WHOSE LIFE IS IT ANYWAY: AN ANALYSIS AND PROPOSAL FOR THE TEXAS PROPERTY CODE WHEN EVERYONE ACTS LIKE A CELEBRITY AND EVERYTHING IS AN ADVERTISEMENT

by Barrett Lewis

"In the future everybody will be world famous for fifteen minutes."
—Andy Warhol, Moderna Museet, Stockholm, Sweden, 1968

I. INTRODUCTION

In September 2019, actor and singer Ariana Grande filed suit against apparel retailer Forever 21 and other relevant parties for infringement of her name, image, and lyrics in the course of business.[1] The brand hired and styled a Grande look-a-like after a failed endorsement deal with the artist.[2] The retailer, strapped for cash, could not pay Grande's fee and instead hired a knockoff version of the pop star.[3] According to the complaint filed in the U.S. District Court for the Central District of California, Grande's worldwide success allows her to generate a six-figure fee for a single Instagram post.[4] Currently, the case has been stayed due to Forever 21's bankruptcy proceedings and Grande's failure to show cause otherwise, but the case represents infringement in a social media age.[5]

Ariana Grande-Butera v. Forever 21, Inc. is a trademark infringement case in federal court, but it illustrates big changes to the landscape of celebrity endorsement and the concept of persona in conjunction with the rise of social

1. Narine Saad, *Ariana Grande Sues Forever 21 Over Failed Deal and Lookalike Model*, L.A. TIMES (Sept. 3, 2019), https://www.latimes.com/entertainment-arts/music/story/2019-09-03/ariana-grande-forever-21-lawsuit; Complaint, Ariana Grande-Butera v. Forever 21, Inc., 2:19CV07600 (C.D. Cal. filed Sept. 2, 2019) [hereinafter Complaint].

2. Complaint, *supra* note 1 ¶ 2, at 2.

3. *Id*.

4. *Id.* ¶ 25, at 7.

5. *See* Saad, *supra* note 1.

media.[6] Content is generated quickly; fast fashion brands can get a concept from design to the store in record time, celebrities interact with fans directly through social media, and virtually anyone with a smartphone can join celebrities in cultivating fans and developing a personal brand.[7] Similarly, plagiarism and falsely representing one's self online is effortless, illustrating the need for updated legal protections of valuable personas and brands.[8]

Across the nation, states are looking for ways to allow citizens to protect and profit from their images and personal brands.[9] In September 2019, California lawmakers sent Governor Gavin Newsom a bill allowing college athletes to earn money from license agreements and endorsement deals.[10] The National Collegiate Athletic Association ("NCAA") initially opposed the new bill, but professional and college athletes across the country applauded the state's legislators for their efforts.[11] In October 2019, the NCAA board voted to allow student-athletes to benefit from their likeness.[12]

The proliferation of social media and constant online presence calls for new privacy and publicity laws for both celebrities and non-celebrities.[13] This new reality creates a need for state legislatures to adapt and revise their respective laws to further protect individuals' rights to their likeness both during life and post-mortem.[14] Texas Property Code Section 26, drafted and passed in 1987 by the 86th Texas Legislature, protects an "individual's name, voice, signature, photograph, [and] likeness after . . . death . . ."[15] However, for living persons, no statutory protections exist in Texas.[16] This poses a risk for those seeking to protect their personal brands: if not protected during their lifetime, the value of their brand at death could be significantly depleted.[17]

There are a variety of justifications for protecting individual rights to privacy and publicity.[18] This comment focuses on those justifications—incentive, economic, natural right to one's identity, et cetera—with regard to estate planning.[19] It also discusses and analyzes Texas's position in the nation as a leader in legislation and how to tailor the state's laws to modern

---

6. *See id*.
7. *See* discussion *infra* Section III.A.
8. *See* Complaint, *supra* note 1 ¶ 25, at 7.
9. Melody Gutierrez, Nathan Fenno, *California Would Allow College Athletes to Profit from Endorsements Under Bill Sent to Newsom*, L.A. TIMES (Sept. 12, 2019), https://www.latimes.com/california/story/2019-09-11/california-college-athletes-endorsements-bill.
10. *Id*.
11. *Id*.
12. *Board of Governors starts process to enhance name, image and likeness opportunities*, NCAA (Oct. 29, 2019), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities [https://perma.cc/ZP8R-BZYE].
13. *See infra* note 94.
14. *See* discussion *infra* Part III.
15. TEX. PROP. CODE ANN. § 26.002.
16. *Id*.
17. *See* discussion *infra* Part III.
18. *See* discussion *infra* Parts III, IV.
19. *See* discussion *infra* Part IV.

developments in society.[20] As a state that works to protect property for the sake of individuals and communities, this comment proposes that Texas adopt new statutes affording living persons the same protections deceased persons have regarding persona and likeness.[21] First, this comment discusses the source of Texas publicity statutes and illustrates how these statutes function through discussions of major cases.[22] It then explores the state of publicity in other community property states, and various rationales for protecting persona.[23] This comment also explores how emerging technologies have invented new types of fame and different ways to exploit that fame.[24] Additionally, this comment lays out which measures the Texas legislature should consider adopting in order to be a frontrunner in the redevelopment of privacy and publicity laws in a world of social media and hyperactive consumer behavior.[25] Finally, this comment examines the rationales for statutorily protecting a living individual's persona and the reasons why every community property state should consider it as well.[26]

II. THE RIGHT OF PUBLICITY IN TEXAS

A. Publicity Rights Protected by Texas Statutes

Currently, the Texas Property Code establishes a property right in an "individual's name, voice, signature, photograph, or likeness after [their] death."[27] The property right is transferable by will or trust and may be transferred during or after the individual's lifetime.[28] Those who claim a right to an individual's publicity may register their claim with the Secretary of State using "Form 3071—General Information (Registration of Claim for Use of Deceased Individual's Name, Voice, Signature, Photograph, or Likeness)."[29] Section 26.011 enumerates prohibited uses of such qualities: "(1) in connection with products, merchandise, or goods; or (2) for the purpose of advertising, selling, or soliciting the purchase of products, merchandise, goods, or services."[30] However, the statute carves out protections for use of an individual's persona in fine art, newsworthy material, periodicals, and plays, books, movies and television.[31] Regardless

20. *See* discussion *infra* Part IV.
21. *See* discussion *infra* Part IV.
22. *See* sources cited *infra* notes 56–57, 66.
23. *See* discussion *infra* Section II.G.
24. *See* discussion *infra* Section III.B, C.
25. *See* discussion *infra* Part III.
26. *See* discussion *infra* Part III.
27. TEX. PROP. CODE ANN. § 26.002.
28. *Id.* § 26.004.
29. *Id.* § 26.006; *see also* App. A.
30. TEX. PROP. CODE ANN. § 26.011.
31. *Id.* § 26.012.

of any protection, the statute only protects the property right for up to fifty years after death, at which time the value of an individual's persona is presumed to be spent.[32] The statute creates a $2,500 damages minimum in addition to "any profits from the unauthorized use," exemplary damages, and reasonable attorney's fees.[33]

B. Statutory History of Texas Publicity Laws

The 70th Texas Legislature enacted Chapter 26 of the Texas Property Code in 1987 after Maria Elena Holly, widow of rock star Buddy Holly, encountered "continual infringements on claims to the singer's name and likeness."[34] Several commercial enterprises attempted to utilize Buddy's likeness in connection to their banking services, pizza, and cars.[35] The bill, as evidenced by the enacted statute, only aims to deter unauthorized commercial use and "sponsored [content] masquerading as broadcasts or articles."[36] This was a fantastic win for Ms. Holly, but, as the bill opponents mentioned, living entertainers were not afforded any similar protections.[37] "Living entertainers . . . must rely on court decisions to protect use of their [personas]."[38] Opponents also pointed out several other potential problems with the new statute—among them, confusing standards for determining whether a particular publication or broadcast is commercially-sponsored, and whether the right to persona is community property or separate property.[39] While a deceased person's publicity rights are thoroughly protected in Texas, a living person must rely on the torts of misappropriation and invasion of privacy to recover for similar infringements on their persona.[40]

C. Tort Law of Invasion and Misappropriation

In 1960, William Prosser, Dean of the University of California School of Law, Berkeley, authored a law review article constructing the modern tort of invasion of privacy from four preexisting torts: intrusion, disclosure, false light, and appropriation.[41] Building on the works of Mr. Samuel Warren and Justice Louis D. Brandeis, Prosser created a sort of "modern" adaptation of

---

32. *Id*.
33. *Id.* § 26.013.
34. House Research Org., Bill Analysis, Tex. H.B. 834, 70th Leg., R.S. (1987) ("Supporters Say").
35. *See id*.
36. *Id*.
37. *See id*.; *see* Mike Graham, *City Approves $20k Contract for Buddy Holly Naming Rights*, DAILY TOREADOR (Jan. 28, 2009), http://www.dailytoreador.com/archives/city-approves-k-contract-for-buddy-holly-naming-rights/articlec99cf063-4054-58fe-988d-e03d0e146ca3.html [https://perma.cc/DAL9-PDWQ].
38. House Research Org., Bill Analysis, Tex. H.B. 834, 70th Leg., R.S. (1987) ("Opponents Say").
39. *See id*.
40. *See id*.
41. *See* William Prosser, Privacy, 48 CALIF. L. REV. 383 (1960).

the once-illusory right to privacy, and conversely, the right to publicity.[42] For the intrusion element, his proposition focused on an individual's right to privacy as mass media began to grow in the United States: "It appears obvious that the interest protected by this branch of the tort is . . . useful chiefly to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights."[43] Prosser qualifies the intrusion as necessarily offensive to a reasonable person.[44]

For the public disclosure of private facts element, Prosser contemplates his predecessors' requirement that any such disclosure either be in writing or otherwise published.[45] He notes, however, that the rise of radio defeated any modern need for such disclosures to be in writing.[46] These and other arguments lead to his proposal for judicial recognition of defamation.[47] His proposal excluded the affirmative defense that if the statements are truthful, defamation cannot be found.[48]

For the false light element, Prosser cites hypothetical situations in which this tort might apply: misattributing a quote or artistic creation to an individual; using an individual's likeness to endorse an event or illustrate a piece of literature where there is no connection; and using an individual's likeness to portray some false fact about them.[49] He qualifies the element by stating that the misrepresentation does not necessarily need to be defamatory or malicious, but must be something objectionable by a reasonable person's standard.[50]

Finally, for the appropriation element, Prosser narrows the scope by excluding the use of a name that is not a symbol of a specific individual's identity, mere mentions of an individual's name in a movie or news broadcast, and incidental appearances in photographs or videos.[51] The "right to publicity," or the right of someone to license his image or enjoin a third-party from using his image and likeness in conjunction with a for-profit venture, originates from the appropriation tort.[52] Despite the lack of recognition for appropriation in the courts at that time, Prosser stated prophetically, "[the right of publicity] would clearly seem justified."[53]

---

42. *Id*. at 383 (*citing* Samuel Warren and Louis D. Brandeis, *Right to Privacy*, 4 HARV. L. REV. 193 (1890) and ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE (1946)).
43. *Id*. at 392.
44. *Id*. at 391.
45. *Id*. at 394.
46. *Id*.
47. *See id.* at 398.
48. *Id.*
49. *See id*. at 398–400.
50. *Id*. at 400.
51. *Id*. at 401–06.
52. *Id*. at 406–07.
53. *Id*. at 407.

Prosser's legal justification would later be memorialized in the *Restatement (Second) of Torts*.[54] Like other jurisdictions, Texas courts have adopted, in part, Prosser's theory.[55] Texas courts have upheld the three-pronged test for misappropriation established in *Matthews v. Wozencraft*: "(1) the defendant appropriated the plaintiff's name or likeness for the value associated with it, and not in an incidental manner or for a newsworthy purpose; (2) the plaintiff can be identified from the publication; and (3) there was some advantage or benefit to the defendant."[56] Though Prosser's theory of invasion mainly addresses those who wish to remain private, in Texas, it has also been used to remedy cases in which an individual wished to profit from his persona.[57]

D. Texas Establishes Common Law Recognition of Privacy and Publicity Torts

In 1972, former Texas A&M football player, John Kimbrough, agreed to pose for a painting meant to recognize him as an outstanding former player in the Texas Sports Hall of Fame.[58] In the initial proposal, Bill Sansing, the man who coordinated the project, informed Kimbrough that commercial use of the images was contemplated, but assured Kimbrough they would seek his "complete approval" for any such ventures.[59] Later that year, Kimbrough's daughter noticed that Coca-Cola was using the painting as a promotion in the SMU-Wake Forest football game program.[60] Kimbrough's complaint cited "violation of an absolute proprietary right, invasion of the right of privacy [sic], fraud and misrepresentation, quantum merit, and unjust enrichment."[61] The court denied Coca-Cola's motion for summary judgment finding that the level of consent given by Kimbrough was in dispute.[62] The case was settled out of court, but it was a big step in the movement toward judicial protection of one's likeness even in a context where *some* amount of consent was given.[63] *Kimbrough* establishes in Texas the concept of persona as a "property" right and that context of usage is at least one limitation of a license to such property.[64]

---

54. *See* RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977).

55. Kimbrough v. Coca-Cola/USA, 521 S.W.2d at 719 (Tex. App.—Eastland 1975, writ ref'd n.r.e.); Matthews v. Wozencraft, 15 F.3d 432 (5th Cir. 1994); Whitehurst v. Showtime Networks, Inc., 2009 WL 3052663 (E.D. Tex. Sept. 22, 2009, no pet.).

56. Watson v. Talia Heights, LLC, 566 S.W.3d 326 (Tex. App.—Houston [14th Dist.] 2018, reh'g denied).

57. *See id*.

58. *Kimbrough*, 521 S.W.2d at 719.

59. *Id*. at 723.

60. *Id*. at 720.

61. *Id*.

62. *Id*. at 724.

63. *See id*.

64. *See id*.

E. The Fifth Circuit Recognizes the Value of Protecting Likeness by Misappropriation

In the late 1970s, Creig Matthews worked as an undercover narcotics officer in Plano, Texas and trained under Kim Wozencraft.[65] Matthews and Wozencraft were hired for a large drug bust in Tyler, Texas.[66] Through their work, the two became romantically involved and started living together.[67] Matthews and Wozencraft led authorities to arrest one hundred defendants across two hundred drug cases.[68] Not long after, the two were attacked at their home resulting in severe injury and a month-long hospitalization for Matthews.[69] Their supervisor in the Tyler Police Department moved Matthews and Wozencraft to a secluded location on the outskirts of the city.[70] Following this, Texas businessman and politician Ross Perot arranged secure living conditions for them in the Dallas-Fort Worth metroplex.[71] Once Matthews and Wozencraft began testifying in some of the cases, their own personal drug use came into question and the two were sentenced to serve time in federal prison.[72]

While in prison, Matthews, Wozencraft and John Rubien, a new acquaintance, signed an agreement that Wozencraft and Rubien were to write a book based on their stories thus far.[73] At the time, Matthews and Wozencraft were married, but Wozencraft divorced Matthews upon their release from prison.[74] She then moved to New York City with Rubien where she enrolled at Columbia University and earned a Master's degree, for which the undercover narcotics agents' story served as her thesis.[75] She eventually published the fictionalized version of the story and entered into contracts for the movie rights.[76] The story became the 1991 movie *Rush* starring Jennifer Jason Leigh and Jason Patric.[77]

Matthews filed suit against Wozencraft, Random House, and MGM Studios for "breach of contract, division of marital asset, and misappropriation/invasion of privacy."[78] On the claim of misappropriation, the Fifth Circuit upheld the District Court's ruling that when fictionalized or portrayed in a biography, one's life story is not protected by the tort of

---

65. *Matthews*, 15 F.3d at 435.
66. *Id*.
67. *Id*.
68. *Id*.
69. *Id*.
70. *Id*.
71. *Id*.
72. *Id*.
73. *Id.* at 436.
74. *Id*.
75. *Id*.
76. *Id*.
77. RUSH (Metro-Goldwyn-Mayer 1991).
78. *Matthews*, 15 F.3d at 436.

appropriation.[79] The case was decided in favor of Wozencraft and the remaining defendants due, in part, to Matthew's voluntary participation in national news coverage of the story and Wozencraft's public domain defenses.[80] However, the Fifth Circuit noted:

> Protecting one's name or likeness from misappropriation is socially beneficial because it encourages people to develop special skills, which then can be used for commercial advantage. Associating one's goodwill with a product transmits valuable information to consumers. Without the artificial scarcity created by the protection of one's likeness, that likeness would be exploited commercially until the marginal value of its use is zero.[81]

The court also noted that "if a well-known public figure's picture could be used freely to endorse commercial products, the value of his likeness would disappear. Creating artificial scarcity preserves the value" to all parties in the use of his likeness.[82] Here, the court acknowledged the economic value and social benefit of protecting one's likeness and image.[83] This is helpful to the cause of this comment because the acknowledgement creates a foundation on which the argument for a modern right to publicity can stand.[84]

F. Texas Penal Code Criminalizes Online Impersonation

Section 33.07 of the Texas Penal Code states it is a crime for a person to "[use] the name or persona of another person to (1) create a web page on a commercial social networking site or other Internet website; or (2) post or send one or more messages on or through a commercial social networking site . . . ."[85] In Texas, the crime of impersonation only applies to violations that intimidate, intend harm, threaten, and intend to defraud others by assuming the actual identity of another person without their permission.[86] While the statute serves a just purpose in deterring and punishing identity theft, it does little for the issue this proposal addresses.[87]

First, the proposed development of law is aimed at equipping private citizens to protect their proprietary online content and likeness from other users who may too closely invoke their likeness for monetary gain.[88] An infraction of the nature this proposal addresses probably does not rise to the level of public interest necessary to justify independent state action; private

79. *Id*. at 437.
80. *See id*. at 439.
81. *Id.* at 437–38.
82. *Id*. at 438.
83. *Id*.
84. *See* discussion *infra* Part V.
85. TEX. PEN. CODE ANN. § 33.07.
86. *Id*.
87. *See* discussion *infra* Part V.
88. *See* discussion *infra* Part V.

action is more appropriate.[89] Second, section 33.07 is aimed at people who actively make themselves out to be another person outright.[90] The proposed law is aimed at people who effectively steal content and present it as their own in order to further their own marketability online.[91]

Section 33.07 seems to be aimed more at situations similar to Joycelyn Savage's impersonator profiting off of her name and likeness by selling podcast subscriptions.[92] Joycelyn Savage, one of singer Robert Sylvester Kelly's (professionally known as R. Kelly) girlfriends, allegedly created a Patreon account where she was going to share her side of the story and charge listeners to hear it.[93] When Patreon could not verify that Joycelyn Savage was the actual creator of the account, they suspended it for "suspected 'impersonation.'"[94] The alleged impersonator presented a story counter to Savage's public statements defending Kelly.[95] Section 33.07 is seemingly aimed at this kind of conduct as it interferes with ongoing criminal trials and hyper-sensitive subjects.[96]

G. A Broad Definition of Likeness Arises in California

In California, recognition of a broader definition of "likeness" was adopted in a case arguably as famous as the plaintiff: *White v. Samsung Electronics America, Inc.*[97] There, consumer electronics manufacturer Samsung created and ran a television advertisement depicting a near future (referring to 2012 at the time) in which Americans still use their Samsung devices.[98] Much to White's chagrin, this near-future world also depicted a television gameshow very similar in appearance to Wheel of Fortune with a robot-host in her place.[99] The robot was "dressed in a wig, gown, and jewelry which [were] consciously selected to resemble White's hair and dress."[100] White pleaded, *inter alia*, a violation of California Civil Code section 3344 and a cause of action for her right to publicity which the court discussed at length.[101]

---

89. *See* discussion *infra* Part V.

90. *See* TEX. PENAL CODE ANN. § 33.07.

91. *See* discussion *infra* Part V.

92. Hannah Yasharoff & Maria Puente, *R. Kelly Girlfriend Joycelyn Savage's Alleged Patreon Account Closed, Possible 'Impersonation'*, USA TODAY (Nov. 26, 2019, 9:00 PM), https://www.usatoday.com/story/entertainment/celebrities/2019/11/26/r-kelly-girlfriend-joycelyn-savage-patreon-account-closed/4314851002/ [https://perma.cc/AVM6-BKXS].

93. *Id*.

94. *Id*.

95. *Id*.

96. *See* TEX. PENAL CODE ANN. § 33.07.

97. *See* White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir. 1992), *reh'g denied*, 989 F.2d 1512 (9th Cir. 1993), *cert. denied*, 508 U.S. 951 (1993).

98. *Id*. at 1395.

99. *Id*. at 1395.

100. *Id*. at 1396.

101. *Id*. at 1397–99.

Although the Ninth Circuit rejected her argument under California Civil Code section 3344, it agreed that her common law right to publicity retained a genuine issue of material fact in the case and therefore denied Samsung's motion for summary judgment.[102] Through similar language to the Texas Property Code section 26.002, the California Civil Code prohibits the use of one'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 . . . ."[103] Interestingly, the statute does not contain provisions limiting the prohibited conduct to use for the value associated with one's likeness or image; it limits prohibited conduct to use "without such person's prior consent."[104]

In discussing the appropriation of one's likeness for the value associated with it based in common law, the White court noted that the "identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice."[105] The court further acknowledged that "[the] law protects the celebrity's sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof."[106] Despite the court's rejection of White's statutory argument, this case highlights the importance of a state offering both common law and statutory protections and remedies.[107]

How a judge or jury will rule on an issue can never fully be predicted, so increasing the number of ways plaintiffs can recover is important.[108] Fame by way of dumb luck is increasingly common in today's meme culture and obsession with viral content.[109] Therefore, states that want to protect the potential economic value of those who, for whatever reason, find themselves in the spotlight should take legislative action to allow more avenues to recover.[110]

---

102. *Id*. at 1397.

103. CAL. CIV. CODE ANN. § 3344 (West 2019).

104. *Id*.

105. *White*, 971 F.2d at 1399.

106. *Id*.

107. *See id*.

108. *See generally id.* (rejecting White's likeness was infringed under statute, but holding her likeness was infringed under common law).

109. *See* Katie Meyer, *Going Viral: Alex from Target, A Year Later and 3,900,000 (Followers) Richer*, MEDIUM (Dec. 1, 2015), https://medium.com/@crowdbabble/going-viral-alex-from-target-a-year-later-and-3-900-000-followers-richer-5b2d56462d8 [https://perma.cc/V297-WVM8].

110. *See id*.

III. PUBLICITY AND PRIVACY TODAY

A. Increased Access to Powerful Devices Leads to Everyone Creating

As cliché as it may be to discuss the rise of smartphone ownership and social media usage, it weighs significantly in a discussion of misappropriation and the rights of publicity and privacy.[111] In the United States, 81% of adults reported owning a smartphone.[112] Additionally, of adults from age 18 to 29 in the United States, 96% reported owning a smartphone.[113] Unsurprisingly, 72% of U.S. adults reported using at least one social media platform in 2019.[114] Again, among adults aged 18 to 29, 90% reported using social media.[115] Moreover, 74% of adult Facebook-users reported daily usage, 63% reported daily usage of Instagram, and 61% reported daily usage of Snapchat.[116] Needless to say, American adults love using social media.[117]

Smartphone and social media usage is undeniable and is arguably rising to the level of addiction; Americans are consuming a rather large amount of content.[118] Some of that content is branded or sponsored content, and some is from peers, friends, and family.[119] All of these categories of content raise concern in regard to this proposal.[120]

B. The Rise of Influencers and "Crowdculture"

1. Where Does Celebrity Come From?

The term celebrity is generally used to refer to someone who grew their fame from movies, television, professional sports, music, the fine arts, politics, or high society.[121] Throughout history, the introduction of new media categories and heightened levels of celebrity correlate with technological

111. *See* Kimberly Buffington & Carolyn S. Toto, *Social Media Brings the Right of Publicity to the Masses*, PILLSBURY (Oct. 7, 2015), https://www.internetandtechnologylaw.com/social-media-brings-the-right-of-publicity-to-the-masses/ [https://perma.cc/9KFC-QKZ8].

112. *Mobile Fact Sheet*, PEW RESEARCH CTR. (June 12, 2019), https://www.pewinternet.org/fact-sheet/mobile/ [https://perma.cc/2SG2-4B6N].

113. *Id*.

114. *Social Media Fact Sheet*, PEW RESEARCH CTR. (June 12, 2019), https://www.pewinternet.org/fact-sheet/social-media/ [https://perma.cc/6TC9-75TY].

115. *Id*.

116. *Id*.

117. *See id*.

118. *See Global Mobile Consumer Study*, DELOITTE (2018), https://www2.deloitte.com/content/dam Deloitte/us/Documents/technology-media-telecommunications/us-tmt-2018-global-mobile-consumer-survey-smartphone-infographic.pdf [https://perma.cc/9EDN-TB8U].

119. *See id*.

120. *See* discussion *infra* Part V.

121. *See* Alexandra Samuel, *With Social Media, Everyone's a Celebrity*, JSTOR (July 16, 2019), https://daily.jstor.org/with-social-media-everyones-a-celebrity/ [https://perma.cc/5VX6-6FHD].

development.[122] For example, Queen Victoria showed the United Kingdom and the world what it meant to be royalty in the newly "burgeoning print and graphic culture of the 1830s and 1840s."[123] Similarly, Charles Dickens experienced wide public acclaim with the rise of mass publishing.[124] Dickens dreaded what he thought his fame would do to his legacy.[125] Timothy Spurgin, in his paper *"Notoriety is the Thing": Modern Celebrity and Early Dickens*, notes that "[by 1839,] Dickens [had] begun to suspect that celebrity [would] rob him of his dignity and self-respect" and had "also begun to hope that public refusal of celebrity [would] help him to gain . . . a more permanent sort of fame."[126] In the 19th Century, America saw the rise of Abraham Lincoln as the most recognized United States President due to his picture's mass publication and distribution.[127] Despite how healthy or unhealthy our collective strive for fame online may be, the widespread adoption of mobile technology and social media has shown its contribution to history's menu of celebrity.[128]

2. Celebrity Created by 21st Century Technology

Prior to 2007, reality television consisted of mainly game shows like *Fear Factor*, *Survivor*, and *The Amazing Race*.[129] A television writers' strike in 2007 forced almost every scripted television show to go off the air with no definite return date.[130] Reality shows such as *Project Runway*, *Biggest Loser*, *American Idol*, and *Keeping Up with the Kardashians* experienced explosive growth as the strike robbed Americans of most scripted, original television content from the major networks.[131] Except for a few cult hit shows (*The Osbournes*, *The Simple Life*), it was not until the 2007 television writers' strike that reality television gained in popularity.[132] This obsession and fascination with the blurred lines between entertainment and reality, celebrity and non-celebrity—along with the rise of social media and smartphone

122. *Id*.

123. John Plunkett, *Of Hype and Type: The Media Making of Queen Victoria 1837-1845*, 13:2 CRITICAL SURVEY 7, 8 (2001).

124. *See* Timothy Spurgin, *"Notoriety Is the Thing": Modern Celebrity and Early Dickens*, 45 DICKENS STUDIES ANN. 45, 47 (2014).

125. *See id*.

126. *Id*.

127. Samuel, *supra* note 121.

128. *Id.*

129. Ray Richmond, *Timeline: 60 Years of Reality TV Programming*, HOLLYWOOD REP. (Sept. 9, 2008), https://www.hollywoodreporter.com/news/timeline-60-years-reality-tv-119972 [https://perma.cc/65ZF-PEJZ].

130. Leigh Blickley, *10 Years Ago, Screenwriters Went on Strike and Changed Television Forever*, HUFF POST (Feb. 12, 2018), https://www.huffpost.com/entry/10-years-ago-screenwriters-went-on-strike-and-changed-television-forever_n_5a7b3544e4b08dfc92ff2b32 [https://perma.cc/TTH9-Z965].

131. *Id*.

132. *Id*.

usage—escorted America into an age of oversharing, personal brands, and the influencer.[133]

Today, virtually everyone can create content indistinguishable from that of corporate-backed celebrities.[134] Anyone has the ability to build up a world around them that feels, to them, like they are the star of their own unscripted, over-produced reality series.[135] Through this, many regular people have and will continue to profit from whatever persona or brand they have cultivated through their online presence.[136]

3. Influencers and Nano-Influencers

Social media's invasion into our everyday lives produced profound effects, especially on the migration of ideas from subcultures and artists to the mainstream.[137] Before social media, subcultures on the fringe of society challenged mainstream ideology through corporate intermediaries who had the incentive and influence to present the American public with new ideas, images, and products.[138] Today, cultural innovators that were once independently voiceless and isolated are now "densely networked, [and] their cultural influence has become direct and substantial."[139] Likewise, artists of all kinds and genres now are enfranchised to distribute their work independently of investors or distributors.[140] "The net effect is a new mode of rapid cultural prototyping" where content is churned out, consumed, and added to the collective repertoire.[141] The idea of the influencer has developed from this new independence afforded by social media accessibility and general access to the internet.[142]

"Influencer" is a term defined as internet-famous people with thousands and sometimes millions of followers on platforms such as Instagram, YouTube, or Twitter.[143] The term also includes podcasters, "Instagram models," and parody Twitter accounts.[144] They make money by paid

133. Brett Bernstein, *A Brief History of the Influencer*, MEDIUM (May 24, 2019), https://medium.com/@bhbern/a-brief-history-of-the-influencer-1a0ef2b36c6e [https://perma.cc/U9FX-44KS].

134. *Id*.

135. Samuel, s*upra* note 121.

136. Kevin Roose, *Don't Scoff at Influencers. They're Taking Over the World*, N.Y. TIMES (July 16, 2019), https://www.nytimes.com/2019/07/16/technology/vidcon-social-media-influencers.html [https://perma.cc/A67M-SSM8].

137. Douglas Holt, *Branding in the Age of Social Media*, HARV. BUS. REV. (Mar. 2016), https://hbr.org/2016/03/branding-in-the-age-of-social-media [https://perma.cc/ZW2Q-4JBV].

138. *Id*.

139. *Id*.

140. *Id*.

141. *Id*.

142. Roose, s*upra* note 136.

143. Sapna Maheshwari, *Are You Ready for the Nanoinfluencers?*, N.Y. TIMES (Nov. 11, 2018), https://www.nytimes.com/2018/11/11/business/media/nanoinfluencers-instagram-influencers.html [https://perma.cc/3BAB-4ERU].

144. Roose*, supra* note 136.

sponsorships from brands who want to harness the influencer's personality and "influence."[145] The idea is that this method of advertising feels more organic and personal to the consumer than a more traditional advertising campaign strategy.[146] Many brands (*e.g.*, Glossier and Away) even claim to be born out of the business of influencers.[147]

Even more niche is the "nanoinfluencer."[148] The New York Times coined and defined the term in 2018:

> That is the term ("nanos" for short) used by companies to describe people who have as few as 1,000 followers and are willing to advertise products on social media.

Their lack of fame is one of the qualities that make them approachable.[149] When they recommend a shampoo or a lotion or a furniture brand on Instagram, their word seems as genuine as advice from a friend.[150] Brands enjoy working with them partly because they are easy to deal with. In exchange for free products or a small commission, nanos typically say whatever companies tell them to.[151]

The existence of nanoinfluencers creates an even more confusing category of people who are not famous in the traditional sense, or even in the same way as today's mainstream influencers.[152] However, at least one company and a handful of people on Instagram have decided that their opinion matters and is worth some monetary or in-kind value.[153] To the general public they are unknown, but to their followers their personality has commercial value—whether it is their beauty, humor, quirkiness or some other aspect.[154]

Furthermore, nanoinfluencers could likely be more lucrative for brands over traditional broad-audience influencers due to their niche position and possible membership in some subculture.[155] Because of the sheer volume of content available online, Douglas Holt, a former Harvard Business School professor and current marketing executive, observed that by "targeting novel ideologies from crowdcultures, brands can stand out."[156] He cites the success of Dove's "Campaign for Real Beauty" and Old Spice's hyper masculinity

145. Maheshwari, *supra* note 143.
146. *Id*.
147. Roose, s*upra* note 136.
148. Maheshwari, *supra* note 143.
149. *Id*.
150. *Id*.
151. *Id*.
152. *Id*.
153. *Id*.
154. *Id*.
155. *See* Holt, s*upra* note 137.
156. *Id*.

parody advertising as evidence.[157] Dove "tapped into this emerging crowdculture by celebrating real women's physiques in all their normal diversity . . . ."[158] Likewise, Old Spice "piggybacked on hipster sophistication with a parody . . . of masculine clichés."[159] What were once hidden ideologies held by a hidden group subculture have now become part of the mainstream.[160] These enormous changes to where, how, and what we consume have many grasping for their fifteen minutes of fame.[161]

Within the three-pronged test for the tort of misappropriation, value associated with one's likeness is the first prong.[162] Whether or not a court would recognize the value associated with a nanoinfluencer's name is yet to be seen.[163] Value, which is subjective, might not survive a defense of "we didn't know who [X influencer] was at the time."[164] The overwhelming success of once-novel ideas transformed into extremely enticing and lucrative ad campaigns, together with the speed and volume that social media brings to the marketplace of ideas, may cause the value of one's likeness to fluctuate drastically from one day to the next.[165]

Additionally, the tort of misappropriation is defeated when the content in dispute is that of a public figure and is therefore part of the public domain.[166] Whether or not an individual's public social media accounts are part of the public domain is a question currently unanswered by Texas courts.[167] This theory stems from Brandeis' and Warren's writings about public figures foregoing, or waiving, their right to privacy in the capacity of their public persona.[168] It is for these reasons that the tort of misappropriation is inadequate on its own to serve the purposes of our modern world.[169]

---

157. *Id*.
158. *Id*.
159. *Id*.
160. *Id*.
161. *See id*.
162. Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994).
163. *See generally* discussion *supra* Section III.B (illustrating the novelty of the influencer culture).
164. *See generally* discussion *supra* Section III.B (illustrating the novelty of the influencer culture).
165. *See* Holt, s*upra* note 137.
166. *Matthews*, 15 F.3d at 440.
167. *See* discussion *supra* Section III.B.
168. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214–15 (1890).
169. *See* discussion *supra* Section III.B.

C. What Constitutes Commercial Use When Everything Is an Advertisement?

1. Meme Culture

Social media and internet culture would be nothing without memes.[170] From "Rick rolling" to Chuck Norris and "doge" to "Trololo guy," memes have evolved into a pastime for social media users.[171] The term "meme" was coined by evolutionary biologist Richard Dawkins to describe a sort of cultural DNA that spread throughout a society, evolved and helped codify the community's shared experiences.[172] Today, the term describes humorous content that passes through social media platforms, changing and evolving as more and more people alter the meaning or interpret the image in a new way.[173] Whether it be graphic interchange formats (GIFs), videos, images, or hashtags, memes have been infused into the regular use of social media and the internet.[174]

Many memes are images or GIFs of animals, reality television stars, or traditional celebrities.[175] However, many ordinary people wake up to find themselves meme'd.[176] Sometimes the meme is created from content the person shared through their personal accounts for an unrelated reason.[177] Other times, the image is uploaded by friends as a prank.[178] Still, other times the meme is created purely by someone taking and posting a picture of a stranger.[179]

Whatever the source of the content for the meme, the origins usually involve a general lack of permission from the subject of the photos.[180] Whether or not meme culture is one big copyright violation is unclear.[181] Whether memes are inherently protected by the parody exception is also

---

170. *See* Angela Watercutter & Emma Grey Ellis, *The WIRED Guide to Memes*, WIRED (Apr. 1, 2018, 7:00 AM), https://www.wired.com/story/guide-memes/ [https://perma.cc/YSD6-KFTL].

171. *Id*.

172. *Id*.

173. *Id*.

174. *Id*.

175. *Id*.

176. *See* Abby Ohlheiser, *Ermahgerd: A Reader's Guide to the People Who Became Memes*, WASH. POST (Oct. 17, 2015), https://www.washingtonpost.com/news/the-intersect/wp/2015/10/17/ermahgerd-a-readers-guide-to-the-people-who-became-memes/ [perma.cc/252S-BLR8].

177. *Id*.

178. *Id*.

179. *See* Katie Meyer, *Going Viral: Alex from Target, A Year Later and 3,900,000* (Followers) Richer, MEDIUM (Dec. 1, 2015), https://medium.com/@crowdbabble/going-viral-alex-from-target-a-year-later-and-3-900-000-followers-richer-5b2d56462d8 [perma.cc/2Z32-KLK4].

180. Ohlheiser, *supra* note 176.

181. Lorelei Laird, *Do Memes Violate Copyright Law?*, A.B.A. J. (Sept. 1, 2016, 4:00 AM), http://www.abajournal.com/magazine/article/do_memes_violate_copyright_law [https://perma.cc/F3WS-KXU8].

unclear.[182] However, posting photos or text online does not automatically include them in the public domain.[183] For example, Twitter's Terms of Service states that users "retain [their] rights to any Content [they] submit, post or display . . . [but they] grant [Twitter] a worldwide, non-exclusive, royalty-free license (with the right to sublicense) . . . ."[184] Other social media platforms have similar provisions in their corresponding user agreements.[185]

Despite the status of posted content, followers on social media platforms have become both social currency and the equivalent of financial currency in some situations.[186] One mattress company allowed customers to buy mattresses using their followers as payment: one follower equals 0.1 euro.[187] Once the bed reaches the customer, he or she posts about receiving the bed and tags the company's Instagram page.[188] Then a discount is applied to their invoice using the 1:0.1 follower-euro ratio.[189] The company, Ester Beds, a Swedish bed manufacturer, considered the experiment a success and in 2018 created a permanent program in which each follower was worth 2.5 cents.[190] Evidently, the business model is somehow flawed; currently, the Ester Beds' website URL returns a "buy this domain" message, indicating the domain is no longer owned or operated by Ester Beds.[191] Regardless, the experiment is indicative of the value of followers and apparent influence on social media.[192] Therefore, the law should equip users to protect themselves from exploitation of their original content that theoretically would increase their number of followers and, in turn, their influence and earning potential via social media.[193]

2. User Agreements and Incidental Use Prevail

Terms of service and user agreements have not stopped some from attempting to sue social media corporations for misappropriation of their

182. *Id.*

183. Jean Murray, *How Copyright Works with Social Media*, BALANCE SMALL BUS., https://www.thebalancesmb.com/copyrights-and-social-media-issues-397821 (last updated July 23, 2020) [https://perma.cc/34LT-VSKY].

184. *Twitter Terms of Service*, TWITTER, INC., https://twitter.com/en/tos (last visited Nov. 14, 2019) [perma.cc/SGC5-AFV8].

185. Murray, s*upra* note 183.

186. *Instagram Followers—A New Currency in e-Commerce*, KLARNA (Nov. 20, 2018), https://www.klarna.com/knowledge/articles/instagram-followers-a-new-currency-in-e-commerce/ [https://perma.cc/V5BD-GJJA] [hereinafter *Instagram Followers*].

187. *Id*.

188. *Id*.

189. *Id*.

190. *Id*.

191. ESTER BEDS, http://esterbeds.se/ (last visited Jan. 17, 2020) [perma.cc/TFE9-ZMV2] (this domain is no longer in service).

192. *Instagram Followers*, *supra* note 186.

193. *See* discussion *infra* Part IV.

name and likeness.[194] The plaintiffs in *Perkins v. LinkedIn Corporation* claimed that LinkedIn misled them into a service that then misappropriated their names, images and likenesses.[195] Specifically, LinkedIn harvested email addresses from existing platform users to invite non-users to sign up.[196] In doing so, they used users' images and names to entice the non-users to sign up for the professional networking service.[197]

The court cited similar California cases and upheld the precedent that plaintiffs must prove actual damages, not merely statutory damages, for use of their likeness.[198] The statutory damages prescribed in California Civil Code Section 3344 have been interpreted by courts to be for emotional anguish that accompanies actual damages.[199] Additionally, on the issue of incidental use, the court cited the Restatement (Second) of Torts.[200] Under the Restatement, the mere mention of one's name is not appropriation, except when it is published to "[take] advantage of his reputation, prestige, or other value associated with" the name for publicity purposes.[201] However, the court agreed with the plaintiffs' argument that their forged endorsements of the service in the reminder emails had commercial value to LinkedIn for recruiting others to join the network.[202] Indeed, the court stated that the "Plaintiffs' names and likenesses was critical, not incidental, to Defendant's commercial purpose."[203]

3. Examples of Proposed Infringements

Comedian and writer Matt Beuchele took to Twitter in 2019 to complain about another person recreating a video sketch without any acknowledgement or credit given.[204] He tweeted "some guy on insta with 2M+ followers took my 'conference room' bit almost word for word, with zero acknowledgement . . . and I know it's dumb to complain but mannnn [sic], it'd be great to one day get paid for all the free content you make online that just get stolen/ripped/reposted[.]"[205] According to his bio on HuffPost,

194. *See* Perkins v. LinkedIn Corp., 53 F. Supp. 3d 1222, 1225 (N.D. Cal. 2014).
195. *Id*.
196. *Id*.
197. *Id*.
198. *Id*. at 1245 (citing Fraley v. Facebook, Inc., 830 F. Supp. 2d 785 (N.D. Cal. 2011)).
199. *Id*. at 1244 (citing Miller v. Collectors Universe, Inc., 159 Cal. App. 4th 988 (Cal. Ct. App. 2008)).
200. *Id*. at 1254.
201. RESTATEMENT (SECOND) OF TORTS § 652C cmt. d. (AM. LAW INST. 1977).
202. *Perkins*, 53 F. Supp. 3d at 1255 (citing Fraley, 830 F. Supp. 2d at 808 (quoting Facebook executives as saying that "the best recommendation comes from a friend" and that these personalized referrals are "the Holy Grail of advertising")).
203. *Id*.
204. Matt Beuchele (@mattbooshell), Twitter (Jan. 7, 2020), https://twitter.com/mattbooshell/status/1202265776549433346?s=21.
205. *Id*.

Matt's work has been featured in the New York Times, on Comedy Central, Complex, and NBC among others.[206] He frequently posts short comedy sketches and original songs to his 57,400 Twitter followers, and solicits business through this channel as well.[207]

The proposed legislation aims to protect creators like Matt against the Instagram user who appropriated the sketch, reproduced it and posted it as his own.[208] The content thief has many more followers than Matt, making it hard for users of either social media platform to identify the party responsible for the content.[209] Because Matt uses his Twitter and Instagram accounts to showcase his talents and skills, and to solicit job opportunities, the Instagram user who stole the sketch has potentially harmed Matt's earning ability and career opportunities.[210] The risk is high that a television producer or casting director recruiting talent via social media would hire the Instagram user who stole the sketch before hiring Matt, the author and original cast of the sketch.[211] This example is relatively straightforward, illustrating the harm that stealing content closely associated with a person's online persona could cause.[212]

Less straightforward is the experience of many social media users who discovered their jokes were new marketing material for the skincare brand Drunk Elephant.[213] The notion that a content creator may find work or fans through the exposure popular brands provide them is largely unfounded.[214] Instead, for some companies, this exposure allows for a low copywriting budget.[215] Kelly Collette, a comedian with an online presence, saw that Drunk Elephant took one of her jokes, posted it, and tagged her without her permission, but said that she did not receive any compensation or any new followers because of the exposure.[216] This case and the many like it illustrate that even when credit is given, the creator does not necessarily benefit.[217]

---

206. Matt Buechele, HUFFPOST, https://www.huffpost.com/author/matt-buechele (last visited Jan. 7, 2020) [https://perma.cc/EW2T-EE6P].

207. Matt Beuchele (@mattbooshell), TWITTER, https://twitter.com/mattbooshell (last visited Sept. 13, 2020) [https://perma.cc/24XJ-GY3C].

208. *See* discussion *infra* Part V.

209. Buechele, s*upra* note 204.

210. Buechele, s*upra* notes 204, 207.

211. Author's original writing.

212. *See* discussion accompanying *supra* notes 200–08.

213. Amanda Mull, *Meme Thievery Goes Corporate*, ATLANTIC (Dec. 6, 2019), https://www.the atlantic.com/health/archive/2019/12/why-brands-steal-viral-jokes-and-memes/603169/ [https://perma.cc/FER6-SFH2].

214. *Id*.

215. *Id*.

216. *Id*.

217. *See id*.

D. Growing Concern to Justly Enrich Those Whose Likeness Is Creating Value

1. Scope and Reach of Social Media Licenses

The issue in *Perkins* has not yet reached all jurisdictions, but the prolific usage of social media suggests it will not be long before they are faced with the issue.[218] Legislatures, judiciaries, and tech companies alike will be faced with a new set of issues: determining what rights social media users give up in order to use the service and how far the terms of service license reaches as user content inevitably evolves.[219] Companies like Twitter, Facebook, and LinkedIn rely solely on user-generated content to drive usage and sell advertisements, and users grant license to these companies in exchange for free use of the medium.[220]

In *Kimbrough v. Coca-Cola/USA*, the defendant's motion for summary judgment was denied because its use of Kimbrough's portrait went beyond the consent he initially gave.[221] In the context of social media, when one's content is reposted without consent, meme'd or otherwise used in a way not initially agreed upon by the user, does that constitute misappropriation of their likeness?[222] After all, the user agreement is between the social media platform and each user individually, and does not license other users to the use of posted content.[223] This proposal aims to—as a way for individual's to retain their descendible property—build a bridge between common law misappropriation of likeness and doctrines of copyright and trademark law as they might apply to licensed content online and on social media.[224]

2. NCAA, California Allows Student-Athletes to Profit from Likeness

One month after California lawmakers passed legislation that pressured the NCAA to allow student-athletes to benefit from their name, image and likeness, the NCAA Board of Governors voted unanimously in favor of the

---

218. *See* Kimberly Buffington & Carolyn S. Toto, *Social Media Brings the Right of Publicity to the Masses*, INTERNET & TECH. L. BLOG (Oct. 7, 2015), https://www.internetandtechnologylaw.com/social-media-brings-the-right-of-publicity-to-the-masses/ [https://perma.cc/N92Q-XK63].

219. *See* Perkins v. LinkedIn Corp., 53 F. Supp. 3d 1222, 1225 (N.D. Cal. 2014).

220. *See generally Twitter Terms of Service*, *supra* note 184 (illustrating that Twitter relies on the licensed, user-generated content to continue as a business).

221. Kimbrough v. Coca-Cola/USA, 521 S.W.2d 719, 724 (Tex. App.—Eastland 1975, writ ref'd n.r.e.).

222. *See Perkins*, 53 F. Supp. 3d at 1255 (citing Fraley, 830 F. Supp. 2d at 808 (quoting Facebook executives as saying that "the best recommendation comes from a friend" and that these personalized referrals are "the Holy Grail of advertising")).

223. *Twitter Terms of Service*, *supra* note 184.

224. *See* discussion *infra* Part V.

measure, effective nationwide.[225] The Board directed each of the Association's divisions to draft its own set of rules that reflect this change while still respecting existing guidelines about the treatment of student-athletes.[226] The purpose of the California bill is to protect college athletes against "nefarious talent agents, recruiters or corporations who could use athletes' contracts to their own benefit . . . ."[227] The NCAA, a billion-dollar corporation, has been long criticized for insisting on the amateur status of student-athletes.[228] These developments indicate a popular concern for, and desire to justly enrich, those whose likenesses have historically been exploited by businesses for immense profit.[229]

IV. PUBLICITY AND PRIVACY WITHIN COMMUNITY PROPERTY AND ESTATE PLANNING

A. General Concern to Maintain the Value of a Community's Property

There are only nine community property states, with Alaska having an optional community property system.[230] These states have indicated a general desire to retain, maintain, and secure a family's property and wealth in the present and over the span of multiple generations by employing their community property systems.[231] By utilizing a community property system, a state recognizes an individual's natural, automatic and "equal right to succeed to the property after dissolution, in case of surviving the other," as long as it is not separate property.[232] As this Comment has highlighted, an individual's persona and presence can grow to be highly lucrative and influential, whether through intentional curation and development or through fame thrust upon them in the name of viral internet culture.[233] Therefore, it

225. *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, NCAA (Oct. 29, 2019, 1:08 PM), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities [https://perma.cc/E58B-R52H].

226. *Id*.

227. Greta Anderson, *The Push for Player Pay Goes National*, INSIDE HIGHER ED. (Oct. 4, 2019), https://www.insidehighered.com/news/2019/10/04/us-congressman-propose-college-athlete-payment-bill [https://perma.cc/XQX5-LUDD].

228. Andy Uhler & Tony Wagner, *What You Need to Know About the NCAA and Paying Student Athletes*, MARKETPLACE (Nov. 13, 2019), https://www.marketplace.org/2019/11/13/what-you-need-to-know-about-the-ncaa-and-paying-student-athletes/ [https://perma.cc/G6BE-33PG].

229. Kelsey Trainor, *Here's How Much Money College Athletes like Zion Williamson and Others Should have Received from the NCAA*, FANSIDED (Nov. 12, 2019), https://fansided.com/2019/11/12/college-athletes-ncaa-compensation-data/ [https://perma.cc/XHX6-LDE4].

230. *Community Property States v. Common Law*, ASSET PROT. PLANNERS, https://www.assetprotectionplanners.com/planning/community-property-states/ (last visited Sept. 8, 2020) [https://perma.cc/5YBK-PGQ4].

231. *See* Meyer v. Kizner, 12 Cal. 247, 251 (1859) (Terry, C.J. and Baldwin, J., concurring).

232. *Id*.

233. *See* Watercutter, *supra* note 170.

should be in the interest of Texas lawmakers to protect this property right equitably in a similar manner to other protected property interests.[234]

Community property creates parallels between marriage and business.[235] The benefits of this are many.[236] Community property systems provide a level of certainty of property division upon a spouse's death, especially if they died intestate, and various tax benefits, many of which are triggered by one spouse's death.[237] Texas is uniquely positioned to offer opportunities for creative estate planning created by its community property system as well as the protections already afforded to heirs of their famous relatives or spouses under Texas Property Code Section 26.002.[238] Texas should adopt similar protections for living person's to ensure the value of one's persona is maintained and allowed to develop to its highest potential value.[239]

B. Protecting Persona as Business

1. FTC Lawsuit Treats Influencers as Businesses

In October 2019, the Federal Trade Commission (FTC) settled a lawsuit with Devumi, LLC over selling fraudulent followers on a host of social media platforms to actors, athletes, and influencers attempting to increase the value of their online presence.[240] Devumi was accused of selling "fake indicators of social media influence, including fake followers, subscribers, views, and likes" which constituted "means and instrumentalities to commit deceptive acts or practices, which is itself a deceptive act or practice in violation of the FTC Act."[241] German Calas, Jr., the owner and CEO of the defunct company, is now responsible for a $2.5 million monetary judgment.[242] This lawsuit by

234. *See Meyer*, 12 Cal. at 251.

235. Abby Wool Landon & Sarah Einowski, *From State to State Community Property in Transit*, CONN. BAR (June 10, 2019), https://www.ctbar.org/docs/default-source/education/clc/2019-materials/session-b/b04-community-property-from-state-to-state.pdf?sfvrsn=92117b41_2 [https://perma.cc/P3YS-EFPE].

236. *Id*.

237. *Id*.; WealthCounsel Staff, *What Is Community Property and What Are Community Property Trusts?*, WEALTH MGMT. (Apr. 19, 2017), https://www.wealthmanagement.com/high-net-worth/what-community-property-and-what-are-community-property-trusts [https://perma.cc/9CY8-DSYW].

238. *See* TEXAS PROP. CODE ANN. §§ 26.002, 26.004, 26.006, 26.011, 26.012, 26.013; *see also* House Research Organization, Bill Analysis, Tex. H.B. 834, 70th Leg., R.S. (1987) ("Supporters Say"); *see also* House Research Organization, Bill Analysis, Tex. H.B. 834, 70th Leg., R.S. (1987) ("Opponents Say"); Graham, *supra* note 37; Prosser, *supra* note 41.

239. S*ee* Graham, *supra* note 37; *see also* Prosser, *supra* note 41.

240. *Devumi, Owner and CEO Settle FTC Charges They Sold Fake Indicators of Social Media Influence; Cosmetics Firm Sunday Riley, CEO Settle FTC Charges That Employees Posted Fake Online Reviews at CEO's Direction*, FEDERAL TRADE COMMISSION (Oct. 21, 2019), https://www.ftc.gov/news-events/press-releases/2019/10/devumi-owner-ceo-settle-ftc-charges-they-sold-fake-indicators [https://perma.cc/3WLK-HEUK] [hereinafter F.T.C.].

241. *Id*.

242. *Id*.

the FTC indicates that online presence and persona is recognized as business or trade, and is subject to the same laws and regulations of traditional trade.[243] This suit, and a similar one against skin-care brand Sunday Riley, bolster the argument to analogize, or even conflate, certain areas of business law with potential law regarding influencers and online persona.[244]

Furthermore, just as traditional businesses stimulate the market for peripheral ones, businesses in the periphery of influencers and curators of online persona are beginning to emerge.[245] Formed in 2017, the Influencer Marketing Council is a coalition of executives from various major corporations whose goal is to "promote standardization and efficiency to help brands increase trust, provide greater transparency, and increase positive business outcomes from [influencers]."[246] Indeed, many influencers today are facing some of the harsh consequences of failing to follow through with business agreements.[247] "Influencer insurance" is even beginning to hit the market, as Tailify, a United Kingdom-based influencer marketing company, launched its "bespoke insurance for influencers" in October 2019.[248]

2. Texas Trademark Statutes

Texas is frequently characterized as extremely business friendly.[249] The nation is witnessing what some call the "Bay Area exodus" as a large number of businesses and families are moving from California to the Lone Star state in search of Texas' low corporate and income taxes, as well as minimal regulation.[250] While one cannot viably attribute any significant part of this migration to the brand protections in the Texas Business and Commerce Code, it proves to be a valuable comparison to the protections afforded to living persons' persona and publicity protections.[251]

---

243. *See id*.

244. *See id*.

245. *See* Influencer Marketing Council, *Influencer Marketing Standards Initiative*, http://www.theimc.co (last visited Nov. 14, 2019) [https://perma.cc/9LUL-84NE].

246. *Group Releases Industry's First Guidelines to Combat Influencer Fraud*, INFLUENCER MKTG. COUNCIL (May 29, 2019), http://www.theimc.co/news.html [https://perma.cc/2WVA-RZCP].

247. Jack Garson, *How to Be an Influencer and Not Get Sued*, FORBES (May 7, 2019, 4:47 PM), https://www.forbes.com/sites/jackgarson/2019/05/07/how-to-be-an-influencer-and-not-get-sued/#31e65267645a [https://perma.cc/3NPN-TP4T].

248. *The World's First Influencer Insurance!*, TAILIFY (Oct. 18, 2019), https://www.tailify.com/post/the-world-s-first-influencer-insurance [https://perma.cc/Z6GN-KY5V]; ASSURED SOCIAL, https://www.assuredsocial.com/ (last visited Nov. 14, 2019) [https://perma.cc/UV9D-TYSL].

249. *For CEOs Looking to Get Things Done, Texas is Still the Best Bet*, DALL. BUS. J. (May 8, 2019, 2:03 PM), https://www.bizjournals.com/dallas/news/2019/05/08/texas-best-state-for-business.html [hereinafter DALL. BUS. J.].

250. *Companies Moving to Texas in 2019*, HT GRP. (Jan. 22, 2019), https://www.thehtgroup.com/companies-moving-to-texas-2019/ [https://perma.cc/BFX5-KHTS]; Mark Calvey, *North Texas Among the Regions Benefitting from 'Bay Area Exodus'*, DALL. BUS. J. (Oct. 11, 2018, 11:49 PM), https://www.bizjournals.com/dallas/news/2018/10/11/north-texas-among-the-regions-benefitting-from-bay.html.

251. *See* TEX. BUS. & COM. CODE ANN. § 16.103; *see also* TEX. PROP. CODE ANN. § 26.002.

The Supreme Court recognizes two functions of a trademark: (1) to ensure that consumers can confidently know products with the same mark are from the same source; and (2) to protect the economic investment of the trademark owner.[252] Texas Business and Commerce Code section 16.103 prescribes enforcement against trademark infringement.[253] The statute states that "a mark is considered to be famous if the mark is widely recognized . . . throughout the state or in a geographic area in this state . . . ."[254] The statute then outlines what factors a court will look to in determining the "fame" of a mark:

> (1) the duration, extent and geographic reach of the advertisement . . . ;
> (2) the amount, volume, and geographic extent of sales of goods or services under the mark . . . ;
> (3) the extent of actual recognition of the mark in the state; and
> (4) whether the mark is registered in this state or the United States Patent and Trademark Office.[255]

The statute limits action by excluding non-commercial uses and any form of news reporting.[256] This level of protection is highly valuable to businesses incorporated in Texas and those that face infringement in the state.[257]

Recognition of monetizing online persona as a legitimate business by government agencies, consumer goods, services companies, marketing agencies, and insurance firms bolsters the argument that a living person deserves certain and affirmative protection of their "money maker."[258] Individuals who spend energy and creativity to build proprietary personae and fan bases that allow them to monetize the resources at their disposal, deserve certain and affirmative protections from third parties who may infringe and dilute their business?[259] In order to protect business opportunities, maintain the value of community property, create value for future generations, and to preserve the current climate of content creation, bloggers and other internet personalities need similar protections.[260]

---

252. Sport Supply Group, Inc. v. Columbia Cas. Co., 335 F.3d 453, 460 (Tex. 2003), *citing* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163–64 (1995).

253. TEX. BUS. & COM. CODE ANN. § 16.103.

254. *Id*. § 16.103(b).

255. *Id*. § 16.103(b)(1)–(4).

256. *Id*. § 16.103(d)(2)–(3).

257. *See Texas Revises Its Trademark Act — Should You Apply for a Texas-Registered Trademark?*, DLA PIPER (Nov. 7, 2012), https://www.dlapiper.com/en/us/insights/publications/2012/11/texas-revises-its-trademark-act--should-you-appl__/ [https://perma.cc/3JVQ-LTW4].

258. *See* DALL. BUS. J., *supra* note 249.

259. *See* F.T.C., *supra* note 240.

260. *See* discussion *supra* Section IV.C.3, Part V.

C. Right of Publicity in Estate Planning

1. New Markets for Estate Planning, Accounting

The independence from traditional media distribution channels, made possible by social media, means virtually everyone is a creator and curator of their personal brands.[261] As a result, the individuals who create a large portion of our entertainment are not afforded the luxuries and protections creators enjoy while working for MGM or 21st Century Studios.[262] Things like legal advice, accounting services, agents, and managers are potentially absent from a lot of individuals building and monetizing their persona and likeness online.[263] The growth of individuals pursuing this avenue for their livelihood opens many doors for the learned professions and peripheral businesses.[264] Transactional attorneys could presumably generate a great deal of business for their firm by working with influencers to protect their content and persona while simultaneously building an estate plan.[265]

Regardless of whether the Texas State Legislature enacts laws such as those proposed in this comment, estate planning and "personal" attorneys should be familiar with methods to protect clients with online, revenue-generating personalities under current Texas law.[266] When this type of client is ready to estate plan and draft a will, it is likely they will want to register their persona with the "Registration of Claim for the Use of a Deceased Individual's Name, Voice, Signature, Photograph, or Likeness."[267] Even if the client receives nominal earnings from their online presence, or they do not anticipate the marketability of their brand to extend past their lifetime, filing with the Secretary of State would ensure that only those registered would have control over their likeness and brand.[268] Afterall, the nature of estate planning is to have plans and contingency plans in place in case the unexpected occurs.[269]

---

261. *See* Samuel, *supra* note 121.

262. *See generally id*. (discussing how celebrity status can be attained by leveraging the power of smartphones independently of traditional paths to fame).

263. *Id*.

264. *See* DALL. BUS. J., *supra* note 249; *see also* ASSURED SOCIAL, *supra* note 248; *Social Media Influencer Attorneys*, TRAVERSE LEGAL, https://www.traverselegal.com/social-media-influencer-attorneys/ (last visited Nov. 15, 2019) [https:// perma.cc/9FNE-9BHC].

265. *See* Kandia Johnson, *The Lawyer Helping Social Influencers Protect Their Passion and Profits*, BLACK ENTER. (Dec. 3, 2018), https://www.blackenterprise.com/this-lawyer-helps-social-influencers-protect/ [https://perma.cc/H7R6-G5SK].

266. *See generally id*. (illustrating that attorneys are increasingly aware of helping influencers to seize on their legal rights).

267. *See infra* Part Appendix A.

268. *See infra* Part Appendix A.

269. *See infra* Part Appendix A.

2. Texas Legislature Adopts Revised Uniform Fiduciary Access to Digital Assets Act

The Texas Legislature recently gave digital assets a formal place in estate planning with the adoption of the Revised Uniform Fiduciary Access to Digital Assets Act.[270] The bill's purpose is stated in a 2017 Bill Analysis: "Interested parties contend that in addition to the legal duties imposed on a fiduciary charged with managing tangible property, such fiduciaries need clarity regarding their duties in managing digital assets."[271] By recognizing the need for this legislative clarity, the Texas Legislature indicated its knowledge of, and intent to maintain, the value of digital assets such as online accounts and communications.[272]

The Uniform Fiduciary Access to Digital Assets Act came with its fair amount of criticism from tech giants like Google and Facebook.[273] However, this legislation was passed unanimously in the House and the Senate.[274] This proposal is complimentary to chapter 2003 of the Texas Estates Code in that it aims to protect and preserve what value someone's digital assets could attain and retain; digital assets which are now subject to possession and management by the fiduciaries of deceased individuals.[275]

Despite this recent development, the Digital Assets Act still does little to protect the living person from the ramifications of exploitation of their earning potential during their lifetime; but it is precisely what this comment's proposal aims to do.[276]

3. Texas Should Set an Example for Community Property States

As one of the few states that employs a community property system in the United States, to adopt this proposed legislation would position Texas to set an example for other community property states.[277] Community property systems, though created largely to protect property interests of males through their wives and daughters, now affords men and women alike protections for

---

270. TEX. EST. CODE ANN. § 2001.001.

271. Judiciary & Civil Jurisprudence Committee, Bill Analysis, Tex. S.B. 1193, 85th Leg., R.S. (2017) ("Background and Purpose").

272. TEX. EST. CODE ANN. §§ 2001.002(1), (4).

273. Abbey L. Cohen, *Damage Control: The Adoption of the Uniform Fiduciary Access to Digital Assets Act in Texas*, 8 EST. PLAN. & CMTY. PROP. L.J. 317, 336 (2015).

274. Bill: S.B. 1193, TEX. LEG. ONLINE (June 1, 2017), https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=SB1193 [https://perma.cc/SKF8-U5N2].

275. *See infra* Part V; *see also* TEX. EST. CODE § 2001.003 (illustrating how the state code has yet to incorporate digital assets).

276. *See infra* Part V.

277. Christopher Migliaccio, *Everything You Need to Know About Texas Community and Separate Property*, WM TX L., https://www.wmtxlaw.com/articles/everything-needed-to-know-texas-property/ (last visited Feb. 7, 2020) [https://perma.cc/BXJ3-WL7M].

their separate and community property.[278] For the kind of assets this proposal addresses, a community property system allows social media earners to keep their personal account separate if they later marry.[279] Additionally, for those influencers who prosper as a couple via social media and then divorce, community property principals afford them a way to divide the subject property.[280]

V. PROPOSAL FOR THE TEXAS PROPERTY CODE

This proposal does not aim to strip society of the benefits of a rich public domain.[281] It does not aim to protect sophisticated parties such as professional entertainers who have incorporated and trademarked their valuable intellectual property.[282] This proposal aims to protect the individuals who, although not necessarily savvy in legal and business aspects, find themselves harnessing and monetizing their online influence; those people, of whom there are many, who do not understand property, persona, infringement and the like, but nevertheless have successfully created value from the resources available to them.[283] Traditional celebrities are backed by production companies, distribution companies, managers, agents, et cetera.[284] Their content is most likely the property of those companies, and is most likely trademarked, copyrighted and fully protected.[285] This proposal aims to empower those who find themselves with social influence without the advantages of signing a recording contract, acting in a major motion picture, or belonging to a major modeling agency.[286]

In the same way that Justice Brandeis conflates four torts—intrusion, disclosure, false light, and appropriation—into one right of privacy or publicity, this proposal borrows legal theories from the tort of misappropriation, Texas' posthumous right to publicity, copyright law, and business trademark regulations to create a living person's right to publicity and persona.[287]

Additionally, the proposed legislation will bring to the legal system a predictability and certainty for individuals who allege a misappropriation of their persona.[288] It is important that this modern view of misappropriation be

278. *See generally* Elizabeth York Enstam, *Women and the Law*, TEX. ST. HIST. ASS'N (June 15, 2010), https://tshaonline.org/handbook/online/articles/jsw02 (detailing the socio-political origins of community property in Texas) [https://perma.cc/PZ3A-YGHK].

279. *See id*.

280. *See id*.

281. *See* discussion *infra* Section V.A.

282. *See infra* Part V.

283. *See infra* Part V.

284. *See* discussion *supra* Part III.

285. *See* discussion *supra* Part I.

286. *See* discussion *supra* Part III.

287. *See supra* text accompanying note 38.

288. *See infra* Part V.

codified in statute rather than created in the courts because the world of yesterday is vastly different than the world of today.[289] To rely on the courts to interpret the current tort law of misappropriation to alleviate the problems discussed in this comment would be irresponsible.[290] These problems did not exist when the tort of misappropriation was recognized by courts; therefore, legislative action is necessary to satisfy the legal needs of exploited online content creators.[291]

A. Creating the Living Person's Right to Publicity

1. Misappropriation

Misappropriation is determined using a three-pronged test: "(1) the defendant appropriated the plaintiff's name or likeness for the value associated with it, and not in an incidental manner or for a newsworthy purpose; (2) the plaintiff can be identified from the publication; and (3) there was some advantage or benefit to the defendant."[292] The "advantage or benefit" of the third prong has historically been construed narrowly, thereby limiting claims of misappropriation to cases where the plaintiff's name has widely recognized value.[293] This construction fails to give weight to the context of the channels through which the public consumes content today.[294] No longer is every American family watching the same television programming, no longer does everyone know the same celebrities, and no longer is the traditional definition of celebrity accurate.[295]

As a foundation, the proposed legislation should create a presumption that original content created and posted by individuals who are registered in the system is part of that person's persona for purposes of the claim.[296] The presumption would be eliminated if it can be proven that one party posted the content prior to the other.[297] Additionally, the presumption would be eliminated by proof of parody, proof of use of public domain intellectual property (*e.g.*, a widespread meme), or proof of content that inherently utilizes someone else's persona (*e.g.*, a collaboration or interaction on the

289. *See supra* Part III.

290. *See supra* Part II (showing that case law involving misappropriation of likeness in Texas is old and outdated).

291. *See* discussion *supra* Section III.B.

292. Watson v. Talia Heights, LLC, 566 S.W. 3d 326, 329 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

293. *Id*. at 330 (citing Moore v. Big Picture Co., 828 F.2d 270, 275 (5th Cir. 1987)); RESTATEMENT (SECOND) OF TORTS § 652 (AM. LAW INST. 1977).

294. *See* discussion *supra* Part III.

295. *See* discussion *supra* Part III.

296. *See generally supra* text accompanying notes 228–32 (illustrating how a user's content is inherently their persona and is now being used as currency).

297. *See* discussion *supra* Section III.C.

social media platform).[298] Of course, this is all in light of the limitation that one cannot copyright an idea, but can copyright a written work, style element, or name.[299] The proposed legislation would not aim to, and could not legally, undermine United States copyright law; rather, it would borrow concepts of copyright law to protect a smaller client whose access to and knowledge of the existing system is limited.[300] By creating automatic protections for creators and lucrative social media endeavors specifically, the necessity for every dispute to be handled by federal copyright law disappears.[301] Indeed, at some point in their career, a creator may reach a level of success that justifies engaging an intellectual property attorney pre-injury, but until that time comes, this legislation would provide a more appropriate threshold of entry to the legal system.[302]

The proposed legislation enumerates factors that can be weighed against each other to determine whether the defendant gained some advantage.[303] In cases stemming from online activity or the value of a plaintiff's likeness, a court will consider factors such as: (1) what, if any, overlap do the plaintiff and defendant have in followers and/or engagement on platform; (2) whether any evidence exists that defendant knew of the plaintiff and/or their accounts; (3) what, if any, followers or influence did the defendant gain; and (4) whether defendant targeted a similar audience or demographic as the plaintiff historically has.[304]

2. Trademark Infringement

When determining the value of a trademark infringement, the Texas Business and Commerce Code prescribes factors to consider, including geographic reach of the mark's recognition weighed against the geographic distribution of the infringing mark.[305] The proposed legislation in this comment borrows the legal theories behind these considerations in determining the value of a plaintiff's influence and the actual damage to the plaintiff.[306] These factors include: (1) whether the plaintiff actively and regularly curated and tailored their online presence; (2) how far the plaintiff's influence reaches; (3) what level of follower engagement the plaintiff

298. *See* discussion *supra* Section III.C.

299. *See* sources cited *infra* notes 314–22.

300. *See* sources cited *infra* notes 314–22.

301. *See* discussion *infra* Section V.A.4.

302. *See generally* discussion *supra* Section III (illustrating how content creators are not necessarily equipped to legally protect themselves or their content).

303. *See generally supra* Section II.C (illustrating how tort law weighs factors in determining misappropriation).

304. *See generally supra* Section II.C (illustrating how tort law weighs factors in determining misappropriation).

305. TEX. BUS. & COM. CODE ANN. § 16.103.

306. *See id*.

historically obtains; and (4) the existence and nature of past and present partnerships with brands that would rise to the level requiring an advertisement disclosure per the FTC influencer guidelines.[307]

3. Right to Publicity and Content Licenses to Tech Companies

By agreeing to the terms of service, users of various mainstream social media platforms like Instagram, Twitter, and Facebook license the content they post to the company.[308] Of course, the social media business model involves selling advertisements based on the number of active users and target users based on the content they interact with on the platform and across the internet.[309] Facebook does not make money unless people use the platform, which means creating and consuming content.[310] This comment's proposed legislation would not limit one's right to license their work and persona, regardless which platform they plan to use for economic gain.[311] However, the legislation would attempt to limit the uses for which social media companies retain a license in exchange for the free use of the platform.[312] Namely, it would limit the company's right to use a user's content in advertisements without notice and user consent.[313] This way, users are allowed the opportunity to fairly negotiate and expand the scope of the license beyond what was initially agreed upon when they signed up.[314]

Twitter recently added in its User Agreement its right to sublicense content uploaded through its services.[315] This change caused a stir among users attempting to decipher the motivation for the change.[316] While some thought the change was Twitter's attempt to slowly erode user's rights to their content, others pointed out that the change was to clarify that the company has the right to host and show others the content users post.[317] Whatever the real motivation for the change, this comment's proposed legislation attempts

---

307. *Id*. § 16.103(b)(1)–(4).

308. *See* McCabe Curwood, *Who Owns My Social Media Content?*, LEXOLOGY (May 16, 2017), https://www.lexology.com/library/detail.aspx?g=a2627dc8-1d2a-4a2a-ae48-04f3f0cc2815 [https://perma.cc/HLZ7-H3HD].

309. *See* Greg McFarlane, *How Facebook, Twitter, Social Media Make Money from You*, INVESTOPEDIA, https://www.investopedia.com/stock-analysis/032114/how-facebook-twitter-social-media-make-money-you-twtr-lnkd-fb-goog.aspx (updated Feb. 7, 2020) [https://perma.cc/2DCF-A49N].

310. *Id*.

311. *See infra* discussion accompanying notes 323–35.

312. *See infra* discussion accompanying notes 323–35.

313. *See generally* sources cited *supra* notes 192–98 (case illustrating how social media companies benefit from clickwrap adhesion contracts).

314. *See generally* sources cited *supra* notes 192–98 (case illustrating how social media companies benefit from clickwrap adhesion contracts).

315. *Twitter Terms of Service*, *supra* note 184.

316. *See* Taylor (@filmmakerflying), TWITTER, https://twitter.com/filmmakerflying/status/1201859026767798275 (last visited Jan. 17, 2019).

317. *Id.*; Robert Johnson (@Anaerin), TWITTER, https://twitter.com/Anaerin/status/1201982114670895105 (last visited Jan. 17, 2019).

to bring equity and clarity to social media companies and social media users' rights.[318]

4. Copyright Law

United States copyright law prescribes types of infringement and the available remedies.[319] The statute provides the possibility of injunction, impoundment, damages and profits, and attorney's fees.[320] Due to the similar nature of the injury the proposal in this comment anticipates, the proposed legislation would borrow some of the copyright infringement remedies.[321] Certainly the proposed legislation would include an injunction remedy.[322] Additionally, it will also include court costs and attorney's fees.[323] In the case that the suit involves manufactured, unsold physical goods, impoundment would be an appropriate remedy for the proposed legislation.[324] Finally, any profits the defendant obtained through using the plaintiff's likeness will be recoverable.[325]

To determine the value of the exploitation, fact finders should look to the earning history of both the parties, as well as industry standards, and consider the degree of influence previously determined.[326] However, because determining the value of influence via social media is difficult to ascertain, and in some cases may not amount to much, plaintiffs who file claims under the proposed legislation should be afforded a temporary injunction against defendants who allegedly wrongfully exploited another person's likeness or persona.[327]

B. Registration and Reporting System

To build a foundation for a claim under this comment's proposed legislation, social media users who intend to use their accounts to promote themselves and their personas, as well as share original content that would ideally be profitable, would be required to register their accounts with some government or private agency.[328] This database would create a reference point for other users and brands to check against before posting content

318. 17 U.S.C. § 504–05 (2019).
319. *Id*. § 501.
320. *Id*. § 502–05.
321. *Id*.
322. *Id*. § 502.
323. *Id*. § 505.
324. *Id*. § 503.
325. *Id*. § 504.
326. *See* discussion *supra* Section V.A.1.
327. *See* discussion *infra* accompanying notes 323–35.
328. *See* discussion *infra* accompanying notes 324–35.

"inspired" or outright plagiarized from another user.[329] The proposed database also serves to differentiate passive personal users from active content creators who utilize social media to promote themselves and their work.[330] The database would also serve to give notice to the public that the registered users are using their accounts to further their careers, brands, and to earn income.[331] Secondarily, the database could serve as a recruiting platform for brands, casting directors, art curators, and other users who locate and hire talent through social media platforms.[332]

This database would also serve as a vehicle for locating individuals or companies responsible for certain social media accounts—a directory of owners of accounts.[333] Currently, most social media platforms employ a "verification" system by which users can identify legitimate celebrity and public figure accounts.[334] The proposed database could overlap with social media platforms' verification programs, but would primarily be used when a party attempts to locate an account owner for whatever reason, especially reporting another user.[335] Users alleging a violation could have the ability to direct message the account within the platform itself.[336] However, accounts with large followings would have the option to turn off notifications for direct messages and not accept direct messages at all.[337] The database would serve to eliminate this and other issues that involve user contact.[338]

Again, this database would be limited to those companies and individuals who currently, or will in the future, earn directly or indirectly from their social media accounts—those who promote products for other companies, companies selling their own products, or creators who use social media as a resume for their respective industry.[339] Obviously, not all users in violation of the proposed legislation will register with the system, but in the Matt Buechele and Drunk Elephant examples, both violators would have likely been registered.[340] In those cases, each party who alleged a violation could have more easily located and communicated with the party responsible for the infringement and solved the issue.[341]

---

329. *See generally* sources cited *supra* note 206 (illustrating how Beuchele's situation could have been alleviated by the proposed registration system).

330. *See generally* sources cited *supra* note 206 (illustrating how Beuchele's situation could have been alleviated by the proposed registration system).

331. *Id*.

332. Author's original writing.

333. *See generally* Yasharoff, *supra* note 92 (showing how identifying the owners of internet accounts is difficult).

334. *See Instagram Help Center*, INSTAGRAM, https://help.instagram.com/854227311295302 (last visited Jan. 17, 2019) [https://perma.cc/LKX6-4KDG].

335. *See generally id.* (outlining Instagram's verified account policy).

336. Author's original writing.

337. Author's original writing.

338. Author's original writing.

339. *See supra* Part III.

340. *See supra* notes 206, 211.

341. *See supra* notes 192, 211.

VI. CONCLUSION

Current Texas law does not sufficiently protect social media users from proprietary content thievery, and does little to equip private citizens with ways to deter others from exploiting their persona for profit.[342] The evolution of the marketing and media consumption landscape has made it relatively simple to take one's content and build a following by exploiting other creatives on various platforms.[343] Conversely, this evolution has made it increasingly difficult to locate and prevent others from exploiting content.[344] Paired with the amount of money being made from social media brands and personas, the evolution of media consumption has brought about a harsh reality for many creators who find their comedy, art, endorsement, or image have been exploited without their knowledge, consent, and without compensation.[345] This comment's proposed legislation aims to modernize Texas law by acknowledging this reality and equipping private citizens with the ability to protect themselves and their online personas from exploitation.[346] This proposal is a hybrid of U.S. copyright law, trademark infringement law, and the tort of misappropriation.[347] By combining certain aspects of each of these established legal concepts, the proposal, along with a modern right to publicity, simultaneously acknowledges a change in our cultural landscape and empowers exploited individuals to bring justice to the business side of social media.[348]

342. *See supra* Part II.
343. *See supra* Part III.
344. *See supra* Part III.
345. *See supra* Part III.
346. *See supra* Part V.
347. *See supra* Part V.
348. *See supra* Part V.

APPENDIX A

Form 3701—General Information
(Registration of Claim for Use of Deceased Individual's Name, Voice, Signature, Photograph, or Likeness)

The attached form is designed to meet minimal statutory filing requirements pursuant to the relevant code provisions. ***This form and the information provided are not substitutes for the advice and services of an attorney.***

Commentary

Chapter 26 of the Texas Property Code and the secretary of state's administrative rules found in title 1, chapter 76 of the Texas Administrative Code govern the use of a deceased individual's property rights, including the deceased individual's name, voice, signature, photograph, or likeness. A person who claims to own a property right of a deceased individual may register that claim with the secretary of state. Registration of a claim is prima facie evidence of the claim's validity, and a registered claim is generally superior to a conflicting, unregistered claim. Tex. Prop. Code § 26.007.

Registration with the secretary of state prior to exercising a property right of a deceased individual is optional, except during the first year following the individual's death. For the first year following the death of the individual, an owner of a property right may exercise that right only if the owner registers a valid claim with the secretary of state. Section 26.006 sets forth the requirements for a registration of claim.

A registration of claim is effective the date the completed registration and filing fee are received by the secretary of state.

Instructions for Form

- **Claimant Information:** The registration of claim must set forth the claimant's name, address, and a statement of the basis of the claim.

  A document on file with the secretary of state is a public record subject to public access and disclosure. When providing address information for owners, use a business or post office box address rather than a residence address if privacy concerns are an issue.

- **Property Rights Claimed:** Include the name and date of death of the deceased individual and state the percentage interest in the property rights claimed, such as 100%, 50%, 25%, or some other interest. Select either A or B to indicate whether the stated percentage interest is claimed in all property rights of the deceased individual or limited rights. If B is selected, describe the limited rights that are claimed.

- **Execution:** The claimant must sign and date the registration statement before a notary public or other official who has authority to administer an oath.

- **Payment and Delivery Instructions:** The filing fee for a registration of claim is **$25.** Fees may be paid by personal checks, money orders, LegalEase debit cards or American Express, Discover, MasterCard, and Visa credit cards. Checks or money orders must be payable through a U.S. bank or financial institution and made payable to the secretary of state. Fees paid by credit card are subject to a statutorily authorized convenience fee of 2.7 percent of the total fees.

  The completed form, along with the filing fee, may be mailed to Registrations Unit, P.O. Box 13550, Austin, Texas 78711-3550 or delivered to the James Earl Rudder Office Building, 1019 Brazos, 5th Floor, Austin, Texas 78701.

Revised 02/2012

Form 3701 1

Form #3701 Rev. 02/2012

Submit to:
SECRETARY OF STATE
Registrations Unit
P O Box 13550
Austin, TX 78711-3550
512-475-0775
512-475-2815 - Fax
Filing Fee: $25

This space reserved for office use

REGISTRATION OF CLAIM FOR USE OF DECEASED INDIVIDUAL'S NAME, VOICE, SIGNATURE, PHOTOGRAPH, OR LIKENESS

Claimant Information

Name: _____

Address: _____ _____ _____ _____
Street *City* *State* *Zip*

Complete one of the following to state the basis for the claim:

☐ A. Claimant has been appointed by a court for the benefit of the estate of the deceased individual.
Select title: ☐ independent executor ☐ executor ☐ independent administrator ☐ temporary or permanent administrator ☐ temporary or permanent guardian

☐ B. Claimant is a surviving relative of the deceased individual.
Select relationship: ☐ spouse ☐ child ☐ grandchild ☐ parent

☐ C. Claimant has been transferred the property rights of the deceased individual.
Select method of transfer: ☐ contract ☐ trust ☐ will

Property Rights Claimed

Name of deceased individual: _____

Date of death: _____ Percentage of property rights claimed: _____ %

Complete one of the following to state the type of rights in which the above percentage is claimed:

☐ A. All types of property rights of the deceased individual are claimed.

☐ B. Limited rights are claimed as follows: _____

Execution

Date: _____

_____
Signature of Claimant

_____
Printed or typed name of Claimant

State of _____)
County of _____)

Sworn to and subscribed before me this _____ day of _____, 20 ___.

(seal)

_____
Notary Public Signature

Form 3701 2

Print Reset