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Tyler W. Hartney

University of Minnesota Law School

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Note

Likeness Used as Bait in Catfishing: How Can Hidden Victims of Catfishing *Reel* in Relief?

Tyler Hartney*

I. INTRODUCTION

A stranger spotted Chia Colarossi and called out her name to no response.¹ She acted like she had never met him before because *she hadn't*.² Her name is actually Ellie Flynn and her photographs were used by someone “catfishing” this stranger.³ Catfishing is “[t]he phenomenon of internet predators that fabricate online identities and entire social circles to trick people into emotional/romantic relationships (over a long period of time).”⁴ This young man had claimed that he had spoken with “Chia” every night for the past two months after meeting on a social networking site and he had fallen in love with her.⁵ Every post that Flynn uploaded to any of her various social media accounts was then simultaneously posted by the catfishing profile that had stolen her appearance and used it to masquerade and create phony relationships with other victims

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1. Ellie Flynn, *Someone's Been Using My Facebook Photos to 'Catfish' People for Nearly a Decade*, VICE (Jan. 21, 2015, 6:00 AM), https://www.vice.com/en_us/article/someones-been-using-my-identity-to-catfish-people-for-nearly-ten-years-930.

2. *Id.*

3. *Id.*

4. *Catfishing*, URBAN DICTIONARY (Feb. 1, 2013), <https://www.urbandictionary.com/define.php?term=Catfishing>.

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

online.⁶ Strangely, it wasn't the first time something like this had happened to Flynn;⁷ she had encountered several people who believe they had met her through a deceptive social media profile.⁸ She would then constantly have to explain the situation and prove her real identity.⁹

Motivating forces of the people that catfish has been a mainstream focus so much so that discovering the legitimacy of an unverified online relationship is the plot of a popular MTV Series.¹⁰ While the show explores how the scams affect the victim in the fraudulent relationship, popular culture often overlooks the other victim of these scams: those whose photographs are used in connection with the faux social media accounts. Some individuals, like Flynn, have nearly sixty fake profiles that use their photographs spanning across the various social media platforms: Facebook, Instagram, Twitter, and a plethora of dating sites.¹¹ These scammers can be very dedicated in their craft, reposting photographs from the social media account of the person whose likeness they're using.¹² This misappropriation of one's photograph seems to be an invasive maneuver into one's privacy. With the massive expansion of the availability of technology and the statistically incredible usage of social media in the United States, the laws have failed to evolve with the technology and it is time for this to change.

A case on point is currently being argued in front of a California state-level court.¹³ In the complaint, Matt McCarthy alleges that Josh Duggar obtained a picture of McCarthy,¹⁴ via Google,¹⁵ and created an account on a matchmaking site, Ashley

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Catfish: The TV Show*, MTV, <https://www.mtv.com/shows/catfish-the-tv-show> (last visited Jan. 21, 2017).

11. *See* Flynn, *supra* note 1.

12. *Id.*

13. Complaint for Damages, *McCarthy v. Duggar*, No. BC 628874 (Cal. Super. filed Aug. 4, 2016), 2016 WL 4158036.

14. Plaintiff is a disc jockey and bartender in Los Angeles, California. *Id.*

15. The defendant, Josh Duggar, is a famous television personality and right-wing political activist. Duggar's character was severely damaged when news broke that he had molested five underage girls as a teenager. The media covered this extensively and highlighted the hypocrisy of Duggar having advocated for family causes and sexual purity. *Id.*

Madison,¹⁶ fraudulently displaying this photo as the owner of the profile.¹⁷ Ashley Madison fell victim to a cyber hack that led to exposure of the profiles and personal information of all of its users, including Duggar.¹⁸ Because Duggar had catfished on Ashley Madison using McCarthy's photos, McCarthy's career and reputation as a disc jockey was severely tarnished as he began to be harassed due to his connection to Duggar's account.¹⁹

The Plaintiff made allegations that the Defendant violated California's misappropriation of likeness statute.²⁰ The California Superior Court will determine whether or not the use of another's photograph in connection with a fraudulent social media account in order to solicit more interest or attraction in the profile is an existing cause of action under this statute.²¹ The law of California is comparatively more gratuitous to plaintiffs than that of other states.²² No state's statute provides a clear or unambiguous cause of action for plaintiffs injured in this type of event.²³

State laws differing to the extent that they currently do creates a hectic national picture of judicial outcomes in similar cases that face the entire nation.²⁴ This lack of uniformity in the right of publicity statutes creates a significant challenge for more than just similarly-situated plaintiffs in all types of right of publicity cases. The expansion of technology and national advertisements²⁵ simultaneously creates legal hurdles for companies attempting to advertise to a nationwide audience

16. Ashley Madison is a website dedicated to facilitating extramarital affairs. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* McCarthy began to receive messages referring to him as "Josh Duggar," "Duggar's Boy Toy," and "DJ Duggar."

20. *Id.*; see CAL. CIV. CODE § 3344(a) (2016) (providing that the Defendant must knowingly use the Plaintiff's photograph or likeness, without consent, "for purposes of advertising or selling . . . goods or services").

21. The outcome of *McCarthy v. Duggar* is practically irrelevant for the purposes of this note; the point of detailing it is to illuminate a prime example of the occurrence and effects of this type of scam.

22. See generally CAL. CIV. CODE § 3344 (2016); OHIO REV. CODE ANN. § 2741.02 (2016); OKLA. STAT. tit. 12 § 1449 (2016); 9 R.I. GEN. LAWS §1-28 (2012).

23. *Id.*

24. Compare *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446 (S.D.N.Y. 2008), with *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992).

25. Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMM. LAW 14 (2011).

because they will have to work around a variety of more or less favorable laws.²⁶ These variations in state law have created a “race to the bottom” where certain states will codify rights of publicity that lead to forum shopping.²⁷ Some of these laws have looming constitutional concerns linked to the restrictions on speech that are inherently tied to one’s right of publicity.²⁸

This note will argue for the creation of a uniform act codifying the right of publicity and misappropriation of likeness in a manner that incorporates anti-catfishing provisions that provide a civil cause of action for acts of online impersonation. The intent of this proposal is to clean up the state-by-state discrepancies of these rights and evolve the law to keep pace with somewhat recent technological advances. First, this note will provide background information on catfishing, the right of publicity, and other similar legal actions and crimes regarding internet impersonation and the legislative differences among the states. Next, this note will provide an overview of the argument in legal academia that the right of publicity should be eradicated. Third, this note will examine imminent constitutional concerns with the cause of action. Further, this note will explain how this cause of action does not already exist under similar laws. Finally, this note will propose a solution that would effectively provide a remedy for the hidden victims of catfishing while addressing the shortcomings of other possible alternatives.

II. BACKGROUND

This section of the note will provide a substantial amount of background information essential to understanding the foundation of the proposed solution. First, this section of the note will define catfishing. Next, it will address the statutory and common law right of publicity and misappropriation of likeness, including the differences in philosophy between the two concepts and public policy justifications. This section will then enumerate a significant list of similar causes of action and crimes to ascertain that public policy has exhibited that the proposed solution would be favored. Further, this section will discuss constitutional protections of freedom of speech and the tests

26. *Id.* at 16.

27. *Id.*

28. *Id.* at 15–17.

courts employ to preserve these protections in the realm of the right of publicity. To conclude this section, this note will discuss the foundational cases of this right that have defined the right in polar opposite manners, the modern legislative differences that create an immense lack of uniformity amongst the states, and why the social media sites have no incentive to take care of this issue on their own.

A. WHAT IS CATFISHING?

The faux email from a Nigerian Prince that needs money to be released from prison and requests your bank account information is one of the earliest versions of Internet fraud. Over time, this type of fraudulent activity occurring online has developed into these so-called “catfishing” scams. As defined in the introduction, catfishing is “[t]he phenomenon of internet predators that fabricate online identities and entire social circles to trick people into emotional/romantic relationships (over a long period of time).”²⁹ Or, as the MTV show based on investigating potential real life examples of this pandemic would define the term, “to pretend to be someone you’re not online by posting false information, such as someone else’s pictures, on social media sites usually with the intention of getting someone to fall in love with you.”³⁰ In 2008, only twenty-four percent of the United States population used social media; in 2016, that number soared to a whopping seventy-eight percent.³¹ With the increased use of social media, the opportunities for the creation and use of fake profiles have expanded. Reports have found that one in ten profiles on certain social media and matchmaking sites are fake.³² These scams have become such a common part of popular culture that MTV has aired multiple seasons of the show investigating these, but the investigations tend not to go in-depth on the person whose photo was used.³³ These phony

29. *See Catfishing*, *supra* note 4.

30. KARIE EATON, *BENEATH THE SURFACE: UNMASKING THE REAL YOU AND LIKING WHAT YOU SEE* (2015).

31. *Percentage of U.S. Population with a Social Media Profile from 2008 to 2017*, STATISTA, <https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/> (last visited Jan. 21, 2017).

32. Christina Farr, *Online Daters, Be Warned! 1 in 10 Profiles Are Scams, Report Reveals*, VENTUREBEAT (Oct. 30, 2012, 10:18 AM), <https://www.venturebeat.com/2012/10/30/online-dating-scam/>.

33. *See generally* MTV, *supra* note 10.

online profiles frequently appropriate the use of another individual's photograph as the profile picture and this image is broadcasted to the world in connection to the actions if/when the scam has been discovered.³⁴ In cases like McCarthy's and Flynn's, being the hidden victim can have potentially unrecoverable and disastrous impacts.³⁵

B. LEGAL FRAMEWORK

The right of publicity has historically stemmed from concepts relating to the invasion of privacy.³⁶ Developments in this area of law have followed changes in business, urbanization, and technological and cultural advancements.³⁷ These advancements in society, even in 1890, made gossip a trade of the press and could make invasions of privacy potentially more damaging to an individual—through mental pain and suffering—than any physical injury.³⁸ While there is a common law right of publicity, approximately half of the states in the United States have codified a version of this cause of action including the concept of misappropriation of likeness.³⁹ These statutes can vary greatly.⁴⁰

While the legal doctrines are often codified together and are conceptually similar, there exists a difference between the right of publicity and misappropriation of likeness.⁴¹ The right of publicity is provided with the aim to protect an individual's—usually a celebrity's—control over the commercial use of his or her persona.⁴² The misappropriation of likeness tort aims to protect an individual's interest in privacy.⁴³ As discussed above,

34. Complaint for Damages, *McCarthy v. Duggar*, No. BC 628874 (Cal. Super. filed Aug. 4, 2016), 2016 WL 4158036.

35. *Resources for Victims*, Cal. Dep't of Justice (last visited Aug. 29, 2017), <https://oag.ca.gov/cyberexploitation/victims>.

36. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

37. *Id.* at 195.

38. *Id.* at 196.

39. See generally CAL. CIV. CODE § 3344 (2016); OHIO REV. CODE ANN. § 2741.02 (2016); OKLA. STAT. tit. 12 § 1449 (2016); 9 R.I. GEN. LAWS §1-28 (2012).

40. See discussion *infra* Section II.D.

41. See Kathryn Riley, *Misappropriation of Name or Likeness Versus Invasion of Right of Publicity*, 12 J. CONTEMP. LEGAL ISSUES 587, 587–88 (2001).

42. *Id.*

43. *Id.* at 587.

the historical and theoretical foundation of this right stems from privacy and commercial interests in the use of one's identity.⁴⁴ Ultimately, the goal of the right of publicity is to ensure that performers incur the profits from their work and thus provide an incentive for creativity to continue.⁴⁵ One key difference between the two claims is that the right of publicity survives the death of the individual and transfers as assignable property;⁴⁶ whereas the misappropriation of likeness terminates upon the death of the individual because mental distress does not continue.⁴⁷ Both legal concepts can apply to the phenomenon of catfishing. An individual is employing the image of another for some purpose. While the purpose of employing another individual's image is not likely to be categorized as "economic" or "commercial" in nature,⁴⁸ the catfisher would likely be seen as violating one's right to privacy and control of the use of their image.

There are multiple public policy reasons in support of the right of publicity and misappropriation of likeness.⁴⁹ The

44. *Id.*

45. See Daniel Mead, Note, *C.B.C. Distribution and Marketing, Inc., v. Major League Baseball Advanced Media, L.P.: Why Major League Baseball Struck Out and Won't Have Better Luck in Its Next Trip to the Plate*, 8 MINN. J.L. SCI. & TECH. 715, 734 (2007).

46. This depends on the state's statute.

47. See Riley, *supra* note 41, at 590.

48. Using another's image to attract more clicks on a social media profile could feasibly be seen as an "economic" gain of some sort, but this argument doesn't seem likely to prevail without a financial transaction.

49. A segment of legal scholars have debated whether the policy rationales supporting the right of publicity hold any weight. See, e.g., Lee Goldman, *Elvis is Alive, but He Shouldn't Be: The Right of Publicity Revisited*, 1992 BYU L. REV. 597 (1992). Goldman argues that these rationales are covered by other laws. The rationale that right of publicity maintains economic incentive to invest in and produce creative works to the public is the same as the underlying rationale of copyright laws. While he finds one's image is their property, Goldman disputes that businesses attempting to use a celebrity's name on a product without their consent would be subject to Lanham prohibitions for misrepresentation. Also, Goldman claims that celebrities that suffer from unauthorized advertisements can always respond with negative ads that a business would fear would negatively impact them. *But see* Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199 (2002). Rothman contests that the absolute abolition of this right would be a grave mistake and have unfavorable effects on the public and celebrities. Without this right, a company may use a celebrity's picture and publish it on the item and this would leave the celebrity with no ability to stop this or recover any financial benefits from the use of the image. Rothman claims that these rights do not conflict with copyright. Rothman disputes the need for proposed limitations that would exclude the roles or characters that actors

protection of these rights defends inherent natural proprietary rights and economic rights of the individual.⁵⁰ One's persona is seen as a natural and intangible form of property⁵¹ which would require support for the implementation and defense of this right under the theory of unjust enrichment.⁵² This legal doctrine, in the context relating to unjust enrichment, holds that the individual using another's identity without their consent to gain some sort of benefit is akin to taking a piece of valuable property when it is not one's to use.⁵³ Economic policy justifications are heavily related to the theory of natural rights and the central policy that a person should be able to manage the commercial use of his or her persona and benefit from it just as he or she might do with any other valuable property in their possession.⁵⁴ Another policy the right of publicity promotes is the incentivizing of individuals to create performances that would be of interest or entertaining to the public and enable them to reap the benefits of doing so.⁵⁵

1. Similar Causes of Action and Crimes

This section will provide background information on criminal cyberbullying statutes, civil and criminal online impersonation statutes, and civil and criminal revenge pornography statutes. These statutes have all been recently passed to address crimes relating to deceptive internet practices that often involve invasions of privacy. While some states have incorporated a civil cause of action into these statutes, most states have only codified criminal statutes. It is important to note that none of these recent developments in deceptive internet practice laws adequately address what this note's proposed solution provides for. However, these examples illustrate that public policy is in favor of protecting people's

portray in addition to excluding the use of persona and voice from the right of publicity because federal copyright preemption already covers these.

50. See generally J. Thomas McCarthy, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 2:2 (2d ed. 2007).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977).

privacy and protecting people from deceptive internet communications.

a. Cyberbullying — Criminal

Like catfishing, cyberbullying has been increasing with the use of social media.⁵⁶ Likewise, cyberbullying statutes must also be narrowly tailored and applied to protect constitutional rights.⁵⁷ These statutes focus on protecting minors from being targeted by others on the internet.⁵⁸ North Carolina’s statute even goes as far as to criminalize the act of building a fake profile or website with the intent to torment a child.⁵⁹ The designated intent, as made illegal by these statutes, is the specific intent to torment a minor or student,⁶⁰ or harass or intimidate another person.⁶¹ It has been found that anonymity tends to lead to individuals feeling more comfortable with acting outside general behavioral norms and often produces negative results.⁶² For these reasons and with expanding technology, this area of law has been updated in order to protect the public from new dangers.⁶³

b. Online Impersonation — Criminal and Civil

Several states have developed online impersonation criminal statutes that are, in effect, fairly similar to the statute that this note is proposing, but fail to protect individuals to the same extent and provide the victims with a personal cause of action or restrict the private causes of action to impersonation of an “actual person.”⁶⁴ Many state legislatures have elevated the

56. *Social Media Bullying Has Become a Serious Problem*, NOBULLYING.COM (Oct. 13, 2016), <https://nobullying.com/category/social-media-bullying-has-beome-a-serious-problem/>.

57. *See* Cyberbullying, 2 *Internet Law and Practice* § 25:30.50.

58. *See generally*, ARK. CODE ANN. § 5-71-217; LA. STAT. ANN. § 14:40.7; N.C. GEN. STAT. ANN. § 14-458.1; N.M. STAT. ANN. § 22-2-21.

59. N.C. GEN. STAT. ANN. § 14-458.1.

60. *Id.*

61. ARK. CODE ANN. § 5-71-217.

62. Issie Lapowsky, *Secret Shuts Down Because Anonymity Makes People Mean*, WIRED (Apr. 29, 2015, 6:05 PM), <https://www.wired.com/2015/04/secret-shuts-down/> (explaining that people using social media have a tendency to say more hurtful things because they do not have to consider the implications they might otherwise consider when communicating face-to-face).

63. *See* Cyberbullying, *supra* note 57.

64. *See* CAL. PENAL CODE § 528.5.

priority of cracking down on this kind of occurrence following an increase in the amount and severity of incidents.⁶⁵ While some of these statutes include the use of one's persona as sufficient basis to be charged with the crime, others simply criminalize the use of one's identity.⁶⁶ Statutes that only criminalize the use of one's identity have been interpreted to only apply to the use of the person's name or other identifying information, regardless of whether or not a photograph was used in connection with the fake social media account.⁶⁷ California, Washington, and Wyoming have civil causes of action for online impersonation but in very limited senses.⁶⁸ For each of these statutes, similar to that of the criminal statutes, the cause of action is limited to individuals whose photos *and* names are used in conjunction in order to make it such that a reasonable person might believe it to be the actual person.⁶⁹

c. Revenge Pornography — Criminal and Civil⁷⁰

Revenge pornography is “the posting online of sexually explicit photos or videos by a former partner seeking retribution.”⁷¹ In addition to intimate images, perpetrators often

65. *Catfishing: A Rise in Online Impersonation*, THE RMN AGENCY (Feb. 8, 2013), <https://www.thermnagency.com/catfishing/>.

66. *Compare* TEX. PENAL CODE ANN. § 33.07, 11 R.I. GEN. LAWS § 11-52-7.1, *and* WASH. REV. CODE ANN. § 4.24.790, *with* LA. STAT. ANN. § 14:73.10, *and* MISS. CODE ANN. § 97-45-33.

67. Colleen M. Koch, *To Catch a Catfish: A Statutory Solution for Victims of Online Impersonation*, 88 U. COLO. L. REV. 233, 257–58 (2017) (citing the Mississippi online impersonation statute to explain the statute's narrowed scope to limited to impersonating an “actual person”).

68. *See* CAL. PENAL CODE § 528.5; WASH. REV. CODE ANN. § 4.24.790; WYO. STAT. ANN. § 6-3-902.

69. *See* CAL. PENAL CODE § 528.5; WASH. REV. CODE ANN. § 4.24.790; WYO. STAT. ANN. § 6-3-902.

70. *Del Mastro v. Grimado* depicts a horrendous example of this in a legal context. *See* *Del Mastro v. Grimado*, 2005 WL 2002355 (N.J. Super. Ct. Ch. Div. 2005). Rhonda Del Mastro and Philip Grimado were engaged in a personal relationship for slightly less than a year. During this time, the couple took various sexually explicit photos of Rhonda. Following the termination of this relationship, Philip sent a Christmas card containing several of these pictures to her friends, family, neighbors, business clients and other individuals without her consent. Philip was found liable for intentional infliction of emotional distress and the tort of invasion of privacy.

71. Jonathon W. Penney, *Deleting Revenge Porn*, POLICY OPTIONS POLITIQUES (Nov. 1, 2013), <http://policyoptions.irpp.org/magazines/vive-montreal-libre/penney/>.

post identifying information to accompany the image or video such as a name, e-mail, address of residence or employment, phone numbers, or Social Security information.⁷² Most social networks have published policies permitting the victims of cyber exploitation to remove the offensive material;⁷³ however, due to section 230 of the Communications Decency Act, these websites cannot be held liable for this distribution of materials.⁷⁴ These victims have several remedies including: invasion of privacy, appropriation, false light, intentional infliction of emotional distress, negligent infliction of emotional distress, and several state statutes.⁷⁵ In these cases, intent to inflict emotional distress is very apparent.⁷⁶

2. Inhibiting Factors of the Cause of Action and Constitutional Tests

Tiger Woods filed suit against a painter who sold an original piece of art depicting Tiger's victory in the Masters.⁷⁷ The court found there to be an "inherent tension between the right of publicity and the right of freedom of expression under the First Amendment."⁷⁸ As in most matters revolving around advertisements and property, there are key First Amendment protection issues that come into play when litigating this cause

72. See *Resources for Victims*, CAL. DEP'T OF JUSTICE, <https://oag.ca.gov/cyberexploitation#modal-long> (last visited Mar. 5, 2017). These materials are usually obtained and posted online by ex-lovers or ex-spouses but may be stolen by complete strangers through hacking or theft of a cell phone or computer.

73. See *Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards#nudity> (last visited Mar. 5, 2017).

74. *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 293 (D.N.H. 2008).

75. See generally RESTATEMENT (SECOND) OF TORTS § 652A–E (AM. LAW INST. 1977).

76. See *Del Mastro v. Grimado*, 2005 WL 2002355 (N.J. Super. Ct. Ch. Div. 2005) ("Rhonda's character and propensities are not the central focus of this dispute. Rather, it is Philip's grotesque utilization of private photographs for hurtful, poisonous reasons which cannot be justified. A civilized society requires more; the failure to adhere to even minimal standards of acceptable behavior warrants the sharpest rebuke given the evil perpetrated by Philip and the knowing consequences that would flow from his dissemination. His actions command societal opprobrium and an appropriately severe monetary punishment.").

77. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 918 (6th Cir. 2003).

78. *Id.* at 931.

of action.⁷⁹ To deal with this delicate balancing act, courts have turned to three tests.⁸⁰

The copyrights-based applicable test is called the Transformative Use Test.⁸¹ Under this test, courts balance First Amendment rights and rights to publicity by determining whether or not the likeness is one of the raw materials that the original work incorporated or if the depiction of the likeness has become so transformed that the defendant has essentially created his own expression.⁸² It is critical to note that rights to publicity claims deriving from copyrightable material are often preempted by The Copyright Act.⁸³ Courts have also turned to the Predominant Use Test.⁸⁴ This test's central focus is on the commercial interest of the persona.⁸⁵ In the application of this test, the courts must determine the predominant use of the likeness.⁸⁶ If the court finds that the product primarily uses this likeness to exploit its commercial value, it must find for the plaintiff; but, if it finds that the primary use of the likeness was to make an expressive comment on or about the person, then it must protect the First Amendment freedoms of the defendant.⁸⁷ A third test that a court potentially might apply is based on the intellectual property concept of trademarks and implementation of the Lanham Act; this test is called the Rogers test.⁸⁸ In applying this test, the court must determine whether or not the

79. See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3rd Cir. 2013).

80. *Id.* at 153.

81. *Id.*

82. *Id.* at 158–68.

83. Copyright Act, 17 U.S.C. § 301 (2012).

84. See *Hart*, 717 F.3d at 153–54.

85. *Id.*

86. *Id.*

87. *Id.*; Michael D. Murray, *DIOS MIO—The KISS Principle of the Ethical Approach to Copyright and Right of Publicity Law*, 14 MINN. J.L. SCI. & TECH. 89, 135–36 (2013) (suggesting that if the use of a celebrity's name or likeness is to criticize the celebrity then it is protected and that if one is considering using the celebrity's image then, one will greatly increase the chances of protection if significant artistic modifications are made to the depiction).

88. *Hart*, 717 F.3d at 154–57. Applying this test, a college football player would not be able to recover from the use of his likeness in an NCAA football video game because the product is not unrelated to his persona. On the other hand, an actor would likely recover if his persona were used to endorse a restaurant because the two are unrelated.

right of publicity should bar the use of one's likeness based on if the likeness is completely unrelated to the product.⁸⁹

C. JUDICIAL HISTORY

1. Foundational Cases

It is critical to have a foundational understanding of the right of publicity, court interpretations, and policy reasons behind the cause of action to understand how they might apply in cases of catfishing. The foundational case that coined the phrase "right of publicity," *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*,⁹⁰ began the era of interpreting the right of publicity as one of economic and commercial value as opposed to the damages of emotional distress.⁹¹

One very important case in obtaining this foundation is *Midler v. Ford Motor Co.*⁹² In interpreting the California publicity statute, the Court found that Ford had not used Midler's likeness because that referred solely to the use of her image.⁹³ However, the Court did find that Ford had committed a tortious misappropriation of her likeness under the common law.⁹⁴ This case judiciously illustrates and executes the policy that individuals possess a natural right to their persona and

89. *Id.* at 154–55.

90. *See Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 868 (2d Cir. 1953) ("We think that, in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture This right might be called a 'right of publicity.'"). This right was made for individuals who make money through public exposure of their likeness and would thus feel financially deprived if they lost the right to profit off of granting rights for advertisements and other depictions.

91. *Vick & Jassy, supra* note 25 (citing *Haelan Labs., Inc.*, 202 F.2d 868).

92. *See Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). Bette Midler was a professional singer and Ford used a "sound alike" singer to sing one of Midler's songs in a commercial. Ford did have authorization to use the song from the holder of the copyright. Because Midler did not contest this issue of the use of the song, the court did not have to acknowledge the preemption of copyright law.

93. *Id.* at 463.

94. *Id.* Interestingly, the Court seemingly found that the damages were practically implicit stating that the company would not have used an imitation of her identifiable and distinct vocal style if not for a commercial advantage or profit.

others may not commercially benefit from its use without consent.⁹⁵

Another foundational case is *White v. Samsung*.⁹⁶ The Court found that the California publicity statute did not apply citing to the *Midler* opinion narrowing the use of the word “likeness” to exclude robotic caricatures of White.⁹⁷ However, the Court found that the common law right of publicity was not as narrowly confined to “likeness” but also incorporated the general term “identity” which could include this identifiable imitation.⁹⁸

Not all courts have chosen to follow the logic of the *White* decision. The United States District Court for the Southern District of New York interpreted the right in *Burck v. Mars, Inc.*⁹⁹ This case had very similar facts to *White*.¹⁰⁰ Both included artistic renditions of a celebrity character.¹⁰¹ Mars employed the parody defense, stating that the commercial was an artistic expression where the M&M characters mimicked, humorously, key landmarks and features of New York City.¹⁰² Unlike *White*,¹⁰³ the artistic manipulations of the famous likenesses were enough to avoid liability for violation of the right of publicity.¹⁰⁴ Additionally, the court determined that the

95. *Id.*

96. *See White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (suit against Samsung for using Vanna White’s likeness in a commercial citing that the commercial featured a robot that was intended to be White by dressing the robot in a similar fashion and having it turn letters on a large display board as White is famous for on the hit game show “Wheel of Fortune.” The court found that the California publicity statute did not apply citing to the *Midler* opinion narrowing the use of the word “likeness” to exclude robotic caricatures of White.)

97. *Id.* at 1397.

98. *Id.* at 1399. Part of the reasoning the Court used was the general policy goal to enable an individual to have the sole right to exploit his or her identity’s value.

99. *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446 (S.D.N.Y. 2008). *Burck* is known as the “Naked Cowboy,” a famous character of New York City that can be found in Times Square. Mars produced an M&M commercial depicting the M&M wearing a cowboy hat and holding a guitar in New York City.

100. *Compare id.*, with *White* 971 F.2d 1395 (both featuring an artistic spin on famous characters, Ms. White and the Naked Cowboy, for the purpose of advertisement).

101. *See Burck*, 571 F. Supp. 2d, at 449; *White*, 971 F.2d, at 1396.

102. *See Burck*, 571 F. Supp. 2d at 451.

103. *See White*, 971 F.2d at 1396.

104. *See Burck*, 571 F. Supp. 2d at 456–58.

meaning of “actual person” as used in the state’s statute does not apply to characters.¹⁰⁵

2. Defense of Incidental Use

The primary defense against being found liable for misappropriation of likeness or violating one’s right of publicity is the use of the Incidental Use Doctrine.¹⁰⁶ The underlying policy reasoning behind this defense, which can be utilized against both statutory and common law claims of misappropriation, is that the incidental use of one’s likeness does not hold any commercial value and thus allowing for recovery of the incidental use would be unduly burdensome.¹⁰⁷ In determining the validity of this defense, the court must consider the commercial profitability of the use,¹⁰⁸ whether the misappropriation contributes something significant, the relationship between the parties and products, and the repetition of the misappropriation.¹⁰⁹ If the use of the likeness is integral or often and relevant/profitable to use, the defense will not likely be successful.¹¹⁰

D. MODERN LEGISLATIVE DIFFERENCES

Currently, there are several different states that have codified misappropriation and publicity protections.¹¹¹ The language of these statutes can vary greatly from state to state.¹¹² As detailed below, multiple states limit those eligible to bring the claim to have a name or likeness that has “commercial value.”¹¹³ Other states simply limit the claims to those used for

105. *Id.* at 449. The court in *Burck* seemingly applied the Transformative Use Test by finding that enough creativity and deviation from the person’s right of publicity had been made to protect this speech as artistic and protected under the First Amendment.

106. *See* *Yeager v. Cingular Wireless LLC*, 673 F. Supp. 2d 1089 (E.D. Cal. 2009). In this case, Cingular employs the Incidental Use Doctrine.

107. *Id.* at 1100.

108. *Id.* Simply mentioning an individual does not constitute a misappropriation.

109. *Id.*

110. *Id.*

111. *See* IND. CODE ANN. § 32-36-1-8; N.Y. CIV. RIGHTS LAW § 51; 9 R.I. GEN. LAWS §1-28.

112. *See generally* IND. CODE ANN. § 32-36-1-8; N.Y. CIV. RIGHTS LAW § 51; 9 R.I. GEN. LAWS §1-28.

113. *See* IND. CODE ANN. § 32-36-1-8.

a “commercial purpose” or “commercial advantage.”¹¹⁴ Some states, such as Rhode Island, even allow for treble damages if the likeness is used intentionally.¹¹⁵ From one polar opposite to the other, Indiana and New York have incredibly different statutes.¹¹⁶

Indiana’s misappropriation and publicity statute is expansive.¹¹⁷ The statute extends the life of the claim for 100 years past the death of the personality.¹¹⁸ While Indiana’s statute is limited to being used for a “commercial purpose”¹¹⁹ the language is very broad in terms of opening the door to claims for any “aspect of a personality’s right of publicity,”¹²⁰ and personality is defined as any name, voice, signature, photograph, image, likeness, *distinctive appearance, gestures, or mannerisms*.¹²¹ This list goes far beyond the standard list that is typically confined to name, portrait, photograph or other likeness.¹²² The commercial purpose of the Indiana statute is confined to mean in connection with a product, a good, a service, advertising, or fundraising.¹²³ Violations of this statute amount to whichever is greater between the actual damages and \$1,000.¹²⁴ The plaintiff can request treble damages if the actions are found to be knowing, willful, or intentional.¹²⁵

New York’s misappropriation and publicity statute is underwhelmingly limited.¹²⁶ The statute does not provide for any post-mortem causes of action by the personality’s descendants.¹²⁷ New York’s statute only provides a claim for those whose name, portrait, picture, or voice were depicted.¹²⁸ The statute continues to limit the claim by stating the

114. *Id.*

115. *See* 9 R.I. GEN. LAWS §1-28.

116. *Compare* IND. CODE ANN. § 32-36-1-6, *with* N.Y. CIV. RIGHTS LAW § 51.

117. *See* IND. CODE ANN. §§ 32-36-1-6, -8.

118. IND. CODE ANN. § 32-36-1-8.

119. *Id.*

120. *Id.*

121. IND. CODE ANN. § 32-36-1-6.

122. *Compare* 9 R.I. GEN. LAWS §1-28, *with* IND. CODE ANN. § 32-36-1-8. *See generally* IND. CODE ANN. § 32-36-1-8.

123. IND. CODE ANN. § 32-36-1-2.

124. IND. CODE ANN. § 32-36-1-10.

125. *Id.*

126. *See* N.Y. CIV. RIGHTS LAW § 51.

127. *See generally id.*

128. *Id.*

characteristics must be used for the purpose of advertising or trade.¹²⁹ This statute is clearly much more limited in scope than the Indiana statute.¹³⁰ These variations continue to show presence among the states with most, if not all, states having a scope that falls between the two statutes referenced above.

California's misappropriation and publicity statute is moderately plaintiff-friendly.¹³¹ It is more aligned with Indiana's statute rather than New York's but remains not nearly as expansive as Indiana's.¹³² California's statute provides a claim for those whose name, voice, signature, photograph, or likeness are used.¹³³ This could provide for a friendlier middle-of-the-road nationwide model for the right of publicity.¹³⁴ This statute also provides for the imposition of punitive damages and attorney's fees to further disincentivize individuals from engaging in this conduct.¹³⁵

E. IMMUNITY FOR COMPUTER SERVICES PROVIDES NO INCENTIVE TO PROVIDE PROTECTIONS

In 1998, a law Congress entitled the "Communications Decency Act" went into effect, including section 230 entitled "Protection for Private Blocking and Screening of Offensive Material."¹³⁶ The intent of the law, as provided within the statute, was to promote the continued development of the internet.¹³⁷ The law states that no provider or user of an interactive computer service shall be treated as the publisher of any information provided by another information content provider.¹³⁸

129. *Id.*

130. Compare IND. CODE ANN. § 32-36-1-6, with N.Y. CIV. RIGHTS LAW § 51.

131. See generally CAL. CIV. CODE § 3344.

132. Compare CAL. CIV. CODE § 3344, with IND. CODE ANN. § 32-36-1-6, and N.Y. CIV. RIGHTS LAW § 51.

133. CAL. CIV. CODE § 3344.

134. Compare CAL. CIV. CODE § 3344, with IND. CODE ANN. § 32-36-1-6, and N.Y. CIV. RIGHTS LAW § 51.

135. See CAL. CIV. CODE § 3344.

136. Communications Decency Act, 47 U.S.C.A. § 230.

137. *Id.*

138. *Id.*; see also Koch, *supra* note 67, at 253 (explaining that this was in direct connection with previously held case law distinguishing the differences between a "publisher" and a "distributor" that had found "publishers," due to the editorial control over shared content, shall be held liable for defamatory

This law grants virtual immunity to social media networks for defamatory content such as faux profiles using the photographs of others.¹³⁹ However, the networks may be potentially held liable, as distributors are, if the network is aware or should be aware of the defamatory content.¹⁴⁰ Unfortunately for the victims of online impersonation, courts have often determined that these internet sites should not be held liable even if they were aware of the defamatory content.¹⁴¹

III. ANALYSIS

A. VICTIMS OF CATFISHING HAVE NO CURRENT LEGAL CAUSE OF ACTION

Current laws do not provide a clear cause of action applicable to a majority of the individuals whose photos are used in the course of catfishing.¹⁴² While a similarly-situated phenomenon, revenge pornography, does provide several state civil causes of action directly in response to the crime,¹⁴³ victims can often make claims under several other theories.¹⁴⁴ For these victims of catfishing, invasion of privacy, appropriation, false light, and intentional or negligent infliction of emotional distress do not provide a substantial likelihood of successful recovery.¹⁴⁵

To constitute an invasion of privacy, the defendant must unreasonably intrude upon the seclusion of another, appropriate another's name or likeness, give unreasonable publicity into another's private life, or give publicity that places another in false light before the public.¹⁴⁶ Intrusion upon seclusion theory would likely not apply because it would require an intent to intrude upon the seclusion of another.¹⁴⁷ In order to succeed on

statements made while distributors have no editorial control and thus are not liable).

139. Koch, *supra* note 67, at 272–73.

140. *See id.*

141. Joseph Monaghan, *Social Networking Websites' Liability for User Illegality*, 21 SETON HALL J. SPORTS & ENT. L. 499, 505 (2011).

142. *See Koch, supra* note 67, at 259.

143. *See generally* RESTATEMENT (SECOND) OF TORTS § 652A–E (AM. LAW INST. 1977).

144. *See supra* Section II.B.1.

145. *See Koch, supra* note 67, at 260.

146. RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977).

147. *Id.* § 652B.

an appropriation theory, the use of another's likeness must be for the user's benefit.¹⁴⁸ This claim has the most potential, but many states have limited appropriation claims to require commercial benefits.¹⁴⁹ It would be an uphill battle for a plaintiff in an appropriation claim to argue that the use of her image was for a commercial benefit or advantage unless the defendant was somehow compensated for profile views. Meanwhile, false light claims require the plaintiff to prove that the false light in which she was placed would be highly offensive to a reasonable person, and the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized manner and the false light in which the plaintiff would be placed.¹⁵⁰ However, for this type of claim and for intrusion upon seclusion claims, it would be immensely difficult to prove the requirement that the defendant published private information;¹⁵¹ if one posts a photo of themselves to a social network, it is not private and thus privacy was not invaded.

A plaintiff would be most likely to succeed on an infliction of emotional distress claim. Intentional infliction of emotional distress would normally be difficult for a plaintiff to show in these scenarios because it is typically not the intent of the catfisher to cause emotional harm to the person whose photo is being used. Rather, the photo being used is simply an accessory in committing deception on those the catfisher intends to communicate with online. Intentional infliction of emotional distress claims require a showing of extreme and outrageous conduct that is intended to cause and does cause severe emotional distress.¹⁵² Negligent infliction of emotional distress ("NIED") claims require the plaintiff to show that the defendant negligently engaged in conduct that was reasonably foreseeable to cause and does cause the plaintiff severe emotional distress.¹⁵³ However, the NIED claims distinctly narrow the plaintiff's exhibition of damages and result in the inability to recover economic damages and would be a hurdle for a plaintiff to

148. *Id.* § 652C.

149. *Id.*

150. *Id.* § 652E.

151. *Id.* § 652D cmt. A.

152. *Radcliffe v. Avenel Homeowners Ass'n, Inc.*, 789 S.E.2d 893, 907 (N.C. Ct. App. 2016).

153. *Id.* at 914.

illustrate the suffering *severe* emotional distress in comparison to the recovery for a plaintiff on right of publicity claims.¹⁵⁴

B. A MISAPPROPRIATION AND RIGHT OF PUBLICITY ACT

1. Need for a New Statute

The current state of disarray in the application of misappropriation of likeness and right of publicity statutes brought on by the state-by-state approach is inefficient and must be changed. As discussed above, the language of the state statutes varies to a great extent.¹⁵⁵ With the expansion of advertising technology, companies have the ability to market to a nationwide audience through channels including Facebook and other social media sources.¹⁵⁶ The lack of uniformity creates a lack of predictability for both parties involved in the suit.¹⁵⁷ The ability to use technology to violate these rights is widespread and should be covered by a uniform act to help create consistency and clarity for a nationwide issue.

Several states have passed statutes that are nearly limitless with the broad scope of their long-arm statute.¹⁵⁸ Several states solely require that the advertisement that allegedly misappropriates one's likeness or violates one's right of publicity simply reaches the forum state.¹⁵⁹ This would enable any plaintiff to forum shop for the best choice of law to apply,¹⁶⁰ creating a "race to the bottom" in terms of states providing the most plaintiff-friendly statutes.¹⁶¹ A race to the bottom in this case would lead to an undesirably wide right of publicity leading to significant liabilities and impediments to businesses. An updated and uniform act would aid the elimination of the race to the bottom and the ability for plaintiffs to forum shop.¹⁶²

154. *Id.*

155. *See supra* Section II.D.

156. *See, e.g., Social Networking and Blog Sites Capture More Internet Time and Advertising*, Post to *Nielson Wire*, THE NIELSON CO. (Sept. 24, 2009), <http://www.nielsen.com/us/en/insights/news/2009/social-networking-and-blog-sites-capture-more-internet-time-and-advertising.html>.

157. J. Eugene Salomon, Jr., *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179, 1192 (1987).

158. *Id.* at 1180-81.

159. *Id.*

160. *Id.*

161. Vick & Jassy, *supra* note 25, at 16.

162. *Id.*

2. Civil Enforcement Can Address the Criminal Law's Inadequacies

The creation of a civil cause of action can address the inadequacies of the criminal online impersonation statutes. First, as with many criminal laws, enforcement does not bring restoration to the victim of the crime.¹⁶³ Additionally, another letdown of the criminal enforcement is prosecutorial discretion.¹⁶⁴ While a victim may want to bring suit against the perpetrator impersonating him/her online, the commencement of a criminal case is entirely out of the victim's control. While criminal law can possibly deter this unwanted societal behavior, accompanying civil cases can address the aforementioned deficiencies of the criminal law and can be done so with a lower standard of evidence.

3. Commerce Powers Give Federal Government the Ability to Enact a Statute

The Constitution of the United States provides that the federal legislature has the power to regulate the commerce amongst the several states.¹⁶⁵ This power given to the federal government has been defined as an incredibly broad capability to regulate almost anything that uses the channels of commerce or that protects and promotes the facilitation of interstate commerce.¹⁶⁶ The right of publicity and misappropriation of likeness are foundationally based in economic and privacy rights;¹⁶⁷ violation of such rights was made illegal by statute when done for commercial benefit.¹⁶⁸ Due to this intrinsic element of commercial benefit or promotional purpose from the use of one's likeness, in addition to the use of the internet, the federal government has the Constitutional authority to pass a law to regulate this type of activity. However, it would be highly irregular for the federal government to legislate on this topic.¹⁶⁹

163. Koch, *supra* note 67, at 261–62.

164. *Id.*

165. U.S. CONST. art. I, § 8, cl. 3.

166. *See generally* N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

167. Vick & Jassy, *supra* note 25.

168. *See* CAL. CIV. CODE § 3344 (2016); OHIO REV. CODE ANN. § 2741.02 (2016); OKLA. STAT. tit. 12 § 1449 (2016); 9 R.I. GEN. LAWS §1-28 (2012).

169. Koch, *supra* note 67, at 268.

4. Federalization Is Not the Answer. A Uniform Act Is.

While the federal government may have the ability to act, enacting a federal policy on certain torts would initiate a slippery slope. Tort and privacy laws are traditionally left to the states.¹⁷⁰ It is unnecessary to have the federal government step in and potentially upset the balance of the structure of American federalism when alternatives are available.¹⁷¹ The concept of federalism is the belief that the government will operate best when the federal and state governments are responsible for separate functions; this is said to be one of the primary goals of the Uniform Law Commission.¹⁷² In 2011, there were approximately 136 active uniform laws adopted by states that were initially drafted by the Uniform Law Commission.¹⁷³ These laws were drafted by the Commission to bring consistency throughout the states.¹⁷⁴ The Commission has drafted several acts regarding long-standing state issues to avoid federal preemption and preserve the respective roles of the federal and state governments,¹⁷⁵ but also provide a nationwide consensus in certain matters.¹⁷⁶ To preserve the rights of state governments to continue presiding over privacy and tort law, the laws regarding the right of publicity and misappropriation of likeness should be drafted by the Uniform Law Commission.

170. Rothman, *supra* note 49, at 248.

171. *Id.*

172. *See generally* ROBERT A. STEIN, FORMING A MORE PERFECT UNION, A HISTORY OF THE UNIFORM LAW COMMISSION (2013).

173. Lynn Foster, *Uniform Laws, Legislation and the Arkansas Bar Association: A History and Report*, 46-WTR ARK. LAW. 10 (2011).

174. Eric M. Fish, *The Uniform Law Commission: Preserving the Roles of Federal and State Law*, 44 *The Book of States* 65 (2012).

175. *Id.*; *see also* *About the ULC*, UNIF. L. COMM'N (last visited Mar. 5, 2017), <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (explaining that the Uniform Law Commission, also known as the ULC, is comprised of lawyers, judges, legislators, and professors appointed by the state government. The goal of the ULC is to keep state law up-to-date and preserve and strengthen the federal system in addition to supporting uniformity between states).

176. *About the ULC*, UNIF. L. COMM'N (last visited Mar. 5, 2017), <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC>.

C. PUBLIC POLICY SUPPORTS FOR THE PROTECTION AGAINST THIS USE OF ONE'S LIKENESS

Several similar issues have been addressed by combative legislative policy across the United States, illustrating that public policy supports addressing the issue of the unconsented use of another's photo for the purposes of creating more interest in a fake profile.¹⁷⁷ These similar laws all address individuals veiling their identity to gain some benefit or to cause detriment to others, often involving the use of technology.¹⁷⁸ Additional criminal and civil laws have been passed in order to keep pace with the advancements of technology,¹⁷⁹ but remedies for the hidden victims of catfishing have seemingly been left out of these updates.¹⁸⁰ This note's proposal would change that.

IV. SOLUTION

A. A UNIFORM RIGHT OF PUBLICITY ACT

In order to provide for the protection of victims that have had their photographs associated with online catfishing scams, a uniform act should be put into place for state-by-state adoption that codifies the misappropriation and right of publicity to include a civil cause of action for online impersonation by use of an actual person's name and/or photograph. This statute would address concerns for the lack of homogeneity of the protections of these criminal, economic, and privacy rights that have seen lack of homogeneity on a state-to-state basis. To benefit the victim and address needs for simplification, this uniform act should provide for punitive damages and include a clause preempting all other state statute claims. A plaintiff-friendly statute would be in the best interest of public policy. It would be critical to keep in mind constitutional concerns for freedom of speech when crafting this legislation and maintain the three aforementioned constitutional tests.

B. PROPOSED LEGISLATION

Effective: January 1, 2018
The Uniform Right of Publicity Act (UROPA) of 2017

177. *See supra* Section II.B.1.

178. *Id.*

179. *Id.*

180. *See supra* Section III.A.

- (a) Any person who knowingly impersonates an actual person by use of that person's actual name or image, in any manner relating to the creation or use of a social networking web site or online bulletin board; or¹⁸¹
- (b) Any person who knowingly uses another actual person's name, voice, signature, photograph, likeness, or any other aspect of a personality's right of publicity in products, merchandise, or goods, or for the purpose of advertising, selling, or soliciting the purchases of any products, merchandise, goods or services; and
- (c) The impersonation or use of the person's right of publicity was intentional and without the actual person's consent;¹⁸²
- (d) The person intended to deceive or mislead other users of the social networking web site or online bulletin board; or
- (e) The person intended to exploit any use provided in subd. B for commercial benefit or otherwise; and¹⁸³
- (f) The person caused economic, emotional, or physical injury to the actual person whose rights under this chapter were violated.
- (g) The remedies provided in this section preempt any remedies available by other state laws, but are available

181. This provision of the statute incorporates a two-pronged approach: (1) anti-catfishing; and (2) right of publicity.

182. This codifies the defendant's defense of incidental use.

183. This further limits the second prong to "commercial" use or benefit.

independently of any potential ongoing, future, or previous criminal trials.¹⁸⁴

(h) For impersonations committed in bad faith, a punitive damage of \$1,000 may be applied and the plaintiff shall be entitled to recover reasonable attorney's fees.

(i) The rights codified under this chapter will be protected to the extent possible to protect the First Amendment rights of any impersonators or advertisers or other defendants subjected to a suit under this cause of action.¹⁸⁵

(j) The rights under subd. B of this chapter will not apply if the person significantly alters the actual person's likeness as to render the final product to be transformed into the person's own creative expression or if the person's use of one's likeness to make an expressive comment about the actual person.¹⁸⁶

(k) The rights under subd. B of this chapter will not apply if the person utilizes the actual person's likeness for a product that is inseparable from the person.¹⁸⁷

a. For example, it would not be actionable if a professional golf player's likeness is used for a PGA video game.¹⁸⁸

C. BENEFITS OF PROPOSED LEGISLATION

The proposed legislation provides for a uniform cause of action that will be available to persons in all states that chose to adopt this in form. This cause of action will simplify the application of misappropriation and rights of publicity and preserve the balance of federalism by maintaining the states' governance over privacy and tort laws. In accordance with the

184. Because this was proposed as a Uniform Act, this note advocates for preemption of previous laws to account for and control the vast differences between each the laws of each state.

185. This provision is incorporated to codify the Predominant Use Test.

186. This provision is incorporated to codify the Transformative Use test to protect First Amendment Rights, which eclipse property rights.

187. This provision is incorporated to codify the Rogers test.

188. This is a reference to *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3rd Cir. 2013).

proposal, constitutional concerns would be accounted for; the three primary constitutional tests to afford freedom of speech protections are explicitly enumerated to ensure that these defenses to liability be maintained. Most importantly, the proposed legislation would extend an opportunity for victims of online impersonation to recover damages at their own initiative through a civil suit. Ultimately, this should provide relief for plaintiffs and further discourage the impersonation of other's online by way of using others' photographs regardless of whether the perpetrator used the victim's name as well.

D. SHORTCOMINGS TO POTENTIAL ALTERNATIVES TO PROPOSED UNIFORM ACT

While the proposed legislation provides several benefits, many may argue there are alternate methods to obtain this result. An alternative proposal gaining traction is to amend section 230 of the Communications Decency Act.¹⁸⁹ This proposed amendment would subject social networking sites to liability by allowing the sites to be sued truly as a distributor rather than the almost preferential treatment given to them by recent case law.¹⁹⁰ However, this amendment would open up social networking sites and online bulletin boards to suits alleging the site was aware of defamatory content and failed to remove it. This would force these sites to have stronger verification systems and place a significant burden on the sites to frantically inspect all content posted to the site by any user.¹⁹¹ This proposed amendment would compromise the Communications Decency Act's purpose to protect and incentivize the growth of the internet.¹⁹² Additionally, while this solution may provide a remedy for the victims, it does not reinforce the criminal law by subjecting the impersonator to personal liability for the damages he or she had caused.

V. CONCLUSION

Public policy has determined that it is in the best interest of the nation to protect individuals from the dangers of fraud on the internet. Several states have enacted criminal laws to

189. See Koch, *supra* note 67, at 275–79.

190. See *supra* Section II.E.

191. See Koch, *supra* note 67, at 275–79.

192. Communications Decency Act, 47 U.S.C.A. § 230.

address the creation of fake social networking profiles used to scam other users. Ellie Flynn and Matthew McCarthy have illustrated the effects that having their images used in connection to a faux account can have on individuals. Sadly, these two aren't the only individuals that have fallen victim to this crime. MTV's show takes in-depth investigations to determine whether online relationships are real or if someone is being catfished; the show, and much of the media, concentrate heavily on the unknowing individual communicating with the catfisher. Rarely does the attention get focused on the person whose image was used in connection to the account. When the news broke about Josh Duggar's Ashley Madison account, Matthew McCarthy's photo was circulated by major news networks as Duggar's profile picture. This unwarranted association plagued McCarthy's life from that point on. Most of states' criminal online impersonation statutes will not be able to provide any recourse for McCarthy or Ms. Flynn. While a court may potentially determine McCarthy is entitled to damages under the California misappropriation statute, the state-by-state approach to this cause of action will continue fall short of clarity. In order to provide a legal remedy that avoids the shortcomings of the criminal law, addresses the lack of uniformity amongst the state laws, and updates the law to keep up with the technology and provide relief for victims of this type of heinous act, the Uniform Law Commission should propose the UROPA.
