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# NOTE

## IT'S SELFIE-EVIDENT: SPECTRUMS OF ALIENABILITY AND COPYRIGHTED CONTENT ON SOCIAL MEDIA

*Alison C. Storella\**

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*The prominence of social media in our society has led to increasing controversy and debate in a variety of legal fields, particularly in regard to privacy and rights of publicity. Recent right of publicity cases, such as Fraley v. Facebook and Rodriguez v. Instagram, demonstrate growing dissatisfaction with how social media websites utilize content created and provided by its users. However, few social media users take into consideration the copyright law ramifications of posting content to social media. Most social media terms of service require users to grant a non-exclusive, transferable, and royalty-free license of all intellectual property posted through the service to the service provider. Such licenses give social media services the ability to license this content to their affiliates, often for use in advertisements, without obtaining additional consent from the copyright holder. Moreover, the majority of social media users are likely unaware that copyright protection extends to their posted materials at all.*

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\* J.D. Candidate, Boston University School of Law, 2015; B.A., Vassar College, 2011. Special thanks to Professor Wendy Gordon, who helped me figure out what I wanted to say; to the brilliant staff of Boston University Law Review, who somehow made it sound good; and to my family and friends, who constantly inspire me to say something worthwhile.

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*This Note argues that a personhood perspective of copyrighted material posted on social media provides several important insights, such as explaining why individuals use social media, recognizing the true value they place in their content, and identifying the real legal complaint behind current litigation. It builds off of traditional personhood and inalienability theories to suggest that alienability should be evaluated on a spectrum, where rights that are more personal are harder to alienate and subject to stricter judicial scrutiny. Because social media users post copyrighted content online for personal and reputational reasons, courts should seek to limit the extent to which users unknowingly waive their intellectual property rights and restrict the licenses granted to social media companies.*

#### INTRODUCTION

In an increasingly technological and Internet-savvy world, people of all ages are generating a massive amount of content to share through social media. This content includes photographs, videos, blog posts, and other creative endeavors that users seek to share within their social networks. While the average user is probably unaware that much of this personal content falls within the realm of copyright, social media companies are well aware of this fact. Standard terms of service in the social media industry include a provision that gives the companies, as well as their affiliates, a non-exclusive, worldwide, royalty-free, and transferable license to all intellectual property that the user posts on the website.<sup>1</sup> Facebook's intellectual property clause, which is fairly typical, reads

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<sup>1</sup> E.g., *Google Terms of Service*, GOOGLE, <http://www.google.com/intl/en/policies/terms/>, archived at <http://perma.cc/QVB2-MBH3> (last modified Apr. 14, 2014) ("When you upload, submit, store, send or receive content to or through our Services, you give Google (and those we work with) a worldwide license to use, host, store, reproduce, modify, create derivative works (such as those resulting from translations, adaptations or other changes we make so that your content works better with our Services), communicate, publish, publicly perform, publicly display and distribute such content."); *Terms of Service*, TWITPIC, <http://twitpic.com/terms.do>, archived at <http://perma.cc/CLD4-6R5J> (last modified May 10, 2011) ("[B]y submitting Content to Twitpic, you hereby grant Twitpic a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the Content in connection with the Service and Twitpic's (and its successors' and affiliates') business, including without limitation for promoting and redistributing part or all of the Service (and derivative works thereof) in any media formats and through any media channels."); *Terms of Service*, VINE, <https://vine.co/terms>, archived at <http://perma.cc/MAJ5-SCFK> (last modified Sept. 5, 2014) ("By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed). You agree that this license includes the right for Vine to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies, organizations or individuals who partner with Vine for the syndication, broadcast,

as follows:

For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.<sup>2</sup>

While these terms of service can be accessed online, they often do little to substantively educate users about copyright in general—such as giving examples of copyrighted material<sup>3</sup>—leading to a situation in which users are unlikely to know the legal scope of the rights they possess over their content.

Although users may be unaware, at least initially, that they are posting copyrighted content to social media, some have taken legal action to express their dissatisfaction with how these websites use copyrighted content, often with respect to advertising. In *Fraley v. Facebook, Inc.*,<sup>4</sup> plaintiffs brought a class action lawsuit under California’s right of publicity statute in regard to Facebook’s Sponsored Stories program.<sup>5</sup> The Sponsored Stories program allows advertisers to use the names and profile pictures of Facebook users who “liked” their company on Facebook in an advertisement that is displayed to other users, without first obtaining the consent of the persons whose names and likenesses are used in the advertisement.<sup>6</sup> While the suit survived an initial motion to dismiss, the parties eventually settled after a long series of

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distribution or publication of such Content on other media and services, subject to our terms and conditions for such Content use.”); *Terms of Use*, INSTAGRAM, <http://instagram.com/legal/terms>, archived at <http://perma.cc/7TP3-MLYU> (last modified Jan. 19, 2013) (“[Y]ou hereby grant to Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to use the Content that you post on or through the Service, subject to the Service’s Privacy Policy . . .”).

<sup>2</sup> *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms>, archived at <http://perma.cc/TY2D-JJTZ> (last modified Nov. 15, 2013).

<sup>3</sup> Elizabeth Townsend Gard & Bri Whetstone, *Copyright and Social Media: A Preliminary Case Study of Pinterest*, 31 MISS. C. L. REV. 249, 274 (2012) (stating that Pinterest’s Terms do not explicitly explain what copyright or fair use is, nor do they provide examples of copyrighted material; however, the Terms do provide links for users to find more information).

<sup>4</sup> 830 F. Supp. 2d 785 (N.D. Cal. 2011).

<sup>5</sup> *Id.* at 791-92 (observing that “[p]laintiffs challenge one of Facebook’s advertising services in particular, known as ‘Sponsored Stories,’ which Facebook launched on January 25, 2011, and which was enabled for all members by default,” and “allege that Facebook’s practice of misappropriating their names and likenesses for commercial endorsements without their consent . . . violated their statutory right of publicity”).

<sup>6</sup> *Id.*

negotiations, resulting in monetary compensation to those who filed claims and injunctive relief against Facebook, including implementation of a system allowing users to “opt-out” of Sponsored Stories.<sup>7</sup> As one controversy drew to a close, another began: this time, Instagram users brought a class action lawsuit, involving both right of publicity and breach of contract claims against the company.<sup>8</sup> Plaintiffs cited concerns about the commercial exploitation of their content after Instagram changed its Terms of Use by expanding the scope of its intellectual property license.<sup>9</sup> Although the suit was soon dismissed for lack of subject-matter jurisdiction,<sup>10</sup> the controversy behind it likely survives as an increasing number of social media users begin to question just how many of their rights they have signed away.

This Note examines the intersection of copyright and social media from a personhood perspective of intellectual property, while also incorporating theories of alienability. Economic analysis usually assumes all types of property should be alienable, transferable, and commoditized on the market; however, some personhood and alienability theories posit that certain things should not be bought and sold, and that the protection of such inalienability contributes to human flourishing.<sup>11</sup> This Note draws inspiration from the incredibly social dimensions of inalienability theory, as well as its emphasis on identity, to provide a new framework from which to view intellectual property posted on social media and to address many of the concerns underlying current litigation over social media policies. The framework places alienability on a spectrum, considering situations in which an object may be of such a personal nature that it implicates the personhood concerns underlying inalienability theories, but where practical realities make full or even partial market-inalienability undesirable. In such situations, the personal nature of the object in question requires stricter scrutiny when an individual allegedly waives his rights. Ultimately, this Note suggests that rights over highly personal objects,

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<sup>7</sup> *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 941-44 (N.D. Cal. 2013) (order granting motion for final approval of settlement agreement) (finding the proposed settlement that included a capped \$20 million settlement fund, allocated fifteen dollars per claim, and provided injunctive relief was “fair, reasonable, and adequate”).

<sup>8</sup> First Amended Complaint at 1, *Rodriguez v. Instagram L.L.C.*, No. 3:12-cv-06482-WHA (N.D. Cal. Mar. 6, 2013).

<sup>9</sup> *Id.* (“This action challenges the shift in property rights resulting from Instagram’s unilateral changes to its ‘Terms of Use’ . . . . The New Terms transfer valuable property rights to Instagram and appropriate the photographs and likeness . . . of Plaintiff and members of the Class for unauthorized commercial purposes.”).

<sup>10</sup> *Rodriguez v. Instagram, L.L.C.*, No. 3:12-cv-06482-WHA, 2013 WL 3732883, at \*1 (N.D. Cal. July 15, 2013) (order dismissing action and denying motion for leave to file a second amended complaint).

<sup>11</sup> See generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (arguing the inadequacy of both traditional liberalism and modern economic analysis in addressing the problems of alienability debates, and advocating a theory of market-inalienability).

such as social media content, should be more difficult to alienate.

Part I of this Note focuses on the “selfie,” a digital self-portrait usually taken with the use of a camera phone. By demonstrating both the popularity of the selfie and its strong case for copyright protection, Part I illustrates the sheer breadth of content that users license away on social media without thought to its copyrighted status. Part II provides a brief background of theories of alienability and personhood before introducing the concept of the spectrum of alienability and applying it to social media content, suggesting that stricter scrutiny should be applied when an individual chooses to waive a more personal right or object. Again, using the selfie as an example, this section shows how users use social media content primarily to construct an identity and manage social relationships, rather than for economic purposes. Part II also makes a case for viewing waivers over this kind of content with more suspicion because users do not approach such waivers from a negotiation-based perspective.

Part III turns to the current legal controversies surrounding social media content. The section focuses on four distinct legal avenues through which one could potentially resolve such controversies in court, and finds that all four avenues pose serious problems in regard to granting users the protection they desire. First, Part III examines the contractual relationship at the root of the controversy, considering the boilerplate contractual language involved in the licensing of this copyrighted content to social media websites, as well as to what extent users truly consent to the contractual provisions or have the ability to reject terms of service that they find unfavorable. Part III then examines the right of publicity suits brought in *Fraleley v. Facebook, Inc.*, and *Rodriguez v. Instagram, L.L.C.*,<sup>12</sup> and suggests that the modern economic foundations of right of publicity laws fail to address the real legal complaint behind the litigation, making success in court a very remote possibility. Third, Part III turns to one of the legal remedies provided in the *Fraleley* case—the opt-out system—and evaluates whether or not it is an adequate mechanism to protect social media users from nonconsensual use of their content. Next, Part III considers modern privacy law in the social media context, with a focus on potential claims involving copyrightable photographic material. Finally, Part IV introduces a potential solution to protect copyright owners from losing control of their works on social media—judicial refusal to enforce broader licenses of social media content by more strictly scrutinizing the alienability of rights over such personal content.

### I. COPYRIGHT PROTECTION AND THE SELFIE

What exactly is a selfie, and does it merit copyright protection? *Time Magazine* defined the selfie as the modern self-portrait, taken at odd angles via smartphone and often shared through social media.<sup>13</sup> While self-portraits

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<sup>12</sup> No. 3:12-cv-06482-WHA, 2013 WL 3732883.

<sup>13</sup> Katy Steinmetz, *The Top Ten Buzzwords of 2012*, TIME (Dec. 4, 2012),

themselves are nothing new, advances in technology such as smartphones with built-in, front-facing cameras and digital photography have transformed the self-portrait into an informal, fluid, and often spontaneous practice.<sup>14</sup> Selfies have become a worldwide phenomenon and are heavily linked with social media usage: a recent survey in the United Kingdom revealed that over 50% of adults had taken a selfie (rising to 75% in the 18-24 age bracket), and that 48% of those that take selfies, share them via Facebook.<sup>15</sup> In early 2013, over 23 million photographs labeled as selfies had been posted to Instagram, a social media service that shares pictures among its users.<sup>16</sup> By the year's end, that number rose to 57 million, prompting Oxford Dictionaries to name "selfie" the word of the year.<sup>17</sup> Although selfies may seem like a frivolous trend, they nevertheless maintain a strong position within the realm of works receiving U.S. copyright protection.

Pictorial, graphical, and sculptural works comprise a single category of works in which copyright protection subsists as soon as the work is fixed in a tangible medium of expression.<sup>18</sup> The current statutory definition of pictorial,

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<http://newsfeed.time.com/2012/12/04/top-10-news-lists/slide/selfie/>, archived at <http://perma.cc/67BG-55L8> ("Selfies are often snapped at odd angles with smartphones and include some part of the photographer's arm."). Although, to date, the term "selfie" has largely escaped judicial attention, the first legal opinion to define the term used the definition provided by the *Time* article. See *United States v. Doe*, No. 1:12-cr-00128-MR-DLH, 2013 WL 4212400, at \*8 n.6 (W.D.N.C. Aug. 14, 2013).

<sup>14</sup> See Charissa Coulthard, *Self-Portraits and Social Media: The Rise of the 'Selfie'*, BBC NEWS MAG. (June 6, 2013), <http://www.bbc.co.uk/news/magazine-22511650>, archived at <http://perma.cc/C7KT-8CRW> (asserting the forward-facing lens and automatic focus features on smartphone cameras encourage users to take pictures anytime, anyplace); Kate Losse, *The Return of the Selfie*, NEW YORKER (May 31, 2013), <http://www.newyorker.com/online/blogs/elements/2013/06/the-return-of-the-selfie.html>, archived at <http://perma.cc/3VFM-BY6N> (observing that "as social-media sites requiring a profile picture gained popularity, so, too, did the self-taken photograph," and detailing the history of selfies from MySpace to today).

<sup>15</sup> *Half of the UK Has Joined the Selfie Craze Creating Over 35 Million Selfies a Month*, PR NEWSWIRE (Aug. 13, 2013), <http://www.prnewswire.com/news-releases/half-of-the-uk-has-joined-the-selfie-craze-creating-over-35-million-selfies-a-month-219364031.html>, archived at <http://perma.cc/4TDS-LTN7> (discussing the findings of a study performed on behalf of HTC, a cellphone manufacturer).

<sup>16</sup> Coulthard, *supra* note 14 ("A search on photo sharing app Instagram retrieves over 23 million photos uploaded with the hashtag #selfie, and a whopping 51 million with the hashtag #me.").

<sup>17</sup> Ben Brumfield, *Selfie Named Word of the Year for 2013*, CNN (Nov. 20, 2013), <http://www.cnn.com/2013/11/19/living/selfie-word-of-the-year/>, archived at <http://perma.cc/3AFE-NHLQ> ("The most esteemed guardian of the English language has bestowed a prestigious honor upon debatably the most embarrassing phenomenon of the digital age: the selfie. . . . There are 57 million photos bearing its hashtag -- #selfie -- on Instagram alone.").

<sup>18</sup> 17. U.S.C. § 102(a)(5) (2012) ("Copyright protection subsists, in accordance with this

graphical, and sculptural works explicitly includes photographs as part of this category.<sup>19</sup> Although the copyright statute did not originally include photographs within its protection, the Supreme Court, in its seminal opinion, *Burrow-Giles Lithographic Co. v. Sarony*,<sup>20</sup> explained that “[t]he only reason why photographs were not included in the extended list in the act of 1802 is probably that they did not exist, as photography as an art was then unknown . . . .”<sup>21</sup> *Burrow-Giles* still stands, despite some controversy, as one metric by which to judge whether a photograph engenders copyright protection. While the Court suggested that mere mechanical recreations of the physical world, without “novelty, invention, or originality,” may not merit such protection,<sup>22</sup> the photographer in this case had “[given] visible form” to “his own original mental conception” of Oscar Wilde by posing him, selecting the costume and accessories, giving thought to lighting and angles, and suggesting a particular facial expression.<sup>23</sup> The Court also may have suggested that elements of artistry and novelty play a role in the originality standard by describing the portrait as a “useful, new, harmonious, characteristic, and graceful picture”;<sup>24</sup> however, the Court would later caution against judicial judgment on the merits of what constitutes “art” for purposes of copyright.<sup>25</sup> In *Bleistein v. Donaldson Lithographing Co.*,<sup>26</sup> Justice Holmes warned that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits,” explaining that copyright should be afforded to any picture that could “command the interest of any public,” even if such pictures had only commercial appeal to the less educated.<sup>27</sup>

Under a straightforward reading of *Burrow-Giles* and *Bleistein*, the selfie merits copyright protection with little debate: the author has clearly put mental

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title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include . . . pictorial, graphic, and sculptural works.”)

<sup>19</sup> *Id.* at § 101 (“Pictorial, graphic, and sculptural works’ include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.”).

<sup>20</sup> 111 U.S. 53 (1884).

<sup>21</sup> *Id.* at 58.

<sup>22</sup> *Id.* at 59.

<sup>23</sup> *Id.* at 60.

<sup>24</sup> *Id.*

<sup>25</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903) (granting copyright protection to a chromolithograph advertisement for a circus); *see also* *Mazer v. Stein*, 347 U.S. 201, 214 (1954) (“Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art.”).

<sup>26</sup> 188 U.S. 239 (1903).

<sup>27</sup> *Id.* at 251-52.

effort into the “composition” of the scene by choosing an outfit, finding the right angle, and picking a particular expression for his or her face.<sup>28</sup> Indeed, many courts today still emphasize criteria such as “the photographer’s selection of background, lights, shading, positioning of subject, and timing”; ‘decisions regarding lighting, appropriate camera equipment and lens, camera settings and use of the white background’; or ‘posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved,’” in evaluating whether such photographs are copyrightable.<sup>29</sup> Tools that allow the further refinement of digital photographs, such as Photoshop, are moving the art of photography back toward more traditional photographic composition, with a new twist that allows photographers to make such creative and compositional decisions after the shutter has clicked.<sup>30</sup> Selfies, which are often heavily edited after taking the picture but before being posted to social media, embody this concept of the new portraiture.<sup>31</sup>

Moreover, the majority of courts have adopted the broad “seepage” view that “almost any[] photograph may claim the necessary originality to support a copyright merely by virtue of the photographers’ [sic] personal choice of subject matter, angle of photograph, lighting, and determination of the precise time when the photograph is to be taken.”<sup>32</sup> This seepage view of originality finds its roots in *Bleistein*, where Justice Holmes commented on the potential copyrightability of an amateur’s attempts to copy a famous portrait:

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<sup>28</sup> The conscious thought that goes into taking the most flattering selfie—based on a careful choice of angle, lighting, posing, and expression—is evident in the slew of articles providing advice on the subject. See Katherine Rosman, *Super ‘Selfies’: The Art of the Phone Portrait*, WALL ST. J., June 27, 2012, <http://online.wsj.com/article/SB10001424052702303640804577490992373514040.html>, archived at <http://perma.cc/7GLD-UBVY> (relaying tips from Tina Craig, an accessories blogger, on how to take an attractive selfie); Sarah Tuttle-Singer, *6 Tips on How to Rock a Selfie*, HUFFINGTON POST, Aug. 14, 2013, [http://www.huffingtonpost.com/sarah-tuttlesinger/six-tips-on-how-to-rock-a\\_b\\_3750316.html](http://www.huffingtonpost.com/sarah-tuttlesinger/six-tips-on-how-to-rock-a_b_3750316.html), archived at <http://perma.cc/4LGN-SVMC> (listing six easy tips for taking a good selfie).

<sup>29</sup> Justin Hughes, *The Photographer’s Copyright – Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 339, 365 (2012) (footnotes omitted) (quoting *Leigh v. Warner Bros.*, 10 F. Supp. 2d 1371, 1376 (S.D. Ga. 1998); *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1230 (11th Cir. 2010); *Roger v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992)).

<sup>30</sup> *Id.* at 422-23 (“[T]here is a vast array of digital technology related to photography that is moving many photographic images in the direction of traditional plastic arts. . . . A variety of choices that photographers could only make easily while shooting can now be easily remade later.”).

<sup>31</sup> See *Half the UK Has Joined the Selfie Craze*, *supra* note 15 (stating that 14% of adults, and 34% of adults aged 18-24, have admitted to digitally enhancing or retouching their selfies).

<sup>32</sup> *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1076-77 (9th Cir. 2000) (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[E][1], at 2-130 (1999)).



The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.<sup>33</sup>

Following the words of Justice Holmes, the seepage view grounds itself in the idea that almost all photographs are affected by the influence of the author, and that the author's personality implicitly "seeps" into the photograph to supply the requisite originality for copyright protection.<sup>34</sup> Limits do exist, however, in regard to how far personality can stand on its own in providing sufficient originality. In *Bridgeman Art Library, Ltd. v. Corel Corp.*,<sup>35</sup> the court explained that "slavish copying" of public domain works of art by merely mechanically transforming paintings into color transparencies lacked the "creative spark" to merit originality.<sup>36</sup> Although the court rejected the broadest application of a personality-based rationale, it nonetheless stated that most pictures would be able to supply the "modest amount of originality required for copyright protection," through elements such as "posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved,"<sup>37</sup> thereby reinforcing the composition-based view of originality established in *Burrow-Giles*.

While personality-based rationales for upholding a broad view of photographic copyright certainly add credence to the alienability concerns explored below, the distinction between a seepage view of copyrightable photographs and an arguably more restrictive view based on composition has little effect on whether the selfie receives protection in the first place. The selfie clearly satisfies both broader and stricter standards for copyrightability in regard to photographs. Consistent with these rationales, courts have already recognized the copyrightability of self-portraits posted online, as well as self-portraits taken merely for the author's personal satisfaction.<sup>38</sup> While both cases

<sup>33</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

<sup>34</sup> Hughes, *supra* note 29, at 369-72 ("If personality is de facto synonymous with originality (as Justice Holmes seems to use it), then instead of an expression theory of originality, we have a type of fingerprint or seepage theory of originality: whatever you do, you leave your imprint."); *see also* NIMMER & NIMMER, *supra* note 32, at 2-129 ("Judge Hand correctly pointed out that, under the teachings of *Bleistein v. Donaldson Lithographic [sic] Co.*, a very modest expression of personality will constitute sufficient originality." (footnote omitted)).

<sup>35</sup> 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

<sup>36</sup> *Id.* at 195-97 (explaining that there "appear to be at least two situations in which a photograph should be denied copyright for lack of originality," including, "where a photograph of a photograph or other printed matter is made that amounts to nothing more than slavish copying" (quoting NIMMER & NIMMER, *supra* note 32, at 2-131) (internal quotation marks omitted)).

<sup>37</sup> *Id.* at 196-97 (quoting *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992)).

<sup>38</sup> *See* *Coton v. Televised Visual X-Ography, Inc.*, 740 F. Supp. 2d 1299, 1303, 1308

just cited focus on portraits of working artists and models, there is little reason to think that the well-established rationales underlying them would not extend to spur-of-the-moment works by the average selfie-taker.

## II. SPECTRUMS OF ALIENABILITY AND SOCIAL MEDIA CONTENT

The popularity of the selfie, paired with its copyrightable status, demonstrates the extremely large amount of copyrighted material posted to social media every day. In fact, given the broad copyrightability of photographs in general, much social media content beyond the selfie almost certainly also engenders protection. But, although users have a legal property right in some of their posted material, what is the real value of this property to its owners in the social media context? And what is the value of the rights social media users waive by licensing the content to social media companies? Although social media companies make a good deal of money from helping users share their copyrightable content, they provide no economic compensation to users who post their material online. Users, therefore, are less likely to view their actions from an economic or marketplace perspective. Inalienability and personhood theories of property, such as Margaret Radin's theory of market-inalienability, explore the potential separation between market considerations and those based on social relationships and identity. These theories provide an interesting perspective from which to view the motivations of social media users who are sharing their copyrighted content online and, by entering into a license, waiving several of their rights over such content. Should these rights be so easy to waive, especially given the social and personal nature of the content at stake?

### A. *Alienability and Personhood Theories in Intellectual Property*

Theories of alienability evaluate when it should be possible to alienate a right or object from an individual and, when it is possible, the ease with which one should be able to do it.<sup>39</sup> Theories of inalienability, which would in practice prevent an individual from severing himself from a right or object, have many different meanings.<sup>40</sup> Some theories identify specific rights or objects as ones that cannot in any way be lost or extinguished, while others

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(M.D. Fla. 2010) (explaining that the unauthorized use of plaintiff's original self-portrait, initially posted online, constituted direct copyright infringement); *Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409, 410 (S.D.N.Y. 1997) (finding valid copyright in a series of ten photographs plaintiff took of himself "for his own artistic satisfaction," without plans to publicly display or commercially exploit them).

<sup>39</sup> Radin, *supra* note 11, at 1857-58 (explaining that alienability theories can be placed on a continuum based on the relationship between the market, the right or object, and the person).

<sup>40</sup> *Id.* at 1849-50 ("Sometimes inalienable means nontransferable; sometimes only nonsalable. Sometimes inalienable means nonrelinquishable by a rightholder; sometimes it refers to rights that cannot be lost at all." (footnotes omitted)).

merely prevent the right or object from being transferred.<sup>41</sup> Even when an object or right is almost universally seen as inalienable, different theories will come to different conclusions about what that inalienability means. Joel Feinberg uses the “inalienable” right to life as an example.<sup>42</sup> A “paternalist” view of the right to life characterizes it as an utterly non-relinquishable right that an individual must exercise in all circumstances; the “founding fathers” view, on the other hand, sees the right to life as a right that may not be relinquished or transferred, but one that an individual can choose to exercise at his discretion by deciding to live or die.<sup>43</sup> The “extreme antipaternalist” perspective also links inalienability with discretion by suggesting that no one can take away or alienate an individual’s utmost discretion about his right to life, even if he wants to exercise his discretion by assigning that right to another.<sup>44</sup>

Besides issues of discretion, theories of inalienability also vary according to context. Another view of inalienability, market-inalienability, allows something to be separable from an individual through personal transfer or gifting, but not through the market, suggesting that such a thing should not be commodified.<sup>45</sup> Commodification extends beyond things that can be physically bought and sold, and can occur in any transaction from the perspective of market methodology, using a monetary cost-benefit analysis.<sup>46</sup> Proponents of theories of universal commodification suggest that even personal relationships and desires can be seen as commodities and discussed in terms of market rhetoric, and should always be alienable based on those considerations.<sup>47</sup>

Market-inalienability brings an important factor to discussions of alienability because of its emphasis on personhood. Margaret Radin, in developing her theory of market-inalienability, has pointed out numerous

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<sup>41</sup> *Id.* at 1853 (“In one important set of meanings, inalienability is ascribed to an entitlement, right, or attribute that cannot be lost or extinguished. If involuntary loss is its focus, inalienable may mean nonforfeitable or noncancelable; if voluntary loss is its focus, inalienable may mean nonwaivable or nonrelinquishable.” (footnotes omitted)).

<sup>42</sup> See Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93-94 (1978) (doubting the absolute inalienability of a right to life).

<sup>43</sup> *Id.* at 120-22.

<sup>44</sup> *Id.* at 122-23 (“[N]ot only is life alienable; the discretionary right to life is alienable too.”).

<sup>45</sup> Radin, *supra* note 11, at 1854-55 (“[M]arket-inalienability does not render something inseparable from the person, but rather specifies that market trading may not be used as a social mechanism of separation.”).

<sup>46</sup> *Id.* at 1859 (“Broadly construed, commodification includes not only actual buying and selling, but also market rhetoric, the practice of thinking about interactions as if they were sale transactions, and market methodology, the use of monetary cost-benefit analysis to judge these interactions.”).

<sup>47</sup> *Id.* at 1860-62 (“[U]niversal commodification means that everything people need or desire . . . is conceived of as a commodity. ‘Everything’ includes not only those things usually considered goods, but also personal attributes, relationships, and states of affairs.”).

problems with using the discourse of universal commodification: not only does universal commodification ignore the non-monetizable, subjective costs that vary from person to person, but it also categorizes many personal attributes and experiences as fungible objects that can be detached from a person without affecting that person's sense of self and personal integrity.<sup>48</sup> Radin's theory of market-inalienability focuses on the non-commodification of those objects integral to personhood.<sup>49</sup> Personhood, she suggests, has three main aspects: freedom, rooted in "the power to choose for oneself"; identity, the ability to have a "unique" and "continuous" self; and contextuality, the necessity of creating identity through interaction with objects and other people in the world.<sup>50</sup> In Radin's view, allowing objects integral to personhood, such as friendship or politics, to be detachable and monetizable "is to do violence to our deepest understanding of what it is to be human."<sup>51</sup> How, then, do we decide what to make market-inalienable? Radin espouses a domino theory, advocating for a case-by-case approach which assesses the importance of keeping a specific good available "in a noncommodified form" and considers whether or not allowing market transactions would make the possibility of a noncommodified version impossible.<sup>52</sup> However, even if domino theory does recommend full market-inalienability in some situations, Radin believes that, given the inequalities of the world, pragmatism sometimes requires that partial market-inalienability becomes a solution when the ideal of total non-commodification would cause too much harm.<sup>53</sup>

Given the varying theories of inalienability—those that forbid all waiver and transfer, those that prevent transfer but allow discretion with regard to exercising a right, and those involving considerations of market-alienability, partial market-inalienability, and universal commodification—it is no surprise

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<sup>48</sup> *Id.* at 1876-81 (cautioning that over-commodification may lead to serious errors of cost-benefit analysis in sensitive cases, injuries to personhood, and transformation of "the texture of the human world").

<sup>49</sup> *Id.* at 1903 ("Market inalienability is grounded in noncommodification of things important to personhood.").

<sup>50</sup> *Id.* at 1904.

<sup>51</sup> *Id.* at 1906.

<sup>52</sup> *Id.* at 1914.

<sup>53</sup> *Id.* at 1915-19 ("In light of the desperation of poverty, a prophylactic market-inalienability may amount merely to an added burden on would-be sellers; under some circumstances we may judge it, nevertheless, to be our best available alternative."). An example of incomplete market-inalienability is the regulation of residential tenancies, including termination restrictions, habitability requirements, and antidiscrimination policies, which Radin suggests should be viewed as protecting a person's personal and continuous connection to his home against decisions based on arbitrary reasons. *Id.* at 1919-20 ("Regulation can be seen as attempting to ensure that tenants are not forced to move from their homes for ideological, discriminatory, or arbitrary reasons, or by a sudden rise in market prices, and to ensure that rental housing is decent to live in and a decent place for family life.").

that some scholars suggest that alienability exists on a spectrum, and that “the choice between alienability and inalienability need not be a binary all-or-nothing decision.”<sup>54</sup> For example, Dagan and Fisher present a theory of alienability that creates several different “alienability mechanisms,” including waiver, gift, barter, and sale, and evaluates whether each mechanism should be restricted or unrestricted for a particular right or object by taking into account normative considerations such as “efficiency, distribution, autonomy, and democratic participation.”<sup>55</sup> How does one determine where on the spectrum a particular right or object should fall? Dagan and Fisher suggest that “on balance, efficiency and autonomy tend to gravitate towards alienability whereas distribution, personhood, and democratic participation lean towards inalienability.”<sup>56</sup>

While Dagan and Fisher provide an extremely comprehensive framework of alienability, this Note chooses to focus on the personhood factor, primarily because of its strong presence in the social media context, which will be explored below. Here, Margaret Radin’s work on market-inalienability and personhood provides an important insight: when a right or object is more personal, there is more at stake when waiver occurs and a greater possibility of damage to an individual’s integrity.<sup>57</sup> While full or partial market-inalienability may go too far in certain circumstances, personal content or rights should be more difficult to alienate because of the potential consequences to the individual and society.<sup>58</sup>

Alienability and personhood theories have traditionally played a small role in the American intellectual property regime, although they provide a critical foundation for much of Central European copyright law, which contains more

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<sup>54</sup> Tsilly Dagan & Talia Fisher, *Rights for Sale*, 96 MINN. L. REV. 90, 106 (2011).

<sup>55</sup> *Id.* at 94, 106-10.

<sup>56</sup> *Id.* at 105-06. One example of this framework in action is the unrestricted sale of pollution quotas. The sale of these quotas should remain unrestricted because market ideology provides for the most efficient use of such quotas, while their sale has little effect on personhood because it does not involve interpersonal relations, play a role in personal identity, or lead to problematic commodification. *See id.* at 110-11. Another example is the idea that the right to file suit should be unrestricted as a gift that can be transferred to members of the public at large, but only for no consideration. *See id.* at 116-17. Allowing individuals to transfer the right to sue to more sophisticated parties, or to consolidate them, would make for a more efficient and accurate legal system. *Id.* However, the personal, expressive nature of claims raises personhood concerns if the right to sue is transferred for consideration, which commodifies the experience of the individual. *Id.*

<sup>57</sup> Radin, *supra* note 11, at 1905-06 (“Universal commodification undermines personal identity by conceiving of personal attributes, relationships, and philosophical and moral commitments as monetizable and alienable from the self. A better view of personhood should understand many kinds of particulars . . . as integral to the self. To understand any of these as monetizable or completely detachable from the person . . . is to do violence to our deepest understanding of what it is to be human.”).

<sup>58</sup> Many thanks to Professor Wendy Gordon, who provided this insight.

restrictions on the alienability of copyrighted works.<sup>59</sup> American copyright law treats works of authorship as independent from the author, while European doctrine concentrates on the personal relationship between the author and the work.<sup>60</sup> The German monist school of copyright theory draws from the writings of Kant to advocate a conception of intellectual property that emphasizes creative works as internally rather than externally motivated, encouraging commercial exploitation only to the extent that it allows the author to disseminate his ideas and enhance his reputation for the benefit of his personality.<sup>61</sup> The French dualist theory, inspired by Hegel, draws a distinction between the external work that can be commercially exploited and the personal rights of the author to decide when and how the work is shared with the public.<sup>62</sup> Because the theoretical underpinnings of European copyright law place an emphasis on the personal nature of the work, the law contains a substantial amount of restrictions on the alienability of copyrighted works, incorporating personhood theories into the spectrum of alienability.<sup>63</sup>

American copyright theory, on the other hand, is shaped by economic incentives rather than theories of personhood, and it places few limits on the alienability of works.<sup>64</sup> Utilitarian theories concentrate on the social benefit of disseminating creative works to the public through publication and distribution, emphasizing the importance of economic incentives for the creation of works and measuring the value of such works by their price on the market.<sup>65</sup> Lockean theory, another classic foundation of the American intellectual property regime, also looks to the sale of works on the market as the principle avenue through which the author can reap the benefit of his labor.<sup>66</sup> These theories rest on the idea that copyrighted works should be just as

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<sup>59</sup> Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 349-50 (1993) (“American law has traditionally treated authors’ creations as fully marketable goods. . . . In contrast, Continental doctrine regards literary and artistic works as inalienable extensions of the author’s personality.”).

<sup>60</sup> *Id.* at 363.

<sup>61</sup> *Id.* at 378-79 (explaining that monists believe that an author’s rights over his own work are “akin to the dominion which one has over a part of oneself”).

<sup>62</sup> *Id.* at 380-81 (observing that the author’s rights over his work “are anchored in the author’s general rights of personality, which survive the market exploitation of the ‘immaterial good’ produced by the author”).

<sup>63</sup> *Id.* at 364 (“Continental copyright law, on the other hand, has long contained pervasive restrictions on alienability. These restrictions reflect the idea that transfer of the author’s exploitation rights does not disengage him from his work.”).

<sup>64</sup> *See id.* at 365 (“The United States Supreme Court has stated repeatedly that the limited ‘monopoly privileges’ vested in authors by the Copyright Act are designed to advance the public welfare by providing economic incentives for creative effort . . .”).

<sup>65</sup> *Id.* at 368-69 (“The social utility of these commodities, as well as their value to the author, is measured by the amount the public will pay for them.”).

<sup>66</sup> *Id.* at 369-70 (“The products of mental labor are property, just as are the fruits of

alienable as other commodities, and that the personal value of rights over the copyrighted content should not be taken into account. From this perspective, it is no surprise that American copyright law contains few inalienability provisions.

One of the earliest inalienability provisions in American copyright law is related to the right of termination: when an author grants another individual a license or the exclusive rights to his work, the author and his or her statutory heirs retain a right to terminate the grant after a certain period of time, and that right cannot be waived.<sup>67</sup> While termination has an undercurrent of moral rights, as it restores control of copyright to an original author or his or her heirs, it was premised on the economic incentive of giving the author a better bargaining position when another party wanted to exploit his or her work.<sup>68</sup> More prominent inalienability provisions, which prevent the transfer of the moral rights established for authors of visual art, entered the American copyright regime with the passage of the Visual Artists Rights Act of 1990 (“VARA”).<sup>69</sup> However, unlike the termination right, the moral rights provided in VARA can be waived with the author’s consent.<sup>70</sup> Although the passage of VARA has given personality theory some weak footholds in American jurisprudence, traditional American property doctrine is opposed to the imposition of further moral rights.<sup>71</sup>

#### B. *Personhood, Alienability, and Social Media*

Given the stark contrast between traditional American copyright theory and other alienability or personality-based theories, where does social media content fit? Does it even matter which theory we use? James Grimmelman suggests that the key to shaping technology law is to understand the social dynamics of why and how consumers use a particular technology, so that policy is better tailored to produce changes in behavior.<sup>72</sup> When it comes to copyright and social media, the intersection between technology and

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physical labor.”).

<sup>67</sup> See 17 U.S.C. §§ 203, 304(c), (d) (2012).

<sup>68</sup> Netanel, *supra* note 59, at 364 (“The sole purpose of this provision was to improve the bargaining position of the author so that he could achieve a greater return on the exploitation of his work.”).

<sup>69</sup> 17 U.S.C. § 106A (2012).

<sup>70</sup> *Id.* § 106A(e) (“The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author.”).

<sup>71</sup> Netanel, *supra* note 59, at 352 (“Predictably, this tentative move towards Europeanization has given rise to considerable opposition among United States copyright traditionalists.”).

<sup>72</sup> James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137, 1139-40 (2009) (“What motivates Facebook users? Why do they underestimate the privacy risks? When their privacy is violated, what went wrong? Responses that don’t engage with the answers to these questions can easily make matters worse.”).

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intellectual property demands a new investigation into why users create, disseminate, and exercise their rights over their works in the way that they do. Only by understanding the incentives behind the use of social media can we develop policy to address current legal controversies.

Grimmelman suggests that social media fulfills three important social values: fostering identity through the creation of a profile, emphasizing relationships through the formation of contacts, and building community by allowing users to make a place for themselves among their peers.<sup>73</sup> The profile page, especially with regard to the choice of profile picture, allows for “impression management,” providing users with the opportunity to construct their identity by carefully controlling what others see.<sup>74</sup> Social media also allows users to create and deepen relationships by communicating and sharing information, and through the public validation of such communication and information.<sup>75</sup> Finally, social media helps the user establish a social position within a community.<sup>76</sup> The desire to compare oneself with others encourages users to add more social media contacts and to broaden their connections, and conceptions of status within the social network encourage competition based on how many contacts someone has.<sup>77</sup> From this perspective, we place content on social media to construct our identity through relationships with others and to generate status within our community.

Selfies, photographic works, and other creative content posted to social media derive their value from the same desires that drive individuals to use social media in the first place, hinting at motivations more in line with inalienability and personhood theories of intellectual property than the traditional economic incentives of American copyright law. Taking a “group selfie” by posing in pictures with friends and then publicly posting them to social media is a way of showcasing one’s social capital.<sup>78</sup> A selfie allows the user to immediately convey information to members of his social media network by displaying where he is and what he is doing in any given moment.<sup>79</sup> Because modern technology lets selfie-takers look at themselves

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<sup>73</sup> *Id.* at 1143 (“Loosely speaking, one could think of these aspects as corresponding to the first, second, and third persons: I, you, them.”).

<sup>74</sup> *Id.* at 1152.

<sup>75</sup> *Id.* at 1154-56 (describing how social media “piggyback[s] on the deeply wired human impulse to reciprocate”).

<sup>76</sup> *Id.* at 1157 (opining that the desire “to be recognized as a valued member of one’s various communities” is “simple and age-old”).

<sup>77</sup> *Id.* at 1157-59 (“My personal favorite for blatant commodification of community is the ‘Friends for Sale’ Application, which has over 2,300,000 users putting price tags on each other.”).

<sup>78</sup> See Losse, *supra* note 14 (“Facebook [is] not just a social network but a means of proving one’s social reach.”).

<sup>79</sup> See Coulthard, *supra* note 14 (“Images can be shared with thousands of other people. Its immediacy – Look where I am! Look what I’m doing! Look at what I look like! – is exciting.”).



while they are taking the photo, they can create an image that they feel best reflects themselves and manage the identity they construct on social media.<sup>80</sup> Often, social media users seek to manage their social media identities by strategically posing in the most flattering way possible.<sup>81</sup> The connection between personhood theories of intellectual property and the selfie is strengthened by the fact that such conscious posing is one of the elements that gives rise to the selfie's copyrightability. Selfies also allow for experimentation with different identities by letting users look at themselves in a new way and "try on" how others would react.<sup>82</sup>

Evaluating selfies and other social media content in light of Radin's three dimensions of personhood suggests that selfies can be a non-fungible component of an individual's personal identity, making them the kind of personal content that should be more difficult to transfer on the spectrum of alienability. Through selfies or other photographs, social media users have the freedom to choose how they want to be represented in their communities. Users construct identities with the photos, creating a continuous "profile" that they use to define themselves. Finally, social media users share this content to interact with others, commenting on each other's photos to publicly affirm relationships and events. When it comes to copyrightable content on social media, market compensation and economic incentives seem to play almost no role at all in the creation and distribution of content for the average user, although some lucky users have occasionally managed to parlay social network notoriety into professional opportunities.<sup>83</sup>

Under Radin's theory, social media content is precisely the type of object that cannot be viewed exclusively from the perspective of marketplace methodology. Because social content plays such a key role in an individual's personal development, conceiving of it solely in market rhetoric risks undervaluing subjective, deeply personal concerns that users may value more highly than any potential market price. These personal concerns place social media content on a different level of the spectrum of alienability than other commodities, because users risk more than just the possibility to monetize their content if they waive their rights over such content by accident or through coercion.

### III. THE INADEQUACY OF CURRENT REMEDIES

Given the real incentives behind sharing copyrightable content through social media and the personal consequences of waiving rights over such works, traditional American copyright jurisprudence may fail to adequately protect

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<sup>80</sup> *See id.* ("You only need this second, forward-facing camera [on your cellphone] if you want to take pictures of yourself.").

<sup>81</sup> *See supra* note 28.

<sup>82</sup> *See Coulthard, supra* note 14.

<sup>83</sup> Tina Craig, for example, "leveraged her large social-media presence . . . into a career as an accessories and clothing designer." Rosman, *supra* note 28.

users' interests in their content. Several legal avenues currently exist in which users can assert non-copyright interests in this content, and litigation has presented potential solutions in regard to legal complaints. However, pursuing litigation outside of the copyright realm can create significant challenges for social media users seeking to protect a personal or reputational interest in their content, making it difficult for these plaintiffs to vindicate their rights.

A. *Terms of Use and Contract Law*

If selfies and other forms of content posted to social media have copyright protection, contract law is the mechanism through which social media companies receive the licenses that permit them to use the content in ways that would otherwise violate the rights of the copyright owners. Courts tend to respect contracts involving copyright, holding that the Copyright Act does not preempt contracts that alter copyright-related rights and obligations among parties.<sup>84</sup> In *ProCD, Inc. v. Zeidenberg*<sup>85</sup>—a case that occurred outside of the copyright context and that involved a “shrinkwrap” license that appeared when a software program started to run—the court held that the defendant’s continued use of the product after seeing the license constituted agreement to the terms.<sup>86</sup> Within the world of copyright, the Fourth Circuit has held that a subscriber who clicks “yes” in response to an electronic terms of use agreement prior to uploading copyrighted photographs has, according to the terms, made a valid transfer in the exclusive rights to those photographs.<sup>87</sup> A simple comparison can be made to the terms of service that social media users accept when they begin using the service, which usually contain licenses for intellectual property. Thus far, courts have recognized these licenses and restricted them to their express contractual provisions, which usually limit the license to the social media company and its affiliates.<sup>88</sup> This suggests that although social media users may not have waived their rights to file claims against some parties who misuse their content, they likely have given adequate licenses to the social media companies themselves and other users on the same platform. The broad liberties taken by social media companies and their

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<sup>84</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454-55 (7th Cir. 1996) (holding that “the rules that respect private choice are not preempted by” the Copyright Act).

<sup>85</sup> 86 F.3d 1447 (7th Cir. 1996).

<sup>86</sup> *Id.* at 1452-1453 (finding that the defendant accepted the terms when he learned of the terms and “did not reject the goods”).

<sup>87</sup> *Metro. Reg’l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 722 F.3d 591, 602 (4th Cir. 2013) (“We therefore hold that an electronic agreement may effect a valid transfer of copyright interests under Section 204 of the Copyright Act.”).

<sup>88</sup> The District Court for the Southern District of New York held that a professional journalist who uploaded pictures of an earthquake in Haiti to Twitpic did not provide anyone with a license to use the photographs besides Twitter, Twitter’s partners, Twitpic, and Twitpic’s affiliates. *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 302-03 (S.D.N.Y. 2011).

affiliates within the terms of the license have not gone unnoticed. For example, the complaint in *Rodriguez v. Instagram* included a breach of contract claim because Instagram changed its Terms of Service to unilaterally expand the intellectual property license granted to the company without providing adequate notice or giving users the ability to opt out.<sup>89</sup>

Although social media users make a valid contract giving companies a license to use their copyrighted content, and thus waive their rights to make a claim based on certain uses of such content, does the existence of such a contract mean that their desires in regard to such content have been truly protected in accordance with the copyright regime? Margaret Radin suggests that these types of contracts, filled with what she calls “boilerplate” language, do not rely on the traditional contract law premise of consent by both parties.<sup>90</sup> This is often because those agreeing to the contracts are unaware that their actions constitute a legal contract, or, more likely, because they do not understand the complex legal terms to which they have agreed and are unaware of the rights they have relinquished.<sup>91</sup> Some key elements that lead to this problematic consent include information asymmetry, wherein those agreeing to the contract lack the legal training to understand the provisions; and heuristic biases, which reduce individuals’ ability to assess the risk of a particular action, such as agreeing to a boilerplate contract—especially when they have done so many times before.<sup>92</sup> Moreover, these boilerplate contracts can work to divest individuals of rights that would otherwise be guaranteed to them by law.<sup>93</sup> In the case of social media, boilerplate terms of service agreements work to limit the exclusive rights of user copyright owners to sue for misuse of their copyrighted content by providing the social media companies with extremely broad licenses, even though users may be unaware that they have such rights or that they are signing them away.

Do these social media contracts fall under Radin’s critique of boilerplate language? Radin herself believes that social media networks, in particular,

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<sup>89</sup> First Amended Complaint, *supra* note 8, at 3 (“Instagram’s New Terms breach the implied covenant of good faith and fair dealing in its Original Terms by adding new and additional covenants that go far beyond the scope and subject matter of the Original Terms.”).

<sup>90</sup> MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 19-32 (2013).

<sup>91</sup> *Id.* (writing that users cannot consent to a contract of which they are unaware, and discussing other problematic issues surrounding consent).

<sup>92</sup> *Id.* at 24-29.

<sup>93</sup> *Id.* at 137 (“[T]he mere existence of boilerplate can have the effect of negating a constitutional limitation. . . . [I]t looks as if federal courts have allowed purported contractual agreements to trump a constitutional right of due process, the right to have a reasonable opportunity to pursue one’s day in court.”). Two examples of this phenomenon include forum selection clauses, which can render litigation nearly impossible for plaintiffs of limited means, and exculpatory clauses, which might sometimes deter lawsuits even when the clause might be invalidated if challenged. *Id.* at 135-40.

have private incentives to avoid potential consumer pushback against coercive boilerplate terms because their business models require constant user participation, they need to survive in a competitive market, and their users are fairly aware of their rights.<sup>94</sup> However, Radin ignores the presence of what she terms “copycat boilerplate” within the social media industry, a situation in which certain boilerplate becomes standard practice and makes it impossible for users to exit their contracts for more advantageous terms.<sup>95</sup> In addition, other scholars suggest that social media is just as prone to issues of problematic consent as other industries. Grimmelman explains that heuristic biases are extremely prevalent in the social media context, where individuals underestimate risks because so many other users are involved in the network.<sup>96</sup> Networking effects, which make a system more valuable to users as the number of users grow, are an essential part of the social media industry, and may prevent user pushback by “locking-in” social media users who have accepted boilerplate terms of service.<sup>97</sup> These network effects are bolstered by the “stickiness” of the system, which can make it challenging to terminate a social media account, as well as the high switching costs associated with moving content from one service to another.<sup>98</sup>

Taken together, the lock-in effects of social media and the standard industry boilerplate in the terms of service suggest that social media users may be unaware that they have altered their rights and remedies under the copyright regime when they post copyrighted content to social media. Essentially, these provisions cause users to alienate their rights over their copyrighted works more easily and freely than they might choose if they understood the consequences of their waivers. Moreover, the heuristic biases of social media users demonstrate that these users are not consenting to contractual provisions after conducting the cost-benefit analysis espoused by contract law and

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<sup>94</sup> *Id.* at 190.

<sup>95</sup> *Id.* at 41-42. Most social networking terms of service include similar intellectual property clauses that grant non-exclusive, worldwide, transferable licenses. *See supra* notes 1-2 and accompanying text. In fact, the *Rodriguez v. Instagram* complaint explicitly addressed concerns that Instagram’s Terms of Service had been changed to become more like those of Facebook, which had acquired the company. First Amended Complaint, *supra* note 8, at 9-10 (“Based on the language in Instagram’s New Terms granting Defendant a ‘transferable and sub-licensable’ worldwide license in the Property, and Instagram’s December 18, 2012 press release describing advertising similar to Facebook’s Sponsored Stories, Plaintiff is informed and believes that Instagram is negotiating, and/or has executed contracts with advertisers and/or other third parties to use Plaintiff and the Class’ Property for purposes of advertising, selling, or soliciting purchases of, products, merchandise, goods or services, or otherwise has concrete and imminent plans to enter into such agreements.”).

<sup>96</sup> Grimmelman, *supra* note 72, at 1160-64 (“Most of the time, when in doubt, we do what everyone else is doing.”).

<sup>97</sup> Spencer Weber Waller, *Antitrust and Social Networking*, 90 N.C. L. REV. 1771, 1786-92 (2012).

<sup>98</sup> *Id.* at 1789-90.

traditional economic theories. Are copyright owners really consenting to a contract when they unknowingly waive some of their rights by agreeing to boilerplate social media contracts, especially if they do not know that their content has copyright protection at all? Despite these problems, the willingness of courts to enforce such copyright contracts forces users to look to other legal avenues when they want to make a claim about misuse of their copyrighted content, such as the right of publicity.

#### B. *Right of Publicity*

Some scholars have suggested that right of publicity claims may offer a potential remedy for misuse of content on social media.<sup>99</sup> The most immediate challenge for potential plaintiffs is availability: the right of publicity is a state law claim that is available in only a little over half of jurisdictions.<sup>100</sup> Moreover, attempting to disguise or vindicate a copyright claim under right of publicity law will often lead to problems of preemption, as the Copyright Act preempts state law claims over its subject matter with the sole exception of sound recordings fixed before February 15, 1972.<sup>101</sup> The Ninth Circuit has developed a two-part test for copyright preemption: a state law claim will be preempted if its subject matter falls within the subject matter of copyright and if the rights asserted under state law are the same as the exclusive rights in § 106 of the Copyright Act.<sup>102</sup> State law claims premised on less complex elements of a particular work, such as an individual's likeness<sup>103</sup> or distinctive voice,<sup>104</sup> can survive a preemption defense. However, claims based on the entire artistic work itself will likely be preempted. In *Laws v. Sony Music*

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<sup>99</sup> See Grimmelman, *supra* note 72, at 1197-98 (“[B]y sticking purchase-triggered ads in News Feeds with users’ names and pictures, Facebook turns its users into shills.”); Carmen Aguado, Note, *Facebook or Face Bank?*, 32 LOY. L.A. ENT. L. REV. 187, 213-15 (2012) (claiming that Facebook may be liable for “appropriation of name or likeness” because users’ names and likenesses are “used for the commercial benefit” of Facebook without users’ consent).

<sup>100</sup> Brian D. Wassom, *Uncertainty Squared: The Right of Publicity and Social Media*, 63 SYRACUSE L. REV. 227, 230 (2013) (“[H]ope remains that the differences between the various jurisdictions will someday narrow, and perhaps even coalesce into a single, federal right.”).

<sup>101</sup> 17 U.S.C. § 301 (2012) (“On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title.”).

<sup>102</sup> *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1137-38 (9th Cir. 2006).

<sup>103</sup> *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1004-05 (9th Cir. 2001) (holding that an advertisement using a picture of famous surfers, along with their names, was subject to a right of publicity claim and not preempted by the Copyright Act).

<sup>104</sup> *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1100 (9th Cir. 1992) (holding that a misappropriation claim based on the use of a sound-alike singer in an advertisement contained elements that were “different in kind” than a copyright claim).

*Entertainment, Inc.*,<sup>105</sup> a snippet of the plaintiff's song was used without permission in another artist's song, and the plaintiff's right of publicity claim—based on the use of her name in the promotional materials—was preempted.<sup>106</sup> In *Jules Jordan Video, Inc. v. 144942 Canada Inc.*,<sup>107</sup> an adult performer made a right of publicity claim for the use of his name and likeness when a company replicated and distributed counterfeit copies of his videos on DVD.<sup>108</sup> The court cited *Laws*, explaining that the plaintiff was really bringing a claim based on the misappropriation of his copyrighted videos and his performance within them, and that the Copyright Act therefore preempted the right of publicity claim.<sup>109</sup> *Laws* and *Jules Jordan* suggest that a social media user will likely face preemption if she tries to vindicate copyright interests through right of publicity claims in regard to videos or sound recordings posted online.<sup>110</sup>

<sup>105</sup> 448 F.3d 1134.

<sup>106</sup> *Id.* at 1142 (“[Plaintiff’s] state tort action challenges control of the artistic work itself and could hardly be more closely related to the subject matter of the Copyright Act.”).

<sup>107</sup> 617 F.3d 1146 (9th Cir. 2010).

<sup>108</sup> *Id.* at 1149-51.

<sup>109</sup> *Id.* at 1152-55 (“We reject this argument for the same reason we rejected it in *Laws*. ‘Although California law recognizes an ascertainable interest in the publicity associated with one’s voice, we think it is clear that federal copyright law preempts a claim alleging misappropriation of one’s voice when the entirety of the allegedly misappropriated vocal performance is contained within a copyrighted medium.’” (quoting *Laws*, 448 F.3d at 1141)).

<sup>110</sup> If copyright may preempt state law, what about other federal law? Some scholars have noted that right of publicity claims often encompass false endorsement claims under the Lanham Act, 15 U.S.C. §§ 1051-1141n (2012). See Wassom, *supra* note 100, at 241-42 (“Many practitioners assume that a false endorsement claim under the federal Lanham Act is the same thing as a right of publicity claim. . . . But there are important distinctions.”). Several cases have included both right of publicity and false endorsement claims in a context involving potential copyright subject matter. See, e.g., *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1011 (3d Cir. 2008) (“The [Facenda] Estate claims that the [NFL]’s use of Facenda’s voice falsely suggested that Facenda endorsed the video game, violating the federal Lanham Act. . . . The Estate also claims that the program was an unauthorized use of Facenda’s name or likeness in violation of Pennsylvania’s ‘right of publicity’ statute.”); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 999 (9th Cir. 2001) (“[Appellants] allege a violation of California’s common law and statutory prohibition against misappropriation of a person’s name and likeness for commercial purposes, a violation of the Lanham Act for confusion and deception indicating sponsorship of Abercrombie goods, and a claim for negligence and defamation.”). A celebrity’s false endorsement claim was examined in the famous *Woody Allen* case, where the court explained that there could be a violation of the Lanham Act if defendant’s advertisement created a likelihood of consumer confusion over whether plaintiff “endorsed or was otherwise involved with [defendant’s] goods and services.” 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:15 (4th ed. 2014) (quoting *Allen v. Nat’l Video, Inc.*, 610 F. Supp. 612, 627 (S.D.N.Y. 1985)). While this could very well apply to non-famous social media users, most courts look

*Fraley v. Facebook* was one case that overcame the preemption hurdle by staking a claim not on copyright subject matter, but on the use of non-copyright subject matter—likenesses. In *Fraley v. Facebook*, the plaintiffs brought a putative class action against Facebook for the use of their names and likenesses in its Sponsored Stories system, which used the names and pictures of users in paid advertisements which stated that the user had “liked” a certain page or company.<sup>111</sup> The plaintiffs’ concerns had social dimensions: they were concerned that other users would interpret their actions as endorsement of a product when they had only “liked” the page to get a discount or see a humorous video.<sup>112</sup> While no copyright existed with regard to the plaintiffs’ names, copyright likely existed in at least some of their profile photographs.<sup>113</sup> As discussed above, however, the plaintiffs would have been extremely unlikely to prevail on a copyright claim given the license they provided to Facebook in its Statement of Rights and Responsibilities, and therefore had to turn to a right of publicity claim.<sup>114</sup> *Fraley*, in particular, made a claim under California Civil Code § 3344, a statutory remedy for commercial misappropriation.<sup>115</sup> The statutory provision provided:

[a]ny person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.<sup>116</sup>

Facebook moved to dismiss the claims by arguing that plaintiffs had consented to such use by agreeing to its Terms of Service and had failed to

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at false endorsement claims under the trademark infringement prong of the Lanham Act, and therefore consider factors focusing on the strength of the “trademark”—in other words, the fame of the celebrity at issue. *See id.*; *see also* *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1400 (9th Cir. 1992) (explaining that the claim would survive summary judgment in part because “White’s ‘mark,’ or celebrity identity, is strong”). While non-celebrity social media users may attempt to pursue false endorsement claims in the future, and create more case law on the subject, the current state of the law does not make it a particularly viable option.

<sup>111</sup> *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 790-92 (N.D. Cal. 2011) (“Plaintiffs allege that Facebook unlawfully misappropriated Plaintiffs’ names, photographs, likenesses, and identities for use in paid advertisements without obtaining Plaintiffs’ consent.”).

<sup>112</sup> *Id.*

<sup>113</sup> *See supra* notes 18-34 and accompanying text (applying the elements that establish copyright protection for a selfie).

<sup>114</sup> *See Statement of Rights and Responsibilities, supra* note 2 (providing that users “grant [Facebook] a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook”).

<sup>115</sup> *Fraley*, 830 F. Supp. 2d at 803.

<sup>116</sup> *Id.* at 803-04 (quoting CAL. CIV. CODE § 3344(a) (West 2014)).

allege an injury under § 3344.<sup>117</sup> In addressing the consent element, the court found that although users had the choice to take actions that would result in the creation of a Sponsored Story, such as “liking” a particular company, nothing in the Terms of Service explicitly gave Facebook consent to use its users’ names and likenesses to disclose what services the user had utilized, and that furthermore, some of the plaintiffs had consented to the Terms of Service before the Sponsored Stories program began and were never subsequently asked to renew their consent.<sup>118</sup> In regard to injury, however, the plaintiffs faced a larger hurdle.

*Fraley* suggests two possible sources of injury on which to premise a right of publicity claim: a privacy-based reputational damage or a claim of economic misappropriation.<sup>119</sup> Misappropriation and free-riding are core concerns of the right of publicity, although claims based on misappropriation have their fair share of detractors.<sup>120</sup> In *Fraley*, and for other social media users, misappropriation claims would stem from social media companies using their likenesses for economic benefit without compensation to the users. Some scholars openly advocate for applying a personality and reputation-based approach to the right of publicity; Roberta Kwall, for example, suggests adding celebrity personas under the copyright regime and creating a cause of action based on “misappropriations or mutilations of one’s persona in situations where damage [is] to the human spirit, rather than economic harm . . . .”<sup>121</sup> A personality-based approach directly addresses the likely motivations of the *Fraley* lawsuit and the social considerations of posting one’s image on social media. K.J. Greene relates the tale of rapper Chuck D, who asserted both misappropriation and personality rationales in a right of publicity lawsuit against McKenzie River Corporation. The company used a snippet of Chuck D’s voice in an advertisement for St. Ides’s malt liquor product, despite his vocal opposition to the detrimental role of malt liquor in black communities.<sup>122</sup> Not only did McKenzie River receive an undeserved economic benefit by profiting from Chuck D’s voice without his permission, but Chuck D felt personally injured when he heard his voice being used in service of something

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<sup>117</sup> *Id.* at 804-06.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 806 (discussing that while violations of privacy have emotional components, they are primarily concerned with the economic value of what has been misappropriated).

<sup>120</sup> K.J. Greene, *Intellectual Property Expansion: The Good, the Bad, and the Right of Privacy*, 11 CHAP. L. REV. 521, 531 (2008) (explaining that “leading scholars are openly disdainful of a broad free-rider metaphor of misappropriation”).

<sup>121</sup> Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights*, 2001 U. ILL. L. REV. 151, 166; see also Greene, *supra* note 120, at 533 (“Scholars such as Justin Hughes have tied personality theory . . . to the right of publicity.”).

<sup>122</sup> Greene, *supra* note 120, at 540-41.



he morally opposed.<sup>123</sup>

How successful is right of publicity law in addressing reputational concerns versus those regarding misappropriation? Samantha Barbas suggests that although the right of publicity may have originated as a remedy to reputation-based harms, with strong roots in privacy law, changing attitudes towards commercial consumption have transitioned the doctrine into one focused almost exclusively on economic misappropriation.<sup>124</sup> In 1903, public outrage arose in the aftermath of *Roberson v. Rochester Folding Box Co.*,<sup>125</sup> in which the New York Supreme Court rejected a right of privacy claim for a young woman whose image had been used on an advertisement for flour without her knowledge or consent.<sup>126</sup> As Barbas explains, the public outcry emphasized the prevailing attitude at the time that “commercial exploitation of a woman’s image was a debasement of her virtue that affronted her reputation, honor, and sense of self,” and the New York state legislature subsequently passed its first right of publicity law in response, drawing inspiration from privacy law.<sup>127</sup>

However, as Americans began to embrace modern consumer culture, claims based on reputational harm began to diminish, and claims began to emphasize economic compensation for the use of an individual’s likeness.<sup>128</sup> Courts started to recognize that pecuniary motives were often the impetus for bringing suit and began to dismiss claims primarily alleging dignitary or emotional harm.<sup>129</sup> The result was a transition to modern right of publicity law: some states merely “merged dignity and property interests,” and others “formally retained appropriation as a separate dignity or privacy based tort, but sharply limited the possibility of recovery for emotional distress or dignitary and reputational harm.”<sup>130</sup> Ultimately, Barbas concludes:

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<sup>123</sup> *Id.* (“It is doubtful . . . that Chuck D[] actually lost record sales as a result of the advertisement, yet the overall harm to [his] reputation and dignity was significant.”).

<sup>124</sup> See Samantha Barbas, *From Privacy to Publicity: The Tort of Appropriation in the Age of Mass Consumption*, 61 BUFF. L. REV. 1119, 1119-21 (2013) (stating that between the early 1900s and 1950s, “[s]everal states formally reworked the tort [of appropriation] so that it no longer principally compensated dignitary and emotional injuries, but rather economic harms . . .”).

<sup>125</sup> 64 N.E. 442 (N.Y. 1902).

<sup>126</sup> Barbas, *supra* note 124, at 1160-63 (explaining that the court declined to “recognize a right of privacy” due to concerns of how it would affect the publishing industry).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 1177-78 (explaining that plaintiffs no longer brought claims “to avoid being made a part of commerce against one’s will. . . [but] to protect one’s ability to publicize oneself and to extract maximum value from the commercial use of one’s image and identity”).

<sup>129</sup> *Id.* at 1179-81 (“In many privacy cases in which a celebrity alleged dignitary or emotional harms, courts dismissed such allegations out of hand. . . Courts also recognized, in cases involving both celebrities and noncelebrities, that in many instances pecuniary injuries were the real motive for bringing suit.”).

<sup>130</sup> *Id.* at 1185.

The appropriation-publicity tort is now oriented largely around economic interests, especially, though not exclusively, the interests of those who make a profession out of commodifying their images. Emotional, reputational, or dignitary harms are rarely, if at all, the basis of recovery. . . . As a practical matter, there is probably no going back to the turn-of-the-century, exclusively dignitary model. The social commitments that supported it no longer exist.<sup>131</sup>

Do Barbas's claims play out in *Fraleley*, and, if so, what does that mean for social media users? In *Fraleley*, the court explained that California right of publicity law was primarily a tool to prevent the commercial use of, and protect the economic value of, names and likenesses, and maintained that plaintiffs had to plead economic rather than reputational injury.<sup>132</sup> However, the court rejected Facebook's argument that because the plaintiffs were not celebrities they had to assert preexisting value to their names and likenesses; for support, the court pointed to statements by Facebook executives claiming that the names and likenesses of individuals had great advertising value to their friends on social networking sites.<sup>133</sup> Ultimately, the court found plaintiffs' arguments—that targeted marketing on social media had increased the marketing value of a non-famous individual's name and likeness—"sufficiently compelling to withstand dismissal."<sup>134</sup> After the parties settled, however, Judge Seeborg explained that plaintiffs would have faced severe burdens in proving injury sufficient for constitutional standing and in proving lack of consent, at least at later stages in the litigation.<sup>135</sup> These problems reflect the same concerns present in the relatively free alienability of copyrighted content on social media by undervaluing the individual's personal stakes in the content and failing to strictly scrutinize the level of consent

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<sup>131</sup> *Id.* at 1187-89.

<sup>132</sup> *Fraleley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 806 (N.D. Cal. 2011) ("California law has long recognized that 'where the identity appropriated has a commercial value, the injury may be largely, or even wholly, of an economic or material nature.'" (quoting *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 (1974))).

<sup>133</sup> *Id.* at 806, 808 (stating that "the Court finds nothing in the text of the statute or in case law that supports Defendant's interpretation of § 3344 as requiring a plaintiff pleading economic injury to provide proof of preexisting commercial value . . . to survive a motion to dismiss," and quoting Facebook CEO Mark Zuckerberg as saying, "[n]othing influences people more than a recommendation from a trusted friend").

<sup>134</sup> *Id.* at 809.

<sup>135</sup> *Fraleley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 942 (N.D. Cal. 2013) (order granting motion for final approval of settlement agreement) ("[P]laintiffs faced a substantial burden in showing they were injured by the Sponsored Stories. While plaintiffs pleaded a sufficient basis for injury to support constitutional standing, it is far from clear that they could ever have shown they were actually harmed in any meaningful way. . . . Plaintiffs also faced a substantial hurdle in proving a lack of consent, either express or implied. While those issues could not be adjudicated in Facebook's favor at the pleading stage, there was a significant risk that at some later juncture, plaintiffs would be found to have consented . . .").

present in the waiver.

Given the result in *Fraleley*, does the right of publicity adequately protect the interests of social media users who dislike the liberties that social media companies have taken with copyrighted images of themselves? A large hurdle exists due to the economic underpinnings and misappropriation rationale of current right of publicity law. The modern rationale for the right of publicity is the same economic incentive theory that drives much of American intellectual property policy.<sup>136</sup> From this economic perspective, giving a celebrity total control over the use and monetization of his or her persona incentivizes him or her to create a persona that is more memorable and valuable to society; and the Supreme Court has confirmed this rationale for the right of publicity.<sup>137</sup> An over-emphasis on this rationale, however, could spell trouble for the average social media user seeking an avenue to take action against social media companies for the use of his or her likeness.

A critical component of Judge Seeborg's approval of the settlement agreement in *Fraleley* was his concern about the plaintiffs' ability to show that they were "actually harmed in any meaningful way."<sup>138</sup> At most, he suggested, the plaintiffs were basing their arguments on the fact that Facebook benefitted economically from its use of their names and photographs.<sup>139</sup> None of the opinions during the course of *Fraleley* emphasize the potential reputational harm or personal injury felt by the plaintiffs, supporting Barbas's assertions about the goals of modern right of publicity law.<sup>140</sup> But, when one considers the motivations of social media users in posting images of themselves online—which are primarily based on reputational and social benefits<sup>141</sup>—*Fraleley* reads as an attempt to redress injuries other than those that are purely economic and easier to value in terms of market rhetoric. The economic underpinnings of right of publicity law provide a clumsy tool to redress these injuries, and the difficulty in making a successful case under it shines through in Judge Seeborg's approval of the *Fraleley* settlement.

Unfortunately, even well-founded misappropriation claims may be difficult for the average non-celebrity to pursue. In almost all jurisdictions, right of publicity plaintiffs must show not only that their likenesses have been

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<sup>136</sup> Greene, *supra* note 120, at 528-29 ("Incentive theory comprises the main theoretical basis for copyright and patent protection.").

<sup>137</sup> *Id.* at 528 & n.65 (citing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977), which held that the right of publicity "provides an economic incentive").

<sup>138</sup> *Fraleley*, 966 F. Supp. 2d at 942.

<sup>139</sup> *Id.* ("[P]laintiffs have repeatedly relied primarily on their argument that Facebook benefitted, rather than that class members were harmed.").

<sup>140</sup> See *supra* notes 124-131 and accompanying text (discussing the transformation of right of publicity-type claims based on reputational or dignitary injury to claims based primarily on economic injury).

<sup>141</sup> See *supra* Part II.B (describing the incentives behind posting selfies to social media websites).

reproduced, but also that those likenesses have commercial value.<sup>142</sup> Indeed, it is this particular argument that the plaintiffs in *Fraleley* try to establish with their contention that individuals on Facebook are “celebrities—to their friends.”<sup>143</sup> While the District Court seemed willing to entertain this argument—at least enough to move the case past dismissal—Judge Seeborg’s statements in his opinion approving the settlement suggest that the plaintiffs would have faced substantial obstacles in proving that such economic opportunity, and therefore actual economic harm to the plaintiffs, existed.<sup>144</sup>

Scholars have argued that although the right of publicity has no formal requirement of celebrity to bring a claim, it acts as a “right without a remedy” for the non-famous.<sup>145</sup> Greene explains that even if a non-celebrity is successful on his claims, “damages—due to lack of commercial value to his identity—would [be] negligible, if cognizable at all,” because “[a] non-celebrity’s harms [would] be wholly non-economic in nature, given the lack of any marketable value for image.”<sup>146</sup> Brian Wassom further clarifies that in “the Restatement (Third) the general common law measurement of damages for right of publicity misappropriation is ‘the pecuniary loss to the other caused by the appropriation or for the actor’s own pecuniary gain resulting from the appropriation, whichever is greater,’” and that this standard, and the availability of other forms of relief, make damage awards in the context of social media right of publicity claims extremely unpredictable.<sup>147</sup>

Thus, even if users were to prevail on a misappropriation claim, the courts would have difficulty calculating damages. Again, the economic focus of the right of publicity, and the difficulty in weighing non-market considerations, would severely limit the remedy available to social media users who wish to seek recourse for the unauthorized use of their photographs.

As Greene notes, the difficulty for a non-celebrity plaintiff to prove any significant amount of damages in a right of publicity case effectively guides her toward seeking injunctive relief, which remains available when “harms cannot be quantified”<sup>148</sup> or toward statutory damages, which are available in some states.<sup>149</sup> Statutory damages for right of publicity claims are usually fairly low, which may prevent potential litigants from pursuing claims when

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<sup>142</sup> Wassom, *supra* note 100, at 232.

<sup>143</sup> *Fraleley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 809 (N.D. Cal. 2011).

<sup>144</sup> *See supra* note 135 and accompanying text.

<sup>145</sup> Greene, *supra* note 120, at 536-38, 538 n.133 (quoting *Doe v. Cnty. of Ctr. Pa.*, 242 F.3d 437, 456 (3d Cir. 2001) (discussing the hardships faced by non-celebrities who wish to bring claims under California’s right of publicity statute or the common law right of publicity).

<sup>146</sup> *Id.* at 538.

<sup>147</sup> Wassom, *supra* note 100, at 242-44 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49(1) (1995)).

<sup>148</sup> Greene, *supra* note 120, at 538.

<sup>149</sup> Wassom, *supra* note 100, at 243.

the statutory damages are insufficient to cover the immense costs of litigation.<sup>150</sup> On the other hand, plaintiffs who seek an injunctive remedy may face several unique disadvantages, such as potential policy considerations against an injunction under specific circumstances.<sup>151</sup> Plaintiffs choosing right of publicity claims over other intellectual property claims, such as copyright or trademark claims, forfeit some of the presumptions that favor injunctions in those contexts.<sup>152</sup> Despite these hurdles, injunctive relief was critical to the plaintiffs in *Fraley*. In negotiating the settlement, the plaintiffs paid substantially less attention to the amount of the settlement payment, suggesting that the “primary purpose of their action from the outset[] [was] to compel Facebook to change its practices prospectively . . . .”<sup>153</sup> Although the plaintiffs were ultimately successful in this regard, Judge Seeborg took the opportunity to suggest that, ironically, the resolution of the lawsuit through settlement may have led to more optimal results for the plaintiffs:

[T]he proffered settlement provides some benefits to the plaintiff class that would be difficult, if not impossible, ever to obtain through a contested judgment, even if plaintiffs were eventually to prevail on the merits. While a court might have some discretion to craft specific injunctive provisions, the settlement process has resulted in Facebook agreeing to implement various tools and procedures that address plaintiffs’ concerns in a more nuanced manner than would likely emerge from any victory at trial.<sup>154</sup>

While the particular plan approved by the court will be more thoroughly explored in the next section, it reveals the challenges that courts face in crafting injunctive remedies when damages are unavailable to plaintiffs and when interests are harder to quantify under a cost-benefit analysis. Plaintiffs who bring right of publicity claims to vindicate primarily reputational interests therefore face a difficult conundrum: they may either seek low compensatory or statutory damages, which fail to remedy their actual grievance, or take a risk by seeking injunctive relief, which will implicate policy concerns and may be

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<sup>150</sup> *Id.* A few states, including Florida and Indiana, will pay statutory damages up to or including the plaintiff’s litigation expenses, or provide attorneys’ fees to the prevailing party. *Id.*

<sup>151</sup> Greene, *supra* note 120, at 538 (discussing the “doctrinal conundrum” that can occur with injunctive relief, and that “injunctive relief in the expressive context of film carries severe free speech dangers”).

<sup>152</sup> *Id.* (contrasting copyright and trademark claims with right of publicity claims where “courts rarely grant preliminary injunctions, and there is no automatic presumption of harm as in the copyright and trademark context”).

<sup>153</sup> *Fraley v. Facebook, Inc.*, No. C 11-1726 RS, 2012 WL 5838198 at \*2 (N.D. Cal. Aug. 17, 2012) (order denying motion for preliminary approval of settlement agreement, without prejudice).

<sup>154</sup> *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 945 (N.D. Cal. 2013) (order granting motion for final approval of settlement agreement).

poorly implemented by courts.

Taken all together, does the right of publicity offer copyright owners a feasible option for asserting claims over content they post on social media? At the outset, the right of publicity seems promising, allowing the average selfie-taker to make a misappropriation-based claim based on the use of his persona without his consent. However, plaintiffs seeking to vindicate their copyright interests have to move past initial preemption claims, dramatically limiting the types of works and actions that will make it to the courts.<sup>155</sup> As seen in *Fraley*, the right of publicity hinges on economic incentives, relegating personal or reputational interests to a bygone era. As a result, right of publicity plaintiffs struggle to find both a cause of action and potential damages when there is no clear economic value to the content being misappropriated. If a copyright owner seeks to protect the social value of his content through a right of publicity claim, he faces an uphill battle in proving any actual harm. Furthermore, should he achieve victory on the merits, the courts may be unwilling to grant injunctive relief without the traditional presumptions that encourage such relief in the copyright context, and will struggle with calculating more than meager pecuniary damages.

Some scholars have already recognized the personhood interests that create these challenges in right of publicity jurisprudence and have applied theories of alienability. Jennifer Rothman explains that, contrary to conventional opinion, the right of publicity already has several restrictions on alienability, including limitations on assignability and the refusal of some jurisdictions to treat the right as marital property that can be divided during divorce proceedings or as a postmortem right that can be bequeathed to another upon an individual's death.<sup>156</sup> While Rothman has few concerns about the commodification of the right of publicity, she concedes that "publicity law needs to consider noneconomic concerns, as well as economic ones, and that the law should be structured in such a way as to support both those who seek to commercialize their identities and those who do not."<sup>157</sup> In conjunction with the potential burden a fully alienable right of publicity places on fundamental rights,<sup>158</sup> and its inefficiency under a law-and-economics analysis,<sup>159</sup> the personhood element of the right of publicity combines with other existing rationales to require a more nuanced approach that places limits on the alienability of publicity

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<sup>155</sup> See *supra* notes 101-110 and accompanying text.

<sup>156</sup> Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 190-204 (2012).

<sup>157</sup> *Id.* at 220.

<sup>158</sup> *Id.* at 209-17 ("If alienated, the right of publicity can be used to severely restrict the liberty, free speech, and associational rights of identity-holders.").

<sup>159</sup> *Id.* at 220-24 (discussing instances in which the alienability of publicity rights is inefficient; for example, when "identity-holders are not the holders of their own publicity rights, then they will have less of an incentive to maintain or enhance the value of their identity").

rights.<sup>160</sup>

While this approach provides several important insights, and generally reflects the theories put forth in this Note, a narrow approach with regard to the right of publicity would ignore the other types of highly personal copyrighted content posted on social media.<sup>161</sup> At best, changing right of publicity law to make it more hospitable to social media users would address a broader problem—specifically, the emphasis on the economic value of an object in ignorance of and at the expense of its personal, social, and reputational value—within only a single subsection of the American intellectual property regime. Such an approach would incorporate some of the right rationales—such as emphasizing the personal value of the content and limiting alienability—but would do so only within a single area, thus allowing users to easily waive their rights in other areas of intellectual property with little scrutiny.

### C. *Opt-Out Plans*

Whether claims based on the use of social media content occur in the right of publicity context or under the copyright regime, courts will need to consider potential injunctive remedies that balance the rights of social media users with the rights of the social media providers that must be granted some legal authorization to use and disseminate content in order to function. The *Fraley* settlement agreement supplies one potential injunctive remedy that courts may use, in right of publicity cases or otherwise, to address the concerns of social media users whose content is being used by social media services in ways that they do not want. The agreement required Facebook “to provide greater disclosure and transparency as to when and how member’s [sic] names and profile pictures are re-published, and to give them additional control over these events.”<sup>162</sup> Currently, the “opt out” setting allows users to change their privacy settings so that other users are unable to see their actions paired with advertising messages,<sup>163</sup> although this is not the default setting and Facebook

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<sup>160</sup> *Id.* at 224 (“Alienating the right of publicity burdens fundamental rights, commodifies (sometimes forcibly) personhood, and may be inefficient under a law-and-economics analysis. . . . [M]y claim is that, to the extent we endorse limits of alienability under one of these paradigms (or a combination thereof), there are reasons to think the right of publicity should be in a category of entitlements that have some limits placed on their alienability.”).

<sup>161</sup> While this Note uses the selfie as an example of copyrightable content commonly posted on social media without knowledge of its legal protection, other copyrightable content, such as home videos of family members or pictures of a person’s home, is equally evocative of personhood theory and does not contain the author’s likeness.

<sup>162</sup> *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 944 (N.D. Cal. 2013) (order granting motion for final approval of settlement agreement).

<sup>163</sup> In a somewhat unsurprising development, neither Facebook’s “About Advertising on Facebook” page nor its “Advertising and Facebook Content” pages explicitly state that a user can opt out or tell the user how to do so. See *About Advertising on Facebook*, FACEBOOK (last visited Aug. 15, 2014), <https://www.facebook.com/about/ads/#control>, archived at <http://perma.cc/79XD-D3FT> (“Your profile picture or name may be paired with

retains permission to

use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you. If you have selected a specific audience for your content or information, we will respect your choice when we use it.<sup>164</sup>

As the *Fraleley* settlement opinion acknowledged, critics of the agreement did not believe that the opt-out system did enough to end “concern[s] of misappropriation, or lack of consent, or commercial exploitation,” although Judge Seeborg reemphasized that because “Facebook has offered defenses, which . . . stand as potentially significant impediments to recovery,” the settlement agreement had to strike a balance that may not have seemed optimal to either side of the controversy.<sup>165</sup>

Do such opt-out plans adequately protect social media users from misappropriation of their copyrighted content and allow for valid waivers of their rights? A recent case, focusing on the controversy surrounding the Google Books project, gave one federal judge the opportunity to consider a settlement agreement including an opt-out plan.<sup>166</sup> The controversy arose when Google began to digitally copy books into an online database without authorization from the copyright owners. Google was attempting to make “snippets” of the books available online so that people could identify the books by searching for portions of the text.<sup>167</sup> After numerous negotiations, the

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an ad to show your activity on Facebook (ex: if you follow the Starbucks Page). Keep in mind that your name and profile picture will only appear to the people who have permission to view your Page likes.”); *Advertising and Facebook Content*, FACEBOOK (last visited Aug. 15, 2014), <https://www.facebook.com/about/privacy/advertising>, archived at <http://perma.cc/QUG3-SYNB> (“In addition to delivering relevant ads, Facebook sometimes pairs ads with social context, meaning stories about social actions that you or your friends have taken. For example, an ad for a sushi restaurant’s Facebook Page may be paired with a News Feed story that one of your friends likes that Page.”). For a user to opt out, he or she must find the “Ads” section of his or her privacy settings, without any guidance, and change the settings under the vague “Ads and Friends” sub-heading.

<sup>164</sup> *Statement of Rights and Responsibilities*, *supra* note 2.

<sup>165</sup> *Fraleley*, 966 F. Supp. 2d at 945.

<sup>166</sup> *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 686 (S.D.N.Y. 2011) (concluding that the settlement agreement was not fair, adequate, or reasonable, and stating that “many of the concerns raised in the objections would be ameliorated if the ASA were converted from an ‘opt-out’ settlement to an ‘opt-in’ settlement”). Ultimately, the case was dismissed because of Google’s successful fair use defense, i.e. the Google Book Project’s public benefit as a research tool. *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 293 (S.D.N.Y. 2013) (“Google Books provides significant public benefits. . . . It has become an invaluable research tool . . .”).

<sup>167</sup> See *Authors Guild*, 770 F. Supp. 2d at 670 (“Google users can search its ‘digital



parties presented an amended settlement agreement to Judge Chin that authorized Google to continue its use of the books, but also provided copyright owners the opportunity to exclude or remove their works from the database.<sup>168</sup> Judge Chin, however, took issue with “the notion that a court-approved settlement agreement [could] release the copyright interests of individual rights owners who have not voluntarily consented to transfer,” suggesting that “if copyright owners sit back and do nothing, they lose their rights.”<sup>169</sup> Such comments reveal a strong argument that opt-out plans are antithetical to normal copyright rules because they transform inaction into a presumption of consent.<sup>170</sup>

Disagreeing with Google’s contention that opting out would sufficiently protect the rights of the owners, Judge Chin provided the following three rebuttals:

First, many authors of unclaimed works undoubtedly share similar concerns [about their work being used without permission]. Second, it is incongruous with the purpose of the copyright laws to place the onus on copyright owners to come forward to protect their rights when Google copied their works without first seeking their permission. Third, there are likely to be many authors—including those whose works will not be scanned by Google until some years in the future—who will simply not know to come forward.<sup>171</sup>

Judge Chin’s arguments against an opt-out plan also seem applicable in the context of copyrighted material, such as selfies posted through social media, and suggests that such content should not be so easily alienated. *Fraleley* demonstrated that a great deal of social media users had concerns about how their content was being used online, and how the terms of service required them to change their privacy settings to opt out of the system.<sup>172</sup> Many users may not even know that they have the option to opt out of Sponsored Stories unless they happen to notice the applicable privacy setting. Moreover, Judge Chin’s third concern echoes Radin’s arguments regarding the issue of consent in boilerplate contracts, suggesting that inaction or lack of knowledge should not provide a sufficient basis for a copyright owner to alter her rights.<sup>173</sup> From this perspective, opt-out plans fail to protect the interests of social media users

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library’ and view excerpts—‘snippets’—from books in its digital collection.”).

<sup>168</sup> *Id.* at 671-72.

<sup>169</sup> *Id.* at 681.

<sup>170</sup> Mira T. Sundara Rajan, *Creative Commons: America’s Moral Rights?*, 21 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 905, 955 (2011) (“From a legal point of view . . . the ‘opt-out’ provisions could not have been more radical. Google was effectively reversing the normal operation of copyright rules. . . . [T]he failure to object would lead to a presumption of consent.”).

<sup>171</sup> *Authors Guild*, 770 F. Supp. 2d at 682 (footnote omitted).

<sup>172</sup> See *supra* notes 162-164 and accompanying text.

<sup>173</sup> See *supra* note 90 and accompanying text.

to the same extent as boilerplate terms of service<sup>174</sup> and also fail to remedy the complaints of users worried about how companies will use their copyrighted content going forward.

#### D. *Privacy Law*

Individuals might consider using privacy laws to bring a cause of action based on social media companies' misuse of copyrighted content. Because right of publicity jurisprudence has transitioned away from its initial emphasis on privacy interests, making it more difficult for plaintiffs to receive a remedy based on reputational harm, a return to privacy law might represent an attractive alternative. At first blush, privacy law is substantially more limited than most social media users would expect. Many constitutions and human rights treaties do not recognize privacy rights, and the constitutional rights that do exist usually only protect citizens against governmental and state actors, not against companies.<sup>175</sup> In addition, most privacy violations are caused by other social media users, not by social media companies themselves, who "can claim broad exemptions from contributory liability" that exist for Internet service providers.<sup>176</sup> Moreover, social media companies often compile data, which is excluded from intellectual property protections because it is factual information not owned by the user.<sup>177</sup>

There are, however, a few privacy concerns implicated by social media companies' use of copyrighted material, and several common law remedies under privacy law may be available for social media users seeking to regain control over their copyrighted material. The first common law remedy is the tort for intrusion upon seclusion. A plaintiff must prove that the defendant substantially interfered with the plaintiff's private affairs by demonstrating that the defendant intentionally interfered with "a private place or matter in which [the] plaintiff ha[d] a reasonable expectation of privacy."<sup>178</sup> Although courts have held that intrusion does not apply when photographs are taken in a public place or when the photograph is put in a forum that is not a secluded arena, such as Facebook,<sup>179</sup> individuals can still allege intrusion upon seclusion when

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<sup>174</sup> In the same way that individuals who do not understand the boilerplate terms of service are unprotected, so are individuals who are unaware of the existence of an opt-out plan.

<sup>175</sup> Lothar Determann, *Social Media Privacy: A Dozen Myths and Facts*, 2012 STAN. TECH. L. REV. 7, ¶ 2 (2012) ("[M]ost constitutions and international human rights treaties do not explicitly recognize rights to privacy. Even if you find privacy rights in constitutions . . . constitutional rights protect you directly only against governments and state actors, but not typically against companies or individual social media users." (footnote omitted)).

<sup>176</sup> *Id.* ¶ 3.

<sup>177</sup> *Id.* ¶ 6 ("Factual information is largely excluded from intellectual property law protection: copyright law protects only creative expression, not factual information.").

<sup>178</sup> Aguado, *supra* note 99, at 215.

<sup>179</sup> *Id.* at 215 n.216 (noting that "Facebook is not a secluded arena because select

the photograph is in a public arena “if the information that is intruded upon is not available to ‘public gaze.’”<sup>180</sup>

The second common law tort that may apply to copyrightable material on social media is a public disclosure tort. Individuals can be liable for public disclosure of private facts when they “(1) publicize information that is (2) private, (3) not of legitimate concern to the public, and (4) disseminate[] [the information] in a highly offensive manner.”<sup>181</sup> Some courts have applied a “limited privacy” approach to the second element of the tort, deciding that information can be disclosed to certain individuals while still retaining its otherwise private character.<sup>182</sup> Other courts, however, reject the “limited privacy” approach, suggesting that once an individual discloses a fact to a friend or acquaintance, it is no longer private as a matter of law.<sup>183</sup> How should courts navigate the public-private dichotomy when it comes to material placed on primarily public forums such as social networking sites? Building off of Lior Strahilevitz’s social networks theory of privacy,<sup>184</sup> Grimmelman suggests

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information is made public and thus is available to ‘anyone, including people off of Facebook’”).

<sup>180</sup> *Id.* at 215-16 (quoting RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977)). Aguado suggests that Facebook users could claim intrusion upon seclusion for Facebook’s use of biometric information because “the data (for example, the exact measurement between a user’s eyes) is information that is not available to public gaze.” *Id.*

<sup>181</sup> Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 928 (2005).

<sup>182</sup> In *Y.G. v. Jewish Hospital*, a Missouri court held that a couple who refused to be interviewed and tried to avoid being filmed at a party for couples undergoing in vitro fertilization did not intend to disclose the treatment within the broader community. 795 S.W.2d 488 (Mo. Ct. App. 1990) (cited in Strahilevitz, *supra* note 181, at 941-42). Using a similar rationale, another court held that a television station violated an HIV-positive man’s expectation of privacy when they failed to adequately digitize his face after he had requested that they do so, even though he had disclosed his HIV status to family members, friends, and members of his support group. Strahilevitz, *supra* note 181, at 942 (citing Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491, 493-94 (Ga. Ct. App. 1994) (finding that he had not waived his expectation of privacy, even though he had disclosed his HIV status to those close to him)).

<sup>183</sup> Strahilevitz, *supra* note 181, at 943-44. An example of this stricter approach can be seen in a case involving Consuelo Sanchez Duran, a judge who indicted drug lord Pablo Escobar and had to flee her country for the United States. When a local news station revealed her identity, the court held that there was no public disclosure of private facts because she had used her real name when shopping and dining and had told some neighbors that drug dealers had threatened her. *Id.* at 944-45 (citing Duran v. Detroit News, Inc., 504 N.W.2d 715, 718, 720 (Mich. Ct. App. 1993)).

<sup>184</sup> Strahilevitz suggests that courts can use predictive social analytics to determine whether an individual has a reasonable expectation that a piece of information shared within his social network will not be disseminated beyond its bounds. *See id.* at 970-75 (advocating for social network theory as a means for courts to evaluate causation “when the plaintiff’s injury stems from dissemination of previously private information”).

that an individual's privacy settings on social media sites might offer good evidence about the extent to which the individual intended to disclose information.<sup>185</sup> However, the problem in relying on a social media user's privacy settings to determine his intent is the same lack of knowledge that taints the reliability of an opt-out plan or consent in boilerplate contracts: many users simply do not know or understand how social media privacy settings work.<sup>186</sup>

Plaintiffs bringing these two common law claims against social media companies for violations of privacy face additional challenges beyond the public-private distinction, which already presents an issue for both types of claims. Similar to right of publicity cases, individuals must prove an injury-in-fact sufficient to create standing and address potential consent arguments arising from social media companies' privacy policies.<sup>187</sup> Moreover, one must remember the following distinction between an intellectual property claim and a privacy claim: any potential privacy law claim involving the distribution of intellectual property is not based on the dissemination of the intellectual property itself, which is governed by copyright law, but rather on the disclosure of information that the intellectual property communicates. Returning to the facts of *Fraley*, the use of a social media user's copyrighted likeness in an advertisement would not create a privacy claim if the photograph did not reveal any particular information about the individual.<sup>188</sup> Even if the photograph did reveal information about the individual, courts might struggle to quantify the injury that revealing that information caused before even reaching the question of whether the information was truly private. In regard to Facebook's collection of biometrics data from copyrighted images, the sensitivity of biometrics information might be sufficient to cause some type of compensable injury, and potential plaintiffs could argue that consent to

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<sup>185</sup> Grimmelman, *supra* note 72, at 1196-97 (stating that privacy settings are "good evidence of how the plaintiff thought about the information at issue, and of how broadly it was known and knowable before the defendant spread it around").

<sup>186</sup> *Id.* at 1185-86 ("Surveys show that many [Facebook] users either don't care about or don't understand how Facebook's software-based privacy settings work."). For example, despite Facebook's extremely comprehensive privacy settings, a U.K. Office of Communications study found that almost half of social media users kept the default privacy settings. OFFICE OF COMMUNICATIONS, SOCIAL NETWORKING: A QUANTITATIVE AND QUALITATIVE RESEARCH REPORT INTO ATTITUDES, BEHAVIOURS, AND USE 8 (2008), available at [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/02\\_04\\_08\\_ofcom.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/02_04_08_ofcom.pdf), archived at <http://perma.cc/WF8N-XX7Y> (stating that "41% of children aged 8-17," and "44% of adults who had a current profile" kept the default privacy setting).

<sup>187</sup> Aguado, *supra* note 99, at 217 ("First, in order to have standing there must be an injury-in-fact. . . . Second, when users upload their photographs to Facebook, they consent to Facebook's privacy policy." (footnotes omitted)).

<sup>188</sup> The potential privacy claim in *Fraley* would not involve the use of the copyrighted materials, but rather the disclosure of the fact that the Facebook users "liked" a certain page or company.

Facebook's privacy policy may not cover facial recognition software.<sup>189</sup> However, plaintiffs asserting claims against other social media services for other types of violations would have to marshal different arguments against the obstacles of standing and consent.

One final common law tort claim that may be available to social media users, and that fares better in terms of recognizing the personal injuries inherent in such misuse, is "false light." False light is often compared to defamation—but while defamation protects an individual's reputation by condemning "false and defamatory" statements, false light focuses on issues of privacy and mental distress by offering a cause of action against statements that are "highly offensive to a reasonable person."<sup>190</sup> Although the Restatement (Second) of Torts requires that a plaintiff prove actual malice—"that the defendant 'had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed'"—the Supreme Court has only applied this standard to cases involving matters of public interest, and has declined to consider whether the standard should apply to other false light cases as well.<sup>191</sup> Finally, the plaintiff must prove that "the defendant has given publicity to a matter that places the plaintiff before the public in a false light."<sup>192</sup> This last element provides the greatest hurdle for social media users. Although the definition of "publicity" is unclear, the Restatement (Second) of Torts states that publicity means "that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."<sup>193</sup> This widespread publicity requirement will likely spell doom for the majority of social media users seeking to bring false light claims because their content will rarely be publicized in such a manner.

Even when the rare social media user can meet the publicity requirement necessary to establish a false light claim, the claim may not always be available. Thirty-one states accept false light as a viable cause of action, but ten states specifically reject it, and the remaining states either fail to address the tort specifically or refuse to explicitly reject or accept it.<sup>194</sup> Many scholars

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<sup>189</sup> See Aguado, *supra* note 99, at 217-22 (explaining that biometric data is more sensitive than other types of information that have been the subject of prior, unsuccessful lawsuits, and that the user agreement "with regard to Facebook's acquisition of biometric data is unconscionable and its terms should be unenforceable").

<sup>190</sup> Sandra F. Chance & Christina M. Locke, *When Even the Truth Isn't Good Enough: Judicial Inconsistency in False Light Cases Threatens Free Speech*, 9 FIRST AMEND. L. REV. 546, 548 (2011) (quoting RESTATEMENT (SECOND) OF TORTS § 652E (1977)).

<sup>191</sup> *Id.* at 549 (quoting RESTATEMENT (SECOND) OF TORTS §652E (1977)).

<sup>192</sup> Bryan R. Lasswell, Note, *In Defense of False Light: Why False Light Must Remain a Viable Cause of Action*, 34 S. TEX. L. REV. 149, 164 (1993).

<sup>193</sup> *Id.* at 165 (quoting *Moore v. Big Picture Co.*, 828 F.2d 270, 273 (5th Cir. 1987) (citing RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977))).

<sup>194</sup> Chance and Locke, *supra* note 190, at 557-60 ("Thirty-one states have accepted false

have openly critiqued false light, arguing that the tort's overlap with defamation provides an overly broad remedy and has a chilling effect on free speech.<sup>195</sup> The Florida Supreme Court relied on these rationales in emphatically rejecting the doctrine of false light in *Jews for Jesus, Inc. v. Rapp*.<sup>196</sup> Even some jurisdictions that have embraced false light have conceded that the doctrine might pose First Amendment concerns if unlimited, and thus require an "actual malice" standard to be applied in all cases.<sup>197</sup> Because the future of false light remains uncertain, the tort provides social media users with an increasingly shaky ground for relief.

In all, a privacy law claim would provide an extremely indirect route to a remedy for misuse of copyrighted material on social media. Users would have to concentrate their claims on the information revealed by the copyrighted work, adding an extra step to the inquiry that might complicate questions of potential damages. This approach bars claims where the copyrighted material discloses no information itself, even though the material is used in a context that might nonetheless damage an individual's reputation or sense of identity. Moreover, users seeking to bring privacy claims against social media services would have to confront potential consent arguments involving acceptance of the privacy policies in the terms of service, which, as discussed above, would likely be enforceable even if the users did not understand or know about the provisions. Finally, the public nature of social media requires users to fight an uphill battle to show that they had any reasonable expectation of privacy in the information disclosed by the copyrighted work. However, jurisdictions that take a "limited privacy" approach may be more amenable to the argument that users with specialized privacy settings only intend to disclose information to certain individuals. Yet, despite the public nature of social media, misuse of content will rarely create sufficient publicity for a false light claim, even if false light is available in the jurisdiction. Although privacy law may seem like a promising avenue through which a social media user can recover for misuse of his copyrighted content, the challenges a user faces in mounting a claim suggest that a more efficient approach might be to focus on the initial waiver of the copyright that led to personal damage against the user.

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light as a viable cause of action. . . . Ten states have specifically rejected false light. . . . Five of the remaining states . . . do not specifically address the tort. . . . [F]our states . . . specifically decline to either reject or recognize false light." (citations omitted).

<sup>195</sup> *Id.* at 552-54.

<sup>196</sup> *Id.* at 561 (citing *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1100 (Fla. 2008)).

<sup>197</sup> *Id.* at 565-67 (citing *Meyerkord v. Zipatoni Co.*, 276 S.W.3d 319, 325 (Mo. Ct. App. 2008)) ("The *Meyerkord* court held that First Amendment concerns could be assuaged by requiring proof of actual malice for all cases . . ."). In *Meyerkord*, a claimant was able to meet the actual malice standard in the realm of social media. The plaintiff's previous employer listed him as the registrant for a fake marketing blog, and the failed marketing campaign became embroiled in controversy. *Meyerkord*, 276 S.W.3d at 321. The average social media user has substantially less interaction with the social media company that misuses her content, and may not meet this standard as easily.

## IV. A POTENTIAL SOLUTION—ALIENABILITY LIMITATIONS ON SOCIAL MEDIA COPYRIGHT

Although social media users post vast amounts of copyrighted content online each day, the contracts they form with social media companies greatly limit their right to control how the companies use their content. Opt-out plans may restore some control to the users, but it is debatable whether such plans comport with traditional copyright norms or whether most users will have the knowledge to take advantage of them. While the right of publicity may provide a legal avenue for users to address some complaints, its emphasis on economic theories over personhood and moral rights theories, as well as potential issues of consent, will greatly limit plaintiffs' chances of success and the remedies they might receive. Similar problems in proving damages also exist for privacy law claims, which involve difficult questions about the "privacy" of any information shared on social media. How, then, can social media users protect their copyright interests once they post content to social media, especially when they may not know they have those interests in the first place?

As explored above, social media companies have broad discretion in how they use the copyrighted content of their users because of the broad licensing agreements users enter into when they agree to the terms of service. The most obvious way to restore the users' rights is to hold aspects of those contracts unenforceable. Courts may void contracts for unconscionability when one party lacks meaningful choice and the terms are unreasonably favorable to another party.<sup>198</sup> Procedural unconscionability, the absence of meaningful choice, could be applicable to boilerplate contracts involving problematic consent, though each case is highly factual.<sup>199</sup> Alternatively, a court could void such a contract on the grounds of public policy, though courts tend to be conservative in invoking that doctrine, and any potential preemption arguments were greatly weakened by *ProCD* and its progeny.<sup>200</sup> Radin, however, points out that because these doctrines are discretionary, unpredictable, and operate on a case-by-case basis, it would be challenging for courts to invalidate boilerplate language on a broad scale, especially because such a tactic would require numerous individuals to become aware of the boilerplate and subsequently bring a lawsuit.<sup>201</sup>

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<sup>198</sup> RADIN, *supra* note 90, at 124 ("Courts have often defined unconscionability as 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)).

<sup>199</sup> *Id.* at 124-26.

<sup>200</sup> *Id.* at 128 ("[C]ourts [can] declare a contract void because it undermines public policy. . . . [M]ost courts today are conservative in using that power."); *see also supra* note 84 and accompanying text.

<sup>201</sup> RADIN, *supra* note 90, at 128-30, 144 ("Application of the doctrine . . . is a process of relentless case-by-case adjudication, with many discretionary judgment calls . . . . [O]utcomes are extremely unpredictable. . . . [The doctrine] is not . . . well suited to

On the other hand, Radin does not think it completely beyond the realm of possibility that courts could decide that certain types of clauses are prima facie unconscionable or against public policy.<sup>202</sup> Radin provides a few parameters to consider when making these decisions: the nature of the right the contract waives, the quality of consent, and the extent to which the boilerplate has been disseminated among the public—including the number of people subject to the restrictions and the market factors that may prevent them from leaving the contract.<sup>203</sup> Focus should lie on the importance of the rights lost along with the quality of consent.<sup>204</sup> In particular, Radin proposes that when a right should be recognized as fully inalienable or market-inalienable, a contract giving up that right should not be enforced.<sup>205</sup> Although some rights may not be fully market-inalienable, courts may want to apply higher scrutiny and some level of partial market-inalienability when the right appears important and there are serious issues of consent.<sup>206</sup>

This Note provides a variation on Radin's suggestions by utilizing Dagan and Fisher's concept of non-binary alienability to focus on a different level of the spectrum of alienability, rather than full or partial market-inalienability.<sup>207</sup> Essentially, this Note argues that courts should apply higher levels of scrutiny to contracts that waive rights over more personal copyright content, even though it might be desirable to allow for the content's full alienability in the first place. Courts have occasionally taken this approach to the waiver of other, more personal rights. In the realm of medical exculpatory clauses, courts require more obvious waivers and will usually fail to enforce small print hidden within lines of text.<sup>208</sup> These requirements are generally rooted in concerns that patients may not understand the intricacies of medical malpractice, and therefore will be unable to understand the significant personal and bodily consequences of waiver.<sup>209</sup> The personal nature of medical treatment and the significance of waiving medical treatment rights also play a role in judicial enforcement of advance directives, legal documents that allow a

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evaluating and limiting large-scale boilerplate rights deletion schemes. Although thousands . . . of people may be subject to such a boilerplate scheme, only a few will bring suit challenging it . . .").

<sup>202</sup> *Id.* at 145.

<sup>203</sup> *Id.* at 154-82.

<sup>204</sup> *Id.* at 247.

<sup>205</sup> *Id.* at 181.

<sup>206</sup> *Id.* at 164-65, 178 ("[W]here consent appears problematic, that uncertainty could influence a court to implement partial market-inalienability (stricter scrutiny) . . .").

<sup>207</sup> See *supra* notes 54-58 and accompanying text.

<sup>208</sup> Scott J. Burnham, *Are You Free to Contract Away Your Right to Bring a Negligence Claim?*, 89 CHI.-KENT L. REV. 379, 382 (2014) ("In the context of the doctor/patient exculpatory clause . . . '[w]aivers . . . must state precisely what is being waived. Most important, courts are usually unwilling to enforce waivers that are hidden in small print in long contracts.'").

<sup>209</sup> *Id.*



person to choose what types of treatment will be performed if he or she becomes incapacitated.<sup>210</sup> Advance directives must meet a high standard of informed consent, which must “be based on adequate information about the benefits of medical treatment, the available alternatives, and the risks involved.”<sup>211</sup> If medical providers provide treatment without obtaining such informed consent, they may be held liable for battery.<sup>212</sup> In the realm of family law, courts have also been reluctant to allow simple waiver of the highly personal rights that a mother has over her biological child. States that allow surrogacy contracts often have strict requirements for enforceability, such as requiring that the contract allow the surrogate mother to make decisions regarding the pregnancy, and sometimes forbidding economic compensation to the surrogate mother.<sup>213</sup>

Taking inspiration from Radin as well as from Dagan and Fisher, courts could recognize the personal nature of the rights at stake in intellectual property social media licenses and treat these contracts with greater scrutiny. Certain provisions of the blanket intellectual property licenses in social media terms of service may serve as suitable candidates for broader judicial rules declaring them unconscionable because the waiver of rights does not meet an adequate level of knowing, voluntary consent. Social media content is unique in the copyright world because it comports better with personhood and alienability theories than with traditional economic rationales.<sup>214</sup> From this perspective, the nature of the right given up in the social media context is fundamentally different from the right given up in the context of a more traditional intellectual property contract, and more difficult to quantify in terms of market rhetoric. Moreover, issues of consent are also heightened in the social media context because of the presence of boilerplate, as well as market factors and heuristic biases that make users less likely to escape unfavorable terms. Finally, even if one focuses solely on posts of copyrightable selfies, the number of copyright owners who limit their rights by posting content on social media is incredible.

To be sure, copyright on social media cannot be fully market-inalienable; the companies must have some license to reproduce and distribute the content

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<sup>210</sup> Nick Anderson, Comment, *Dr. Jekyll's Waiver of Mr. Hyde's Right to Refuse Medical Treatment: Washington's New Law Authorizing Mental Health Care Advance Directives Needs Additional Protections*, 78 WASH. L. REV. 795, 797-99 (2003) (“An advance directive is a legal document that declares a patient’s wishes about medical treatment to be provided should the patient become incompetent or unable to communicate.”).

<sup>211</sup> *Id.* at 799.

<sup>212</sup> *Id.*

<sup>213</sup> Amanda Mechell Holliday, Comment, *Who's Your Daddy (and Mommy)? Creating Certainty for Texas Couples Entering into Surrogacy Contracts*, 34 TEX. TECH L. REV. 1101, 1112-15 (2003) (explaining that Florida’s statute requires that the surrogacy contract “allow the surrogate mother to make decisions regarding the pregnancy,” and that Florida, Nevada, and Virginia forbid compensation of the surrogate).

<sup>214</sup> *See supra* Part II.

in order to provide their services. But if these contracts are more carefully scrutinized, it might be appropriate to hold certain key provisions prima facie unconscionable: those allowing the license to be transferable and sub-licensable, and those that allow the company to maintain its license after the original poster has deleted his account if he has previously shared the content with others who have not deleted that content.<sup>215</sup> The provisions allowing the license to be transferable and sub-licensable provided an intellectual property defense for advertisers' use of content in the *Fraleley* and *Rodriguez* controversies.

Holding these types of licenses unconscionable might give plaintiffs like those in *Fraleley* and *Rodriguez* the opportunity to pursue copyright claims instead of right of publicity claims or possibly privacy claims. In addition, both provisions greatly limit the copyright owner's rights—including reproduction, distribution, display, and others—by allowing the social media company both to transfer those rights to other corporations and to exercise those rights after the owner himself has attempted to remove his content from the network.

By applying a higher level of scrutiny and holding that copyright owners cannot provide transferable licenses through boilerplate social media contracts, courts would restore control to copyright owners and provide a mechanism through which the owners could severely limit and legally contest misuse of their content. In addition, after such rules were in place, stricter scrutiny of the alienation of such rights could act as a mechanism to protect users who were unaware of their rights in the first place by changing the industry standard terms of service to something more favorable.

#### CONCLUSION

In late 2013, scandal arose when an Internet user stumbled across a Facebook advertisement for a Canadian dating website featuring the photograph of Rehtaeh Parsons, a seventeen-year-old girl who committed suicide after pornographic pictures of her alleged sexual assault were distributed among her classmates online.<sup>216</sup> Many wondered how the photograph, an innocent selfie taken before the teenager's death, had found its way into the advertisement. Facebook declared it a gross violation of its advertising policies.<sup>217</sup>

Yet every day, social media users post vast amounts of content that is likely protected under copyright law, such as the selfie, without any awareness of the legal ramifications of their actions. Indeed, these licenses likely represent the greatest mass waiver of intellectual property rights in history. However, the

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<sup>215</sup> For an example of these standard provisions, see *Statement of Rights and Responsibilities*, *supra* note 2.

<sup>216</sup> Michael Bolen, *Rehtaeh Parsons Photos Show Up in Facebook Dating Site Ads*, HUFFINGTON POST CAN. (Sept. 17, 2013), [http://www.huffingtonpost.ca/2013/09/17/rehtaeh-parsons-facebook-dating-ad\\_n\\_3943375.html](http://www.huffingtonpost.ca/2013/09/17/rehtaeh-parsons-facebook-dating-ad_n_3943375.html), archived at <http://perma.cc/3QZ8-KVT6>.

<sup>217</sup> *Id.*

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users waiving these rights are not incentivized to create and disseminate this content out of economic benefit, but rather do so to shape their own sense of identity, to connect with others, and to build their reputations. When social media companies or other users take advantage of these waivers and misuse content, deeply personal interests suffer the consequences. In this sense, the legal protection of copyright law provides little protection at all. The American copyright regime recognizes entirely different interests than those of the average social media user by focusing on economic incentives and allowing rights over such content to be easily and freely alienable. Should these differing interests be protected and, if so, what legal mechanisms are available to protect them?

This Note has examined how the social and personal interests that motivate creators of copyrighted content can be difficult to understand in terms of traditional economic incentive and marketplace rhetoric. Grimmelman describes Facebook and social media culture as “users voluntarily sharing information with each other for diverse reasons, both personal and social. They don’t use intellectual property to control Wall posts, they don’t buy and sell their social capital (except in jest), and they don’t organize themselves hierarchically.”<sup>218</sup> Grimmelman makes an accurate point about the motivations of social media users (though this Note argues that users might take more advantage of intellectual property law if they were not allowed to waive their rights so easily). These social interests are difficult to measure and better comport with theories of personhood, making copyrighted content on social media a fairly unique phenomenon in the field of intellectual property, and requiring a different level of alienability.

When owners of this content unknowingly enter into licensing agreements with social media companies through the terms of service, they waive their rights to control the content that they would have otherwise maintained under copyright law. Although certain controversies like *Fraley* and *Rodriguez* made their way into the courts, plaintiffs have struggled to fit these legal complaints into the appropriate intellectual property paradigm. While the right of publicity may be able to provide relief for misuse of specific types of content, such as the selfie, its emphasis on economic damage limits plaintiffs’ odds of both success and recovery. Furthermore, opt-out plans might be won in settlement or as injunctive relief, but they do little to protect those who are unaware of the plan’s existence, or to provide control over non-advertising-related misuses of the same content. Although a plaintiff could bring a privacy law claim, he or she would face substantial hurdles in recovery.

This Note has returned to the crux of the issue—the initial waiver of intellectual property rights—and suggests legal mechanisms to protect users’ interests. If courts consider the personal nature of social media copyright content and employ stricter judicial scrutiny of the licenses that social media companies receive for content posted through their services, rights over such

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<sup>218</sup> Grimmelman, *supra* note 72, at 1188 (footnote omitted).

content will be harder to alienate. Social media users will retain greater control over their works to prevent damage to their reputational or personal interests, while maintaining the option of entering into licenses for economic exploitation of their works with greater awareness and the ability to demand better terms.