

1-1-2012

## Privacy in Social Media: The Right of Publicity

S. Michael Kernan

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### Recommended Citation

S. Michael Kernan, *Privacy in Social Media: The Right of Publicity*, 34 HASTINGS COMM. & ENT. L.J. 363 (2012).  
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# Privacy in Social Media: The Right of Publicity

by  
S. MICHAEL KERNAN\*

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## I. Introduction

As we live our lives on social media websites like Facebook and Twitter, there is a growing concern regarding the right of privacy on websites. For the websites themselves, as well as their advertisers, there is often no clear direction, but only a myriad of common law cases to guide them in what is and is not permitted.

At the same time, as websites monetize using an advertising model, that monetization is colliding with one of the four privacy claims: the right of publicity. The right of publicity has been heavily litigated lately, particularly against Facebook as it attempts to monetize its massive user base.

This Comment is the first of four covering each of the four privacy claims in relation to social media. It begins with recent litigation on the right of privacy, then explains right of publicity claims and defenses, and suggests a framework for websites to obtain the “consent” of their users to avoid right of publicity claims.

## II. Recent Right of Publicity Cases

On December 16, 2011, a federal judge refused to dismiss a class action lawsuit against Facebook for violating the class’s right of publicity.<sup>1</sup> Specifically, the class challenged Facebook’s practice of running “Sponsored Story” advertisements, which include the names of a user’s friends who like that advertisement.<sup>2</sup> The class alleged that the conduct was a “commercial appropriation” of the friends’ likenesses.<sup>3</sup>

Two other class actions against Facebook for violation of right of publicity have also garnered a great deal of attention this past year.<sup>4</sup> The first addresses the right of publicity in the context of minors (under eighteen) who use Facebook.<sup>5</sup> That action was brought by a minor Facebook user’s parent, alleging that the minor’s name and likeness was appropriated for commercial advantage without the consent of his parents, as required by section 50 of the New York

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1. *Fralely v. Facebook, Inc.*, No. 11-CV-01726-LHK, 2011 U.S. Dist. LEXIS 145195 (N. D. Cal. Dec. 16, 2011).

2. *Id.*

3. *Id.*

4. *Id.*

5. Amended Complaint, *J.N. v. Facebook, Inc.*, No. 11-cv-2128 (E.D.N.Y. May 3, 2011).

Civil Rights Code.<sup>6</sup> Section 50 provides that a living person's name, portrait or picture may not be used for advertising purposes without the person's written consent, "or if a minor of his parent or guardian."<sup>7</sup> The other federal lawsuit, filed in California, alleged the taking of the adult users' name and likeness.<sup>8</sup> On June 28, 2011, the district court granted Facebook's motion to dismiss on the ground, among others, that the users consented to the use of their names and likenesses.<sup>9</sup>

To explain the bases of these lawsuits, it helps to address the claims for right of publicity, both statutory (state law) and common law.

### III. Elements of the Common Law Right of Publicity

The Court has held that to establish a *prima facie* case for violating one's common law right of publicity (misappropriation of plaintiff's picture or name) only one element need be proved—namely, the *unauthorized* use by defendant of plaintiff's picture or name for defendant's *commercial advantage*.<sup>10</sup> The *Zacchini* case is the one and only time the United States Supreme Court has reviewed the right of publicity.

In *Zacchini*, the plaintiff was the famous "human cannonball" who objected to his entire fifteen-second performance being televised on the local news.<sup>11</sup> He argued that the value of his act depended on the public's desire to witness the event, so televising the event detracted from the demand of people willing to pay to see his act.<sup>12</sup> The defendant, Scripps, argued that it was newsworthy, and asserted a First Amendment defense.<sup>13</sup> The Court recognized *Zacchini's* right of publicity and rejected Scripps's First Amendment defense.<sup>14</sup>

The Court explained that the basis of the right of publicity, much like the Copyright Act, is not merely to ensure compensation to the plaintiff.<sup>15</sup> Rather, the purpose of the right of publicity is to provide "an economic incentive for him to make the investment required to

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6. N.Y. CIV. RIGHTS LAW § 50 (Gould 2012).

7. *Id.*

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

9. *Id.*

10. *Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562, 576 (1977).

11. *Id.* at 563–64.

12. *Id.* at 575.

13. *Id.* at 578–79.

14. *Id.*

15. *Id.* at 566–67.

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produce a performance of interest to the public.”<sup>16</sup> As noted by the Court, liability in right of publicity cases is generally limited to the use of plaintiff’s picture or name in connection with the promotion or advertisement of a product or service.<sup>17</sup>

#### **A. State Statutory Right of Publicity Claims**

Many states, such as California and New York, have statutory causes of action for right of publicity. It is helpful to explore each state’s right of publicity laws in more depth.

##### *1. The California Right of Publicity Statute*

Section 3344 of the California Civil Code states, in relevant part:

Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.<sup>18</sup>

The California Supreme Court, in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, held that the defendant artist’s sale of lithographs and t-shirts which reproduced a drawing depicting the former comedy act, “The Three Stooges,” violated the publicity rights statute prohibiting such use without consent.<sup>19</sup>

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16. *Id.* at 576.

17. *Id.*

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

19. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 800 (2001). *See also* *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 693 (9th Cir. 1998) (finding that former major league pitcher Don Newcombe’s likeness was used to beer company’s and advertising company’s commercial advantage in violation of plaintiff’s common law rights regarding unauthorized commercial use of name and likeness); *Eastwood v. Nat’l Enquirer*, 123 F.3d 1249, 1256 (9th Cir. 1997) (granting actor Clint Eastwood judgment against tabloid newspaper based on the commercial misappropriation of his name, likeness and personality through misrepresentation of an article based on an exclusive interview with him); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 415 (9th Cir. 1996) (finding a well-known athlete stated claims under California common and statutory law for misappropriation of his identity by alleging that advertiser used his former name, Lew Alcindor, in television commercials).

## 2. *The New York Right of Publicity Statute*

Similar to California's statute, New York's statutory right of publicity that prohibits the use of one's name and likeness for commercial purposes.<sup>20</sup> Section 50 of the New York Civil Rights Code provides that a living person's name, portrait or picture may not be used for advertising purposes without the person's written consent.<sup>21</sup>

## IV. Defenses to Right of Publicity Actions in Social Media

There are typically three main defenses to right of publicity claims in the social media context: (1) section 230 of the Communications Decency Act<sup>22</sup> ("CDA"), (2) a license to use the likeness—either express or implied,<sup>23</sup> and (3) the First Amendment.<sup>24</sup> Section 230 of the CDA is a defense unique to Internet and social media companies. Moreover, express and implied consent is currently at issue in a great deal of litigation due to the consents put into the Terms of Use, to which users of websites such as Facebook are required to agree. Finally, First Amendment cases have a split in authority, which further clouds the issue.

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20. N.Y. CIV. RIGHTS LAW § 50 (GOULD 2012).

21. See, e.g. *Beverly v. Choices Women's Med. Ctr., Inc.*, 532 N.Y.S.2d 400 (N.Y. App. Div. 1988), *aff'd*, 587 N.E. 2d 275 (N.Y. 1991), *appeal dismissed*, 73 N.Y.2d 785, 533 N.E.2d 673 (1988) (upholding summary judgment and damage award in favor of plaintiff, finding that the use of plaintiff's photograph on defendant's calendar was a commercial use); *Arrington v. N.Y. Times Co.*, 434 F. 2d 1319 (N.Y. 1982) (finding that plaintiff stated sufficient claims for relief against free-lance photographer and photographic agency for the nonconsensual publication of a photograph of plaintiff which constituted the use of plaintiff's name and likeness for purposes of trade under New York law); *Davis v. High Soc'y Magazine, Inc.*, 457 N.Y.S.2d 308 (N.Y. App. Div. 1982); *Brinkley v. Casablancas*, 80 438 N.Y.S.2d 1004 (N.Y. App. Div. 1981); *Booth v. Curtis Publ'g Co.*, 223 N.Y.S.2d 737 (N.Y. App. Div. 1962); *Spahn v. Julian Messner, Inc.*, 221 N.E. 2d 543 (N.Y. 1966), *vacated & remanded*, 387 U.S. 239, *motion to amend remittitur granted*, 20 N.Y.2d 752, 229 N.E.2d 712, 283 N.Y.S.2d 119, on reconsideration in light of *Time, Inc. v. Hill*, 385 U.S. 374 (1967); after re-argument, the court of appeals in *Spahn* reaffirmed the damages award and the injunction against the sale of the book, 233 N.E. 2d 84, (N.Y. 1967), *appeal dismissed*, 393 U.S. 1046 (1969); *Bi-Rite Enters. Inc. v. Button Master*, 555 F. Supp. 1188 (S.D.N.Y. 1983) (explaining posters, buttons, passes, bumper stickers and other items bearing pictures of rock musicians without their consent justified granting summary judgment in favor of plaintiffs); *Clark v. Celeb Publ'g, Inc.*, 530 F. Supp. 979 (S.D.N.Y. 1981); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978); *Grant v. Esquire*, 367 F. Supp. 876 (S.D.N.Y. 1973).

22. Communications Decency Act, 47 U.S.C. § 230 (2006).

23. J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY & PRIVACY* § 10:13 (2nd ed. 2012).

24. U.S. CONST. amend. I.

### A. Immunity Under Section 230 of the CDA

Section 230 of the CDA provides immunity to social media websites for tortious actions of third party users.<sup>25</sup> The two exceptions to this immunity are intellectual property claims and situations in which the website acts in conjunction with the third party user, such that the website becomes a “content provider.”<sup>26</sup> As to the intellectual property exception, there is a split of authority as to whether the right of publicity claims are actually intellectual property claims. The majority view is that right of publicity claims *are* intellectual property claims, and thus, the immunity under section 230 of the CDA does not apply. However, the minority view, which only the Ninth Circuit currently adopts, is that section 230 immunity applies and is a bar to right of publicity claims.<sup>27</sup>

At the time of this writing, six courts across the United States have analyzed whether section 230 of the CDA bars right of publicity claims. These are all federal decisions, and come from the First, Second, Ninth and Eleventh Circuits. Only the Ninth Circuit has determined that immunity bars right of publicity claims.

#### 1. First Circuit

In 2007, the First Circuit Court of Appeals held that state law claims for trademark dilution are “[c]laims based on intellectual property laws [and] are not subject to Section 230 immunity in *Universal Communication Systems v. Lycos*.<sup>28</sup>

The following year, in *Doe v. Friendfinder*,<sup>29</sup> a federal district court in New Hampshire ruled a state claim for infringement of the right of publicity is an intellectual property claim, such that the CDA does *not* immunize an ISP from liability, expressly disagreeing with the Ninth Circuit’s ruling in the *Perfect 10* case<sup>30</sup> (discussed below).

#### 2. Second Circuit

In a 2009 case, *Atlantic Recording Corp. v. Project Playlist, Inc.*<sup>31</sup> the federal district court for the Southern District of New York found

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25. § 230.

26. *Id.*

27. *Id.*

28. *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 422–23 (1st Cir. 2007).

29. *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302 (D.N.H. 2008).

30. *Perfect 10, Inc. v. CCBill LLC*, 481 F.3d 751 (9th 2007).

31. *Atlantic Recording Corp. v. Project Playlist, Inc.* 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009)

that Section 230 did not apply to state or common law copyright claims (disagreeing with *Perfect 10* decision and agreeing with *Doe v. Friendfinder*).

The same court found in the 2001 case, *Gucci America Inc. v. Hall & Associates*,<sup>32</sup> that New York state trademark infringement and unfair competition under New York law were within the intellectual property exception to the immunity.

### 3. Ninth Circuit

In *Perfect 10, Inc. v. CCBill LLC*,<sup>33</sup> the Ninth Circuit held that the term “intellectual property” in Section 230 (e)(2) means only *federal* intellectual property (not state regimes like right of publicity), which dramatically increased the protection for defendants claiming immunity under Section 230.

### 4. Eleventh Circuit

The Eleventh Circuit, in a 2006 case, *Almeida v. Amazon.com, Inc.*<sup>34</sup> explained that “there appears to be no dispute that the right of publicity is a type of intellectual property right” and found state as well as federal intellectual property laws to be excluded from section 230’s immunity.

How would the United States Supreme Court rule in light of this split? The *Doe v. Friendfinder* court noted how the United States Supreme Court interprets the word “any” in a statute enacted by Congress.<sup>35</sup> It explained, “the modifier ‘any’ in section 230(e)(2), employed without any limiting language, amounts to ‘expansive language [that] offers no indication whatever that Congress intended [a] limiting construction.’”<sup>36</sup>

The term “any” law pertaining to intellectual property should mean just that: “any” law, which obviously includes state intellectual property laws.<sup>37</sup> The *Harrison* Court’s interpretation of “any,” as well

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32. *Gucci America Inc. v. Hall & Associates*, 135 F. Supp. 2d 409, 411 (S.D.N.Y. 2001)

33. *Perfect 10, Inc. v. CCBill LLC*, 481 F.3d 751, 768 (9th Cir. 2007), opinion amended on other grounds on denial of reh’g, 488 F.3d 1102 (9th Cir. 2007), cert. denied, 128 S. Ct. 709 (2007).

34. *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1323–24 (11th Cir. 2006).

35. *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302 (D.N.H. 2008).

36. *Id.* (quoting the Supreme Court in *Harrison v. PPG Indus.*, 446 U.S. 578, 589 (1980)).

37. *Id.*

as the Supreme Court's protection of the Right of Publicity in the only case which addresses that claim,<sup>38</sup> suggests the Supreme Court would side with the majority view.

The *Atlantic* court's discussion of the erroneous analysis in *Perfect 10*, and that case's inherent contradiction with other Ninth Circuit cases is worth quoting. The party seeking immunity from the state law intellectual property claim in that case, Playlist, relied on the *Perfect 10* case.<sup>39</sup> The *Atlantic* court rejected the Ninth Circuit opinion and stated, "In support of its position, Playlist relies heavily on a 2007 Ninth Circuit case in which the Ninth Circuit held that the term 'intellectual property' in the CDA really means 'federal intellectual property.'"<sup>40</sup>

The problem with Playlist's argument is that it lacks any support in the plain language of the CDA.<sup>41</sup> In four different points in section 230(e), Congress specified whether it intended a subsection to apply to local, state, or federal law.<sup>42</sup> It is therefore clear from the statute that if Congress wanted the phrase "any law pertaining to intellectual property" to actually mean "any *federal* law pertaining to intellectual property," it would have made that clear, but chose not to.<sup>43</sup>

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38. *Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562, 576 (1977).

39. *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 703 (S.D.N.Y. 2009).

40. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007) ("In the absence of a definition from Congress, we construe the term 'intellectual property' to mean 'federal intellectual property.'"). This aspect of the court's holding appears to be inconsistent with other Ninth Circuit precedent. *See, e.g., SEC v. Gemstar-TV Guide Int'l, Inc.*, 367 F.3d 1087, 1095 (9th Cir. 2004) ("Absent a definition from Congress, we interpret the words using their ordinary, contemporary, and common meanings."), *rev'd en banc on other grounds*, 401 F.3d 1031 (9th Cir. 2005); *Bonnichsen v. United States*, 367 F.3d 864, 875 (9th Cir. 2004) ("It is axiomatic that, in construing a statute, courts generally give words not defined in a statute their ordinary or natural meaning.") (internal citation and quotations omitted); *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999) ("Where a statutory term is not defined in the statute, it is appropriate to accord the term its ordinary meaning.") (internal citation and quotations omitted).

41. The Ninth Circuit did not engage in a textual analysis. *Atl. Recording Corp.*, 603 F. Supp. 2d at 703.

42. *See* 47 U.S.C. §§ 230(e)(1) ("any other *Federal* criminal statute"), (3) ("any *State* law" and "any *State* or *local* law"), (4) ("any similar *State* law") (emphasis added in all).

43. *Cf. Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[I]t is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v. U.S.*, 464 U.S. 16, 23 (1983))); *United States v. Gonzales*, 520 U.S. 1 (1997) (holding that "any other term of imprisonment" includes both state and federal terms of imprisonment because "Congress did not add any language limiting the breadth of that word, and so we must read [the statute] as referring to all 'terms of imprisonment'").

Moreover, the modifier “any” in section 230(e)(2), employed without any limiting language, “amounts to ‘expansive language [that] offers no indication whatever that Congress intended [a] limiting construction.’”<sup>44</sup> This conclusion is bolstered by the fact that, as discussed above, the “surrounding statutory language” supports the conclusion that Congress intended the word “any” to mean any state or federal law pertaining to intellectual property.<sup>45</sup>

Because the plain language of the CDA is clear, as “any law” means both state and federal law, the Court need not engage in an analysis of the CDA’s legislative history or purpose.<sup>46</sup> How the United States Supreme Court would rule remains an open question, but past precedent gives guidance.

### **B. Plaintiff Consented to the Use of Right of Publicity**

On the issue of “consent,” meaning the plaintiff consented to defendant’s use of his or her likeness, the issue typically turns on the scope of the likeness granted. For example, the terms of use of many websites, such as Facebook, permit the use of the name and likeness of users.<sup>47</sup> Specifically, Facebook’s terms of service states, “your name and profile picture may be associated with commercial, sponsored, or related content . . . served or enhanced by us. You give us permission to use your name and profile picture in connection with that content, subject to the limits you place.”<sup>48</sup>

The legal issue is typically whether the use of the likeness at issue is within the scope of the grant of likeness. The law is well settled that the right to use someone’s likeness can be limited in scope. According to J. Thomas McCarthy:

The right of publicity need not be assigned for any and all uses; it may be assigned *limited to certain uses, such as the*

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44. Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 299 (D.N.H. 2008) (quoting Harrison v. PPG Indus., 446 U.S. 578, 589 (1980)).

45. See ACLU v. Dep’t of Def., 543 F.3d 59, 69 (2d Cir. 2008) (holding that word “any” in statute “deserves an expansive application where the surrounding statutory language and other relevant legislative context support it”).

46. See Lee v. Bankers Trust Co., 166 F.3d 540, 544 (2d Cir. 1999) (“It is axiomatic that the plain meaning of a statute controls its interpretation and that judicial review must end at the statute’s unambiguous terms. Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous.”) (internal citations omitted).

47. Terms, FACEBOOK, <http://www.facebook.com/legal/terms> (last visited Apr. 2, 2012).

48. *Id.*

*identity in a specific photograph.*<sup>49</sup> For example, a model consent agreement may . . . specifically assign the model's right of publicity inherent in the *use of a specific photo or photos*. This makes it clear that the assignee has the power to enforce the right of publicity of the model in a commercial use *of that image.*<sup>50</sup>

While assent may take place even through assent to "Terms of Use," there are limitations to consent. Even if someone consents to the taking of a photograph subject to express limitations or conditions as to the manner in which the photograph will be used or published, the photographer's selling, licensing or exploiting the photograph beyond the scope of the limited permission or release is wrongful, actionable and can constitute grounds for injunctive relief and for recovery of damages.<sup>51</sup>

The Court's analysis in *Brinkley v. Casablancas* is also instructive.<sup>52</sup> In that action, model Christie Brinkley sought to enjoin the unauthorized publication, distribution and sale of posters of her photograph in violation of her right of privacy and her right of publicity, and sought compensatory, emotional distress, and exemplary damages, among other claims.<sup>53</sup> Brinkley had not signed a release authorizing distribution of her photograph or likeness.<sup>54</sup> The court explained:

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49. J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY & PRIVACY* § 10:13 (2nd ed. 2005) (citing *Del Amo v. Baccash*, No. CV 07-663 PSG, 2008 WL 2780978 (C.D. Cal. July 15, 2008)).

50. *Id.*

51. *Clark v. Celeb Publ'g, Inc.*, 530 F. Supp. 979 (S.D.N.Y. 1981); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985) (holding that despite the fact that Douglass consented to the photographs being published in *Playboy* magazine, the unauthorized publication in *Hustler* magazine was actionable and justified an award of damages); *Genesis Publ'ns v. Goss*, 437 So. 2d 169 (Fla. Dist. Ct. App. 1983) (holding the publication of nude photo of model exceeded the scope of the original consent, and therefore was actionable); *McCabe v. Vill. Voice*, 550 F. Supp. 525 (E.D. Pa. 1982) (stating the publication of nude photo in the centerfold section of a particular magazine was held to be wrongful and actionable since it exceeded the scope of the original consent); *Barrows v. Rozansky*, 11 A.D.2d 105, 489 N.Y.S.2d 481 (N.Y. App. Div. 1985) (holding an ex-boyfriend's sale of nude photos to media based on recent notoriety concerning plaintiff to be violation of right of publicity. Injunction was granted). *See* RESTATEMENT SECOND TORTS § 892A(4).

52. *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004 (N.Y. App. Div. 1981)

53. *Id.* at 1005–06.

54. *Id.* at 1006.

Moreover, plaintiff never authorized distribution of the particular photograph or poster. While she undoubtedly permitted photographs of herself to be taken which might be used on a poster for commercial sale, she reserved the right, prior to their commercial exploitation, to reject or approve the use to which the photographs would be put. . . . Here, plaintiff never gave final approval to the poster nor did she give oral or written consent to its release.<sup>55</sup>

In *Dzurenko v. Jordache*, the Plaintiff, a male commercial model, posed for photographs and signed a release wherein he inserted the words “magazine ad use only.”<sup>56</sup> Jordache used the photographs on posters and distributed to retailers for advertising purposes.<sup>57</sup> Although the lower court determined that plaintiff had consented to the commercial exploitation of his photograph and may not now be heard to complain that its use infringed his privacy, the Court of Appeals of New York reversed, holding that the use went beyond the scope of plaintiff’s consent.<sup>58</sup> The court stated: “A defendant’s immunity from a claim for invasion of privacy is no broader than the consent executed to him. Whether the limitation in the consent is as to time, form, or forum, the use of a name, portrait or picture is without consent if it exceeds the limitation.”<sup>59</sup>

In *Canessa v. J.I. Kislak, Inc.*, the Canessa family consented to an article being written about the family and posed for a picture in conjunction with the article, which was published in defendant’s magazine.<sup>60</sup> Defendant then had reprints of the article made and used it for advertising purposes for commercial advancement.<sup>61</sup> Denying defendant’s motion for summary judgment, the New Jersey Superior Court held: “If the actual invasion goes beyond the contract, fairly construed, as for example by alteration of the plaintiff’s picture, or publicity differing materially in kind or in extent from that contemplated, or exceeding the authorized duration, there is liability.”<sup>62</sup> Citing several other cases, the court stated:

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55. *Id.* at 1008–09.

56. *Dzurenko v. Jordache*, 451 N.E. 2d 477 (N.Y. 1983)

57. *Id.*

58. *Id.* at 478.

59. *Id.* (quoting *Shields v. Gross*, 448 N.E. 2d 108, 112 (N.Y. 1983)) (emphasis added).

60. *Canessa v. J.I. Kislak, Inc.*, A.2d 62, 64–65 (N.J. Super. Ct. Law Div. 1967).

61. *Id.* at 65.

62. *Id.* at 79–80; WILLIAM PROSSER, LAW OF TORTS 850–51 (3d ed. 1964).

Many of the cases in which the right of privacy has been protected are instances where plaintiff had consented to his or her photograph being taken in the first instance, but because defendant then used the photograph for a further and different purpose, for its own commercial benefit, it is held that there is no waiver or consent for such latter use.<sup>63</sup>

In *Faber v. Condecor, Inc.*, plaintiffs granted a license to Kodak to use a particular photograph “for the purpose of illustration, advertising, trade or publication in any manner.”<sup>64</sup> The photograph appeared in two editions of a publication by Kodak.<sup>65</sup> Defendant, Condecor, took the picture from the Kodak publication, without plaintiff’s or Kodak’s permission, and used the picture to advertise picture frames which defendant sold commercially.<sup>66</sup> After a jury trial, plaintiff was awarded \$45,000 for invasion of privacy.<sup>67</sup> The Superior Court, Appellate Division, affirmed the verdict, relying heavily on *Canessa v. J.I. Kislak, Inc.*,<sup>68</sup> and stated: “Defendant’s use of plaintiff’s picture was not contemplated by the agreement between plaintiffs and Kodak.”<sup>69</sup> “One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy.”<sup>70</sup>

In *Russell v. Marboro Books*, plaintiff was a model who signed a consent to “unrestricted use” of her photograph by a named photographer and by unnamed “advertisers and assigns” and waived her right “to inspect or approve advertising matter used in connection therewith.”<sup>71</sup> The original photograph was for an educational book advertisement in a newspaper and on posters in bookstores.<sup>72</sup> The photographer sold the photo to the book store, which in turn sold the photo to a bed sheets company which retouched and substantially altered the photograph and used it with vulgar and salacious captions in an advertisement in defendant magazines.<sup>73</sup> The court held

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63. *Canessa*, 235 A. 2d at 80 (citations omitted).

64. *Faber v. Condecor, Inc.*, 477 A.2d 1289, 1291 (N.J. Super. Ct. App. Div. 1984).

65. *Id.*

66. *Id.* at 1290.

67. *Id.* at 1294.

68. *Id.*

69. *Id.*

70. *Id.* at 1292.

71. *Russell v. Marboro Books*, 183 N.Y.S.2d 8, 18–19 (N.Y. Sup. Ct. 1959).

72. *Id.* at 16.

73. *Id.* at 36.

plaintiff could maintain a cause of action against the bed sheets company and magazines for violation of right of privacy and defamation, despite the open-ended scope of license.<sup>74</sup>

“If a jury finds that the changes in plaintiff’s picture were substantial and were not consented to, her signed consent cannot be construed to authorize a libel upon her person and her professional standing.”<sup>75</sup>

In *Leavy v. Cooney*, the plaintiff, a county prosecutor, had entered into an agreement with the defendant, a filmmaker, agreeing to appear before cameras and narrate a made for television documentary regarding a criminal case that he had prosecuted based on the express condition that it would be exhibited only on television and not in theaters.<sup>76</sup> Since the defendant exhibited the film in theaters, exceeding the consent given by plaintiff, the court affirmed not only the award of compensatory damages and punitive damages against the defendant but also affirmed the granting of an injunction prohibiting further exploitation of the picture in theaters.<sup>77</sup>

### C. First Amendment Defense

Certain uses of one’s name and likeness may be protected by the First Amendment. Thus, for example, the use of a personality’s name or likeness in a magazine story, even if motivated by profit, may or may not be actionable. The Ninth Circuit rejected actor Dustin Hoffman’s claim that a magazine profited by using his likeness in a picture from a film.<sup>78</sup> In that case, the district court found that Hoffman’s photograph from the film *Tootsie* was used to “attract attention” and sell magazines, which the Ninth Circuit rejected.<sup>79</sup> However, the Eleventh Circuit recently took the exact opposite view in a case by Nancy Benoit’s estate against *Hustler* magazine.<sup>80</sup> Nancy, a famous wrestler, was killed by her husband.<sup>81</sup> *Hustler* magazine acquired decades-old photographs of the model to illustrate and article about her death.<sup>82</sup> Nancy’s estate sued, stating that *Hustler* was

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74. *Id.* at 30.

75. *Id.* at 16.

76. *Leavy v. Cooney*, 29 Cal. Rptr. 580, 582 (Cal. Ct. App. 1963).

77. *Id.* at 584–85.

78. *Hoffman v. Capital Cities*, 255 F.3d 1180, 1184 (9th Cir. 2001).

79. *Id.* at 1186.

80. *Toffoloni v. LFB Publ’g Grp.*, 572 F.3d 1201 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1689 (2010).

81. *Id.* at 1204.

82. *Id.*

using her name and likeness for advertising purposes.<sup>83</sup> *Hustler* argued that the article was newsworthy and protected by the First Amendment.<sup>84</sup> After the Eleventh Circuit agreed that Nancy's estate had a claim, *Hustler* appealed to the United States Supreme Court, which denied cert.<sup>85</sup> The Eleventh Circuit explained that the Court must look to the uses with an eye towards what is "reasonable."<sup>86</sup>

## V. How Social Media Companies and Other Websites Can Protect Themselves From Right of Publicity Claims

Social media companies and websites can navigate around claims for violation of one's right of publicity by obtaining the consent of the users. Advertisers on those websites should obtain specific agreement from any user that is used in one of its advertisements.<sup>87</sup> The following explains the process of obtaining the consent of users based upon the most recent case law pertaining to consent to terms of use.

### A. Terms of Use

The easiest way for companies providing online services to protect themselves against claims for violation of a person's right of publicity is by establishing terms and conditions for the use of their online services. When a company's services include aggregating user information, standard practice should be to include provisions in their Terms of Use (as hereafter defined). Terms of Use, also sometimes known as "Terms of Service," are rules which one must agree to abide by in order to use a service or website.

The website's Terms of Use should grant the website a non-exclusive, perpetual, transferable, royalty-free, irrevocable, worldwide (or throughout the universe) license for the right to use a person's name and likeness for the promotion, development and

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83. *Id.*

84. *Id.* at 1207.

85. LFP Publ'g Grp. v. Toffoloni, 130 S. Ct. 1689 (2010).

86. *Toffoloni*, 572 F.3d at 1211.

87. This note focuses on how the websites themselves can protect against right of publicity claims similar to those brought against Facebook. Advertisers must make sure they have the consent of anyone they are using in advertisements. Whether an advertiser wants to rely on the websites Terms of Use or Terms of Service depends upon the risk acceptance of the advertiser, and is not recommended. An agreement should be made between an advertiser and any person used in an advertisement. For a sample agreement, see [www.SocialMediaLaw.com/AdvertiserLikenessAgreement](http://www.SocialMediaLaw.com/AdvertiserLikenessAgreement).

general operation of the website. Further, a company should reserve the right to sub-license a user's name and likeness to third parties, such as advertisers, for the same or similar uses. In the event that a person's name or likeness is displayed on a website without that person's consent, a procedure should be in place under Terms of Use allowing that person to have the content removed upon a showing of misappropriation.

#### **B. Acceptance of Terms of Use by the Users**

To ensure acceptance of Terms of Use, users should be required to accept the terms prior to the use of any services on the website. This includes any mobile variants of the website and any applications used in conjunction with the website. Actual display of the Terms of Use and affirmative acceptance of those terms can be achieved in different ways.

Terms of Use can be displayed in their entirety before a person may create a user profile on a website. They can also be displayed as a hyperlink upon a person accessing a website.

A company will want an affirmative acceptance of those terms, including the terms granting use of the right of publicity, by all persons prior to creating a user profile or accessing portions of websites containing user-generated content. A click wrap agreement allows a user to read through a dialog box containing the terms of use, and can require the user to affirmatively acknowledge those terms, clicking "Accept" for example, before being granted use of a website or the ability to upload media onto that website.<sup>88</sup> If a user does not agree to the terms of use, the user does not have to click "Accept" or otherwise use the website. Even where the full terms of use are not presented on the same page as the "Acceptance" button, where the user was provided the opportunity to review those Terms of Use in the form of a sufficiently conspicuous hyperlink, the user has assented to those terms by clicking "Accept."<sup>89</sup>

The Terms, including those pertaining to right of publicity, are deemed sufficiently conspicuous if notice is given on the home page and on any page requiring an action by the user to precede use of the website, stating that anyone proceeding past that page has assented to the Terms of Use.<sup>90</sup> Once terms are found to be sufficiently

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88. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

89. *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 912 (N.D. Cal. 2011).

90. *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV997654HLHVBKX, 2003 WL 21406289 (C.D. Cal. Mar. 7, 2003).

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conspicuous, enforceability of those terms “does not depend on [the user] actually having read them” before “Accepting” said terms.<sup>91</sup>

### C. Notice of Modification

Once a user has agreed to the Terms of Use of a website, the user must be placed on notice if any of those terms are removed or modified, or if additional terms are included.

Notice can be given as a message posted within the website for notifying users of any modifications made to the Terms of Use.<sup>92</sup> Alternatively, if the website requires that users register an email address, notice can be given via an email message.<sup>93</sup> Notice provided should specify what sections within the Terms of Use have been added, removed or modified.<sup>94</sup> Mere posting of the revised terms on the offeror’s website does not provide the necessary notice to users.<sup>95</sup>

## VI. Conclusion

Based upon courts’ willingness to hold a person has “signed” an agreement by clicking “Accept” to the same extent as someone who signs a written contract, companies would be prudent to ensure that users visiting their website affirmatively click “Accept” regarding their Terms of Use. In the alternative, companies can design websites such that users are given sufficiently conspicuous notice as to the existence of the Terms of Use, and the mere use of the website is an assent to those sufficiently conspicuous terms.

If a website is particularly concerned about the right of publicity, it can allow a user to “opt out” of allowing his or her right of publicity to be used. For example, Google’s privacy policy states:

When you sign up for a Google Account, we ask you for personal information. We may combine the information you submit under your account with information from other Google services or third parties in order to provide you with a better experience and to improve the quality of our services.

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91. *Druyan v. Jagger*, 508 F. Supp. 2d 228, 232 (S.D.N.Y. 2007); *See also People v. Direct Revenue LLC.*, No. 401325/2006 (N.Y. Sup. Ct. Mar. 12, 2008).

92. *Douglas v. U.S. Dist. Court*, 495 F.3d 1062, 1066 (9th Cir. 2007).

93. *Id.*

94. *Id.*

95. *Id.* at 1066–67.

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For certain services, we may give you the opportunity to opt out of combining such information.<sup>96</sup>

Statements such as these help ensure that the needs and concerns of both users and providers of social media platforms are addressed.

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96. See *Policies and Principles*, GOOGLE <http://www.google.com/intl/en/policies/privacy/archive/20111020> (last visited Apr. 1, 2012).