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FRALEY V. FACEBOOK: THE RIGHT OF PUBLICITY IN ONLINE SOCIAL NETWORKS

Jesse Koehler[†]

“Nothing influences people more than a recommendation from a trusted friend. A trusted referral influences people more than the best broadcast message. A trusted referral is the Holy Grail of advertising.”

—Facebook Chief Executive Officer Mark Zuckerberg¹

As Mark Zuckerberg’s statement indicates, consumers often base their purchases and brand affinities on recommendations and endorsements by other consumers, especially by friends and family. But what happens when an advertiser sends to a consumer a message dressed up as an endorsement from a trusted friend?

First, the recipient of the message might distrust future referrals by that trusted friend. Second, if the recipient continues to receive similar messages from the same friend, the referrals may prove less and less meaningful to the recipient. Thus, the recipient’s “trusted friend” might lose some credibility with the recipient and subsequently lose some ability to influence the recipient. The now-less-trusted friend might be embarrassed by the unintended referral and might also suffer some harm to his reputation in the eyes of the recipient. Moreover, if the advertiser—or some intermediary—profits from the deceptive referral, the advertiser has been unjustly enriched by misappropriating the friend’s referral because the friend could have charged the advertiser directly to give such an endorsement.

This brief hypothetical demonstrates the dangers that result from a single abuse of an individual’s unique right to influence a friend or family member through an endorsement or referral. If an advertiser or intermediary abuses this right on a grander scale—such as in the context of an online social network—the harms become more substantial and more dangerous.

In January 2011, Facebook, Inc.—provider of the worldwide online social networking site based in Menlo Park, California—launched a new

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1. Claire Hoffman, *The Battle For Facebook*, ROLLING STONE, Sept. 15, 2010, <http://www.rollingstone.com/culture/news/the-battle-for-facebook-20100915>.

advertising service labeled “Sponsored Stories” that did just that.² “Sponsored Stories” exploited a user’s stated preferences for certain products and services (“Likes”) in conjunction with the user’s name and profile photo to convince that user’s “Friends” to similarly “Like” a product or service.³ Facebook enabled this service for all of its 600 million users as a default setting.⁴ Because Facebook users join the site for free, Facebook sustains itself through revenue generated by selling targeted advertising, such as “Sponsored Stories.”⁵ Advertisers paid Facebook for these “Sponsored Stories” advertisements in search of the value of these trusted referrals.⁶

Facebook users brought a class action lawsuit in the North District of California, *Fraley v. Facebook*, alleging that Facebook misappropriated their names, profile photos, and likenesses in paid advertisements without their consent.⁷ Specifically, plaintiffs alleged that Facebook violated their statutory right of publicity under California Civil Code section 3344 by unwillingly drafting Facebook users as “unpaid and unknowing spokespersons for various products.”⁸

In response to plaintiffs’ claims, Facebook alleged a defense under section 3344(d)’s exemption for newsworthiness.⁹ The court, in assessing this argument, found the plaintiffs to be “celebrities within their own Facebook social networks . . . [and thus] subjects of public interest among the same audience.”¹⁰ However, the court later concluded that even the newsworthy actions of such “celebrities” fall outside of section 3344(d)’s exemption where the speech in question is published for commercial purposes.¹¹

As a result, the court found the plaintiffs’ misappropriation allegations to properly establish monetary injury and denied Facebook’s motion to dismiss for failure to state a claim.¹² The parties have since reached a settlement with Facebook paying \$20 million for its massive-scale right of publicity violations.¹³

2. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 791 (N.D. Cal. 2011).

3. *Id.*

4. *Id.* at 790.

5. *Id.*

6. *Id.* at 792.

7. *Id.* at 790.

8. *Id.* at 792.

9. *Id.* at 804.

10. *Id.* at 805.

11. *Id.* (citing *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1002 (9th Cir. 2001)).

12. *Id.* at 812.

13. Nate Raymond, *Facebook pitches new \$20 million “Sponsored Stories” settlement*, REUTERS, Oct. 8, 2012, <http://www.reuters.com/article/2012/10/08/us-facebook-settlement-idUSBRE89712220121008>. This settlement followed U.S. District Court Judge

This Note delves into the tension between privacy and newsworthiness as exemplified by the way the right of publicity straddles the line between these conflicting concepts. Additionally, this Note examines the weaknesses in the current right of publicity law's limited focus on economic harm as applied in *Fraley* and considers alternative approaches that incorporate non-economic harm, along with the implications and applicability of such alternatives. Moreover, this Note places a special emphasis on how the tension between privacy and newsworthiness takes on a new form in light of changing technology—specifically online social networks—and on resolving this tension in the context of the new types of fora that the Internet provides.

Part I frames the latter discussion by examining the legal history leading to the development of the right of publicity at common law through privacy tort and introduces the California statutory protection for the right of publicity.

Part II delves into the right of publicity's internal tension between privacy rights and newsworthiness. It outlines the historical relevance of newsworthiness as a defense to a right of publicity claim, provides an example of how the standard has developed in defamation law in the face of privacy constraints, and takes a brief look at California's statutory exemption for newsworthiness and the relevant case law.

Part III focuses on the difficulty that non-celebrity plaintiffs face in pleading and proving harm in right of publicity cases. It explores the development of word-of-mouth advertising and its expanded capabilities online, especially for social marketing in online social networks. The discussion emphasizes the economic and non-economic harms that result from abuse of a non-celebrity's right of publicity via unauthorized word-of-mouth messages. Additionally, Part III examines the court's rulings in Facebook's previous legal problems with infringement of its users' right of publicity to emphasize the availability of non-economic harm under California right of publicity law.

Part IV analyzes the holding of *Fraley* in light of the previous right of publicity case against Facebook and the policy behind California's right of publicity statute. This Part criticizes the weaknesses of the current approach to the right of publicity in California and addresses the issues left unanswered by the *Fraley* decision. In particular, Part IV proposes a holistic economic and

Richard Seeborg's rejection of a previous settlement proposal by the parties. Dan Levine, *UPDATE 2—Judge rejects Facebook settlement over ad feature*, REUTERS, Aug. 17, 2012, <http://www.reuters.com/article/2012/08/18/facebook-settlement-idUSL2E8JI00420120818>.

non-economic approach to the right of publicity and considers both the benefits and possible criticisms of such an approach. Additionally, it explores the broader challenges of resolving the privacy-newsworthiness tension in a way that deems newsworthy all actions by online social network users and indicates the potentially dangerous implications of such an overbroad resolution. Finally, Part IV presents key considerations for online social networking companies that are looking to avoid right of publicity liability.

I. RIGHT OF PUBLICITY LAW

To understand the strengths and weaknesses of current right of publicity laws, this Note first explores how right of publicity laws developed. It briefly traces the underlying rationales and tensions of the current right of publicity from the birth of the privacy torts through the growth of the right of publicity as a separate tort and finally to the right's codification in state law. Tracing this development illuminates the root of the privacy-newsworthiness tension as well as the rationales supporting recovery for both economic and non-economic harm for right of publicity misappropriations.

A. THE BIRTH OF PRIVACY TORTS

The concept of the right of publicity arose out of the development of privacy tort law in the early 1960s.¹⁴ In 1960, William Prosser famously recognized four distinct categories of privacy torts¹⁵ from the general premise of privacy protection espoused by Louis Brandeis and Samuel Warren in their 1891 essay, *The Right to Privacy*.¹⁶ In particular, Prosser's fourth privacy tort—"[a]ppropriation, for the defendant's advantage, of the plaintiff's name

14. See Melissa Desormeaux, *When Your Rights Depend on Your Paycheck: The Scary Way Courts Are Deciding Right of Publicity Cases*, 12 TUL. J. TECH. & INTELL. PROP. 277, 278–79 (2009) (tracing the right of publicity through the privacy torts to its culmination in 1960 and recognition state-by-state thereafter).

15. Prosser recognized the following four privacy torts: "[i]ntrusion upon the plaintiff's seclusion or solitude, or into his private affairs;" "[p]ublic disclosure of embarrassing private facts about the plaintiff;" "[p]ublicity which places the plaintiff in a false light in the public eye;" and "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness." William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). As reporter for The American Law Institute, Prosser later included these same four torts in the Restatement (Second) of Torts. RESTATEMENT (SECOND) OF TORTS §§ 652A–652E (1977).

16. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1891) (starting a judicial trend toward recognizing a person's legal right to be left alone as well as his legal right to control what personal information others can reveal about him to the public).

or likeness”¹⁷—initiated the progressive trend toward a recognized right of publicity.

The policy justifications behind Prosser’s recognition of the privacy torts reveal exactly what the right of publicity aims to protect. Prosser conceptualized his fourth privacy tort of misappropriation—the tort from which the right of publicity directly derives—as one that protects a person’s proprietary interest in the use of his name or likeness.¹⁸ That is not to say that the misappropriation privacy tort represents solely a property tort. Rather, this protection contains a reputational interest in a person being able to decide which products and services they want to be associated with and how the public, or at least a relevant public, perceives him.¹⁹ Finally, the misappropriation tort aims to protect the mental integrity of a person by preventing unnecessary mental distress or “hurt feelings” from public misperception.²⁰

Based on the various interests that the misappropriation tort labors to protect, the application of the tort—and thus the perception of the legal right—differs when applied to a celebrity rather than a non-celebrity private person.²¹ Specifically, Prosser conceptualized a lower expectation of privacy for public figures.²² This lower expectation of privacy derives from the fact “that [public figures] have sought publicity and consented to it, and so cannot complain of it; that their personalities and their affairs already have become public, and can no longer be regarded as their own private business; and that the press has a privilege . . . to inform the public about those who have become legitimate matters of public interest.”²³

On the other hand, these same rationales support a stronger proprietary interest in a public figure’s name and likeness. This stronger proprietary interest increases the amount recoverable and the likelihood of recovery by a public figure under the misappropriation privacy tort. Because privacy tort law generally involves a recovery for “hurt feelings,” courts and some legal

17. Prosser, *supra* note 15, at 389.

18. *Id.* at 406.

19. Desormeaux, *supra* note 14, at 290–91.

20. See Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 228 (2005) (noting that most people—as private persons—would not suffer identifiable economic damage but still deserved recovery as a result of emotional harm).

21. For further discussion of what makes someone a public figure and the importance of this classification regarding newsworthiness considerations, see *infra* Section II.A.

22. See Prosser, *supra* note 15, at 411.

23. *Id.*

scholars²⁴ struggle to recognize the applicability of the misappropriation tort to private persons by arguing that a private person cannot prove injury as a result of a public misconception about him.²⁵ Specifically, this line of thinking focuses the misappropriation tort solely on the monetary harm caused by the breach of one's proprietary right and completely overlooks any "hurt feelings" or mental distress that might result from such misappropriation and its reputational harm.²⁶ Instead, this view finds that private persons cannot quantify the monetary harm resulting from the use of their name or likenesses that a public figure—who can profit from endorsements—could.²⁷ This public figure/private person dichotomy figures prominently in discussions of the right of publicity because the right of publicity shares the privacy torts' policy justifications and First Amendment considerations.²⁸

Some early cases involving a pseudo-right of publicity²⁹ demonstrate the interconnectivity of the economic and non-economic approaches to the misappropriation tort that later influenced the codification of the right of publicity in California and elsewhere. In 1905, the Georgia Supreme Court in *Pavesich v. New England Life Insurance Co.* looked to privacy tort law to recognize the importance of a right to prevent misappropriation of one's name or likeness in commercial advertising.³⁰ The advertiser in that case, an insurance company, used Pavesich's image in the company's advertisement, suggesting that the company insured Pavesich.³¹ Although the *Pavesich* court focused heavily on the advertisement's violation of Pavesich's right to

24. See Paul Czarnota, *The Right of Publicity in New York and California: A Critical Analysis*, 19 VILL. SPORTS & ENT. L.J. 481, 482 (2012) (stating that "[i]n practice, . . . only celebrities possess sufficient commercial value in their identity to justify litigation").

25. See McKenna, *supra* note 20, at 229.

26. See *id.* at 228.

27. See *id.*

28. See *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 804–05 (N.D. Cal. 2011). For further analysis and discussion, see *infra* Section III.B.

29. This Note uses the phrase "pseudo-right of publicity" cases to refer to cases brought as privacy tort actions prior to a common law or statutory recognition of the right of publicity as a stand-alone right that share policy considerations and rationales with current right of publicity law. See, e.g., *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 79 (Ga. 1905) (holding that defendants had "no more authority to display [plaintiff's image] in public for the purpose of advertising . . . than they would have had to compel the plaintiff to place himself upon exhibition for this purpose"); *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 170 (5th Cir. 1941) (holding that plaintiff as a public figure could not recover for injury resulting from a false reputational impression).

30. *Pavesich*, 50 S.E. at 79–80.

31. *Id.* at 79.

seclusion against intrusion,³² the court recognized that “[n]othing appears from which it is to be inferred that [Pavesich] has waived his right to determine for himself where his picture should be displayed in favor of the advertising right of defendants.”³³ The court thus acknowledged that the unauthorized commercial use of a person’s name or likeness overlaps with and is distinct from the privacy torts.³⁴

However, prior to the development of the right of publicity, not all courts were willing to award recovery for commercial misappropriation of an individual’s name or likeness under the existing privacy conceptions.³⁵ In 1941, the Fifth Circuit in *O’Brien v. Pabst Sales Co.* denied recovery to the college football player Davey O’Brien on his privacy claim because the court did not believe a public figure could recover for a false reputational impression resulting from use of his name or likeness.³⁶ Specifically, the court rejected the concept that a public figure’s reputation or feelings might be hurt by a particular, albeit commercial, use of his identity as opposed to the general publicity surrounding the public figure.³⁷ Under a modern right of publicity regime, this case would most certainly have been found to represent a misappropriation of O’Brien’s image.³⁸

Similarly, in 1902 the New York Court of Appeals in *Roberson v. Rochester Folding Box Co.* refused to recognize a right of privacy when it rejected a woman’s claim that a flour manufacturer harmed her by misappropriating her likeness on advertisements for its flour.³⁹ The court held that the

32. The right to seclusion against intrusion is another of Prosser’s privacy torts. Prosser, *supra* note 15, at 389 (recognizing the existence of a privacy tort for “[i]ntrusion upon the plaintiff’s seclusion or solitude, or into his private affairs”).

33. *Pavesich*, 50 S.E. at 70 (“One who desires to live a life of partial seclusion has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze.”).

34. McKenna, *supra* note 20, at 242.

35. *O’Brien v. Pabst Sales Co.*, 124 F.2d 167, 170 (5th Cir. 1941).

36. *Id.*

37. *Id.* Note that the case “was not for the value of [O’Brien’s] name in advertising a product but for damages by way of injury to him in using his name in advertising beer.” *Id.*

38. *See, e.g.*, *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996) (presenting a similar fact pattern and permitting recovery for misappropriation for primarily advertising purposes based on both economic and emotional injury to plaintiff’s reputation); *Carson v. Here’s Johnny Portable Toilets*, 698 F.2d 831, 836 (6th Cir. 1983) (allowing recovery for commercial use of the phrase “Here’s Johnny” because defendant’s use of the phrase in connection with its product and corporate name appropriated plaintiff’s identity). Note, however, that the defendant in *O’Brien* might have been able to allege a defense of newsworthiness. *See* discussion *infra* Part II (explaining how newsworthiness provides a defense to misappropriation under a right of publicity allegation).

39. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447 (N.Y. 1902).

manufacturer's use was not libelous.⁴⁰ Roberson alleged that her friends' recognition of her image humiliated her and damaged her good name to the point that it caused her "great distress and suffering, both in body and mind . . . compel[ling her] to employ a physician."⁴¹ Notably, however, Judge Gray in his dissent challenged the majority by recognizing Roberson's need to recover—at least through injunctive relief—for the reputational harm and emotional distress caused by the flour manufacturer's use of her image.⁴²

This judicial disagreement regarding the availability of recovery for misappropriation of a person's name or likeness demonstrates the early conflict about the relationship between newsworthiness, harm, and privacy. Although Prosser's conception of four separate privacy torts helped unify much of the judicial landscape regarding misappropriation of a person's name or likeness, the misappropriation tort developed apart from its privacy tort brethren due to its dual economic and non-economic roots.

B. GROWTH OF RIGHT OF PUBLICITY AS A SEPARATE TORT

Following the publication of an influential article by Melville B. Nimmer⁴³ and a critical decision by the United States Court of Appeals for the Second Circuit,⁴⁴ Prosser's proposed misappropriation tort gained more widespread recognition and gave rise to a separate legal right known as the right of publicity.⁴⁵ Since the early misappropriation tort permitted recovery for economic harm, some legal scholars characterized the right of publicity solely as a protection against economic injury.⁴⁶

These critics favor division between the right of publicity as focused on recovery of economic harm and a separate misappropriation tort focused on

40. *Id.*

41. *Id.* at 442.

42. *Id.* at 449–50 (Gray, J., dissenting). Judge Gray argued in his dissent:

The proposition is . . . an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement, [sic] as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity.

Id. at 450.

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

44. *Haelan Labs v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (stating "in addition to and independent of [the] right of privacy . . . a man has a right in the publicity value of his photograph. . . . This right might be called a 'right of publicity'").

45. *See* 1 J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 5:63 (2d ed. 2003).

46. *See* McKenna, *supra* note 20, at 228.

recovery for injuries to a person's emotional well-being.⁴⁷ Under such a division, primarily public figures assert the economic right of publicity and non-celebrity private persons generally assert the non-economic misappropriation tort.⁴⁸

Professor Robert C. Post, for instance, argues for such a division between economic and non-economic harm:

Because appropriation and the right of publicity flow from such very different moral commitments, it may not be sufficient simply to make either tort available at the election of a plaintiff. . . . There is a sharp internal contradiction in the position of a plaintiff who alienates and objectifies her image and simultaneously claims that it is integral to her very identity in the manner presupposed by the tort of appropriation.⁴⁹

Professor Post's view conforms to statutory and judicial language limiting specific states' right of publicity.⁵⁰ However, not all states have such limiting judicial or legislative language in their cases and statutes; these states instead recognize a singular right of publicity rather than both the right of publicity and a separate misappropriation tort.⁵¹

Under such a singular construction, a solely economic approach to the right of publicity suggests a limiting of the right to celebrities and thus raises a barrier to prevent private persons from recovering from mental distress and reputational harm caused by an appropriation—absent a separate, possibly unavailable, misappropriation tort claim.⁵²

47. See MCCARTHY, *supra* note 45, § 5:63; Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 674–79 (1991).

48. However, a strict division between the applicability of either the economic right of publicity and the non-economic misappropriation tort to either public figures or private persons would “falter as an overgeneralization.” MCCARTHY, *supra* note 45, § 5:63.

49. Post, *supra* note 47, at 677.

50. See, e.g., *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 976 (10th Cir. 1996) (“Publicity rights, however, are meant to protect against the loss of financial gain, not mental anguish.”); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) (“The right of publicity has developed to protect the commercial interest of celebrities in their identities.”).

51. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995) (“[I]n some jurisdictions separate causes of action now redress the commercial and personal injuries resulting from an unauthorized commercial exploitation of a person's identity. . . . In other jurisdictions, relief for both personal and commercial harm is available through a single common law or statutory cause of action.”). In particular, California's statutory and judicial language allows for a combined economic and non-economic approach to the right of publicity. See *infra* Section I.C for discussion of this duality.

52. See *supra* note 50; see also discussion *supra* notes 24–28 and accompanying text.

Nimmer directly opposed such a construction of the right of publicity: “[i]t is impractical to attempt to draw a line as to which persons have achieved the status of celebrity and which have not; it should rather be held that every person has the property right of publicity.”⁵³ Moreover, such an economic approach relies heavily on the alienability—or transferability—of an individual’s right of publicity such that the individual can grant use of his identity to a company or advertiser.⁵⁴ This focus on alienability emphasizes the value of the appropriation of an individual’s name or likeness to a potential advertiser rather than recognizing the devaluation of the individual’s right of publicity that results from misappropriation.⁵⁵ In particular, this focus ignores the most compelling justifications for the right of publicity: “autonomy and personal dignity,” “natural rights (largely a labor-reward analysis),” and the reputational and emotional harms associated with their violation.⁵⁶ These justifications do not necessarily require alienability and still allow for recovery when unjustly infringed upon.⁵⁷

A more holistic approach to a singular right of publicity instead recognizes the non-economic harm caused to a person in the form of embarrassment and discomfort that arises from having his name or likeness associated with products and services incongruent with his values.⁵⁸ Recognition of such non-economic harms characterizes the right of publicity in part as what Mark P. McKenna labels an individual’s legitimate interest in “autonomous self-definition.”⁵⁹ This approach to the right of publicity focuses on the ability of an individual—either a public figure or a private person—to control his identity and define for himself how the public perceives him.⁶⁰ Under this approach, misappropriation of a person’s name or likeness directly harms the individual by forcibly refusing him the right to define his identity. The approach looks not at whether the perceived

53. Nimmer, *supra* note 43, at 217.

54. See Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 234 (2012) (acknowledging the dangers and inconsistencies resulting from the construction of the right of publicity as an alienable right as well as the difficulty of changing such an embedded conception decades after the engraving of the right in common law).

55. See *infra* Sections III.B, IV.A.1 for further discussion of the importance of this distinction.

56. Rothman, *supra* note 54, at 229.

57. *Id.* at 229–30.

58. See McKenna, *supra* note 20, at 290–91 (supporting a finding of non-economic harm that can be paired with an economic approach to the right of publicity for a holistic approach).

59. *Id.* at 279 (“[B]ecause an individual bears uniquely any costs attendant to the meaning of her identity, she has an important interest in controlling uses of her identity that affect her ability to author that meaning.”).

60. *Id.* at 279–80.

misappropriation would be objectionable to the public generally but whether the particular misappropriation conflicts with and thus “destabilizes” the individual’s self-definition.⁶¹

Much like the rationalization for Prosser’s misappropriation tort, a holistic right of publicity also concerns protections for an individual’s reputational interests. For example, if a company utilizes a private individual’s name in an advertisement for life insurance, the private individual might not be able to claim much in economic damages for the use of his name. However, the individual will certainly bear the unique costs of having been associated publicly with a product that may be incongruent with the individual’s self-defined public identity.⁶²

C. CALIFORNIA’S RIGHT OF PUBLICITY STATUTE

Although many states currently recognize a common law right of publicity, some states—such as California⁶³ and New York⁶⁴—have gone as far as to codify the right of publicity. California’s statutory right of publicity mandates that “[a]ny person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner . . . for purposes of advertising or selling, or soliciting purchases . . . without such person’s prior consent . . . shall be liable for any damages sustained by the person or person injured as a result thereof.”⁶⁵ Although California’s statutory right of publicity arose as a response to the state’s need to protect the entertainment industry and its celebrities,⁶⁶ California courts have interpreted the statute’s legislative record to support the conclusion that the right needed to extend beyond

61. *Id.* at 288.

62. *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 69 (Ga. 1905) (“The publication is malicious, and tends to bring plaintiff into ridicule before the world, and especially with his friends and acquaintances, who know that he has no policy in the defendant company.”).

63. CAL. CIV. CODE § 3344 (West 2012).

64. N.Y. CIV. RIGHTS LAW § 51 (McKinney 2012). New York’s statutory right of publicity limits recovery to “[a]ny person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent” of the individual. *Id.* Additionally, the New York statute’s lack of a statutory minimum for damages constrains the applicability of the statute to non-celebrities, thus focusing the statute on protecting plaintiffs’ economic interests but not the reputational or autonomous self-definition interests that the California statute potentially protects.

65. CAL. CIV. CODE § 3344(a).

66. *See* CAL. CIV. CODE § 3344.1 (appealing celebrities in the entertainment industry by extending their right of publicity recovery capabilities to their successors after the celebrity’s death).

mere celebrities and public figures.⁶⁷ To that end, the statute specifically provides recovery for injured persons for either the actual damages suffered from the unauthorized use plus any profits attributable to the use or, in the alternative, \$750.⁶⁸ By providing this minimum claim for damages, the statute more easily extends to private persons who may otherwise struggle to quantify and demonstrate commercial value in their name, image, or likeness.⁶⁹

Moreover, unlike Professor Post's separate economic right of publicity tort and non-economic misappropriation tort, the California right of publicity statute implies inclusion of both the economic harm and the non-economic dignitary and reputational harm. This duality of the California right of publicity statute arises from the statutory minimum for damages,⁷⁰ the availability of the right to private persons,⁷¹ and the courts' acknowledgement of "hurt feelings" as a possibility for meeting the harm requirement.⁷²

II. TENSION BETWEEN PRIVACY AND NEWSWORTHINESS

Because California's right of publicity statute prevents a commercial speaker from inappropriately using an individual's name or likeness and thus

67. *Miller v. Collectors Universe, Inc.*, 72 Cal. Rptr. 3d 194, 204 (Ct. App. 2008) ("[S]ection 3344(a) as originally enacted in 1971 'established a concrete remedy for the little man with a minimum of \$300 [now \$750] payment,' 'a simple, civil remedy for the injured individual.'" (quoting Assemblymember Vasconcellos, Letter to Gov. Reagan, Nov. 10, 1971 re Assem. Bill No. 826 (1971 Reg. Sess.) 1–2)).

68. CAL. CIV. CODE § 3344(a). Notably, the California Court of Appeal has interpreted this statutory minimum damages to apply for "each cause of action arising from each prohibited use" rather than per instance of misappropriation. *Miller*, 72 Cal. Rptr. 3d at 206. Thus, if a plaintiff pursues statutory damages, only \$750 can be awarded even for multiple instances of misappropriation *unless* the plaintiff can allege separate causes of action. For further discussion of this distinction and its legislative grounding, see *id.* at 202–09.

69. Andrew M. Jung, *Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites*, 86 CHI.-KENT L. REV. 381, 393 (2001). For further discussion of the importance of this availability of right of publicity claims to private persons, see *infra* Section III.C.

70. CAL. CIV. CODE § 3344(a). For further discussion of how statutory minimum damages gives rise to a right of publicity focused on both economic and non-economic harm, see *infra* Section III.C.

71. See *Miller*, 72 Cal. Rptr. 3d at 204 (citing Assemblymember Vasconcellos, Letter to Gov. Reagan, Nov. 10, 1971 re Assem. Bill No. 826 (1971 Reg. Sess.) 1).

72. See, e.g., *Cohen v. Facebook, Inc. (Cohen I)*, 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011) (recognizing mental harm could substantiate harm in a right of publicity claim); *Miller*, 72 Cal. Rptr. 3d at 205 ("[B]y enacting section 3344(a), the Legislature provided a practical remedy for a non-celebrity plaintiff whose damages are difficult to prove and who suffers primarily mental harm from the commercial misappropriation of his or her name.").

places a strain on what a speaker can say, the right of publicity can conflict with the First Amendment's free speech and freedom of the press clauses. American society and its legal system have long recognized the fundamental importance of the public's right to be informed and kept up-to-date on important matters, as well as the need for a free press to inform the public.⁷³ Thus, the right of publicity and the concept of newsworthiness require a balancing test that weighs the newsworthiness of the speech in question against the right of publicity of the person implicated as the subject matter of the speech.⁷⁴ As a result of varying expectations of privacy, this balancing test applies differently for public figures as opposed to private persons.⁷⁵

The U.S. Supreme Court addressed this conflict and need for balancing in the landmark 1977 right of publicity case, *Zacchini v. Scripps-Howard Broadcasting Co.*⁷⁶ In *Zacchini*, the Court looked at whether a news reporter's broadcast of Hugo Zacchini's "human cannonball" act—"in which [Zacchini was] shot from a cannon into a net some 200 feet away"—violated Zacchini's right of publicity.⁷⁷ The Court took an economic approach to the right of publicity and held that the "State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment."⁷⁸ Notably, the Court found that the line-drawing between the First Amendment and Zacchini's right of publicity clearly favored Zacchini.⁷⁹ In doing so, the Court rejected the argument that the newsworthiness of the event should immunize the media from liability for profiting from the broadcast of Zacchini's entire act—which ruined the

73. See, e.g., U.S. CONST. amends. I, XIV; *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 567 (1977) ("[T]he press has a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private.").

74. On an international note, the importance of a newsworthiness-balancing test similarly appears in the laws of other countries but often balances privacy and publicity concerns differently based on the formation of national privacy law. Paul M. Schwartz and Karl-Nikolaus Peifer offer a unique comparative analysis of the U.S. approach to privacy and publicity as outlined in Prosser's four torts and the German single unitary concept of the right of personality. Paul M. Schwartz & Karl-Nikolaus Peifer, *Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?*, 98 CALIF. L. REV. 1925 (2010). Regarding newsworthiness, German courts prove more willing than U.S. courts to "find that a reported matter is not newsworthy, but merely 'entertainment' (Unterhaltung) or otherwise lesser-valued speech." *Id.* at 1979.

75. For further discussion of the different newsworthiness balancing for public figures and private persons, see discussion *infra* Section II.A.

76. *Zacchini*, 433 U.S. at 562.

77. *Id.* at 562.

78. *Id.* at 573.

79. *Id.* at 574–75.

novelty and thus the profitability of Zacchini broadcasting the act himself—without paying him or receiving his consent.⁸⁰

Certainly *Zacchini* represents a clear-cut case where the right of publicity trumps newsworthiness,⁸¹ but the newsworthiness issue generally involves more balancing and discussion.

A. DIFFERENT NEWSWORTHINESS STANDARD FOR PRIVATE PERSONS
VERSUS PUBLIC FIGURES

Prosser recognized in his path-breaking article *Privacy* that private persons have a higher expectation of privacy than public figures.⁸² As a result of this lower level of expectations of privacy for public figures, courts generally require a higher standard of invasiveness for public figures to be able to prove invasion of privacy.⁸³ A discussion of key defamation cases reveals how these different standards interact with exceptions for newsworthiness in the application of the law.

In the seminal defamation case *New York Times v. Sullivan*, the Supreme Court explicitly addressed how the public figure/private person dichotomy affected the law.⁸⁴ The case pitted the *New York Times* and its right to free speech and freedom of the press against Sullivan—an elected Alabama city commissioner—alleging libel by the newspaper.⁸⁵ Based on Sullivan's position as a public government official, the Court recognized that the press, and speakers generally, need a buffer of protection to criticize a public official's actions without being threatened with a defamation suit or chilled into self-censorship by the threat of a lawsuit.⁸⁶ To create such a buffer, the Court established a higher standard of proof that public figures would have to meet to be able to recover for defamation.⁸⁷ This “actual malice” standard requires a public figure to prove that the defamatory speaker acted with knowledge of falsity or reckless disregard for the truth when speaking about the public figure.⁸⁸ The standard safeguards speakers criticizing or

80. *Id.*

81. *Id.* at 576 (“Ohio has recognized what may be the strongest case for a ‘right of publicity’ involving, not the appropriation of an entertainer’s reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.”).

82. See discussion *supra* Section I.A.

83. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

84. *New York Times Co.*, 376 U.S. at 279–80.

85. *Id.* at 256–57.

86. *Id.* at 279.

87. *Id.*

88. *Id.* at 280.

commenting on the newsworthy actions of a public figure, so long as the speaker does not act with “actual malice” in the course of publishing the defamation.

In *Gertz v. Robert Welch, Inc.*, on the other hand, the Court clearly refused to extend the same “actual malice” standard to private persons alleging defamation.⁸⁹ The Court focused on a public figure’s greater ability to access channels of communication to counteract false statements as well as a public figure’s voluntary assumption of the risk of potentially defamatory falsehoods resulting from willfully entering the public sphere.⁹⁰ Specifically, the Court held that a private person “has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood.”⁹¹

Private persons have thus secured greater protection by the law for recovery in defamation cases by avoiding voluntary immersion into the public sphere and by keeping their actions private and beyond what any court would consider newsworthy.

B. CODIFICATION OF NEWSWORTHINESS EXEMPTION IN SECTION 3344(D) AND EXPANSION THROUGH CASE LAW

To reinforce the importance of freedom of speech and newsworthiness when applying the California statutory right of publicity, the California legislature codified the common law newsworthiness defense in California Civil Code section 3344(d).⁹² Section 3344(d) exempts from statutory liability the “use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign.”⁹³ Even though the exemptions in this section appear to be quite straightforward and limited, California courts have expanded the scope of the

89. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974). While the Court clearly held that the “actual malice” standard does not apply to private persons, the Court filled out the contours of where the line between public figures and private person should be in a string of cases following *Gertz*. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Wolston v. Reader’s Digest Ass’n, Inc.*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

90. *Gertz*, 418 U.S. at 345 (noting the rarity of a truly involuntary public figure and leaving that issue for a later date).

91. *Id.*

92. CAL. CIV. CODE § 3344(d) (West 2012).

93. *Id.*

use exemption to cover even commercially-driven uses, so long as the appropriation was not primarily for advertising purposes.⁹⁴

For instance, in *Dora v. Frontline Video Inc.* the California Court of Appeal held that the use of an image of a famous surfer in the context of a surfing documentary constituted an exempted use under section 3344(d).⁹⁵ Frontline produced a video documentary chronicling the events and public figures, including Dora, critical to the creation of the surfing lifestyle—a lifestyle that the court held to have influenced popular culture.⁹⁶ Because Frontline used the newsworthiness of the name and likeness of Dora and other surfers in the related context of a documentary about surfing, the court found Frontline’s use protected and exempted from liability under section 3344(d).⁹⁷

Conversely, the Ninth Circuit in *Abdul-Jabbar v. General Motors Corp.* held that section 3344(d)’s newsworthiness exemption did not extend to appropriative uses primarily for advertising purposes.⁹⁸ In *Abdul-Jabbar*, General Motors Corporation (“GMC”) used basketball player Kareem Abdul-Jabbar’s former name, Lew Alcindor, in a television commercial that aired during a NCAA men’s basketball tournament.⁹⁹ The *Abdul-Jabbar* court found that GMC’s use of Abdul-Jabbar’s former name attracted television viewer’s attention, thus creating a commercial advantage for GMC since “the first step toward selling a product or service is to attract the consumers’ attention.”¹⁰⁰ By attempting to use the newsworthiness of Abdul-Jabbar’s name apart from the context of his newsworthiness, GMC had gone beyond the safeguards made for free speech and harmed Abdul-Jabbar’s proprietary and reputational interest in the use of his name as protected by his right of publicity.¹⁰¹

As these cases indicate, the newsworthiness of a public person’s actions and the freedom of the press to comment thereon often come into conflict with that individual’s right of publicity. When the speech appropriates an

94. See, e.g., *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996) (finding defendant’s use of plaintiff’s name for primarily for advertising purposes to be outside of the newsworthiness exemption); *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 795 (Ct. App. 1993) (finding defendant’s use of plaintiffs’ names and likenesses to be newsworthy).

95. *Dora*, 18 Cal. Rptr. 2d at 795.

96. *Id.* at 794.

97. *Id.* at 795.

98. *Abdul-Jabbar*, 85 F.3d at 415–16.

99. *Id.*

100. *Id.* at 416 (citing *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 349 (Ct. App. 1983)).

101. *Id.*

individual's name or likeness in the context of that individual's newsworthy actions, *Dora* indicates that the public's interest in the newsworthiness of the individual's name or likeness trumps the individual's interest in controlling the use of his name or likeness.¹⁰² On the other hand, the Ninth Circuit's holding in *Abdul-Jabbar* distinguished appropriations of a person's name or likeness primarily for advertising purposes from recognized exempted uses.¹⁰³ Such advertising-centric uses infringe too much upon a person's proprietary and reputational interest in his right of publicity and extend beyond the scope of any discussion of the person's newsworthiness exempted by section 3344(d).¹⁰⁴

III. ESTABLISHING HARM: ECONOMIC AND NON-ECONOMIC HARMS

This Part explores the right of publicity's dual economic and non-economic aspects as they apply to private persons, especially in the context of online social networks.

Under traditional celebrity-centric conceptions, the right of publicity gives a person the right to control the products and services that he endorses and to which he ties his identity. Adherents to this endorsement-based concept of the right of publicity reject non-celebrity private persons' claims of misappropriation because those persons lack the ability to establish significant monetary harm related to endorsements without consent.¹⁰⁵ However, such an interpretation of the right of publicity overlooks the value of word-of-mouth advertising, especially in online social marketing.

A. PRE-INTERNET WORD OF MOUTH

Word-of-mouth advertising "describes peer-to-peer interactions in which an individual passes on opinions about a product to others."¹⁰⁶ Traditionally, this type of advertising occurs without prompting by an advertiser; a user or purchaser of a service or product shares, of his own will, his opinions about the product or service with other consumers—likely the individual's close friends and family.¹⁰⁷ Advertisers and brand owners have long sought after

102. See *Dora*, 18 Cal. Rptr. 2d at 795.

103. See *Abdul-Jabbar*, 85 F.3d at 416.

104. See *id.*

105. See, e.g., Czarnota, *supra* note 24, at 482 (stating that "only celebrities possess sufficient commercial value in their identity to justify litigation").

106. William McGeeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105, 1109 (2009).

107. *Id.*

word-of-mouth endorsements because of the high level of influence that consumers have over the opinions and purchasing decisions of their friends and family.¹⁰⁸ Advertising researchers have documented the widespread acknowledgment in the marketing community of the importance of word-of-mouth advertising.¹⁰⁹

Due to the recognized value of word-of-mouth advertising, a private individual's endorsement has value, and as such, that individual should have the right to control his endorsements within his social sphere. However, advertisers historically struggled to fully leverage a single individual's endorsement within his social sphere, given the difficulties in trying to personalize and deliver a message and to identify persons within that individual's sphere of influence.¹¹⁰ Additionally, advertisers faced the danger that consumers' family and friends might view the advertisement as less than genuine since it did not come directly from the mouth of the individual.¹¹¹

B. SOCIAL MARKETING

The dawn of online social networks and the Internet significantly reduced the impediments advertisers previously faced in personalizing advertisements.¹¹² In particular, public access to other consumers' opinions increased in number and visibility with the rise of the Internet and the creation of new fora for the collection, publication, and dissemination of

108. Kineta H. Hung & Stella Yiyan Li, *The Influence of eWOM on Virtual Consumer Communities: Social Capital, Consumer Learning, and Behavioral Outcomes*, 47 J. ADVERTISING RES. 485, 485 (2007) (“[Word of mouth] is the most important source of influence in the purchase of household goods, and advice from other consumers about a service exerts a greater influence than all marketer-generated information combined.”).

109. McGeeveran, *supra* note 106, at 1110. McGeeveran states that “one advertising researcher estimates that Americans participate in 3.5 billion word-of-mouth conversations daily and that 49 percent of those who hear word of mouth are ‘highly likely’ to pass that information on to others.” *Id.* (citing to Justin Kirby, *How to Manage and Measure the Word of Mouth Revolution*, MARKETINGPROFS, Feb. 28, 2006, <http://www.marketingprofs.com/6/kirby1.asp>). In fact, Facebook's own Chief Executive Officer Mark Zuckerberg stated that “nothing influences people more than a recommendation from a trusted friend and that a trusted referral is the Holy Grail of advertising.” Hoffman, *supra* note 1.

110. *See* ANDY SERNOVITZ, WORD OF MOUTH MARKETING: HOW SMART COMPANIES GET PEOPLE TALKING 4–5 (2006).

111. *See* Louise Kelly, Gayle Kerr & Judy Drennan, *Avoidance of Advertising in Social Networking Sites: The Teenage Perspective*, 10 J. INTERACTIVE ADVERTISING 16, 16 (2010).

112. McGeeveran, *supra* note 106, at 1112. McGeeveran notes various alternative ways in which advertisers and public relations practitioners encouraged word-of-mouth advertising such as Tupperware parties, discounts for friend referrals, and the use of stunts like midnight release parties for books and films. *Id.* at 1110–11.

consumer opinions and reviews.¹¹³ Professor Eric Goldman offers an assessment of the Internet’s amplification of word-of-mouth advertising that proves especially poignant in the context of online social networks due to users’ established online connections with family and friends.¹¹⁴ Specifically, Goldman argues that the Internet amplifies word-of-mouth advertising by (1) “reduc[ing] consumers’ costs to share their views,” (2) disseminating a consumer’s opinion beyond that consumer’s own social network through the ease of online “forwarding” of messages, and (3) giving rise to online intermediaries that “systematically capture and republish consumer opinions.”¹¹⁵

In the context of online social networks, advertisers and companies refer to these word-of-mouth advertising messages as “social marketing.”¹¹⁶ Social marketing utilizes all the benefits of online word-of-mouth advertising that Eric Goldman outlines and combines them into a single location. Consumers provide both the audience and message by connecting with their family and friends while also freely espousing their interests—in the case of Facebook, clicking “Like” on the page of a product, service, or brand they support.¹¹⁷ Through advertising structures implemented by the online social network provider, advertisers have both the messages and content at their fingertips

113. *Id.* at 1112. Furthermore, consumer opinions on the Internet are often displayed directly on the webpage selling the product or service under review, which marks a significant departure from pre-Internet practices and increases the influence of the consumer opinions by providing them to potential purchasers at the critical point-of-purchase. *See, e.g.,* YELP, <http://www.yelp.com> (last visited Feb. 13, 2013); AMAZON.COM, <http://www.amazon.com> (last visited Feb. 13, 2013).

114. Eric Goldman, *Online Word of Mouth and Its Implications for Trademark Law*, in TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 404, 411 (Graeme B. Dinwoodle & Mark D. Janis eds., 2008).

115. *Id.* Although the growing visibility, veracity, and value of online word-of-mouth advertising proves fruitful for companies and advertisers, the ubiquity of such online word-of-mouth messages generated concern from the Federal Trade Commission (“FTC”) about the threat of blurring the line between consumer-generated word-of-mouth messages and corporate-sponsored word-of-mouth messages. Pradnya Joshi, *Approval by a Blogger May Please a Sponsor*, N.Y. TIMES, July 12, 2009, http://www.nytimes.com/2009/07/13/technology/internet/13blog.html?_r=0. In December 2009, the FTC implemented a new guideline, extending from its truth in advertising guidelines, that requires online endorsers such as bloggers, or even Twitter users, to fully disclose the existence of a connection “between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement.” 16 C.F.R. § 255.5 (2009).

116. McGeeveran, *supra* note 106, at 1116 (defining social marketing as “any technique that sends information about an ordinary individual’s interaction with a product to that person’s friends and acquaintances in order to stimulate demand for that product”).

117. *See* Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 790 (N.D. Cal. 2011).

and merely need to pay the “gatekeeper” to be able to send their social marketing messages.

For instance, an advertiser utilizing Facebook’s “Sponsored Stories” would simply pay Facebook to run an advertisement featuring any users who had clicked “Like” on the advertiser’s page.¹¹⁸ This advertisement would appear on the homepages of the “friends” of those users, indicating that the users like the advertiser’s brand or product.¹¹⁹ Such an advertisement aims to convince the users’ “friends” to similarly “Like” the advertiser’s page or go a step further and purchase the advertiser’s brand or product.¹²⁰

As a result of the ease of online social marketing, advertisers can capitalize on word-of-mouth advertising on a much grander scale than ever before. With over one billion active monthly users,¹²¹ Facebook offers a huge audience for social marketers through its targeted advertising and Sponsored Stories.¹²²

But, as Professor William McGeeveran conceptualized in his analysis of social marketing, such amplified use of social marketing harms a person’s privacy and right of publicity both qualitatively and quantitatively.¹²³ On a qualitative level, abuse of social marketing—by appropriating a person’s name or likeness without consent—harms a person’s right to publicity by decreasing the credibility or reliability of endorsements by that person and thus mitigating the strength of the person’s future endorsements.¹²⁴ Regarding quantitative harm, repeated appropriation of a person’s right of publicity in social marketing devalues the person’s right because the sheer volume of marketing messages floods the market and makes each recommendation or endorsement less important as the messages add to and compete with the noise of other social marketing.¹²⁵

On a related note, advertisers and companies utilizing social marketing often overlook the potential privacy harms of their advertisements by incorrectly assuming that individuals expect less privacy online; however,

118. *See id.* at 791–92.

119. *See id.*

120. *See id.*

121. Geoffrey A. Fowler, *Facebook: One Billion and Counting*, WALL ST. J., Oct. 4, 2012, <http://online.wsj.com/article/SB10000872396390443635404578036164027386112.html>.

122. *See How advertising and Sponsored Stories work*, FACEBOOK, <http://www.facebook.com/about/privacy/advertising> (last visited Feb. 1, 2013).

123. McGeeveran, *supra* note 106, at 1129.

124. *Id.* at 1129–30.

125. *Id.* at 1130.

such a view represents a popular misconception.¹²⁶ Thus, when an advertiser utilizes a user's expressed interest in its brand, it might cause additional reputational harms and "hurt feelings" by revealing to that user's friends a possibly controversial or embarrassing interest to which the user did not realize he had openly attached his online social network profile.¹²⁷

Moreover, opting out of social networking to avoid invasions of one's privacy is no longer a realistic alternative; rather, by opting out of social networking, an individual would abdicate control over his own reputation, leaving his friends, family, and acquaintances to shape the individual's reputation by tagging the abstainer in photos or discussing the abstainer.¹²⁸

C. *COHEN V. FACEBOOK: OPENING THE DOOR TO NON-ECONOMIC HARM FOR NON-CELEBRITIES IN RIGHT OF PUBLICITY CASES*

Having established the unique value social marketing offers to advertisers as well as the potential economic and non-economic harms social marketing misuse can cause to users, social network users facially appear to be in a clear position to prove injury and damages in right of publicity cases where a company has misappropriated their names or likenesses in social marketing messages without consent.¹²⁹ However, prior to *Fraley*, the California courts

126. In fact, a recent survey about targeted advertising online indicated that when informed about how marketers target advertisements online, between 73% and 86% of individuals "say they would not want such advertising." Joseph Turow et al., *Americans Reject Tailored Advertising and Three Activities that Enable It*, SSRN ELIBRARY, *1 (2009), <http://ssrn.com/paper=1478214>. Moreover, opposite to popular belief, "large percentages of young adults are in harmony with older Americans when it comes to sensitivity about online privacy and policy suggestions." Chris Jay Hoofnagle et al., *How Different are Young Adults from Older Adults When it Comes to Information Privacy Attitudes and Policies?*, SSRN ELIBRARY, *3 (2010), <http://ssrn.com/paper=1589864>. Additionally, people actually expect a "higher—not a lower—degree of privacy in communications with friends and family members" who encompass much, if not all, of a person's social network. McGeveran, *supra* note 106, at 1125.

127. For example, a user might have mistakenly thought he had obscured his stated interests and preferences from the view his friends. Furthermore, even if a user was concerned with revealing his brand loyalties, that user may have unknowingly clicked "Like" on a page "to access a special offer code for a new product, to access photographs of an event, or to become eligible for a promotional prize." See *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 792 (N.D. Cal. 2011). Or, the user simply might not have realized how the social network functioned because of unclear or vague descriptions of how the social network provider would share such stated interests and preferences.

128. McGeveran, *supra* note 106, at 1127.

129. See CAL. CIV. CODE § 3344(a) (West 2012). As mentioned briefly in Section I.B, *supra*, California courts permit recovery for private persons under the California right of publicity statute.

did not award damages to such private person plaintiffs in right of publicity cases.¹³⁰

For instance, Facebook previously faced a similar right of publicity class action in *Cohen I* (and subsequently *Cohen II*).¹³¹ The court granted Facebook's motions to dismiss in both instances.¹³² Although the *Cohen I* court dismissed the case, the court demonstrated an apparent willingness to substantiate a right of publicity claim on non-economic harm alone¹³³—a willingness absent in *Fraley*.

In 2011, Facebook found itself in court—in *Cohen I*—on allegations that its “Friend Finder” service violated users’ right of publicity.¹³⁴ This service allowed Facebook subscribers to use their email accounts and contacts from those email accounts to locate other subscribers on Facebook that the subscriber already knew but who were not yet among the subscriber’s “friends.”¹³⁵ Facebook then promoted this service by placing notifications on homepages of the subscriber’s “friends” informing them that the subscriber tried the service.¹³⁶ These messages displayed the subscriber’s photo and name as endorsements encouraging the subscriber’s “friends” to use the service as well.¹³⁷ The *Cohen I* court dismissed the plaintiffs’ section 3344 claim with leave to amend.¹³⁸ The court held that plaintiffs failed to plead that they suffered any harm from the infringement of their right of publicity.¹³⁹ Interestingly, the court recognized section 3344(a)’s protection for non-celebrity plaintiffs through statutory minimum damages and stated that recovery could be available for mental anguish apart from economic harm.¹⁴⁰ However, the court held that the plaintiffs still needed to plead

130. *See, e.g.*, *Cohen v. Facebook, Inc. (Cohen I)*, 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011). The court dismissed the plaintiffs’ complaint with leave to amend and the plaintiffs subsequently amended their complaint, but the court dismissed the amended complaint without leave to amend. *Cohen v. Facebook, Inc. (Cohen II)*, C 10-5282 RS, 2011 WL 5117164, at *3 (N.D. Cal. Oct. 27, 2011).

131. *Cohen I*, 798 F. Supp. 2d at 1097; *Cohen II*, 2011 WL 5117164, at *3.

132. *Cohen I*, 798 F. Supp. 2d at 1097; *Cohen II*, 2011 WL 5117164, at *3.

133. *Cohen I*, 798 F. Supp. 2d at 1097.

134. *Id.* at 1092.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 1097.

139. *Id.*

140. *Id.*; *see also* *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996) (“Injury to a plaintiff’s right of publicity is not limited to present or future economic loss, but ‘may induce humiliation, embarrassment, and mental distress.’” (citing *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1103 (9th Cir. 1992))). *But see* *Post, supra* note 47, at 674–79

harm—if solely mental anguish—as even the statutory damage award required a showing of harm.¹⁴¹

On review of the plaintiffs’ amended complaint in *Cohen II*, the court dismissed without leave the plaintiffs’ amended section 3344 claim and held that the Facebook subscribers failed to demonstrate harm by infringement of their right of publicity.¹⁴² The court drew attention to the fact that Facebook had not used subscribers’ names and likeness outside of any context in which they already appeared, stating that subscribers’ “friends” had access to the subscribers’ names and likenesses in the course of the friends’ normal use of Facebook.¹⁴³ The court reiterated its previous holding: “[t]he fact that the California Legislature has provided for statutory damages in the amount of \$750 for a [sic] individual who is unable to *quantify* the amount of damages suffered does not eliminate the requirement of a cognizable injury in the first instance.”¹⁴⁴ Thus, although the California legislature directly provided for recovery for non-economic injury through statutory minimum damages, this allowance does not eliminate a plaintiff’s burden of showing such harm.

IV. *FRALEY V. FACEBOOK*: CRITICISMS AND IMPLICATIONS

When Facebook again faced class allegations of infringing its users’ right of publicity, the *Fraley* court found what the plaintiffs in the *Cohen* cases failed to properly allege—harm.¹⁴⁵ The Facebook subscribers alleged that they did not know that their choice to click the “Like” button would be “interpreted and publicized by Facebook as an endorsement of those advertisers, products, services, or brands.”¹⁴⁶ Although Facebook included the ability to appropriate its users’ likenesses for other commercial purposes in its Terms of Use, Facebook did not allow users to opt out of being featured in “Sponsored Stories” when the new advertising service launched.¹⁴⁷

(arguing for a division between a right of publicity focused on economic recovery and a separate misappropriation tort focused on non-economic reputational and emotional harm).

141. *Cohen I*, 798 F. Supp. 2d at 1097.

142. *Cohen v. Facebook, Inc. (Cohen II)*, C 10-5282 RS, 2011 WL 5117164, at *3 (N.D. Cal. Oct. 27, 2011).

143. *Id.*

144. *Id.*

145. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 810 (N.D. Cal. 2011).

146. *Id.* at 792.

147. *Id.* Note that this lack of opt-out proves especially problematic for minors using Facebook because they cannot consent to commercial use of their names or likenesses without parental consent. *See id.* at 803–04 (quoting CAL. CIV. CODE § 3344(a) (West 2012)) (“Any person who knowingly uses another’s name, voice, signature, photograph, or likeness . . . without such person’s prior consent, or, in the case of a minor, the prior consent

Notably, the plaintiffs in *Fraleley* only alleged economic injury as a result of Facebook's infringement of their right of publicity and did not allege non-economic harm such as mental anguish or hurt feelings.¹⁴⁸ Unlike the *Cohen* cases, the plaintiffs here could demonstrate actual calculable economic loss from the abuse of their right of publicity because the "Sponsored Stories" resulted in a profit for Facebook attributable to the plaintiffs.¹⁴⁹ In making this finding, the court denied Facebook's argument requiring plaintiffs to prove preexisting value in their right of publicity before permitting recovery.¹⁵⁰ Such an approach to the right of publicity would run counter to the California legislature's intent for the statute to extend to non-celebrity private persons as indicated by the statutory minimum damages.¹⁵¹

Under the precedent set forth by the Ninth Circuit in *Abdul-Jabbar*, the district court in *Fraleley* properly entered a preliminary finding in favor of the plaintiffs regarding the motion to dismiss.¹⁵² The court recognized that although the plaintiffs' actions on Facebook could be deemed newsworthy in the context of their online social network, comprising their friends and family, "Facebook's *commercial use* of those actions in Sponsored Stories remove[d] them from the scope of [section] 3344(d)'s newsworthy privilege."¹⁵³ However, to reach this conclusion, the court first rejected plaintiffs' claims that their actions on the online social network did not constitute newsworthy actions and that they could not be considered anything other than private persons.¹⁵⁴ The court instead found plaintiffs to be local celebrities in the context of their personal social network, thus identifying them as "subjects of public interest among the same audience."¹⁵⁵ This struggle over plaintiffs' celebrity status arose because plaintiffs did not want to be classified as celebrities since doing so could strength Facebook's possible newsworthiness defense, but at the same time, the plaintiffs wanted to establish some form of localized fame to argue the value of their endorsements and resulting injury.¹⁵⁶

of his parent or legal guardian, shall be liable for any damages sustained by the person . . . injured as a result."). The *Fraleley* settlement directly addresses this issue by requiring Facebook to implement a process for confirmed parents to be able to opt their children out of "Sponsored Stories." Raymond, *supra* note 13.

148. *Fraleley*, 830 F. Supp. 2d at 807.

149. *Id.* at 809.

150. *Id.* at 806–07.

151. *Id.* at 807.

152. *Id.* at 805, 810.

153. *Id.* at 805.

154. *Id.* at 804.

155. *Id.* at 805.

156. *See id.* at 804.

Whether intentional or not, the court's analysis of the privacy-newsworthiness tension in the context of online social networks suggests far-reaching and perhaps problematic implications for the right of publicity as well as other areas of law, including defamation and the privacy torts.¹⁵⁷ Moreover, the plaintiffs' failure to allege non-economic harm in addition to economic harm compelled the *Fraleley* court to depart from *Cohen I* and *Cohen II*'s non-economic view of the right of publicity in such a way that undermines the strength of the right of publicity in an online context.¹⁵⁸ *Fraleley*'s analysis also falls in line with criticisms of an encompassing economic and non-economic approach.¹⁵⁹ However, such an approach is incongruent with section 3344's statutory language and previous case law.¹⁶⁰

A. WEAKNESSES OF CURRENT RIGHT OF PUBLICITY FRAMING

In *Cohen I* and *Cohen II*, the court denied the plaintiffs' section 3344 claim because the plaintiffs failed to allege either economic harm or harm as a result of mental distress.¹⁶¹ The *Fraleley* plaintiffs, however, had a stronger argument for proving harm since Facebook's profits from its "Sponsored Stories" social marketing were directly attributed to the use of the plaintiffs' names and likenesses.¹⁶² The plaintiffs may have also avoided pleading other economic and non-economic harms due to perceived difficulty in demonstrating these less quantifiable harms.

Limited to the economic harm aspect of the allegation as a result of plaintiffs' ambiguous pleading and opposition to the motion to dismiss, the *Fraleley* court could not address the potential non-economic aspects of the right of publicity and also focused only on the *value of the misappropriation to the*

157. See *supra* Section II.A.

158. See Memorandum of Law in Opposition to Motion to Dismiss at 9–11, *Fraleley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011) (No. CV 11-01726), 2011 WL 7663488. Plaintiffs argued:

While section 3344 certainly *allows* a plaintiff to plead and recover under a theory of mental anguish, there is nothing to suggest that the Legislature did not *also* intend to allow the non-celebrity to also recover that penalty where there is a misappropriation of his or her name or likeness for the economic advantage of a defendant.

Id. at 10.

159. See Post, *supra* note 47, at 674–79.

160. See *supra* notes 70–73 and accompanying text.

161. *Cohen v. Facebook, Inc. (Cohen I)*, 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011); *Cohen v. Facebook, Inc. (Cohen II)*, C 10-5282 RS, 2011 WL 5117164, at *3 (N.D. Cal. Oct. 27, 2011).

162. See *Fraleley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 809 (N.D. Cal. 2011).

violator rather than the *devaluation of the individual's right of publicity*.¹⁶³ The plaintiffs' plea of harm based on the profits alone and their resulting failure to plead with enough specificity regarding other theories of injuries outside of lost profits forced the court to adopt this limited approach.¹⁶⁴ Still, the *Fraleley* court, as a result of the plaintiffs' pleading, left unaddressed a full discussion of harm and the right of publicity.

1. *Applying a Holistic Economic and Non-Economic Approach*

Although some states and legal scholars recognize the right of publicity as a solely economic harm—leaving mental anguish and dignitary recovery to a separate misappropriation tort—California case law and statutory language reject a bifurcated approach, thus permitting consideration of both economic and non-economic harms.¹⁶⁵ Specifically, California case law and model civil jury instructions¹⁶⁶ permit the fact-finder to award damages for mental anguish and dignitary harm by showing proof of “anxiety, embarrassment, humiliation, shame, depression, feelings of powerlessness, [and] anguish”¹⁶⁷ that “concerns one’s own peace of mind”¹⁶⁸ as well as “impairment of reputation and standing in the community.”¹⁶⁹

The plaintiffs in *Fraleley* should have pled both economic and non-economic harm. Such pleading would have allowed the court to follow the *Cohen* court’s commitment to legislative intent and judicial precedent¹⁷⁰ that implicated the need for a holistic economic and non-economic approach to the right of publicity.¹⁷¹ Had the pleading allowed the *Fraleley* court to adopt such an approach, the court likely would have found additional harm apart from the economic harm.

The facts of the case allege that Facebook users routinely clicked “Like” on the pages of companies and brands for reasons other than to express their

163. *Id.* at 806 (“Here, Plaintiffs allege not that they suffered mental anguish as a result of Defendant’s actions, but rather that they suffered economic injury because they were not compensated for Facebook’s commercial use of their names and likenesses in targeted advertisements to their Facebook Friends.”).

164. *See id.*

165. *See supra* notes 70–73 and accompanying text.

166. Judicial Council of California Civil Jury Instruction 1820 (CACI 1820) (2012).

167. *Miller v. Nat’l Broad. Co.*, 232 Cal. Rptr. 668, 680 (Ct. App. 1986).

168. *Selleck v. Globe Int’l, Inc.*, 212 Cal. Rptr. 838, 846 (Ct. App. 1985).

169. *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 774 (Ct. App. 1983) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

170. *See Miller v. Collectors Universe, Inc.*, 72 Cal. Rptr. 3d 194, 204 (Ct. App. 2008) (citing Assemblymember Vasconcellos, Letter to Gov. Reagan, Nov. 10, 1971 re Assem. Bill No. 826 (1971 Reg. Sess.) 1).

171. *See Cohen v. Facebook, Inc. (Cohen I)*, 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011).

support for the company or brand.¹⁷² For example, users may have clicked “Like” on a page because doing so allowed them “to access a special offer code for a new product, to access photographs of an event, or to become eligible for a promotional prize.”¹⁷³ Thus, when Facebook incorporated the users’ names and likenesses into its “Sponsored Stories,” the company broadcasted to the users’ “friends” potentially misleading word-of-mouth messages that could have conflicted with the way the users intended to present themselves online. Such messages could have caused users non-economic harm in the form of humiliation and impairment of reputation by presenting them to their “friends” as proponents of brands and companies that they did not in fact endorse.¹⁷⁴ Moreover, if users had restricted the visibility of the “Likes” section of their profile to only certain “friends” or to no one but themselves, the broadcasting of these “Likes” through “Sponsored Stories” would certainly have caused them embarrassment and feelings of powerlessness as their selected privacy settings led to a greater expectation of privacy. The unavailability of an option to opt-out of social marketing paired with the lack of transparency about what happens when a user clicks the “Like” button strengthens the support for a finding of non-economic harm.¹⁷⁵

The absence of this entire analysis in the *Fraleley* opinion and the court’s focus solely on economic harm overemphasized the categorization of the plaintiffs as public figures,¹⁷⁶ and suggested the enforcement of a solely economic-harm-focused approach to the right of publicity. This type of interpretation of section 3344 focuses incorrectly on what *profit the misappropriating party received* from the violation of a person’s right of publicity rather than the *harm actually incurred upon the violated party*. The economic focus devalues the violated party’s interest in their right of publicity by limiting its value only to what value others can derive from it. In actuality, misappropriation of an individual’s right of publicity causes more harm than the profits gained by the infringer.¹⁷⁷ As discussed in Section III.B, *supra*, misappropriation harms an individual’s right of publicity both qualitatively and quantitatively.¹⁷⁸ Limiting the scope of recovery only to the infringer’s

172. *Fraleley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 792 (N.D. Cal. 2011).

173. *Id.*

174. *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 79–80 (Ga. 1905); *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 449–50 (N.Y. 1902) (Gray, J., dissenting).

175. *See Fraleley*, 830 F. Supp. 2d at 792.

176. *See infra* Section IV.B for further discussion of the implications of this overemphasis.

177. *See McGeeveran, supra* note 106, at 1129.

178. *Id.*

profits ignores the devaluation of the individual's right of publicity. Such devaluation results from oversaturation of the market for the individual's word-of-mouth messages as well as the discrediting of the usefulness of suggestions or endorsements from that individual.¹⁷⁹

This evaluation demonstrates the value of a holistic approach to right of publicity harm that blends economic harm, dignitary harm from loss of control over self-image, and mental anguish in the form of humiliation and embarrassment. Inclusion in section 3344 of a statutory minimum for incalculable harm suggests that the statute should dually focus on economic harm as well as harm caused by restricting an individual's self-control of his image, which is often less calculable and tied to mental distress.¹⁸⁰ Since the *Fraley* court found economic harm supporting recovery, a future court's deference to *Fraley* could lead to defective pleadings by future plaintiffs and subsequent dismissals of cases like *Cohen* where plaintiffs cannot easily quantify economic harm.¹⁸¹ Such an approach more closely resembles an early pseudo-right of publicity holding rather than the recent California case law.¹⁸²

2. Criticisms and Dangers of Holistic Approach

Approaching the right of publicity with a stronger focus on autonomous control of self-image does give rise to some possible criticisms. First, some critics might view a right of publicity focused more on control of self-image as providing an intellectual-property-like protection for a person's public identity—similar to inventions protected by patent law and creative works protected by copyright law.¹⁸³ Since Congress and state legislatures generally give such intellectual property (“IP”) protection to foster creative and scientific growth and improvement, a critic might argue that a person does not need legal encouragement through IP protection to create their identity,

179. *See id.*

180. *See* CAL. CIV. CODE § 3344(a) (West 2012).

181. *See* *Cohen v. Facebook, Inc. (Cohen I)*, 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011); *Cohen v. Facebook, Inc. (Cohen II)*, C 10-5282 RS, 2011 WL 5117164, at *3 (N.D. Cal. Oct. 27, 2011).

182. *Compare* *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447 (N.Y. 1902) (rejecting a misappropriation claim by finding the use of plaintiff's image to be non-libelous and thus lacking harm) *with* *Miller v. Collectors Universe, Inc.*, 72 Cal. Rptr. 3d 194, 205 (Ct. App. 2008) (stating that “by enacting section 3344(a), the Legislature provided a practical remedy for a non-celebrity plaintiff whose damages are difficult to prove and who suffers primarily mental harm from the commercial misappropriation of his or her name”).

183. *See* Post, *supra* note 47, at 676 (“[W]e must inquire whether we wish the law to create a social structure in which our very names and images have become alienable commodities.”).

as they will do it naturally.¹⁸⁴ This is not necessarily true, however, in an age where individuals often create online personas completely separate from their real life persona.¹⁸⁵ Moreover, protection of autonomous control of self-image does not aim to encourage development of a person's identity for purposes of increasing the value of the person's right of publicity; rather, the interest focuses on compensating individuals for infringements upon their personal right to control their identity along the lines of a "Natural Rights Perspective."¹⁸⁶ This perspective recognizes that a person's identity is inherent to that person such that employing that person's identity without consent infringes on that person's natural right to own—and therefore control—his identity and how he portrays himself to others.¹⁸⁷

Second, some commentators might voice concerns that strengthening the right of publicity by allowing for more recovery—resulting from mental distress and loss of control of self-image—will in turn endanger the public's right to be informed and the press's right to inform the public by potentially chilling speech.¹⁸⁸ This argument fails because strengthening individuals' ability to substantiate their injury in no way affects a court's analysis of whether or not a defendant's use qualifies for a newsworthiness exemption; the balancing test occurs separately from any considerations of harm and damages.¹⁸⁹

184. See, e.g., David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn From Cultural Studies*, 25 CARDOZO ARTS & ENT. L.J. 913, 934–35 (2008) (arguing that such incentives prove especially unnecessary in the Internet era of meritless celebrity); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 184 (1993) (arguing that such a rationale is based "on a fundamental misconception of the processes by which fame is generated and public images are formed in contemporary society").

185. See Daniel Nemet-Nejat, *Hey, That's My Persona?: Exploring the Right of Publicity for Blogs and Online Social Networks*, 33 COLUM. J.L. & ARTS 113, 119 (2009) ("[T]hese are not merely digital renderings of one's physical world identity; they are 'alter egos,' derived, but distinct, from their creators.").

186. See Jeffrey J. Brown, *Defending the Right of Publicity: A Natural Rights Perspective*, 10 INTELL. PROP. L. BULL. 131, 139 (2006).

187. See *id.* ("If one can own anything in this world, one owns his own *Person* and nobody has any right to it but himself.") (internal quotation marks omitted).

188. See Russell Hickey, *Refashioning Actual Malice: Protecting Free Speech in the Right of Publicity Era*, 41 TORT TRIAL & INS. PRAC. L.J. 1101, 1102 (2006).

189. For example, the *Fralely* court addresses separately newsworthiness and injury. *Fralely v. Facebook, Inc.*, 830 F. Supp. 2d 785, 805–07 (N.D. Cal. 2011). Moreover, the *Cohen* court did not even mention newsworthiness in its discussion of injury. *Cohen v. Facebook, Inc. (Cohen I)*, 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011).

B. IMPLICATIONS FOR PRIVACY-NEWSPWORTHINESS TENSION

In addition to the *Fraleley* court's less-than-ideal approach to evaluating harm and damages, the court's language concerning newsworthiness and celebrity in the context of social networks is also potentially problematic for claims regarding the right of publicity, privacy, and defamation. Even though the court found that Facebook's "Sponsored Stories" fell outside of section 3344(d)'s newsworthiness exemption due to Facebook's commercial use of plaintiffs' names and likenesses,¹⁹⁰ the court still provided a thorough interpretation of how newsworthiness should be understood in the context of an online social network.¹⁹¹ In particular the court found the plaintiffs to be "local 'celebrities' within their own Facebook social networks . . . [which] ma[de] them subjects of public interest among the same audience."¹⁹² Moreover, the court suggested an increasing arbitrariness regarding the distinction between public figures and private persons in light of the domination of online social networking websites, including YouTube and Twitter.¹⁹³

Before delving into the implications of such a conception of newsworthiness in the context of online social networks, it should be noted that the *Fraleley* court's primary fixation on the status of plaintiffs as either public figures or private persons arose from the plaintiffs' contradictory pleading that they could be celebrities for the purposes of showing injury, but not celebrities in the context of the newsworthiness discussion.¹⁹⁴ But, as the analysis in Section IV.A.1, *supra*, indicates, plaintiffs did not need to demonstrate their "celebrity status" to their Facebook "friends" to be able to recover economically.¹⁹⁵ In fact, plaintiff's "celebrity" status added nothing to the discussion of injury because the value of endorsements in advertising depends on the endorser's ability to influence potential buyers into purchasing a good or service. Word-of-mouth advertising does not rely on the fame or notoriety of the endorser but rather on an individual's ability to affect the purchasing decisions of members of his social network.¹⁹⁶ Had the plaintiffs or the court framed the injury to the plaintiffs as the devaluation of

190. *Fraleley*, 830 F. Supp. 2d at 805 (following the Ninth Circuit's holding in *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996)).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 804.

195. *See supra* notes 178–179 and accompanying text (noting the availability of substantiating harm through non-economic means or through qualitative and quantitative harm to the plaintiffs' right of publicity for social marketing purposes).

196. *Fraleley*, 830 F. Supp. 2d at 792.

the plaintiffs' right of publicity through overuse and misuse along with harm resulting from Facebook's infringement of the plaintiffs' control over their self-identities, the court could have avoided this celebrity/non-celebrity "contradiction" and may have had less of an issue recognizing the plaintiffs as private persons rather than public figures for newsworthiness purposes.

1. *Newsworthiness Implications for Right of Publicity*

Under the *Fraleley* court's interpretation of newsworthiness, misappropriation of an individual's right of publicity in the social networking context will almost inherently be newsworthy because a user's actions in the social network will nearly always be to a limited audience that has opted to "friend" the user. Thus, from the court's viewpoint, the user's "friends" find all of the user's actions of interest to them, or else the "friend" would not have opted to join that person's social network. As a primary matter, this view of newsworthiness overstates the relationship between a Facebook user and his "friends" or, more broadly, between any online social network user and the people with whom he connects. A user might have many reasons for connecting with another person—including that it would be awkward or uncomfortable for the user to reject a request to connect with another person—such that the user's "supposed 'friends' are also populated by relatives, professional colleagues, neighbors, former classmates or co-workers, and many casual acquaintances."¹⁹⁷ Some of these "friends" will be uninterested in the actions of the user, or perhaps more commonly, the user will be uninterested in the online actions of his "friends." As a result of this disinterest, at least a portion of the user's "friends" likely consider his actions in the context of the online social network as less newsworthy on the whole than the *Fraleley* court anticipated.

Labeling as newsworthy all of a user's "public" actions¹⁹⁸ within the online social network places appropriation of a user's right of publicity regarding those actions wholly within the section 3344(d) exemption; therefore, such an overbroad classification places the onus on a plaintiff to prove that a defendant's use falls outside of the exemption. Even though this presumption of newsworthiness seems less than problematic in the case of

197. See McGeveran, *supra* note 106, at 1126 n.104.

198. Note that because of users' customized privacy settings some actions, including a user's "Likes," are less visible and thus less "public" than other actions. Here, the court considers the plaintiffs' "Likes" to be "public" as implied by the court's finding the actions can be deemed newsworthy. *Fraleley*, 830 F. Supp. 2d at 804–05. See also *supra* note 175 and accompanying text (explaining that plaintiffs' may have obscured their "Likes" from visibility by any of their "friends" such that the "Likes" could not possibly be considered "public" or newsworthy actions).

Fraleley—where misappropriation occurred in the context of social marketing and thus primarily for advertising purposes—the presumption will likely prove harmful when the use by a defendant lacks a facially discernible advertising focus.¹⁹⁹ This potential harm results from the forced presumption of public interest in the plaintiff’s actions in the context of his online social network, which would further decrease the plaintiff’s chances by allowing the defendant to claim an exemption under section 3344(d); the burden of the exemption discussion then falls on the question of whether or not the defendant appropriated the users’ names or likenesses primarily for advertising purposes.²⁰⁰

2. *Newsworthiness Implications for Privacy Torts and Defamation*

Applying the newsworthiness standard espoused by the *Fraleley* court as a blanket rule is detrimental to a user’s expectation of privacy because it places a higher pleading burden on the user.²⁰¹ Under the *Fraleley* interpretation, all social networking users would be considered public figures in the context of their network of “friends” because of the users’ willingness to connect with others and to place some facts about themselves into the quasi-public sphere of their social network.²⁰² For a public figure, a court would apply a higher requirement of intent and a lower expectation of privacy for the torts of intrusion upon seclusion, public disclosure of embarrassing facts, false light invasion of privacy, and defamation.²⁰³

199. Consider the fine line between what garners exemption under section 3344(d) in two cases evaluating surfing as newsworthy and consider the purported role of advertising in the appropriating of the plaintiffs’ names and likenesses. *Compare* *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 795 (Ct. App. 1993) (finding defendant’s use of plaintiffs’ names and likenesses to be newsworthy in the context of a documentary about surfing) *with* *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1002 (9th Cir. 2001) (refusing to find defendant exempt from liability because defendant’s use of plaintiffs’ likenesses drew too tenuous a connection to the theme of the clothing catalog in which defendant used the likenesses).

200. *See* *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996) (focusing heavily on the purpose of the appropriated use since the plaintiff’s name and basketball statistics were presumed to be newsworthy).

201. *See supra* note 23 and accompanying text.

202. *See* *Fraleley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 805 (N.D. Cal. 2011). *See supra* Section IV.B.1 for discussion of issues with this overbroad characterization.

203. *See* Prosser, *supra* note 15, at 411. The torts of public disclosure of embarrassing facts and false light invasion of privacy represent the last two of Prosser’s privacy torts. *Id.* at 389 (acknowledging torts for “[p]ublic disclosure of embarrassing private facts about the plaintiff” and “[p]ublicity which places the plaintiff in a false light in the public eye”).

Consider, for instance, a case where a user's "friend" posts a libelous comment on the user's Facebook wall for all of the user's "friends" to see.²⁰⁴ Such a post might cause the user considerable reputational harm and mental distress.²⁰⁵ However, under the *Fraleley* newsworthiness conception, a court would view the user as a public figure and would require the user to establish that the "friend" who posted the libelous comment acted with actual malice before permitting recovery.²⁰⁶ This view would limit the user's ability to recover regardless of the harm sustained or the inapplicability of the public figure status.

On the other hand, the imposition of the higher pleading standard might prevent social networking users from becoming overly litigious in the quasi-public sphere of online social networking where users generally speak more freely—arising from the common ability of an online speaker to speak from behind a curtain of anonymity.²⁰⁷ But this litigation deterrence provides only a narrow potential benefit since libelous speech and invasions of privacy, in the context of online social networks, are perhaps more potent than other instances of the torts. In particular, the relevant audience likely represents an amalgamation of the people to whom the targeted user would be most sensitive about revealing personal or libelous information.²⁰⁸ Moreover, the capabilities of users to share and redistribute a libelous message or one that invades a particular user's privacy dispel any notion that speech in the online social networking context should deserve any less scrutiny than other online speech or print speech.²⁰⁹

204. For an actual online social network defamation case similar to the example provided, see *Chaker v. Mateo*, 147 Cal. Rptr. 3d 496, 501–02 (Ct. App. 2012) (demonstrating the California courts' willingness to hold users of online social networking sites to be public figures based on election to join a site where other users would have a legitimate interest in knowing about a user's character). See also L.V. Anderson, *Can You Libel Someone on Twitter?*, SLATE, Nov. 26, 2012, http://www.slate.com/articles/technology/explainer/2012/11/libel_on_twitter_you_can_be_sued_for_libel_for_what_you_write_on_facebook.html.

205. See McKenna, *supra* note 20, at 290–91.

206. See *Fraleley*, 830 F. Supp. 2d at 805.

207. See Katherine D. Gotelaere, *Defamation or Discourse?: Rethinking the Public Figure Doctrine on the Internet*, 2 CASE W. RES. J.L. TECH. & INTERNET 1, 1 (2011) ("While online anonymity is valuable as it encourages the speaker to distribute his ideas freely, it is also dangerous as it widens the potential for cognizable legal harm to individuals in the form of online defamation.").

208. See McGeeveran, *supra* note 106, at 1125.

209. See Goldman, *supra* note 114, at 411. Note, however, that a user could still be deemed a limited purpose public figure depending on the topic of the potentially libelous or privacy-invasive speech and the users' voluntary participation. See *Reader's Digest Ass'n v. Superior Court*, 690 P.2d 610, 615 (Cal. 1984) ("Unlike the 'all purpose' public figure, the 'limited purpose' public figure loses certain protection for his reputation only to the extent

C. FUTURE OPPORTUNITY FOR USERS TO RECOVER FOR VIOLATIONS OF THE NOW LEGALLY-COGNIZABLE RIGHT OF PUBLICITY

Finally, the *Fraley* court's finding favoring the plaintiffs on their right of publicity claim paves the way for similar cases of abuses of social marketing. As explained in Section IV.A.2, *supra*, if future courts or plaintiffs follow the economic-harm-focused approach of the *Fraley* court, potentially damaging infringement of users' right of publicity will go unpunished for failure to plead harm apart from a calculable economic profit by the social network provider. For example, the plaintiffs in *Fraley* likely would have struggled to plead injury under their profits-focused pleading if Facebook had not charged advertisers for the "Sponsored Stories." However, the plaintiffs still would have suffered economic injury and non-economic injury as discussed in Section IV.A.1, *supra*, even in the absence of Facebook's own direct profiting from the messages.

If future plaintiffs and courts instead adopt the holistic approach focusing on the *harm incurred on plaintiffs* rather than the *profits of the infringer*, plaintiffs will be more likely to recover.²¹⁰ For instance, the plaintiffs in *Cohen I* and *Cohen II* might have been able to avoid dismissal of their section 3344 claims had they adopted this approach.²¹¹ They would have been able to allege injury through the qualitative and quantitative devaluation of their right of publicity resulting from repeated use by Facebook to promote its "Friend Finder" service, even though they could not have proved a calculable monetary harm. Such a finding of harm, although immeasurable, exemplifies

that the allegedly defamatory communication relates to his role in a public controversy." Still, a presumption of being a public figure significantly overshadows any concerns of a user's public figure status arising on an individual case-by-case basis and causes more far-reaching harm due to its blanket application. See *supra* notes 203–208 and accompanying text.

210. Such findings of non-economic harm find support in both right of publicity and pseudo-right of publicity cases in California. For instance, in *Fairfield v. American Photocopy Equipment Co.*, the California Court of Appeal reversed a lower court's decision regarding a false endorsement because the lower court precluded the plaintiff from presenting evidence relating to his mental anguish and hurt feelings the plaintiff suffered as a result of the misappropriation of his name in the inaccurate endorsement. 291 P.2d 194, 200 (Cal Ct. App. 1955). Moreover, regarding the California's statutory right of publicity, the California Court of Appeal in *Miller v. Collectors Universe, Inc.* substantiated a non-celebrity's injury based on his hurt feelings apart from economic harm. 72 Cal. Rptr. 3d 194, 209 (Ct. App. 2008).

211. Plaintiffs in *Cohen I* and *Cohen II* twice failed to plead injury through mental distress or devaluation of the users' right of publicity regardless of the court's specific suggestion that pleading injury caused by mental distress might have been sufficient to allow for recovery under the section 3344(d) statutory minimum. See *Cohen v. Facebook, Inc. (Cohen I)*, 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011); *Cohen v. Facebook, Inc. (Cohen II)*, C 10-5282 RS, 2011 WL 5117164, at *3 (N.D. Cal. Oct. 27, 2011).

the California legislature's rationale for inclusion of a statutory minimum damages in section 3344.

Because of the potential for future successful cases by online social network users regarding right of publicity infringement, online social networking providers would be wise to take active steps outlined in Section IV.D, *infra*, to protect themselves from having to pay enormous damage awards—at least \$750 per plaintiff—or large settlements similar to the \$20 million Facebook paid to settle the *Fraleley* case.²¹² Additionally, online social networking providers enabling social marketing should recognize that abuse of social marketing not only proves harmful for social network users, but abuse also harms the use of social marketing generally.²¹³

D. KEY IMPLICATIONS FOR ONLINE SOCIAL NETWORKING COMPANIES

To prevent right of publicity lawsuits, social networking companies need to take action to insure that their Terms of Service (“TOS”) properly outline the data that the social network provider collects, how the provider currently uses the data, who the provider permits to use the data, and how the provider plans to use the data in the future—if the provider has plans to offer new products or services. For example, both the *Fraleley* court and the

212. See CAL. CIV. CODE § 3344(a) (West 2012); Levine, *supra* note 13.

213. Because word-of-mouth advertising and social marketing rely heavily on the trust an individual has amassed among his close friends and family members over time, false endorsements by social networking providers appropriating the individuals' names or likenesses lead receivers of those endorsements to distrust social marketing messages more generally. See McGeeveran, *supra* note 106, at 1165. Not only does social marketing abuse cause users to distrust word-of-mouth messages they receive but it also minimizes users' willingness to tie themselves to messages as they recognize the tendency for abuse of such messages. See Angela Hausman, *Marketing is Dead?????*, HAUSMAN MARKETING LETTER (Aug. 12, 2012), <http://www.hausmanmarketingletter.com/marketing-is-dead> (“As more [marketing] firms take shortcuts by compensating consumers for favorable endorsements, social media users are becoming jaded and beginning to distrust their friends' opinions. A recent research study by Robert Kozinets found both anger and distrust generated when bloggers were compensated for their product reviews by as little as free products.”). A 2012 online survey revealed that 98% of Americans distrust information found on the Internet with 59% citing too many ads as a main reason for distrust and 53% citing distrust resulting from viewing information as self-promotional. *Mancx Survey: 98% of Americans Distrust Information on the Internet*, HARRIS INTERACTIVE (July 17, 2012), http://www.harrisinteractive.com/vault/2012_Mancx%20Distrust%20Internet%20Info.PDF. This distrust is not limited to the specific social marketing abuser, but rather poisons users' perceptions of the word-of-mouth messages generally. See McGeeveran, *supra* note 106, at 1165. As William McGeeveran warns, there is a “danger that irresponsible social marketing practices by a few individual firms could damage the entire recommendation ecology.” *Id.* Furthermore, overuse of social marketing by multiple parties can lead to the “spamification” of word-of-mouth messages whereby the messages lose meaning and effectiveness in an oversaturated market. *Id.*

Cohen I court held that consent remained a disputed question of fact precluding dismissal on that ground alone because Facebook's TOS did not directly disclose that users' names and likenesses would be used for social marketing purposes.²¹⁴ Had Facebook instead ensured that its TOS required consent to be given for appropriation of users' names and likenesses in its "Sponsored Stories," the TOS would have likely provided Facebook a strong defense to even its advertising-purposed appropriation of users' right of publicity.²¹⁵

Second, online social networking companies should write their TOS consent terms as clearly as possible. Additionally, they should recognize that extra steps would need to be taken to gain consent from minors, as they cannot consent to appropriation of their names and likenesses without parental authorization.²¹⁶ If the company's existing TOS does not provide for right of publicity appropriation, the company will need to send a notice of modification to its users when it adds such consent requirements to its TOS.²¹⁷ This notice of modification actively informs users of the changing TOS and its implications.

214. *Fralely v. Facebook, Inc.*, 830 F. Supp. 2d 785, 805 (N.D. Cal. 2011) (holding the issue of consent to be a disputed question of fact not ripe for dismissal); *Cohen I*, 798 F. Supp. 2d at 1095 ("Nothing in the provisions of the Terms documents to which Facebook has pointed constitutes a clear consent by members to have their name or profile picture shared in a manner that discloses what services on Facebook they have utilized, or to endorse those services.").

215. Of course, a court might invalidate the TOS consent if the court does not believe the browse-wrap consent—consent purportedly given by the mere action of using an online or downloadable product or service—to be enough to protect the company. The court might also invalidate the consent if it deems the TOS terms to be unconscionable or lacking willfulness on the part of the users in their agreeing to the terms. Thus, consent provides a full defense in an ideal situation but likely includes potential weaknesses.

216. Note that as a result of the *Fralely* settlement, Facebook has implemented an opt-out consent for minors as long as requested by a confirmed parental guardian. *See supra* note 147.

217. Generally, online social networking companies implement the broadest language possible regarding how the company can and will use the information users provide. For example, prior to *Fralely*, Facebook's TOS stated, "You can use your privacy settings to limit how your name and profile picture may be associated with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. You give us permission to use your name and [Facebook] profile picture in connection with that content, subject to the limits you place." *Fralely*, 830 F. Supp. 2d at 805. Such broad language relies on a questionable understanding that if the company changes how it would like to use users' information in the future, these new uses will still be covered by the existing TOS such that the company can implement the new uses of the information without requiring users to reaffirm consent to the TOS. However, as *Cohen I* and *Fralely* demonstrate, the California courts have proven unwilling to recognize consent under a broadly worded TOS, at least regarding utilization for endorsement purposes that implicate users' right of publicity. *Fralely*, 830 F. Supp. 2d at 805

Finally, should a company want to take additional steps to protect its users' interest in their right of publicity and avoid possible litigation altogether, the company should consider offering either an opt-in or opt-out availability for appropriation of users' names and likenesses in the company's social marketing service.

Implementing an opt-out or opt-in consent for social marketing purposes provides the highest level of protection for users, but it represents a considerable sacrifice on behalf of the social networking provider. Namely, offering the ability to opt-out—or going so far as to make the social marketing service opt-in—limits the online social network provider's profits by limiting the number of participants available for appropriation purposes.²¹⁸

However, a provider might also benefit from the added legal protection. Allowing users to opt out permits those who would be offended by the use of their names or likenesses to opt out, thus eliminating many of the would-be plaintiffs. From the users' perspective, the ability to opt out provides the necessary ability to control and shape their personal identities. Finally, opt-out ensures that the messages that appear through social marketing actually provide meaningful endorsements by users who are aware that advertisers will use the users' right of publicity to promote the brands and companies for which the users indicate support.

For specific aspects of an online social network provider's social marketing service, a provider might also consider implementing a more user-friendly opt-in requirement before allowing word-of-mouth messages to issue regarding a user's particular actions. Opt-in would require users to assent to the promotion of their specific online actions in social marketing messages targeting their "friends."²¹⁹ Applying such an opt-in requirement to

(holding the issue of consent to be a disputed question of fact not ripe for dismissal); *Cohen I*, 798 F. Supp. 2d at 1095 ("Nothing in the provisions of the Terms documents to which Facebook has pointed constitutes a clear consent by members to have their name or profile picture shared in a manner that discloses what services on Facebook they have utilized, or to endorse those services.").

218. For example, Facebook continues to face enormous financial pressures to increase profitability through advertising—especially after its stock's sharp decline in value immediately after its IPO—while simultaneously facing pressure not to affect users' experience in a way drives away users. See Michel Liedtke, *After IPO, Facebook will face new profit pressures*, YAHOO! FINANCE, Feb. 2, 2012, <http://finance.yahoo.com/news/ipo-facebook-face-profit-pressures-224809565.html>. Of course, advertising is not the only way Facebook and other online social networking companies can make money will maintaining free services. *Id.* ("[Facebook also] charges a commission for some of the sales of games and other services on its website."). Although, last year 85% of Facebook's revenue came from advertising. *Id.*

219. Facebook currently provides such an opt-in requirement for promotion through its Beacon program whereby Facebook and its advertisers encourage users not only to opt-in to

all social marketing messages ensures that a social network provider will face reduced likelihood of a lawsuit for infringement of users' right of publicity, but such broad implementation could result in detrimental consequences regarding the profitability of the social marketing service.²²⁰ However, contracting properly for consent can limit the need for such an opt-out or opt-in provision, unless the company is interested in taking that additional protective step.

V. CONCLUSION

The *Fraley* court's decision in favor of the plaintiffs on their section 3344 claims represents a step toward defining how the right of publicity will play out in the online social networking context. Even though the court arrived at the proper result in favor of the users, the court's exclusively economic approach to the right of publicity exemplifies the weaknesses of the current right of publicity law, especially in light of social marketing practices and autonomous control concerns. A holistic approach focusing on the *injury caused to plaintiffs*—qualitatively, quantitatively, and incorporating non-economic harm—rather than solely on the profits earned by the misappropriating party would more accurately conceptualize the injury resulting from right of publicity infringement. Moreover, such an approach would properly increase the capabilities of online social network users to recover when a provider violates their right of publicity, regardless of whether the misappropriating party directly profited from the use.

On the other hand, the court introduced a problematic framing of newsworthiness whereby future courts could deem the actions of similarly situated plaintiffs inherently newsworthy in the context of the plaintiffs' "friends" due to the plaintiffs' pseudo-public figure status among his "friends." A subscriber trying to allege invasion of privacy or defamation in

promote their actions but also to create the message to accompany the endorsement or recommendation. See McGeeveran, *supra* note 106, at 1120–21.

220. Advertisers would only be able to promote their brand at the moment users interact with the brand by asking them to opt-in and promote the brand. This severely minimizes the usefulness of social marketing both for the advertisers and for the social network provider because it places both parties' ability to profit from social marketing wholly at the unpredictable whim of users. Even the inclusion of an opt-out provision might seem too injurious to the profitability of social marketing, but a social network provider looking to differentiate itself in the market might promote its opt-out provision as making it a more user-friendly and user-focused social network. Such reduced profitability could additionally lead a social network provider to consider transforming its free service into a subscription service—a change users would likely view negatively. See *supra* note 218 for further discussion of the centrality of advertising to Facebook and to similar online social networking companies.

the online social network context could potentially be held to a higher pleading standard and thus a loss of protection because of his *Fraley*-anointed public figure status. Moreover, a plaintiff alleging infringement of his right of publicity may no longer be able to assert that his actions online do not constitute a subject of public interest such that the plaintiff can no longer rely on his private person status as a counterargument to a defendant's claim of exemption under section 3344(d).

