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by
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I. Introduction

Several recent high-profile instances of cyberbullying and online impersonation have prompted state legislatures across the country to

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take action against this real and growing problem.[1] But like all attempts to regulate use of the internet, laws governing online communication must carefully tread the line between protecting individuals from harm and respecting freedom of speech. On January 1, 2011, California Senate Bill 1411 (now codified at section 528.5 of the Penal Code) went into effect, creating civil and criminal liability for "any person who knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person."[2] Shortly before the statute went into effect, the bill's author, California State Senator Joe Simitian, D-Palo Alto, sent out a press release explaining his motivations in writing the bill: "E-personation is the dark side of the social networking revolution. Facebook or MySpace pages, e-mails, texting and comments on Web forums have been used to humiliate or torment people and even put them in danger . . . Until now, there really has been no deterrent."[3]

The issue was brought to Senator Simitian's attention by Carl Guardino, a constituent and the president and chief executive officer of the Silicon Valley Leadership Group, which represents several local technology companies.[4] Three years ago, someone created a fake email address for Guardino and used it to send malicious notes, harshly criticizing the work of the recipients, to Guardino's professional contacts.[5] In May 2010, a crude email was sent to a local reporter from a fake Guardino account.[6] The perpetrator of either

1. Examples include: 18-year-old Tyler Clementi of New Jersey (who was outed as gay by his roommate on the Internet), 15-year-old Billy Lucas of Indiana (who hanged himself after continued bullying from his peers about his sexuality), and 13-year-old Asher Brown of Texas (who shot himself after years of abuse online), and 13-year-old Megan Meirs of Missouri (who hanged herself after the being bullied by the mother of a peer through a fake MySpace account).

2. CAL. PENAL CODE § 528.5(a) (Deering 2012). The crime is a misdemeanor, and penalties are similar to those for other forms of impersonation (i.e., a fine of up to $1,000 and/or up to one year in jail). CAL. PENAL CODE § 528.5(d) (Deering 2012). The bill also allows victims to pursue compensation in civil court. CAL. PENAL CODE § 528.5(e) (Deering 2012).

3. *Malicious E-Personation Protection Effective January 1*, STATE SENATOR JOE SIMITIAN (Dec. 22, 2010) http://www.senatorsimitian.com/entry/malicious_e-personation_protection_effective_january_1/ (hereinafter Simitian I).

4. Maggie Shiels, *California Looks to Outlaw Online Impersonation*, BBC NEWS (Aug. 24, 2010, 7:49 AM), http://www.bbc.co.uk/news/technology-11045070.

5. Andrea Koskey, *New Year Brings New Law Targeting Cyberbullying*, SAN FRANCISCO EXAMINER (Dec. 31, 2010, 5:00 AM) http://www.sfexaminer.com/local/2010/12/new-year-brings-new-law-targeting-cyberbullying#ixzz1ca6vKWdX.

6. Shiels, *supra* note 5.

action has not been caught.[7] Guardino told the local paper, "It could have ruined my reputation . . . Luckily, [the e-mail recipients] know me well enough to know that e-mail was out of character."[8] A more outrageous example is that of Guardino's brother, a science teacher on the Monterrey peninsula. Someone created a fake Yahoo email address and Facebook account, and used them to make it seem as though Guardino's brother was mocking a disabled student.[9] When Guardino's brother went to the District Attorney and the County Sheriff for help, they told him there was nothing they could do under existing state law.[10]

At first glance, the e-personation statute seems perfectly reasonable: It is short, filled with good intentions, and just applies existing harassment, intimidation and fraud laws to the relatively recent medium of the Internet.[11] However, a more thorough read exposes the fallacy of this view and reveals serious reasons for concern. For one thing, the existing statute does not expressly exclude acts that might be performed through use of the Internet, so there is nothing to suggest that the law would not apply in that context.[12] Additionally, the phrase "for the purpose of harming . . . another person" is incredibly broad and could easily be construed such that it would criminalize protected speech. Moreover, there is no objective explanation of what it means to "credibly impersonate" another actual person. While there is clearly a core of behavior that is not protected, that behavior is already prohibited by several existing and long-standing statutory and common law causes of action, with well-developed bodies of case law behind them to guide police, prosecutors, judges, and juries in enforcing them.

7. Koskey, *supra* note 6.

8. *Id.*

9. Julie Gottlieb, *California Criminalizes Online Impersonation (E-personation)*, SOCIAL MEDIA NEWS (April 1, 2011) http://socialmedialawnews.com/2011/01/04/california-criminalizes-online-impersonation-e-personation/; *see also* Shiels, *supra* note 5.

10. Shiels, *supra* note 5.

11. Larry Downes, *The Fallacy of "E-personation" Laws*, LARRYDOWNES.COM (June 11, 2010) http://larrydownes.com/the-fallacy-of-%E2%80%9Ce-personation%E2%80%9 D-laws/.

12. Bill Analysis of S.B. 1411 (as amended May 11, 2010), Assembly Committee on Judiciary, June 29, 2010, http://leginfo.ca.gov/pub/09-10/bill/sen/sb_1401-1450/sb_1411_cfa_20100628_112759_asm_comm.html; "For purposes of this chapter, 'personal identifying information' means any . . . unique electronic data including information identification number assigned to the person, address or routing code, telecommunication identifying information or access device." CAL. PENAL CODE § 530.55(b) (Deering 2012).

Essentially, the crux of the problem with this law is that the authors, aware that technology evolves faster than any legislative body can hope to stay abreast of, wrote the bill so that it is simultaneously both under-inclusive and over-inclusive.[13] Consequently, it does not address much of the cyberbullying behavior it is intended to deter but has the potential to be abused by over-zealous prosecutors and litigious plaintiffs with otherwise weak cases. In other words, this statute will be largely ineffective at best, and a tool to chill speech at worst. With the enactment of this bill, California now takes its place among such stalwart defenders of free speech as Morocco[14] and India,[15] both of whom have arrested their citizens for creating Facebook pages for others.

While there are several problems with California's new e-personation statute, this Note will primarily focus on the implications for traditionally protected speech resulting from the potential overbreadth of the phrase "for the purpose of harming . . . another person" and vagueness of the standards for "credibly impersonate." Part II of this Note will provide background on the overbreadth and vagueness doctrines in Constitutional law, and will review several existing causes of action that are analogous or related to section 528.5 to show that there is already a well-established body of law in California prohibiting the behavior that the e-personation statute is intended to deter. Part III will analyze the core language of the e-personation law and show that it is impermissibly broad and vague, potentially lowering the threshold for legitimate causes of action such that enforcement of the law would criminalize or subject to civil litigation speech that has traditionally been protected by the First Amendment. Part IV will attempt to provide some guidance on how the language should be constructed by reviewing courts (or, ideally, amended by the legislature) to narrow and more clearly define the vague and ambiguous statutory language. Part V will conclude that even with narrowing the offending language to limit the statute's application to protected speech, the bill covers exactly the same kind of conduct that is already covered by existing statutes, and that the behavior at which this statute is directed is best regulated by the private platforms on which it is conducted.

13. Downes, *supra* note 12.

14. *Facebook Fraudster "Stole Prince's ID"*, CNN.com (Feb. 7, 2008, 8:52 AM) http://edition.cnn.com/2008/WORLD/africa/02/07/morocco.identiity/index.html.

15. *1 Arrested For Fake Face Book Profile of Rudy*, NEWS4U.CO.IN (April 28, 2010) http://news4u.co.in/2010/04/1-arrested-for-fake-face-book-profile-of-rudy/.

II. Background

A. Constitutional Challenges

The First Amendment prohibits unreasonable restrictions on speech by the federal government,[16] and applies to state governments through incorporation of the due process clause of the Fourteenth Amendment.[17] Attacks on a statute's constitutionality are either facial challenges or as-applied challenges. To prevail in a facial challenge, a plaintiff must establish that the legislation is always, and under all circumstances, unconstitutional; if successful, the court will strike the statute down entirely. Sometimes, a court will reject a facial challenge but insinuate that an as-applied challenge could prevail.[18] To succeed in an as-applied challenge, a plaintiff must show that a statute is unconstitutional when applied to a particular situation; if successful, the court will narrow the circumstances in which the statute may constitutionally be applied without striking it down.

1. Vagueness Doctrine

The vagueness doctrine, rooted in due process, states that a given statute is unenforceable and facially invalid if persons of "common intelligence must necessarily guess as its meaning and differ as to its application"; in other words, a law is too vague when an average citizen cannot generally determine what persons are regulated, what conduct is prohibited or required, or what punishment may be imposed.[19] It protects an individual's right to live free from fear or the chilling effect of unpredictable prosecution, and limits the discretion of the state to initiate criminal prosecutions and selectively enforce laws.[20] The Supreme Court has held that a law threatening fundamental First Amendment rights demands a higher degree of clarity than a statute that does not threaten a constitutionally protected right.[21] However, where a statute could apply to both

16. "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

17. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .." U.S. CONST. amend. XIV.

18. Gonzales v. Carhart, 550 U.S. 124 (2007); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

19. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

20. Cantwell v. Conn., 310 U.S. 296, 308 (1940).

21. Keyishian v Bd. of Regents, 385 U.S. 589, 603–04 (1967); Winters v. New York, 333 U.S. 507, 509–10 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940).

protected and unprotected conduct, and the law's valuable effects outweigh its potential general harm, a court will strike it down only as applied.[22] Vagueness does not always lead to a determination of invalidity—courts may cure a vagueness problem that appears on the face of the statute through a clarifying judicial interpretation.

2. Overbreadth Doctrine

The overbreadth doctrine states that a statute is overly broad (and facially invalid) if, in banning unprotected conduct, it also proscribes protected conduct.[23] Specifically, the doctrine seeks to "strike a balance" between two "competing social costs":[24] The "harmful effects" of "invalidating a law that in some of its applications is perfectly constitutional," and the possibility that "the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech."[25] Given the likelihood of chilled speech under an overly broad law, the doctrine allows third party standing on the ground that the statute violates others' First Amendment rights.[26] Because almost any law regulating speech (even when the vast majority of prohibited speech is not protected by the First Amendment) will seem to potentially reach some protected speech, "the overbreadth of the statute must not only be real but substantial as well, judged in relation to the statute's plainly legitimate sweep" for a court to invalidate it.[27] Demonstrating substantial overbreadth invalidates all enforcement of that law, until a limiting construction or partial invalidation (deletion of the impermissibly broad part of the law from the remainder of the statute) narrows it to eliminate the threat to protected expression.[28]

To determine whether a statute's overbreadth is substantial, courts consider a statute's application to real-world conduct, not far-

22. Palmer v. City of Euclid, 402 U.S. 544 (1971); Vill. of Hoffman Estates v. Flipside, 455 U.S. 489, 494–95 (1982); United States v. Nat'l Dairy Corp., 372 U.S. 29 (1963).

23. Lewis Sargentich first analyzed and named the doctrine in his famous note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, (1970). The Supreme Court explicitly recognized the doctrine in 1973.

24. United States v. Williams, 553 U.S. 285, 292 (2008).

25. *Id.*

26. *See, e.g.*, Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 483 (1989), *and* R.A.V. v. City of St. Paul, 505 U.S. 377, 411 (1992).

27. Broadrick v Oklahoma, 413 U.S. 601, 612–13, (1973), citing Lewis Sargentich, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, (1970).

28. Canatella v. Stovitz, 365 F.Supp.2d 1064 (N.D. Cal. 2005), (citing Virgina v. Hicks, 539 U.S. 113 (2003)).

fetched conjectural situations.[29] Accordingly, courts have repeatedly emphasized that an overbreadth claimant bears the burden of demonstrating, "from the text of [the law] and from actual fact" that substantial overbreadth exists.[30] Similarly, there must be a "realistic danger" that the statute itself will "significantly compromise recognized First Amendment protections of third parties" to be facially challenged on overbreadth grounds.[31]

B. Alternative Causes of Action Available

There are several statutory and common law causes of action in California that are related to e-personation. False impersonation, identity theft, defamation, intentional misrepresentation, intentional infliction of emotional distress, rights of privacy (misappropriation of likeness or name, right of publicity, and false light) all have elements or conceptual similarities to the e-personation statute, and are summarized below.

1. False Personation

California's false personation law makes it a crime to falsely assume the identity of another person in order to cause harm to the other person or to gain personal benefit, by subjecting the impersonated party to financial loss or civil and criminal liability.[32] This definition necessarily implies that the person impersonated is a real person and not a fictitious one (even if the individual is deceased).[33] To be violate the statute, the impersonator must, in addition to pretending to be someone, either receive money or

29. *See, e.g.*, *Williams*, 553 U.S. at 301–02.

30. *Hicks*, 539 U.S. at 153.

31. Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984).

32. CAL. PENAL CODE § 529 (Deering 2012).

33. Lee v. Super. Ct., 989 P.2d 1277, 1279 (Cal. 2000).

> Pen. Code, § 529, by referring to impersonation of "another," contemplates impersonation of a real or actual (as opposed to fictitious) person; it does not follow, however, that a deceased person is not a real or actual person for purposes of Pen. Code, § 529. Statutes prohibiting impersonation have two purposes: preventing harm to the person falsely represented, and ensuring the integrity of judicial and governmental processes. Both purposes are furthered by construing Pen. Code, § 529, as applying to impersonation of a deceased person as well as of a living person, and both would be frustrated by a contrary interpretation of the statute.

Id.

property intended for the individual so impersonated,[34] subject the impersonated to "any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person,"[35] or "marry, or sustain a marriage relationship with another."[36]

In other words, for this statute to apply, an impersonator must wage intentional deception and commit one of the additional specified acts.[37] For example, forging someone's signature on a citation booking form or submitting to fingerprints while impersonating someone else is not a violation of this statute, because the impersonation was inextricably part of the action.[38] False personation comes with a $10,000 fine, a year in prison, or both.[39] Because the statute requires an additional act beyond identifying oneself falsely there are two defenses: (1) the impersonator did not commit one of the specified additional acts, and (2) that the individual impersonated won't be subject to any harm, and no one is benefitting from the impersonation. However, the statute does not require an actual harm or benefit to have occurred, just the potential to create one.[40]

34. CAL. PENAL CODE § 530 (Deering 2012).

35. CAL. PENAL CODE § 529(a) (Deering 2012).

36. CAL. PENAL CODE § 528 (Deering 2012).

37. People v. Rathert, P.3d 700, 707 (2000)

> …[S]ection 529, paragraph 3 [California's false impersonation law], unlike public welfare offenses, does not dispense with a mental element. One does not violate paragraph 3 merely by happening to resemble another person. Rather, one must intentionally engage in a deception that may fairly be described as noninnocent behavior, even if, in some instances, it might not stem from an evil motive.

Id.

38. These examples are taken from People v. Stacy, 108 Cal. Rptr. 3d 312, 317 (Cal. Ct. App. 2010); People v. Cole, 18 Cal. Rptr. 2d 788, 790 (Cal. Ct. App. 1994); People v. Robertson, 273 Cal. Rptr. 209, 210 (Cal. Ct. App. 1990) (overruled on other grounds).

39. CAL. PENAL CODE § 528 (Deering 2012).

40. ". . .does any other act whereby, if done by the person falsely personated, he *might*, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit *might* accrue to the party personating, or to any other person." CAL. PENAL CODE § 529 (Deering 2012) (emphasis added).

2. Identity Theft and Counterfeit Official Documents

Identity theft is the taking of another person's personally identifying information for use in a criminal or deceptive manner.[41] California's identity theft statute allows for criminal charges when someone "willfully obtains personal identifiable information to use for any unlawful purpose," including, but not limited to, "obtain[ing], or attempt[ing] to obtain, credit, goods, services, or medical information in the name of another person."[42] Specifically, the statute prohibits four types of identity theft: (1) intentionally obtaining someone's personal identifying information and using that information for any unlawful purpose without that person's consent;[43] (2) acquiring or retaining possession someone's personal identifying information (without his or her consent) with the intent to commit a fraud; (3) selling, transferring, or providing a third party with someone's personal identifying information (without his or her consent) with the intent to commit a fraud; and (4) selling, transferring, or providing a third party with someone's personal identifying information (without his or her consent) with the actual knowledge that the information will be used to commit a fraud.[44]

Somewhat appended to the identity theft law is a prohibition on the manufacture, sale, offer for sale, or transfer of any document purporting to be a government-issued identification card or driver's license (but not amounting to counterfeit), which by virtue of the wording or appearance thereon could reasonably deceive an ordinary person into believing that it is issued by a government agency.[45]

3. Defamation

In California, defamation (known as "libel" in written from, and "slander" if uttered orally), is defined by both statute[46] and case law.[47]

41. CAL. PENAL CODE § 530.5 (Deering 2012).

42. *Id.*

43. California courts have found that "unlawful" does not only refer to criminal activity, but to any act prohibited by some type of law—even a civil one such as defamation. E.g., In re Rolando S., 129 Cal. Rptr. 49, 54 (Cal. Ct. App. 2011).

44. CAL. PENAL CODE § 530.5 (Deering 2012). Here, the term "fraud" means a deliberate act that is designed to (1) secure an unfair or unlawful gain, or (2) cause another person to suffer a loss, as in the false personation statute.

45. CAL. PENAL CODE § 529.5 (Deering 2012).

46. *See* CAL. CIV. CODE §§ 44, 45(a), and 46 (Deering 2012).

47. *See e.g.,* Cunningham v. Simpson, 461 P.2d 39, 42 (Cal. 1969); Bindrim v. Mitchell, 155 Cal. Rptr. 29, 38 (Cal. Ct. App. 1979); Noral v. Hearst Publ'ns, Inc., 104 P.2d 860, 863 (Cal. 1940); Hellar v. Bianco, 244 P.2d 757, 759 (Cal. 1952); RESTATEMENT (SECOND) OF TORTS §§ 577, 592, 564A, 580B (1977).

The elements of a defamation claim are: (1) publication to one other than the person defamed (2) of a false statement of fact which is understood as (3) being of and concerning the plaintiff, and (4) has a natural tendency to injure the plaintiff's reputation or which causes "special damage."[48] Public figures must additionally prove "actual malice."[49] As a matter of law, in cases involving public figures or matters of public concern, the burden is on the plaintiff to prove falsity in a defamation action.[50] In cases involving matters of purely private figures concern, the burden of proving truth is on the defendant.[51] One important aspect of a defamation case is whether a false statement about someone is likely to be believed.[52] Jocular intent alone will not relieve the author/publisher of liability,[53] but if the statement is too bizarre or hyperbolic to be credible, and readers will likely interpret it as a joke, then the suit is unlikely to succeed.[54] A private plaintiff is with a prima facie case of libel per se may presume damages,[55] otherwise, the plaintiff must prove "special damages," which are concrete, provable, and a direct result of the defamation.[56]

48. Robert Kavanaugh, *Elements of a Defamation Claim: 4-45 California Torts § 45.04*, MATTHEW BENDER & CO., INC., 2011. Last visited Nov. 7, 2011.

49. Kapellas v. Kofman, 459 P.2d 912, 916 (Cal. 1969).

50. Nizam-Aldine v. City of Oakland, 54 Cal. Rptr. 2d 781, 786–90 (Cal. Ct. App. 1996) ("whether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record").

51. Smith v. Maldonado, 85 Cal. Rptr. 2d 397, 403 n.5 (Cal. Ct. App. 1999).

52. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52–54 (1988).

53. Arno v. Stewart, 54 Cal. Rptr. 392, 395 (Cal. Ct. App. 1966); Menefee v. Codman, 317 P.2d 1032, 1035 (Cal. 1957).

54. *Arno*, 54 Cal. Rptr. at 395.

55.

> [T]he jury 'also may award plaintiff presumed general damages.' Presumed damages 'are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required.'

Sommer v. Gabor, 48 Cal. Rptr. 2d 235, 246 (Cal. Ct. App. 1995), (internal citations omitted); *see also* 23 CAL. JUR. 3D DAMAGES § 171. Libel per se is the publication of a false statement about another which accuses him/her of a crime, immoral acts, inability to perform his/her profession, having a loathsome disease (like syphilis), or dishonesty in business. Such claims are considered so obviously harmful that malice need not be proved to obtain a judgment for "general damages," and not just specific losses.

56. *See* CAL. CIV. CODE § 48(a) (Deering 2012); 23 CAL. JUR. 3D DAMAGES § 152.

4. Intentional Misrepresentation or "Fraud"

Under California law, wrongful actions can be characterized as civil "fraud" under the theory of intentional misrepresentation.[57] The general elements of a cause of action for fraud or deceit are (1) misrepresentation (in the form of false representation, concealment, or nondisclosure) of a material fact; (2) knowledge of falsity or lack of reasonable ground for belief in the truth of the representation (scienter); (3) intent to induce reliance; (4) actual and justifiable reliance by plaintiff; and (5) resulting damage.[58] It is not enough that the victim was told a lie; the victim must also be able to prove some type of measurable damage resulted from the lie.[59]

A false statement or omission is actionable only if the plaintiff's reliance was justifiable or reasonable.[60] The reasonableness of the reliance is ordinarily a question of fact. However, if reasonable minds can come to only one conclusion based on the facts, whether a party's reliance was justified may be decided as a matter of law.[61] Reliance is not justifiable if it is unreasonable in light of the plaintiff's intelligence, experience, and business ventures.[62] The test is whether or not it was reasonable under these particular circumstances for this particular plaintiff to have relied on the representation.[63]

57. CAL. CIV. CODE § 3294 (Deering 2012).

58. Peter R. J. Thompson, *3-40 California Torts § 40.02: Elements of Tort of Fraud or Deceit*, MATTHEW BENDER & COMPANY, INC., 2011. *See* Orient Handel v. United States Fid. & Guar. Co., 237 Cal. Rptr. 667, 671 (Cal. Ct. App. 1987); Hackethal v. Nat'l Cas. Co., 234 Cal. Rptr. 853, 857 (Cal. Ct. App. 1987). *See also* CAL. CIV. CODE §§ 1572(1), (2), 1710(1), (2) (Deering 2012); Mirkin v. Wasserman, 858 P.2d 568, 570 (Cal. 1993) (actual reliance); Chi. Title Ins. Co. v. Super. Ct., 220 Cal. Rptr. 507, 513 (Cal. Ct. App. 1985) (justifiable reliance); State Farm Fire & Cas. Co. v. Keenan, 216 Cal. Rptr. 318, 334–35 (Cal. Ct. App. 1985) (knowledge of falsity, justifiable reliance); Hilliard v. A. H. Robins Co., 196 Cal. Rptr. 117, 144 (Cal. Ct. App. 1993) (knowledge of falsity); Hart v. Browne, 163 Cal. Rptr. 356, 361–62 (Cal. Ct. App. 1980) (knowledge of falsity); Gold v. L.A. Democratic League, 122 Cal. Rptr. 732, 739 (Cal. Ct. App. 1975) (recklessness or lack of reasonable ground for belief in truth of representation).

59. *See* CAL. CIV. CODE § 1709 (Deering 2012); Gonsalves v. Hodgson, 237 P.2d 656, 662 (Cal. 1951).

60. Seeger v. Odell, 115 P.2d 977, 980 (Cal. 1941); *Hackethal*, 234 Cal. Rptr. at 857; Wagner v. Benson, 161 Cal. Rptr. 516, 522 (Cal. Ct. App. 1980).

61. Guido v. Koopman, 2 Cal. Rptr. 2d 437, 440 (Cal. Ct. App. 1991).

62. *Wagner*, 161 Cal. Rptr. at 522; Winn v. McCulloch Corp., 131 Cal. Rptr. 597, 601 (Cal. Ct. App. 1976); *see Chi. Title Ins. Co.*, 220 Cal. Rptr. at 513.

63. Kruse v. Bank of Am., 248 Cal. Rptr. 217, 226 (Cal. Ct. App. 1988) (testimony concerning one's own reliance is legally insufficient if that reliance is without justification; plaintiff's misguided belief in statement on which no reasonable person would rely was not justifiable).

> As a general rule negligence of the plaintiff is no defense to an intentional tort .. . . Nor is a plaintiff held to the standard of precaution or of minimum knowledge of a hypothetical, reasonable man . . .. Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled . . . however, even an unsophisticated victim may not put faith in representations which are preposterous, or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.[64]

5. Intentional Infliction of Emotional Distress

California has long recognized the right to recover damages for the intentional infliction of mental or emotional distress ("IIED"). To win an IIED suit, plaintiff must prove: (1) outrageous conduct by the defendant; (2) that the defendant intended to cause, or recklessly disregarded of the probability of causing, emotional distress; (3) suffering severe or extreme emotional distress by the plaintiff; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.[65] Consequently, a plaintiff may recover for intentional infliction of emotional distress only when he or she has, in fact, suffered severe emotional distress.[66] "Severe" emotional distress is that which is "substantial" or "enduring" as opposed to "trivial" or "transitory,"[67] and has been defined as "emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it."[68] It may consist of "any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry."[69] Both the intensity and the duration of the plaintiff's emotional distress are factors to be considered in determining whether it is severe.[70]

California was the first state (and one of the few) that allows monetary recovery for *de minimus* physical injury (i.e., unnecessary

64. Seeger v. Odell, 115 P.2d 977, 980–81 (Cal. 1941).
65. Alcorn v. Anbro Eng'g., Inc., 468 P.2d 216, 218 (Cal. 1970).
66. Agarwal v. Johnson, 603 P.2d 58, 71 (Cal. 1979).
67. Girard v. Ball, 178 Cal. Rptr. 406, 414 (Cal. Ct. App. 1981).
68. Schild v. Rubin, 283 Cal. Rptr. 533, 537–38 (Cal. Ct. App. 1991).
69. Fletcher v. W. Nat'l Life Ins. Co., 89 Cal. Rptr. 78, 91 (Cal. Ct. App. 1970).
70. *Id.* at 90.

medications and medical tests) if the outcome was foreseeable, and emotional distress alone (even in the absence of any physical injury to the plaintiff), in cases involving extreme and outrageous intentional invasions of one's mental and emotional tranquility.[71]

6. Invasion of Privacy Torts

Unlike a defamation claim, the invasion of privacy torts do not protect a plaintiff's interest in his or her reputation. Instead, the wrong inflicted by an invasion of privacy is a direct injury to the plaintiff's feelings and peace of mind, and compensation is awarded for that injury, not for loss of standing in the eyes of others. There are four categories of privacy invasion: intrusion of solitude and seclusion, public disclosure of private facts, misappropriation of name or likeness, and false light. The latter two are relevant to this discussion.

a. Misappropriation of Likeness or Name and Right of Publicity

Thirty years ago, California adopted Dean Prosser's elements for the tort of misappropriation of name or likeness:[72] "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."[73] However, harm to the plaintiff is typically presumed as long as the first three elements are demonstrated. Courts have held that *any invasion of a legal right* is an injury satisfying the fourth element, although without proof of material harm the plaintiff may only be entitled to nominal damages.[74] In one case, a court held that any violation should be recoverable even if the injury was mental and subjective; therefore even the unauthorized use of a person's name is an actionable invasion of the plaintiff's rights (even if the injury was slight).[75] In this vein, the law does not require that the unauthorized use or publication of a person's name or picture suggest an endorsement or association with the injured person to be actionable.[76] Likewise,

71. State Rubbish Collectors Assn. v. Siliznoff, 240 P.2d 282, 284–286 (Cal. 1952).

72. Eastwood v. Super. Ct., 198 Cal. Rptr. 342, 347 (Super. Ct. of L.A. 1983). *See also* Prosser, LAW OF TORTS ß 117 (4th ed. 1971); Newcombe v. Adolf Coors Co., 157 F.3d 686, 692 (9th Cir. 1998) (applying California law).

73. *Eastwood,* 198 Cal. Rptr. at 347. *See also* Prosser, LAW OF TORTS ß 117 (4th ed. 1971); Newcombe, 157 F.3d 686 (applying California law).

74. Fairfield v. Am. Photocopy Equip. Co., 291 P.2d 194, 198 (Cal. 1955).

75. *Id*. at 197.

76. *Eastwood*, 198 Cal, Rptr. at 347.

misrepresenting a plaintiff's authorship or attributing statements to him or her for the purpose of advertising some business enterprise may also be actionable.[77]

However, even if a plantiff establishes a prima facie case, the First Amendment requires that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information.[78] Thus, publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it, is not ordinarily actionable. This public matters exemption is a broad one; a matter in the public interest is not restricted to current events, and may extend to reproduction of past events.[79]

A related tort is the right of publicity, defined by J. Thomas McCarthy, as "the inherent right of every human being to control the commercial use of his or her identity."[80] The right of publicity does not prevent mere reputational damage; it can only be used to prevent someone else from improperly *profiting* from a celebrity's image, thereby preventing the celebrity from exploiting his or her own image in that context.[81] In California, the right of publicity is protected by statute[82] and applies almost exclusively to celebrities. The elements of a right of publicity claim are: (1) the defendant's use of the plaintiff's identity, (2) appropriation of the plaintiff's name or likeness to the defendant's commercial advantage, (3) lack of consent, and (4) injury.[83] To prevail, a plaintiff must demonstrate that his or her "name, voice, signature, photograph, or likeness" was used "on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of products, merchandise, goods or

77. Kerby v. Hal Roach Studios, 127 P.2d 577, 580–81 (Cal. 1942).

78. Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 314–315 (Cal. Ct. App. 2001), review denied, (Mar. 27, 2002).

79. Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639, 643 (Cal. Ct. App. 1995), as modified, (May 30, 1995).

80. *See* J. Thomas McCarthy, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2011).

81. *See, e.g.*, CAL. CIV. CODE §3344 (Deering 2012) (statutory right of publicity only applies to uses for the "purposes of advertising or selling") (emphasis added). This definition has been accepted by most courts and explicitly incorporated into many of the right of publicity statutes. *See also*, Jim Henson Prods., Inc. v. John T. Brady & Assocs., Inc., 867 F. Supp. 175, 188 (S.D.N.Y. 1994) ("The right to publicity protects that value as property, and its infringement is a commercial, rather than a personal tort.") The Supreme Court also appears to subscribe to this definition; *see* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573–74 (1977).

82. CAL. CIV. CODE § 3344 (Deering 2012).

83. Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 313 (Cal. Ct. App. 2001), review denied, (Mar. 27, 2002).

services, without such person's prior consent."[84] California courts have extended protection beyond name, voice and image[85] to include a celebrity's general "identity."[86]

The unauthorized use of a celebrity's name, photograph, or likeness on a publication and in broadcasted advertisements, in connection with the publication of a false (but nondefamatory) article, is actionable under both common law[87] and statutory law.[88] This type of "commercial exploitation" is not privileged or protected by the Constitution.[89] However, a public figure can only recover damages for noncommercial exploitation of his or her image by showing that the defendant acted with reckless disregard for the truth or a high degree of awareness of probable falsity.[90]

b. False Light

Publicity that places the plaintiff in a false light in the public eye constitutes an invasion of privacy.[91] To recover under a false light claim, a plaintiff must prove that the defendant knowingly (or recklessly) made and publicized a false representation that would be highly offensive to a reasonable person.[92] A false light claim, like libel, exposes a person to contempt, ridicule, or humiliation and assumes the audience will recognize it as such.[93] The violation can manifest in several ways.

For example, the unauthorized use of plaintiff's picture to illustrate an article in which the plaintiff is falsely characterized may constitute an invasion of privacy.[94] However, if a photograph is a fair and accurate depiction of the plaitniff in the scene in question, albeit

84. CAL. CIV. CODE § 3344(a) (Deering 2012).

85. *Id.*

86. White v. Samsung Elecs. Am., Inc, 971 F.2d 1395, 1397–99 (9th Cir. 1991).

87. Eastwood v. Superior Court, 198 Cal. Rptr. 342, 347 (Super. Ct. of L.A. 1983).

88. CAL. CIV. CODE § 3344; *see* 6A CAL. JUR. ASSAULT AND OTHER WILLFUL TORTS § 133.

89. *Eastwood*, 198 Cal. Rptr. at 349.

90. Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1186 (9th Cir. 2001).

91. Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979); Forsher v. Bugliosi, 608 P.2d 716, 725 (Cal. 1980).

92. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

93. M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 514–15 (Cal. Ct. App. 2001).

94. Gill v. Curtis Publ'g. Co., 239 P.2d 630, 635 (Cal. 1952) (holding that plaintiffs stated a cause of action for invasion of privacy based on the unauthorized use of a photograph taken of plaintiffs in an amorous pose at their place of business and used to illustrate a magazine article treating various types of love in such a manner as to depict plaintiffs as immoral persons); *M.G.*, 107 Cal. Rptr. 2d at 514–15.

portraying the plaintiff in less than flattering light, it is not actionable—so long as the photograph is not highly offensive to persons of ordinary sensibilities.[95] Similarly, falsely attributing some statement or belief to a plaintiff—such as the unauthorized signing of his or her name to a letter that would cast doubt on his or her character[96]— may may also be actionable under this tort.[97]

However, publicity that places one in a false light is not necessarily an invasion of privacy where it discloses no fact the person wishes to keep secret relative to his or her private life.[98] A false light cause of action is in substance equivalent to a libel claim[99] and, therefore, must meet the same requirements, including notice and a demand for retraction as required by statute in actions for damages for the publication of a libel in a newspaper or of slander by a radio broadcast,[100] and the necessity to show malice.[101]

III. Analysis

The e-personation statute is susceptible to challenge under both the overbreadth doctrine for the phrase "harming . . . another person" and the vagueness doctrine for the ambiguity of the term "credibly impersonate" another person.

A. Constitutional Problems

When interpreting statutes, California state courts must give precise meaning to otherwise unconstitutionally vague terms (even if doing so means that a court overturns prior precedent).[102] A law is unconstitutionally vague if it is so ambiguous and lacking in criteria

95. Aisenson v. Am. Broad. Co., 269 Cal. Rptr. 379, 387 (Cal. Ct. App. 1990).

96. Kerby v. Hal Roach Studios, 127 P.2d 577, 580–581 (Cal. 1942).

97. Fairfield v. Am. Photocopy Equip. Co., 291 P.2d 194, 197–98 (Cal. 1955).

98. Patton v. Royal Indus., Inc., 70 Cal. Rptr. 44, 48 (Cal. Ct. App. 1968) (holding that there was no invasion of privacy where defendant, the former employer of plaintiff, sent letters to customers for plaintiff's type of work advising that plaintiff had been terminated and replaced by workers with more knowledge and experience, where the letter disclosed no facts relative to plaintiff's private life, revealed no secrets of plaintiff, and, although it placed plaintiff in a false light by reflecting on his skill and ability, was defamatory only in reflecting on the professional standing of plaintiff in the public view).

99. Kapellas v. Kofman, 459 P.2d 912, 921 n.16 (Cal. 1969); *Aisenson*, 269 Cal. Rptr. 379, 387 (Cal. Ct. App. 1990).

100. Briscoe v. Reader's Digest Ass'n, Inc., 483 P.2d 34, 39 (Cal. 1971) (referring to Civ. Code § 48a); Selleck v. Globe Int'l, Inc., 212 Cal. Rptr. 838, 845 n.6 (Cal. Ct. App. 1985) (referring to Civ. Code § 48a).

101. *Kapellas*, 459 P.2d at 924–25; *Briscoe*, 483 P.2d at 44; *Selleck*, 212 Cal. Rptr. at 845; *Aisenson*, 269 Cal. Rptr. at 387.

102. Pryor v. Mun. Ct., 599 P.2d 636, 640–41 (Cal. 1979).

that it not only fails to adequately describe the conduct it requires (or prohibits) to those who must observe it, but also allows police, judges, and juries to resolve basic policy matters on an ad hoc and subjective basis, with the ensuing likelihood of arbitrary and discriminatory application.[103] That said, some ambiguity in statutory language is acceptable (and arguably inevitable), so it is not fatal if a statutory term or word does not have a universally recognized meaning or there is a matter of degree in the definition. A statute will be deemed sufficiently precise if its meaning can be fairly established by references to similar statutes, other judicial interpretations, to the common law, the dictionary, or a common and generally accepted meaning.[104]

To overcome a statutory vagueness challenge, a criminal statute must be definite enough to provide both a standard of conduct for those whose activities are proscribed as well as a standard for police enforcement and for ascertainment of guilt.[105] Although the standards for certainty in a civil statute are less exacting than the standards for a criminal statute, both must be sufficiently clear as to give a fair warning of the conduct prohibited and provide a standard against which conduct can be uniformly judged by courts.[106] Because the e-personation statute creates both civil and criminal liability, the language should be held to the higher criminal standard.

1. Analyzing the Overbreadth of "Harm"

Although Senator Simitian says the law will only be used to stop "pernicious" attackers,[107] the statute's language is broad enough to allow a much more expansive application. The four purposes enumerated ("harming, intimidating, threatening, or defrauding") cover a large spectrum of possibility—and the bill neither provides a definition for what it means to have the purpose of "harming," nor clarifies if "another person" refers only to the person whose identity has been usurped, or includes some third party. Because the

103. Meyers v. Arcata Union High School Dist., 75 Cal. Rptr. 68, 74–75 (Cal. Ct. App. 1969), *In re* H.C., 96 Cal. Rptr. 3d 793, 794–95 (Cal. Ct. App. 2009). *See also* Bowland v. Mun. Ct., 134 Cal. Rptr. 630, 636–37 (Cal. 1976), *In re* Sheena K., 153 P.3d 282, 293 (Cal. 2007).

104. *In re* Mariah T., 71 Cal. Rptr. 3d 542, 547 (Cal. Ct. App. 2008).

105. People v. Morgan, 170 P.3d 129, 137 (Cal. 2007).

106. State Bd. of Equalization v. Wirick, 112 Cal. Rptr. 2d 919, 925 (Cal. Ct. App. 2001).

107. STATE SENATOR JOE SIMITIAN, *Fact Sheet Senate Bill 1411: Criminal "E-Personation"*, http://www.senatorsimitian.com/images/uploads/SB_1411_Fact_Sheet.pdf.

standards for "intimidating" and "threatening" behavior are subjective (i.e., whether the victim *believed* they were in danger) and require only testimony of a victim's subjective state, whereas "defrauding" is objective, and requires proof of monetary damages to recover, it is also unclear what types of harm (e.g., emotional, physical, or financial) are actionable, and how much harm has is required (or intended) for a prima facie case. Additionally, it is difficult to determine exactly which acts of impersonation are threatening, intimidating, or defrauding, and reasonable people will disagree whether an impersonation falls within these categories.

The problem under a broad definition that includes emotional or reputational harm, is that critical satire or parody (which are otherwise protected) could be actionable. Satire is the use of irony, sarcasm, ridicule, or similar devices to expose, denounce, or deride vice and folly in a target;[108] and the line between that and emotional or reputational harm is fuzzy at best. The object of satire is usually to provoke its targets to improve or alter their behavior (at the very least to publicly expose their shortcomings) through ridicule—and therefore, is effective *only* when it causes its target to feel sufficiently embarrassed to change future behavior.[109] However, embarrassment is not the kind of harm normally allowed as basis for a lawsuit.[110]

As the law stands today, a public figure may not recover damages for emotional harm caused by the publication of a parody he or she finds offensive unless it contains a false statement of fact that satisfies the actual malice standard (knowledge of falsity or reckless disregard for truth or falsity).[111] In the *Hustler* case, a nationally circulated magazine printed a parody article suggesting Jerry Falwell (a nationally known minister and an active political and social commentator) and his mother were drunks, had an incestuous rendezvous in an outhouse, and that Falwell was a hypocrite who only preached under the influence.[112] That the material might be deemed

108. *Satire definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/satire (last viewed Jan. 20, 2012).

109. Robert Harris, *The Purpose and Method of Satire*, (originally published Aug. 20, 1990, version date Oct. 24, 2004), http://www.virtualsalt.com/satire.htm.

110. Corynne McSherry, *"E-Personation" Bill Could Be Used to Punish Online Critics, Undermine First Amendment Protections for Parody*, ELECTRONIC FRONTIER FOUNDATION (Aug. 22, 2010), https://www.eff.org/deeplinks/2010/08/e-personation-bill-could-be-used-punish-online; *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.").

111. Hustler Magazine v. Falwell, 485 U.S. 46, 49 (1988).

112. *Id.* at 48.

outrageous and that it might have been intended to cause severe emotional distress are not enough to overcome First Amendment protections.[113] Vicious attacks on public figures in the form of cartoons, the Court noted, are part of the American tradition of satire and parody,[114] a tradition of speech that would be hamstrung if public figures could sue them anytime the satirist caused distress.[115] Although the justices conceded that this ad was not technically a political cartoon, they were unable to find a standard that could separate this kind of ad from the others.[116] The Court also noted that vague terms like "outrageousness" have an "inherent subjectiveness" about them, which "allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."[117]

The Supreme Court recently weighed in on the balance between First Amendment protection of speech on matters of public concern made peaceably in a public space causing significant psychological and emotional harm to a private individual.[118] The Court defined "matters of public concern" broadly as "a subject of general interest and of value and concern to the public."[119] The majority opinion in *Snyder* did suggest that personally directed harassment, such as speech to a small number of people, like the publication of someone's sex tape, would be "private speech" and more readily amenable to regulation based on its content.[120] Taken together, *Hustler* and *Snyder* suggest that the First Amendment guarantees trump the feelings of those harmed by speech that crosses the line into harassment, as long as the speech at issue concerns a public matter (which has been broadly defined), and that otherwise actionable speech is immunized by the First Amendment when interspersed with protected speech.

Another issue with this statute is that statements of truth, albeit made with harmful intent, are traditionally protected against defamation claims, but seem to be actionable under the e-personation statute. The truth defense in defamation cases rests on First Amendment principles that one cannot be prosecuted for saying the truth. Likewise, a statement of opinion (as opposed to one of fact) is

113. *Id.* at 53.
114. *Id.* at 54.
115. *Id.* at 53.
116. *Id.* at 55.
117. *Id*. at 55.
118. Snyder v. Phelps, 131 S. Ct. 1207, 1220–21 (2011).
119. *Id.* at 1216.
120. *Id.*

protected against defamation claims. Courts articulated a standard for distinguishing opinion from fact which relies on use of language and provability.[121] For a statement to qualify as opinion, the factual basis of the statement must be clearly disclosed, and any statement of opinion without underlying facts (or implies the existence of undisclosed false facts) is to be treated as a per se factual assertion and actionable.[122] False statements of fact couched in an opinion context are actionable unless clearly set aside by "loose, figurative or hyperbolic language."[123] Generally, a statement is measured "not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader" in determining whether it is defamatory, and therefore actionable.[124] Consequently, the e-personation statute seems to criminalize an otherwise protected activity solely on the basis of its medium. For example, imagine someone created a "credible" fake Facebook profile for another person and used it to reveal embarrassing, but truthful, facts about that person with the intent to harm them. Under defamation law, this conduct would not be actionable, but under the e-personation law, it would.

Finally, although Senator Simitian claims that the e-personation statute only updates the existing law against false personation to take account of the Internet, the statute actually does something slightly different. In reality, this statute expands the crime to one against both the *target* of the false impersonation *as well as* against *the person falsely impersonated*. Under the existing false personation statute, the crime is only against the person whose identity is assumed; in contrast, this law provides an additional civil remedy for persons who are harmed, intimidated, threatened, or defrauded by this impersonation, *even if they are not the person impersonated*.[125] Even more worrisome is that under the definitions in the statute, "person" means not only humans, but various business forms as well.[126] This means that if someone impersonates a corporation to satirize them,

121. Morningstar, Inc. v. Super. Ct., 29 Cal. Rptr. 2d 547, 556–57 (Cal. Ct. App. 1994).

122. *Morningstar,* 29 Cal. Rptr. 2d at 554.

123. *Id.*

124. *Id.* at 553 (citations omitted).

125. ASSEMB. COMM. ON JUDICIARY, BILL ANALYSIS OF S.B. 1411 (as amended May 11, 2010), STATE OF CAL. ASSEMB. 2009–2010, *available at* http://leginfo.ca.gov/pub/09-10/bill/sen/sb_1401-1450/sb_1411_cfa_20100628_112759_asm_comm.html.

126. "For purposes of this chapter, 'person' means a natural person, living or deceased, firm, association, organization, partnership, business trust, company, corporation, limited liability company, or public entity, or any other legal entity." CAL. PENAL CODE § 530.55(a). (Deering 2012).

they could be liable to that company and subject to criminal prosecution.

2. Analyzing the Vagueness of "Credibly"

The statute defines "credible" as "if another person would reasonably believe, or did reasonably believe, that the defendant was or is the person who was impersonated."[127] According to the legislative history, the scope of the statute was originally much broader,[128] and "credibly" was later added[129] to narrow it so it would not undermine online activism and protected speech.[130] The problem with this position is two-fold: (1) the fact that the statute provides a definition for "credible" is not dispositive as to its clarity, and (2) "credibility" is inherently subjective and therefore a poor standard by which to objectively judge conduct.

In *Reno v. ACLU*, the Supreme Court found that, "just because a definition including [several] limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague."[131] In that case, the Court unanimously voted to strike down portions of the Communications Decency Act ("CDA") for violating the First Amendment[132] because the "many ambiguities"[133] of the language in the Act regarding the scope of its coverage "lack[ed] the precision that the First Amendment requires" when regulating content of speech.[134] The justices found the undefined terms "indecent" and "patently offensive" problematic because they "provoke uncertainty among speakers about how the two standards relate to each other and just what they mean."[135] The vagueness of content-based regulation, combined with its increased deterrent effect as a criminal statute, raised special First Amendment concerns for the Justices because of its "obvious chilling effect on free speech."[136] The Court also found that this increased deterrent effect, coupled with the "risk of

127. CAL. PENAL CODE § 528.5(b) (Deering 2012).

128. CAL. S., S.B. 1411, INTRODUCED, CAL. S. 2009–2010, *available at* http://leginfo.ca.gov/pub/09-10/bill/sen/sb_1401-1450/sb_1411_bill_20100219_introduced.pdf.

129. CAL. S., S.B. 1411, AMENDED (APR. 28, 2010), CAL. S. 2009–2010, April 28, 2010, *available at* http://leginfo.ca.gov/pub/09-10/bill/sen/sb_1401-1450/sb_1411_bill_20100428_amended_sen_v97.pdf.

130. Simitian, *supra* note 4.

131. Reno v. ACLU, 521 U.S. 844, 873 (1997).

132. *Id.* at 883.

133. *Id.* at 870.

134. *Id.* at 874.

135. *Id.* at 871–72.

136. *Id.*

discriminatory enforcement" of vague regulations, poses greater First Amendment concerns than those implicated by the civil regulation"[137] The "vague contours" of the Act's scope "unquestionably silences some speakers whose messages would be entitled to constitutional protection," and that the Act's burden on protected speech "cannot be justified if it could be avoided by a more carefully drafted statute."[138]

In another case, the Court struck down on vagueness grounds a criminal statute defining a person as a "gangster" if he was without lawful employment, had been either convicted at least three times for disorderly conduct or had been convicted of any other crime, and was "known to be a member of a gang of two or more persons."[139] The Court observed that neither common law nor the statute gave the words "gang" or "gangster" definite meaning, that the enforcing agencies and courts were free to construe the terms broadly or narrowly, and that the phrase "known to be a member" was ambiguous.[140]

Although the e-personation statute incorporates the "reasonable person" standard (which measures conduct against a hypothetical person who "exercises the degree of attention, knowledge, intelligence and judgment that society requires of its members for the protection of their own and of others' interests"),[141] this definition does not elucidate any sort of objective workable criteria which would make someone's online portrayal of another credible. There is a fundamental problem with the qualifier "credibly," in that it is virtually impossible to assess someone's belief against an objective, "reasonable" person because such evaluations will always be context-based and fact-specific. Even if one were to accept this subjective standard—the bill doesn't define who "another person" (to whom the impersonation must seem credible) is: someone with personal knowledge of the impersonation victim or a third party without such knowledge who stumbles across the impersonation? This matters because the degree to which someone knows the victim will guide whether they find the impersonation credible or not. A plain language reading of the e-personation statute would allow an

137. *Id*. at 872.

138. *Id*. at 874.

139. Lanzetta v. New Jersey, 306 U.S. 451, 454–455 (1939).

140. *Id*. at 458.

141. BLACK'S LAW DICTIONARY 1380 (9th ed. 2009). Black's comments that the reasonable person "acts sensibly, does things without serious delay, and takes proper but not excessive precautions."

individual to bring a lawsuit merely because a stranger was duped by an impersonation that, to anyone with personal knowledge of the plaintiff, would not be credible—regardless of whether any actual harm resulted.

Finally, the argument that credibility is a sufficient filter to protect free speech misses the point—successful parody, for example, *depends* on initial credibility. A parody is a work created to mock, comment on, or make fun of an original work, its subject, author, style, or some other target, by means of imitation. Parody can provide a nuanced means for expressing critical sentiments and for openly exploring controversial subjects, but it often depends heavily on the readers ability to identify and understand the irony in the work because the device does not work when blatantly labeled as such. This subtlety that gives parody its utility also contributes to its greatest drawback: Implied meanings are often lost on their intended audience. In textual communication this difficulty is magnified by the absence of any nonverbal queues that might imply a nonliteral interpretation.

As an example of just how easy it is for something that is clearly a parody to be considered "credible" by another person, consider the suspension and subsequent removal of the @ceoSteveJobs Twitter account.[142] The account churned out tongue-in-cheek tweets poking fun at Apple (and its late founder) such as, "It's official. The iPad now comes in greater variety than my clothing."[143] "When Chuck Norris holds the iPhone 4 the signal increases,"[144] and "Women love playing with my nano."[145] It seems unlikely that anyone familiar with Steve Jobs or Apple, Inc. (and its notoriously well-controlled public relations department) could reasonably believe that this account was genuine. But in fact, someone did—on July 28, 2010, the *Daily Mail*, (the United Kingdom's second largest newspaper) quoted the account as the real Steve Jobs in a story about customer dissatisfaction with

142. On March 1, 2011, Twitter suspended the @ceoSteveJobs Twitter account (which had approximately 460,000 followers and more than 650 tweets at the time of deletion) and renamed it @fakeceoSteve. Don Reisinger, *Twitter Suspends Fake Steve Jobs Account, Then Backtracks*, CNET NEWS (Mar. 2, 2011, 7:40 AM), http://news.cnet.com/8301-13506_3-20038220-17.html.

143. Twitter status, TWITTER, http://twitter.com/#!/FakeceoSteve/status/43078667148066816 (now defunct).

144. Twitter status, TWITTER, http://twitter.com/#!/ceoSteveJobs/status/20794014540 (now defunct).

145. Twitter status, TWITTER, http://twitter.com/#!/ceoSteveJobs/status/37590375245950976 (now defunct).

the iPhone 4[146] despite the fact that the account's biography explicitly stated it was a parody.[147] This illustrates the pitfalls of the "credible" standard as defined in the statute; even where the parody was labeled, a professional and well-established news outlet could be—and actually was—mistaken about the veracity of a parody account.

The Yes Men, a group of political activists, provide an example of the kind of political speech that may be chilled by the e-personation statute. The Yes Men impersonate entities that they dislike (typically corporations and public officials) in a practice they call "identity correction" to raise awareness of what they consider problematic social and political issues.[148] And, illustrating the concern that overly sensitive litigants may abuse this new law, the targets of the criticism have responded with aggressive legal threats and lawsuits.[149] For example, in October 2009, The Yes Men issued a press release and staged a press conference as the U.S. Chamber of Commerce in which the Chamber ostensibly reversed its position and promised to stop lobbying against strong climate change legislation.[150] The hoax fooled a lot of reporters and attracted a lot of media attention.[151] As part of the stunt, The Yes Men published a parody website[152] resembling the Chamber's, which featured a fake statement by chief executive officer Thomas J. Donahue about the supposed change of policy.[153] In the middle of the press conference, a Chamber of Commerce representative rushed into the room and revealed that the Chamber's position on climate change legislation had not in fact changed.

Afterwards, the Chamber of Commerce aggressively took action, first sending a takedown notice under the Digital Milenium Copyright Act to The Yes Men's upstream service provider demanding removal of the parody website (which was later disputed), then filing suit in federal district court against members of The Yes Men for trademark

146. Charles Arthur, *Daily Mail Fooled by Fake Steve Jobs Tweet on iPhone 4 Recall*, GUARDIAN.CO.UK (June 28, 2010), http://www.guardian.co.uk/media/2010/jun/27/daily-mail-twitter-jobs-iphone-mistake.

147. The biography section read, "I don't care what you think of me. You care what I think of you. Of course this is a parody account." *Id.*

148. THE YES MEN, http://theyesmen.org/ (last visited Mar. 2, 2011).

149. McSherry, *supra* note 111.

150. *Chamber of Commerce Goes Green*, THE YES MEN, http://theyesmen.org/hijinks/chamber (last visited Mar. 2, 2011).

151. Lisa Lerer & Micael Calderone, *CNBC, Reuters Fall for Climate Hoax*, POLITICO (Oct. 19, 2009, 2:44 PM), http://www.politico.com/news/stories/1009/28456.html.

152. Chamber of Commerce parody site, THE YES MEN, http://www.chamber-of-commerce.us/090118tjd_prosperity.html (now defunct).

153. *Chamber of Commerce Goes Green*, THE YES MEN, *supra* 133.

claims of infringement, dilution, cybersquatting, and false advertising.[154] On January 5, 2010, The Yes Men filed a motion to dismiss the complaint (arguing that the Chamber's lawsuit is designed to punish core political speech, rather than to vindicate any actual trademark harm) and a motion to stay discovery.[155] As of publication of this Note, the case is still pending in court.

B. Preclusion Concerns

Section 528.5 makes a point of not precluding any other claims,[156] which raises concerns about potential abuse by prosecutors and plaintiffs. The statute provides harsh penalties; in addition to any other civil remedy available, a person who suffers damage or loss because of online impersonation may, within three years of discovery by plaintiff,[157] bring a civil action against the violator for compensatory damages and injunctive relief or other equitable relief related to costs incurred by plaintiff,[158] reasonable attorney's fees,[159] punitive or exemplary damages[160] (upon showing of oppression, fraud, or malice by defendant),[161] and possible forfeiture of materials owned by the defendant and used in conjunction with the impersonation.[162] Since this law does not preclude any other causes of action, plaintiffs and prosecutors are almost certainly going to plead multiple, simultaneous causes of action based on the same conduct, such that this law could easily be used as a gap-filler, or lower threshold crime,

154. *U.S. Chamber of Commerce v. Yes Men*, CITIZEN MEDIA LAW PROJECT, http://www.citmedialaw.org/threats/us-chamber-commerce-v-yes-men (last visited on Feb. 27, 2011). Court filings for Chamber of Commerce v. Sevrin are available at http://dockets.justia.com/docket/district-of-columbia/dcdce/1:2009cv02014/139111/.

155. *U.S. Chamber of Commerce v. Yes Men*, CITIZEN MEDIA LAW PROJECT, http://www.citmedialaw.org/threats/us-chamber-commerce-v-yes-men (last visited on Feb. 27, 2011).

156. CAL. PENAL CODE § 528.5(f) (Deering 2012).

157. CAL. PENAL CODE § 502(e)(5) (Deering 2012).

158. CAL. PENAL CODE § 502(e)(1) (Deering 2012).

159. CAL. PENAL CODE § 502(e)(2) (Deering 2012).

160. CAL. PENAL CODE § 502(e)(4) (Deering 2012).

161. CAL. CIV. CODE § 3294 (c) (Deering 2012), defining: (1) "Malice" as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others;" (2) "Oppression" as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights;" and (3) "Fraud" as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

162. CAL. PENAL CODE § 502(g) (Deering 2012).

to find liability on a lower (noneconomic) harm standard for conduct that would not have been actionable otherwise.

IV. Proposal

Ideally, the e-personation statute should be repealed—or amended—by the legislature before anyone is tried under the law. Despite the vagueness and overbreadth issues discussed above, a reviewing court is unlikely to strike the law in its entirety because it is not facially invalid—there is a core of conduct proscribed that is not protected speech—and will instead attempt to interpret the statutory language to more clearly define what it means to "credibly" impersonate someone, and to set the threshold of "harming . . . another person."

California statutory interpretation doctrine states that where the plain meaning of statutory text is insufficient to interpret it, courts should look to the legislative intent behind the statute, then to other extrinsic sources. If possible, all statutes relating to the same subject (or having the same general purpose) should be read together so that they harmonize and achieve a uniform and consistent legislative purpose.[163] When deciphering the intended meaning of a statutory phrase, courts should look to the same or similar language in related statutes and give the same interpretation to the phrase at issue.[164] Because the plain meaning of the e-personation statute's text is unclear, this section will propose a narrower and more precise understanding of the statute using the legislature's intent, the meaning of the statute as a whole, and similar language in analogous statutes.

A. Limiting the Meaning of "Harming Another Person"

The phrase "harming . . . another person" is not clear on its face, and the definition does not further elucidate its meaning.[165] The use of "harm" as an umbrella term suggests that the legislature intended its meaning to be broader than the other enumerated intents (intimidating, threatening or defrauding); but it is unclear whether it

163. 58 CAL JUR 3D STATUTES § 123; *see also* Kendall-Brief Co. v. Super. Ct., 131 Cal. Rptr. 515, 518 (Cal. Ct. App. 1976) (citing Isobe v. Unemployment Ins. Appeals Bd., 526 P.2d 528, 532 (Cal. 1974)).

164. 58 CAL JUR 3D STATUTES § 123; *see In re* Do Kyung K., 106 Cal. Rptr. 2d 31, 36 (Cal. Ct. App. 2001).

165. The definition of "harm" is, "injury, loss or detriment." BLACK'S LAW DICTIONARY 722 (7th ed. 1999).

means emotional, reputational, physical or economic harm—or some combination thereof. The provision in subsection (e) suggests that it means at least economic harm.[166] Because the phrase "harm" does not appear anywhere else in Chapter 8 of the Penal Code, reviewing courts should consider similar language in related statutes.

Determining what interest the statute aims to protect is necessary in resolving how harm should be defined. Using the analogous legal claims summarized in Part II as a guide, there are three possible approaches to defining "harm," depending on the interest protected. The first interpretation limits the protected interest, and consequently harm, to the specific examples provided in the false personation statute—exposing someone to actual or potential legal or financial liability. The second interpretation broadens the protected interest to include the privacy and identity of the individual impersonated such that it presumes harm from the impersonation alone, much like existing invasion of privacy torts. The third interpretation is somewhere in between the first two and protects reputational and emotional interests of impersonation victims (in the same manner as IIED and defamation claims), and reflects the fact that the legislature felt that the existing statutes were not sufficient to address the issue.

There are two bits of evidence supporting this first approach to interpreting "harm" (specifically, limiting it to the specific examples provided in the false personation statute—essentially exposing someone to at least the possibility of legal or financial liability). The first is that Senator Simitian, the author of the bill, stated that his intent was to merely update the existing law to reflect the technological advances made since it was enacted in 1892.[167] The second is that doing so would maintain consistency with the neighboring statutes, and help achieve a consistent legislative purpose.[168]

However, several differences in the application and scope of the statutes suggest that this construction of the legislature's intent is not the most appropriate. First, under both the false personation and identity theft statutes, the crime (i.e., harm) is only against the person whose identity is assumed. The e-personation statute, on the other hand, expands the crime to one against both the *target* of the false

166. CAL. PENAL CODE § 528.5(e) (Deering 2012).

167. Simitian I, *supra* note 3.

168. The e-personation statute is codified in Chapter Eight of the Penal Code (False Personation and Cheats §§ 528–539) between the false personation and identity theft statutes.

impersonation *as well as* against *the person falsely impersonated*. In other words, the e-personation statute provides an additional civil remedy for persons who are harmed, intimidated, threatened, or defrauded by this impersonation, *even if they are not the person impersonated*.[169] Another complication is that the existing statute does not expressly exclude acts carried out over the Internet, so there is nothing to suggest that the law would not already apply in that context;[170] further, if the intent was to update the existing statute, it could have been amended to explicitly allow online impersonations. Lastly, under the false personation statute, a plaintiff must establish, in addition to the fake impersonation, an additional act that created at least the possibility of bringing financial or legal liability upon the victim or benefit to someone—either the impersonator or a third party. The e-personation statute requires only intent to harm, not actual (or potential) damage, like the existing statutes. For these reasons, it's reasonable to assume that the legislature intended a different, or at least broader, meaning for "harm" than the one outlined here. Therefore, to determine which of the other two interpretations is correct, it is imperative to determine the interest being protected—either the integrity of the impersonation victim's peace of mind (as in the privacy torts) or the victim's reputation and standing in his or her community in the wake of the impersonation (as with defamation claims). Both options are considered in turn.

The fact that the e-personation statute requires only *intent* to harm—whether or not someone is *actually* harmed, (or intimidated, threatened, or defrauded) is irrelevant—supports the interpretation that harm of being falsely impersonated is inextricable from the act; the injury is in the violation of the identity and privacy of the individual impersonated, the same principle behind the invasion of privacy torts. The wrong inflicted by an invasion of privacy is a direct injury to the plaintiff's feelings and peace of mind, and compensation is awarded for that injury, as opposed to any reputational damage resulting from the invasion. For example, to recover under a false light claim, a plaintiff must only prove that the defendant knowingly (or recklessly) made and publicized a false representation which would be highly offensive to a reasonable person; actual injury is

169. ASSEM. COMM. ON JUDICIARY, *supra* note 126.

170. "For purposes of this chapter, 'personal identifying information' means any . . . unique electronic data including information identification number assigned to the person, address or routing code, telecommunication identifying information or access device." CAL. PENAL CODE § 530.55(b) (Deering 2012).

irrelevant—it is presumed.[171] The strongest argument supporting application of this standard is that it lowers the threshold of actionable harm for the victim, which seemed to be what Sen. Simitian wanted to do, and that courts balance this lower threshold of harm against First Amendment protections for dissemination of information and matters of publics interest.[172] However, this is probably not the correct understanding for several reasons. First, the harm only extends to the person whose identity is usurped, which may or may not be the person to whom the harm was intended. Further, while the false light claim is a relatively good fit for e-personation, the misappropriation and right of publicity claims are fundamentally about protecting victims' economic interests. Finally, if adopted, it would essentially make moot the issue of harm, since it would be presumed by the intentional act of impersonation, and would therefore make *any* impersonation actionable.

Therefore, the third construction, which interprets "harm" to include both reputational and emotional harm is probably the most accurate representation of the legislature's intent. Defamation and IIED are the legal causes of action to address reputational and emotional harm; both of which logically follow from the discovery of a malicious impersonation and the consequential damage done to one's reputation in its wake. They are also appropriate because defamation law contains a broad exception for matters of public interest and IIED claims require a high threshold of proof, the adoption of which would help balance the statute with First Amendment principles. However, there are still problems; these legal theories, unlike e-personation, are predicated on the fact that harm has actually occurred and that it was significant, or at least measurable. Under the defamation statute, a plaintiff must establish, in addition to publication and falsity, that the statement *actually injured* the plaintiff's reputation (with the specific exceptions of libel per se). Under the IIED statute, the victim must establish, in addition to the defendant's intent, outrageous conduct and proximate cause, that they were *actually seriously emotionally distraught*, and physically manifested this distress. In contrast, the e-personation statute requires only intent, and provides no minimum threshold for the harm intended. Trying to devise a complementary standard here is difficult because what matters with defamation and IIED is how

171. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

172. Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 313 (Cal. Ct. App. 2001), review denied, (Mar. 27, 2002).

much harm resulted, not how much was intended. For example, imagine a situation in which someone creates a realistic fake Facebook page for someone else without their consent and makes false factual statements on it, but no one ever actually sees it, so neither the intended target's reputation or emotional state is harmed. A lawsuit alleging defamation or IIED under those facts would probably not succeed, but an e-personation claim well might. "E-personators" who are caught will claim that they didn't intend to harm (threaten, intimidate, or defraud) anyone through their actions, and intent is difficult to prove, especially without the linked requirement of actual damage. Despite these problems, this interpretation is ultimately the most resasonable because it reflects the fact that the legislature felt the actionable harm in the existing statutes did not sufficiently address the problem, but does not create a situation in which the minimum harm threshold would be negligible. Even so, this interpreation sets up the statute for conflict with established First Amendment principles.[173]

B. Clearly Defining "Credibly Impersonate"

Even with clearer limits to the definition of "harm," the problem of what it means to "credibly" impersonate someone remains. The main question that must be addressed regarding the standard of credibility is the relationship between the individual impersonated and who must find the impersonation credible. Because credibility is such a nebulous and inherently subjective standard, courts should create strict limits on the audience to whom the impersonation must be believable. The statute bill does not define exactly who "another person" is—i.e., to whom the impersonation must seem credible; someone with personal knowledge of the impersonation victim or a stranger who stumbles across the impersonation? This matters because the degree to which someone knows the victim will guide whether they find the impersonation credible or not. The two most obvious limits would be based on relationship to the victim or geographic boundaries of the audience. The problem with limiting the audience geographically (say, to a 100-mile radius of the victim, or his or her state of residence, etc.) is that the nature of the internet makes those geographic distances meaningless. Limiting the audience by the strength of their relationship to the victim has its own set of challenges: (1) where the line should be drawn; (2) how it should even be evaluated in the first place; (3) whether there should

173. *See* discussion *supra* Section III.A.1.

be some sliding scale reflecting the inverse relationship between personal knowledge of the victim and believability of the impersonation or just a bright line rule; and (4) whether future or likely contacts should be considered.

Because he meaning of "credibly" is not clear on its face, its definition in the statute does not shed much light on how it should be applied either,[174] and the word appears only once in Penal Code Chapter 8, courts should consider similar causes of action in interpreting the phrase. One legal theory to consider is intentional misrepresentation, which requires a minimum level of credibility for a fraudulent represenation to be actionable. Under this statute and related common law, the sophistication of the victim plays a role in determining whether his or her reliance on the fraudulent statement was reasonable; however, even an unsophisticated victim "may not put faith in representations which are preposterous, or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth."[175] A plain language reading of the e-personation statute, however, would allow an individual to bring a claim because a stranger was fooled by an impersonation that (and regardless of whether or not they relied on it), to anyone with personal knowledge of the plaintiff, would not be credible. There are still people who believe that a Nigerian prince would like to share his fortune with them,[176] if only they could wire him $5,000 to access it.[177] The naïveté of a few people should not override guaranteed protections for speech.

Whether reliance on a statement is reasonable or not is generally considered a matter of fact for a jury to decide. However, intentional misrepresentation is a purely civil cause of action, so the fact that it is more fact-specific is permissible. E-personation, on the other hand, is a criminal offense and requires a higher standard of specificity. For example, California's counterfeit official document law provides some specific, objective standards to help determine what would be considered a plausible counterfeit document by limiting the meaning

174. "For purposes of this section, an impersonation is credible if another person would reasonably believe, or did reasonably believe, that the defendant was or is the person who was impersonated." CAL. PENAL CODE § 528.5(b) (Deering 2012).

175. Seeger v. Odell, 115 P.2d 977, 981 (Cal. 1941).

176. Anna Song, *Woman Out $400K to 'Nigerian Scam' Con Artists*, KATU.COM (Nov. 21, 2008, 4:30 AM), http://www.katu.com/news/34292654.html.

177. *Nigerian Scam*, SNOPES.COM, http://www.snopes.com/fraud/advancefee/nigeria.asp (last visited Feb. 28, 2011).

of "purport" to "*by virtue of the wording or appearance thereon* could reasonably deceive an ordinary person into believing that it is *issued by a government agency*."[178] While those standards are not necessarily transferrable to electronic platforms, similar objective standards as to what would make an impersonation credible could help cure the vagueness problem with that term.

Any objective standard must acknowledge the paradoxical fact that the more outrageous, out of character, or damaging an impersonation, the less credible it will be to anyone who actually knows the victim, and the less likely it is to be believable. Guardino himself articulated this idea in the newspaper article for which he was interviewed: "It could have ruined my reputation .. . . Luckily, [the e-mail recipients] know me well enough to know that e-mail was out of character."[179]

A trademark infringement case for online impersonation from the Second Circuit Court of Appeals illustrates how trademark law may provide an appropriate paradigm for evaluating the credibility of impersonation claims in this medium. In that case, the New York Stock Exchange ("NYSE") brought an action alleging that Gahary's unauthorized use of variations of the name of its CEO (Richard Grasso) to post offensive messages to stock-related Internet bulletin boards violated the Lanham Act and state law.[180] The court found that the use was non-infringing because, "here, both the sheer outrageousness of Gahary's messages, as well as the particular place he chose to post them, paradoxically bolster defendants' claim that Gahary's intention could not have been to impersonate Grasso."[181] According to the court, "the more participants there are on RagingBull.com who use such celebrity screen names, the less likely readers should be to confuse the author of a message posted under a famous alias."[182] The *Gahary* opinion reiterated that the law is clear that "First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed,"[183] and that Supreme Court has long cautioned judges against the temptation to act too readily as arbiters of taste or effectiveness

178. CAL. PENAL CODE § 529.5 (a).
179. Koskey, *supra* note 6.
180. New York Stock Exch. v. Gahary, 196 F. Supp. 2d 401, 405 (S.D.N.Y. 2002).
181. *Id.* at 406.
182. *Id.* at 411.
183. Campbell v. Acuff-Rose Music, 510 U.S. 569, 583 (1994).

where expression such as parody is concerned.[184] While the *Gahary* decision was about a public figure (whose name had arguably acquired a secondary meaning), the principle behind it—that forum, context, and content matter when determining credibility—is equally applicable to private individuals.

While the *Gahary* court did not "engage in any systematic analysis" of the likelihood of confusion question (because the parties' briefs did not address it in sufficient detail), the opinion did discuss some general points about the relationship between parody impersonation and likelihood of confusion.[185] While e-personation and trademark law protect different interests, the overlap between the two on the issue of parody impersonation suggests the eight-factor *Polaroid* test for likelihood of confusion (or selected elements of it) might provide a fairly reasonable preliminary framework for evaluating credibility objectively.[186] The *Polaroid* factors are: (1) the strength of the mark, (2) the degree of similarity between the two marks, (3) the proximity of the products, (4) the likelihood that the prior owner will "bridge the gap," (5) actual confusion, (6) the defendant's good faith in adopting its mark, (7) the quality of the defendant's product, and (8) the sophistication of the buyers.[187] For example, adopting some variation of first, second, fifth, sixth, and eighth elements would be a good start. This sort of test would still require courts (and juries) to not only evaluate these elements, but also to balance them against each other—which does create potential for abuse—but literally *any* objective standards to provide guidance in determining what it means to "credibly impersonate another person" would be an improvement over the current definition.

Adopting a two-tiered system for public and private figures establishing credibility is another possible way to limit abuse of the e-personation statute by overly sensitive plaintiffs. Under this system, public figures would have to prove that the offending impersonation was especially credible, or more likely to be believed, than a private figure would—in the same way that public figures must show actual malice to prevail on a defamation claim. Public figures have more resources at their disposal, like access to media and the public's interest and attention in the first place, to debunk the impersonation.

184. *Id.* at 582.

185. *Gahary*, 196 F. Supp. 2d at 409.

186. Polaroid Corp. v. Polaroid Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961).

187. Arrow Fastener Co. v. Stanley Works, 59 F.3d 384, 391 (2d Cir. 1995) citing *Polaroid*, 287 F.2d at 495.

Further, as a social norm, satirical impersonations and parody accounts of public figures on social networking sites have become relatively common, to the extent that both Twitter and Facebook offer "verified" accounts for certain public figures so that fans know they are "following" or "liking" the real thing, not an imposter.[188]

Ultimately, the crux of the problem with a standard of credible impersonation online is that when you represent yourself through the facets of the Internet that come into play here (e.g., a social networking or media site, forum chat, email address, blog, or website), there is no "official" stamp of approval for your identity because the vast majority of hosting platforms do not authenticate users' identities. In other words, on the Internet, nobody knows you're a dog.[189] Moreover, the hosting website and platforms have no feasible way to authenticate the identities of their users. California's identity theft statute limits itself to any document purporting to be government-issued identification, or birth or baptism certificate.[190] because we as a society rely on official, government-issued documentation to verify identity as opposed to allowing people to make up their own. No store selling alcohol will take someone claiming to be 21 at their word, nor will they accept a homemade identity card as proof of legal age. This inability to authenticate "real-world" identity means that people who use the Internet should be, and largely are, skeptical that people are not who they represent themselves to be.[191]

Senator Simitian is correct that malicious online impersonation is a real and growing problem. However, privately owned social media hosting platforms are better equipped to deal with the problem than the government. For one thing, private platforms are in a far better position to determine what it means to "credibly impersonate" someone because they are more aware of the telling contextual signs of what would make an impersonation credible on their particular

188. *About Verified Accounts*, TWITTER, http://support.twitter.com/groups/31-twitter-basics/topics/111-features/articles/119135-about-verified-accounts (last visited Feb. 15, 2012); Josh Constine, *Facebook Launches Verified Accounts and Pseudonyms*, TECHCRUNCH (Feb. 15, 2012), http://techcrunch.com/2012/02/15/facebook-verified-accounts-alternate-names/.

189. Peter Steiner, *On the Internet, Nobody Knows You're a Dog*, THE NEW YORKER, July 5, 1993, at 61 (cartoon) *available at* http://www.unc.edu/depts/jomc/academics/dri/idog.html.

190. CAL. PENAL CODE §§ 529a, 529.5 (a) (Deering 2012).

191. For example, journalists have developed guides to help their peers authenticate tweets. *See* Craig Kanalley, *How to Verify a Tweet*, TWITTERJOURNALISM.COM, (Jun. 25, 2009) http://www.twitterjournalism.com/2009/06/25/how-to-verify-a-tweet/.

platform. Further, while Section 230 of the Communications Decency Act ("CDA") immunizes providers and users of an "interactive computer service" who publish information provided by others, essentially prohibiting the government from requiring private platforms to monitor and be held liable for content posted on them,[192] Twitter, Facebook, LinkedIn, Yahoo!, and MySpace (among others) have implemented impersonation policies and mechanisms for those whose identities have been stolen to flag the offending profile and request its removal.[193] The fact that these platforms have voluntarily established impersonation policies shows that they take the problem seriously even in the absence of legal obligation. But most importantly, if private companies, in implementing their policies, err on the side of caution, they cannot be sued for violating free speech.

This principle is illustrated in the contrast between Twitter's treatment of the @ceoSteveJobs[194] and @BPGlobalPR[195] accounts. The @BPBlobal PR account, which sprung up in the wake of the Deepwater Horizon oil rig explosion in the Gulf of Mexico in April 2010, churned out satirical tweets such as, "Sadly we can no longer certify our oil as Dolphin Safe,"[196] and "You know what they say about the ocean... Once it goes black it never goes back! JOKING-the water is brown,"[197] and "@Jesus walked on water and soon you can too! (Please pray for BP, we're losing a lot of oil)."[198] Although a spokesperson for British Petroleum stated that it was clear the account was a parody,[199] many people were confused and outraged by the account's sardonic tweets.[200] Twitter did not take any action against the BPGlobal PR account. In contrast, Twitter required the @ceoSteve Jobs account to change its name (at the request of Apple)

192. 47 U.S.C. 230(c)(1).

193. Jacob Share, *Reference: Impersonation Policies for Top Social Networks*, PERSONAL BRANDING BLOG, (Nov. 6, 2009, 5:15 AM) http://www.personalbrandingblog.com/reference-impersonation-policies-for-top-social-networks/.

194. *See supra*, notes 142-47.

195. BP Global PR Account Page, TWITTER, https://twitter.com/#!/BPGlobalPR.

196. Twitter status, TWITTER, https://twitter.com/#!/bpglobalpr/status/14456229115.

197. Twitter status, TWITTER, https://twitter.com/#!/BPGlobalPR/status/14519730735.

198. Twitter status, TWITTER, https://twitter.com/#!/BPGlobalPR/status/14639541783.

199. SciTechBlog, *Fake BP Twitter Feed Mocks Company Over Oil Spill*, CNN.com (May 26, 2010) http://scitech.blogs.cnn.com/2010/05/26/fake-bp-twitter-feed-mocks-company-over-oil-spill/.

200. Juli Weiner, *Somehow, the Internet Appears Not to Understand "BPGlobalPR" Twitter is a Joke*, VF Daily (May 24, 2010, 12:45 PM) http://www.vanityfair.com/online/daily/2010/05/somehow-the-internet-appears-not-to-understand-bpglobalpr-twitter-is-a-joke.

to "@fakeSteveJobs" just days after the e-personation law went into effect[201] (the account was eventually deleted after the passing of Steve Jobs in October 2011). The similarities between the two accounts is striking, and the disparate treatment can be chalked up to only one thing: Apple's request to have the account parodying its CEO account shut down, days after the e-personation statute's enactment. This example also illustrates the validity of the concern that companies will use the statute as an opportunity to stifle criticism and traditionally protected commentary.

V. Conclusion

While this law is an admirable attempt to combat cyberbullying, digital identity theft, and online harassment, it is too broadly and vaguely written. The behavior that is unquestionably not protected is already addressed by other statutes with established bodies of law behind them (and no reason to think they are not applicable in the digital world), while the conduct that is possibly protected is best addressed by the privately owned and managed platforms that host it. Courts have long recognized that "where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[202]

Ultimately, there are already effective laws on the books to deter all of the truly harmful behavior the e-personation law is intended to address—in particular, various forms of impersonation, defamation, identity theft, intimidation, harassment, fraud, and invasion of privacy. Senator Simitian believes the e-personation statute is needed to extend those crimes to cover the use of "Internet Web sites" and "other electronic means," but there is no reason to believe that the technology used is any bar to prosecutions under existing law—in fact, the use of electronic communications to commit the acts would extend the possible criminal laws that apply, since electronic communications are generally considered interstate commerce and thus subject to federal as well as state laws.

Another existing statute, cyberstalking, has proved to be particularly effective against some instances of online impersonation. The Los Angeles District Attorney's office convicted a man of

201. Alexia Tsotsis, *Apple Goes After The Parody @CeoSteveJobs Twitter Account*, TECHCRUNCH, Jan. 6, 2011, http://techcrunch.com/2011/01/06/apple-twitter/.

202. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972).

violating California's cyberstalking laws when he falsely impersonated a woman who had rejected his romantic advances in various chat rooms.[203] Statutes such as these are more appropriate to bring suit and prosecute under because they have established standards and well-defined protected interests to guide courts in their application.

In short, the e-personation statute covers very little new behavior, but, because of ambiguous and broad language, could be used as a tool to intimidate those engaging in protected speech but without the resources to defend themselves against litigious plaintiffs and overzealous prosecutors eager to set an example. Even with a saving construction of the term "harm," the question of what, exactly, it means to "credibly impersonate" someone on the Internet is fatal. For an impersonation to be damaging would, in most cases, mean that it was also not credible; the inverse relationship between the two concepts makes the law so narrowly applicable to the proscribed conduct that to have any teeth, its terms must be construed so broadly that they butt up against protected speech.

The e-personation statute should have been written more specifically to target the types of activities it wants to prohibit and exclude the constitutionally protected activities it does target. Given the Court's trend of expanding the scope of recognized protected speech, it is likely that this law, if properly challenged, will fail on First Amendment grounds. There are two feasible solutions here. The first is to go back to the drawing board and come up with an objective set of metrics (similar to those in the identity theft statute or trademark likelihood of confusion test) that could be applied to evaluate credibility. The alternative is to reinstate the old system, in which individuals who are being impersonated report the offending profile directly to the platform to have it removed, then, if warranted, sue the profile's creator for defamation, invasion of privacy, cyberbullying, (or any of the other applicable causes of action).

203. He posed as the woman in a number of chat rooms telling other "chatters" that she fantasized about being raped. He provided her phone number and address so that people wishing to fulfill her fantasy could actually do so. On at least six occasions, sometimes in the middle of the night, men knocked on the woman's door saying they wanted to rape her. The former security guard pleaded guilty in April 1999 to one count of stalking and three counts of solicitation of sexual assault. He faces up to six years in prison. *1999 Report on Cyberstalking: A New Challenge for Law Enforcement and Industry*, UNITED STATES DEPARTMENT OF JUSTICE (Aug. 1999), http://www.justice.gov /criminal/cybercrime/cyberstalking.htm (last updated Feb. 7, 2003).

There is bad behavior to deter, but this law as it stands currently is too sloppily drafted to pass constitutional muster.