supra* note 20, at 282; see also *Hepp*, 14 F.4th 204; e.g., N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2025).

220. See Tan, *Affective Transfer*, *supra* note 20, at 282–85; TAN, APPROPRIATION OF FAME, *supra* note 20, at 109–11 (“The courts appeared to have predominantly relied on an unjust enrichment rationale to prevent the commercial free-rider from exploiting the associative value of the plaintiff's identity.”).

221. Tan, *Affective Transfer*, *supra* note 20, at 282–84; see also *Hepp*, 14 F.4th at 208 (discussing how Hepp failed to prove a “strong connection to the misappropriation of Hepp's likeness” for two other defendants she had sued, Reddit and Imgur).

misappropriator's own use.<sup>222</sup> This misappropriation of commercial value injury distinguishes the right of publicity from actions that private persons can pursue and highlights the property issues inherent in the action in most jurisdictions.<sup>223</sup> It also captures the kind of pecuniary injury at issue in other intellectual property claims: The harm comes from the use of the property to unjustly enrich the misappropriator, not from the misappropriation itself.<sup>224</sup>

Celebrities' estates, for example, are often "concerned with preventing the unjust enrichment of the photographers' estates" that hold the copyright in photographs of deceased celebrities.<sup>225</sup> These estates often argue that the photographs' continued value is a result of the deceased celebrity's notoriety, and the celebrity's estate should thus be compensated for the commercial value it lends to the photograph.<sup>226</sup> However, the true injury in these cases is to the public perception of the celebrity from unpredictable or "distasteful" unlicensed uses of the photograph, because this would damage the persona's value.<sup>227</sup> In most right of publicity claims, damages are calculated according to "financial loss."<sup>228</sup> The injury in right of publicity cases already relies on the use of that value by the defendant for its own unjust enrichment;<sup>229</sup> articulating the injury as such in a codified law merely clarifies the point.

## 2. Why Reframing Value Matters for Third Parties: An Argument for a Federal Right of Publicity That Resolves the Circuit Split

If commercial value is what grants a right of publicity, and diminishment of this value is the injury at issue in a right of publicity action, then the liable parties should naturally be those who were the proximate cause of the injury. A direct infringer, like Ancestry.com in *Fry*,<sup>230</sup> should clearly be liable for diminishment of value caused by

222. Tan, *Affective Transfer*, *supra* note 20, at 282–85.

223. See, e.g., Perot, *supra* note 194, at 145 n.168. Dr. Perot adds that "some courts have considered damages for emotional distress" in right of publicity cases. *Id.* (first citing *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 880 (S.D.N.Y. 1973) (New York right of publicity action under the privacy statute); and then citing *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1103 (9th Cir. 1992)). *Contra* Tan, *Affective Transfer*, *supra* note 20, at 285 (arguing that "considerations of commercial appropriation and the First Amendment defense ought to be kept separate").

224. Ownership of a creation, and the ability to monetize that creation as a consequence of that ownership, is inherent to the concept of intellectual property. See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (noting that Ohio law's "[right of publicity] interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation"); TAN, APPROPRIATION OF FAME, *supra* note 20, at 111; Tan, *Affective Transfer*, *supra* note 20, at 282–85.

225. Matthew S. Ingles, Comment, *Picture This: Resolving the Conflict Between Postmortem Celebrity Publicity Rights and Deceased Photographers' Copyrighted Images*, 40 SETON HALL L. REV. 311, 334 (2010).

226. *Id.* at 334–35.

227. *Id.* at 336, 338–39.

228. Perot, *supra* note 194, at 145 n.168.

229. See Tan, *Affective Transfer*, *supra* note 20, at 310 ("This article urges a return to first principles where the right of publicity was evolved to prevent unjust enrichment by providing a remedy against the exploitation of the goodwill or reputation that an individual has developed in his or her identity."). The facts of *Hepp* are an excellent example of this. See *Hepp v. Facebook*, 14 F.4th 204, 206–07 (3d Cir. 2021).

230. *Fry v. Ancestry.com Operations Inc.*, No. 22-CV-140, 2023 WL 2631387, at \*7 (N.D. Ind. Mar. 24, 2023).

its actions. The question of third-party liability is more difficult to answer, but an analysis of both proximate cause and the legal duties owed by third-party content providers is instructive. Third-party platforms like Facebook act as both “bulletin boards” and advertisers; they generate revenue from targeted advertising on people’s pages, but this advertising is largely not for their own products.<sup>231</sup> Advertisements are targeted based on user data, but Facebook does not generate the content in the advertisements.<sup>232</sup> Imposing a duty on third parties to police such advertisements for unlicensed photographs would generate immense costs and litigation, chill speech protected by the First Amendment, and contravene the original purpose of Section 230: enabling the development of new Internet sites and technologies.<sup>233</sup> However, if the right of publicity is firmly recognized as intellectual property in federal law, third-party content hosts would have an incentive to develop new technologies to prevent infringement.<sup>234</sup> Increased and more consistent liability under a more inclusive right of publicity would encourage policing of commercial misuse of individuals’ names, images, or likenesses, and make compliance standards clearer. Under such a regime, people like Patty Ratermann would be able to pursue actions that were previously unavailable under Section 230.

There is an additional reason to believe that a federal right of publicity grounded in the misappropriation of the targeted value of a plaintiff’s identity could eventually bring better uniformity to right of publicity law while making justice available to plaintiffs. Professor Rothman has argued that patent law justifies federal preemption of state right of publicity claims when it comes to legal actions by trademark owners.<sup>235</sup> But including state right of publicity claims under the intellectual property exception, as the *Hepp* court did,<sup>236</sup> puts state intellectual property claims on an equal level with federal intellectual property law in Section 230 legal cases, contrary to Professor Rothman’s preemption theory.<sup>237</sup> And a federal law based on the privacy theory, as seen in *Ratermann*,<sup>238</sup> is a dead end for plaintiffs; if liability for misappropriation and diminishment of a persona’s commercial value cannot be extended to third parties, no

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231. *About Facebook Ads*, FACEBOOK, [https://www.facebook.com/ads/about/?entry\\_product=ad\\_preferences](https://www.facebook.com/ads/about/?entry_product=ad_preferences) [<https://perma.cc/335J-NKKD>] (last visited Apr. 28, 2025); see also KOSSEFF, *supra* note 65, at 37 (discussing the origins of the “bulletin board” metaphor for third-party web content hosts).

232. *About Facebook Ads*, *supra* note 231. But see *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 801–03 (N.D. Cal. 2011) (denying Facebook’s motion to dismiss under Section 230 immunity because Facebook “transformed the character of Plaintiffs’ words, photographs, and actions into a commercial endorsement to which they did not consent” when misappropriating their likenesses for its Sponsored Stories feature).

233. See VALERIE BANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 1 (2021).

234. Of course, this can come with its own set of problems; YouTube accounts can be unfairly suspended using Digital Millennium Copyright Act (DMCA) “copyright strikes,” for example. Timothy S. Chung, Comment, *Fair Use Quotation Licenses: A Private Sector Solution to DMCA Takedown Abuse on YouTube*, 44 COLUM. J.L. & ARTS 69, 80–84 (2020).

235. Rothman, *supra* note 39, at 1339–40 (“[T]he Supreme Court has recognized the dangers of piecemeal, conflicting state laws that set up a clash with federal patent entitlements, not only directly, but also by virtue of being unpredictable and variable from state to state.”).

236. *Hepp v. Facebook*, 14 F.4th 204, 212 (3d Cir. 2021).

237. Rothman, *supra* note 39, at 1339–40.

238. See *Ratermann v. Pierre Fabre USA, Inc.*, 651 F. Supp. 3d 657, 670 (S.D.N.Y. 2023).

cause of action can survive regardless of whether state intellectual property claims are available.

In light of the phenomenon that “[d]istinctions between public and private figures make little sense today” in right of publicity actions,<sup>239</sup> incorporation of the misappropriation-of-value injury into a federal intellectual property law should reassure those who are concerned about over-availability of the action to noncelebrities. This commercial value standard is inclusive of plaintiffs whose image has value in narrow contexts.<sup>240</sup> Meanwhile, if a likeness has *not* been misappropriated *because* of the persona it represents, an action should not be available because the commercial value of the persona itself has not been injured.<sup>241</sup>

Although the value-misappropriation analysis might give more credence to the intellectual property right of publicity than the privacy one, it also allows actions where a nonfamous plaintiff’s value has been misappropriated in the context of their social circles.<sup>242</sup> It thus preserves the action for those who have suffered pecuniary harm to their likenesses, regardless of whether the individual is a celebrity.<sup>243</sup> The misappropriation theory also comports with fair use doctrines in other areas of intellectual property law, which allow noncommercial uses of protected property regardless of whether the user holds a license.<sup>244</sup>

This clarification of the law does not resolve the debate as to whether the intellectual property exception applies to state and federal law, or federal law only. However, it does make a compelling argument for the Ninth Circuit’s articulated desire for uniformity in *Perfect 10*<sup>245</sup> and for creating a federal right of publicity law that incorporates property-oriented theories of value tailored to the specific viewing audience. This would eliminate odd inconsistencies like *Ratermann*, where state statutory construction rendered a claim unavailable that the same court *would* have allowed to proceed had it sounded in trademark or copyright law.<sup>246</sup> Notably, the *Ratermann* court did not mention *Atlantic Recording* in its examination of decisions where the right of publicity fell under the intellectual property law exception.<sup>247</sup> The court used *Hepp* to instead underscore that the Third Circuit dealt with a very different

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239. ROTHMAN, *supra* note 2, at 183.

240. See *Fry v. Ancestry.com Operations Inc.*, No. 22-CV-140, 2023 WL 2631387, at \*7 (N.D. Ind. Mar. 24, 2023) (holding that the plaintiff’s image had commercial value in the context of his circle of acquaintances); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (AM. L. INST. 1995) (“[A]n evaluation of the relative fame of the plaintiff is more properly relevant to the determination of appropriate relief.”).

241. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d; TAN, APPROPRIATION OF FAME, *supra* note 20, at 134–35.

242. See *Fry*, 2023 WL 2631387, at \*7.

243. See Tan, *Affective Transfer*, *supra* note 20, at 301–02 (discussing injury based on a connection to the “associative value” of a persona).

244. See, e.g., Rothman, *supra* note 39, at 1345, 1347–48; Tan, *Affective Transfer*, *supra* note 20, at 285–86, 309 n.201.

245. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118–19 (9th Cir. 2007).

246. *Ratermann v. Pierre Fabre USA, Inc.*, 651 F. Supp. 3d 657, 668–70 (S.D.N.Y. 2023); see also *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 702–03 (S.D.N.Y. 2009).

247. *Ratermann*, 651 F. Supp. 3d at 669 n.5.

statute than New York's, and *Hepp* thus did not apply.<sup>248</sup> This reasoning is appropriate, but, strangely, the court did not reveal its stance on the intellectual property exception's applicability to state law.<sup>249</sup> Directly criticizing *Atlantic Recording* probably would not have been appropriate under the court's reasoning that the right of publicity is a state law privacy action.<sup>250</sup> However, this unwillingness to take a stance on the circuit split and its origins demonstrates the split's unworkability and the need for an action that can be consistently enforced in trial courts.

A federal intellectual property right of publicity grounded in misappropriation of targeted value would lead to the same result in any Section 230 federal right of publicity action: Section 230 immunity would not apply. The Third Restatement states that the plaintiff should be identifiable in the material at issue in a right of publicity action,<sup>251</sup> so adding the requirement of identifiability *to the audience* would clarify the law in cases of online defendants. The Third Restatement already states that "an evaluation of the relative fame of the plaintiff is more properly relevant to the determination of appropriate relief" than the celebrity of the plaintiff.<sup>252</sup> More specific identifiability would bridge these parts of the restatement and reinforce the connection between the tort and its damages.

The misappropriation-of-value conception would not necessarily grant someone like Karen Hepp a right of action if she were unable to prove that the value of her image in the advertisement was connected to her identity as a news anchor. It would instead limit right of publicity actions to those where the plaintiff suffered pecuniary loss in a commercial capacity. Privacy actions, meanwhile, would still serve their traditional purpose of addressing misuse of a likeness without an injury to its value. It could thus also provide a right of action for plaintiffs like Patty Ratermann, for whom it would only be unavailable because of the statutory quirks of their jurisdictions.<sup>253</sup>

The intellectual property misappropriation right of publicity need not swallow the right of privacy whole; instead, it would track the well-recognized dichotomy between commercial and noncommercial speech.<sup>254</sup> It would also accommodate the realities of targeted and microtargeted advertising, where likenesses are often used specifically because the target audience is more likely to recognize and respond to them.<sup>255</sup> These

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248. *Id.*

249. See *Hepp v. Facebook*, 14 F.4th 204, 210 (3d Cir. 2021) (citing *Atl. Recording Corp.*, 603 F. Supp. 2d at 703–04).

250. See *Ratermann*, 651 F. Supp. 3d at 669 n.5.

251. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (AM. L. INST. 1995).

252. *Id.*

253. See *Ratermann*, 651 F. Supp. 3d at 668–70.

254. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 n.21 (1993) ("The interest in preventing commercial harms justifies more intensive regulation of commercial speech than noncommercial speech even when they are intermingled in the same publications. On the other hand, the interest in protecting the free flow of information and ideas is still present when such expression is found in a commercial context."); Tan, *Affective Transfer*, *supra* note 20, at 275–77.

255. *Microtargeting*, INFO. COMM'R'S OFF., <https://ico.org.uk/for-the-public/microtargeting/> [https://perma.cc/368K-2M6D] (last visited Apr. 11, 2025); see also Michael Angelini, *Pay Up or Act Right: Extending the Right of Publicity to Online-Service Users Injured by Online Behavioral Advertising*, 31 NYSBA ENT., ARTS & SPORTS L.J. 31, 31 (2020) ("Online behavioral advertising necessarily depends on 'appropriat[ing] the commercial value of [the target of advertising]'s identity by using without consent the

new frameworks would simplify and clarify the law and could untangle some of the complicated web of right of publicity law in the digital space.

#### IV. CONCLUSION

The prominence of targeted online advertising combined with the circuit split on Section 230 demands a federal right of publicity that reflects modern realities. Not only does the law vary wildly across different states; it also fails to recognize the reality that a right of publicity grounded in property rights now applies to most people. Ad targeting analyzes the online behavior of private individuals and their networks and has begun to misappropriate likenesses based on their value to the micro-audience viewing the ad.<sup>256</sup> The privacy-based right is no longer necessary to preserve the action for the ordinary, nonfamous person. As seen in *Fry*, anyone's image can be valuable.<sup>257</sup> Conversely, just because someone is "famous" does not mean her image will have value in every context as a representation of her persona. Karen Hepp's relatively anonymized image was probably not misappropriated because she was Karen Hepp, but instead was an invasion of her privacy as an anonymous person in an everyday setting. Patty Ratermann's case represents something in between; although most people would probably not be able to identify a picture of her as "Patty Ratermann," her image probably was misappropriated because she appeared in it as a model.

Hinging the right of publicity on whether the value of the likeness is connected to the persona depicted would resolve many of the most difficult issues with the right of publicity. It would incorporate the Third Restatement's suggestion that a plaintiff must be "reasonably identifiable" to the perceiving audience.<sup>258</sup> It also adapts the right of publicity to current realities of impression-based targeted advertising—where many misappropriations, as seen in *Hepp*, *Ratermann*, and *Fry*, take place—which is often highly specific to users' browsing activity, demographics, and content preferences to optimize the possibility for content recognition and engagement.<sup>259</sup> Additionally, it would distinguish the right of publicity from the right to privacy, a distinction which is sorely needed in cases involving Section 230. Misappropriation of people's likenesses is as much of a problem now as it was in the nineteenth century, but with the advent of the digital space, it is time to separate the right of publicity from the right to privacy. We should create federal law that instead reflects the modern reality of online advertising venues where the right of publicity is at issue.

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person's name, *likeness*, [and] *other indicia of identity* for purposes of trade,' and falls within the right of publicity's scope as a result." (first and third alterations in original) (footnote omitted) (internal quotation marks omitted) (quoting *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 930 (6th Cir. 2008))).

256. See *Fry v. Ancestry.com Operations Inc.*, No. 22-CV-140, 2023 WL 2631387, at \*7 (N.D. Ind. Mar. 24, 2023).

257. See *id.*; Michael Mullins, Note, *New Fame in a New Ballgame: Right of Publicity in the Era of Instant Celebrity*, 45 IND. L. REV. 869, 893–94 (2012).

258. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (AM. L. INST. 1995); see also 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:7 (5th ed. 2024) (explaining that the plaintiff must be identifiable in order to "trigger infringement of the right of publicity," but noting that using different tests of identifiability applying to celebrities and noncelebrities has been proposed, with a less rigorous test applied to noncelebrities).

259. John et al., *supra* note 17.