Me.com: The Growing Need for the Illinois Right of Publicity Act to Respond to Online Social Networks

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I. INTRODUCTION

The year 2011 revealed an upward trend in the use of online social networks in both personal and commercial contexts that, due to the pervasive nature of the media, inevitably induced a correlating rise in online social network-related litigation.1 Much of this litigation surrounds the implication of user publicity or privacy rights stemming from the exploitation or appropriation of the user’s online identity—especially when the user is a celebrity.2 While users enjoy the convenient networking and information-sharing interface provided by social media, these features also enable ready access to personal user information.3 Seeking to capitalize on the large “cyber-captive” audience, businesses are becoming increasingly prevalent in the social networking web—exploring an array of avenues to reach the consuming public.4 While the number of OSN users continues to climb, so does commercial opportunity: new means to reach those users are increasingly available for exploitation.5

Although the growing viability of online social networks (“OSNs”) has proven, in many ways, beneficial to the marketplace in a commercial sense, it has undoubtedly borne a variety of

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1 Indeed, Facebook boasts over 800 million active users (users who have returned to the site in the last 30 days). See FACEBOOK, http://www.facebook.com/press/info.php?factsheet (last visited Jan. 16, 2012). MySpace has over 185 million active users, and Twitter more than 25 million. For examples of related litigation, see, e.g., Fraley v. Facebook, Inc., 11-CV-01726-LHK, 2011 WL 6303898 (N.D. Cal. Dec. 16, 2011) (Federal judge refusing to dismiss class action lawsuit against Facebook. Complaint claiming Facebook’s ads with names of user’s friends who “like” the ad constitute “commercial appropriation” of friends’ likenesses. The case has not yet been decided on the merits.); see also Moreno v. Hanford Sentinel, Inc., 91 Cal. Rptr. 3d 858, 864 (Cal. Ct. App. 2009) (alleging republication of OSN journal entry in local newspaper under author’s full name not an invasion of privacy because information was readily ascertainable).


3 See Greg Lastowka, User Generated Content and Virtual Worlds, 10 VAND. J. ENT. & TECH. L. 893, 896-900 (2008) (discussing benefits stemming from ease of sharing content over the Internet and resulting ownership and control issues).

4 See, e.g., Fraley, 2011 WL 6303898 (stating advertisers’ use of Facebook friend endorsements is “a valuable marketing tool” similar to celebrity endorsements); see generally Amy Morganstern, In the Spotlight: Social Network Advertising and the Right of Publicity, 12 INTELL. PROP. L. BULL. 181 (2008) (thorough analysis of privacy and publicity concerns in relation to Facebook’s implementation of an advertising tool known as Beacon); GOOGLE, http://www.google.com/+business (last visited Feb. 15, 2010) (using the “brand page” feature on Google’s G+ interface, companies can directly engage with potential consumers).

5 See TURNER, supra note 2.
concerns that will be increasingly ushered into our court systems. Of most significance, perhaps, is the ability of OSNs to assist a user in the creation of a digital persona as well as to provide an expansive network to share and communicate that persona to the public, thus spawning a new breed of celebrity—one borne not of traditional media but of an entirely novel form pioneered by online social networks. As stated by one commentator, “[h]istorically, the legal recognition of a public persona has been relevant only for celebrities, as they were typically the only people with the ability to create public identities with economic value….” However, OSNs have made it increasingly possible to create an online persona simply by setting up a profile, and given the development of OSNs as an enterprise, the possibility that any user could develop an online persona generating economic value deserving legal protection is an issue of growing concern.

Given the novelty of current issues surrounding online social networks, it is uncertain how the court will treat individual claims. What is certain, however, is the extensive potential scope of such claims due to the trending nature of OSNs—beckoning the great need for the court system to address and respond to the unique issues raised, particularly those involving a right of publicity based on a non-traditional notion of celebrity.

The right of publicity is interpreted via many varying perspectives around the United States; each providing protection in widely varying degrees. States that recognize a right of publicity treat it as a property right—granting individuals the right to control the commercial use

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8 Id. at 113-14.
9 See Horton, supra note 6, at 1301 (discussing how current law struggles to keep up with the increasing pace of technology).
10 See id.
11 This Comment focuses on publicity claims where the social network is not a party. Analysis of potential claims brought by a user against an online social network is outside the scope of this article.
of their own likeness.\textsuperscript{12} Generally, in order to show infringement of one’s publicity right, an individual must first show that the defendant, without permission, used an aspect of the plaintiff’s identity that is identifiable from the defendant’s use.\textsuperscript{13} Secondly, the individual must show the defendant’s use is likely to cause damage to the commercial value of that person’s identity.\textsuperscript{14} Of the thirty states that recognize the right of an individual to recover damages for the appropriation of his identity, Illinois is one of nineteen states to codify these rights by statute.\textsuperscript{15} The remaining eleven states recognize a common law cause of action.\textsuperscript{16} Within these states, there are those that adopt the minority view and limit the right of publicity to celebrities.\textsuperscript{17} Alternatively, there are those that adopt the majority view: extending the right to non-celebrities on the ground that the level of celebrity goes to damages, not to the existence of the right.\textsuperscript{18}

\textsuperscript{12} See Melville B. Nimmer, The Right of Publicity, in 19 Law & Contemp. Probs. 203, 203-04 (1954) (providing an early discussion of publicity as a property right) [hereinafter Nimmer, The Right of Publicity]; see also 1 J. Thomas McCarthy, RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2001) (“The right of publicity is a state-law created intellectual property right whose infringement is a commercial tort of unfair competition.”).

\textsuperscript{13} McCarthy, supra note 12, at § 3:2 (2d ed. 2001).

\textsuperscript{14} Id.


\textsuperscript{17} McCarthy, supra note 12, at § 4:15.

\textsuperscript{18} See, e.g., McCarthy, supra note 12, at § 4:17-19 (“A private figure may recover for a reduction in the commercial value of his or her identity upon proof that the unauthorized use has diminished the value of the identity for use in the plaintiff's own business.”); Restatement (Third) of Unfair Competition § 49 cmt. d.; see also Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1102 (9th Cir. 1992) (stating “well-known” is a relative term that is adequately reflected in the calculation of recoverable damages); Canessa v. J.I. Kislak, 235 A.2d 62, 75 (N.J. Super. Ct. Law Div. 1967) (stating level of celebrity is “relevant only to the question of damages”); Vinci v. Am. Can Co., 459 N.E.2d 507, 510 (Ohio 1984) (stating “degree of notoriety” goes to damages).
Illinois adopts the majority view, extending protection under the Right of Publicity Act to individuals without regard to their celebrity status.\(^{19}\)

Illinois is one of a number of states (including California,\(^{20}\) Indiana,\(^{21}\) and Tennessee\(^{22}\)) that not only recognize an individual’s publicity right during their lifetime, but also extend this right postmortem.\(^{23}\) These states recognize the great value an individual may develop in his or her identity, and that the right to control and benefit from the use of that identity should pass to the decedent’s heirs upon death.\(^{24}\) On the other hand, some states do not recognize a separate cause of action for publicity rights and instead analyze claims of this nature through the right to privacy lens.\(^{25}\) The result of this great variation among the states becomes apparent when attempting to unmuddy the waters: there simply is no clarity to be found, anywhere.

This Comment attempts to interpret the tide of publicity rights in Illinois specifically by directing analysis to issues emerging out of the increasing prevalence of online social networks. While there has been significant discussion on the topic of rights implicated by OSNs generally,\(^{26}\) limiting the analysis to Illinois unleashes a flood of uncertainty deserving due consideration. This Comment focuses on the problems that arise when attempting to locate a home for claims involving social networks within the current Illinois publicity statute\(^{27}\) and concludes that due to the unique nature of the media forming the bases of such claims, tailored statutory revision is of increasing necessity.\(^{28}\)

\(^{19}\) 765 ILL. COMP. STAT. 1075/10 (1999).
\(^{20}\) CAL. CIV. CODE §§ 3344, 3344.1(g) (West 2007).
\(^{21}\) IND. CODE § 32-36-1-8(a) (2002).
\(^{23}\) See 765 ILL. COMP. STAT. at 1075/30.
\(^{24}\) CAL. CIV. CODE §§ 3344, 3344.1(g) (West 2007); 765 ILL. COMP. STAT. 1075 (1999); IND. CODE § 32-36-1-8(a) (2002); TENN. CODE ANN. § 47-25-1104 (2001).
\(^{25}\) 765 ILL. COMP. STAT. 1075/10 (1999).
\(^{26}\) See generally Adkins, supra note 15, at 500; Nemet-Nejat, supra note 7, at 113; Patricia Sanchez Abril, A (My)space of One’s Own: On Privacy and Online Social Networks, 6 NW. J. TECH. & INTELL. PROP. 73 (2007) [hereinafter Abril I].
\(^{27}\) See 765 ILL. COMP. STAT. 1075/1 et seq. (1999).
\(^{28}\) See 765 ILL. COMP. STAT. 1075/1 et seq. (1999); see also Abril I, supra note 26, at 73 (discussing characteristics that make OSNs unique communicative and expressive tools).
Part II provides an overview of common justifications cited in support of legal recognition of a publicity right. Part III discusses the Illinois Right of Publicity Act. Part IV discusses online social networks and identifies a number of distinguishing characteristics relevant to their analysis. Part V introduces the 2011 Illinois case Maremont v. Fredman Design Group, where an individual alleged damage to her publicity right under the Illinois Right of Publicity Act stemming from unauthorized postings to the individual’s OSN pages. Part VI provides a discussion of several tests being applied to publicity rights by courts around the United States as well as an application of these tests to the current definition of the right of publicity in Illinois. By sifting through the issues created by OSNs addressed by the current tests and an application of each test to the court’s analysis in the Maremont case, this Part exposes many issues of significance yet to be tackled by the Illinois court system or recognized within the current Illinois statute.

Part VII concludes by suggesting ways in which the Illinois Right of Publicity Act might adapt to the growing prevalence of online social networks. Addressing the inevitable growth of social network-related litigation, Part VII argues that in limited circumstances Illinois law should recognize a so-called “digital” right of publicity and provides a two-part analysis to be applied to claims implicating this right. The first step of the analysis sets forth a threshold test for determining whether an actionable claim exists. If an actionable claim of infringement of a digital right of publicity is found, the second step of the test is to be applied when determining and calculating damages.

II. TRADITIONAL JUSTIFICATIONS FOR LEGAL RECOGNITION OF PUBLICITY RIGHTS

29 765 ILL. COMP. STAT. 1075/1 et seq. (1999).
The most commonly referenced justifications proffered in support of recognizing publicity rights involve protecting commercial interests and include rationales reflecting moral, economic, and consumer protection concerns.\(^3^1\) Each of these doctrinal bases, as well as others, have been the subject of intense discussion and criticism,\(^3^2\) “but the right of publicity in the United States is firmly entrenched in American jurisprudence and is the fundamental protection for the commercial value of celebrities' identities.”\(^3^3\) Discussion of the philosophical underpinnings for publicity rights has generally fallen within a property context and commonly uses Lockean\(^3^4\) labor theories of property to explain the assertion of a property right in identity or persona.\(^3^5\)

From a moral standpoint, the most common justification for the right of publicity evokes the Lockean principle “that every individual has a property in his or her own person, and that labor is also the property of the individual who has expended the effort.”\(^3^6\) Thus, under the Lockean theory the essential step in evaluating ownership of economic value, as afforded by one’s celebrity status, is determining whose laborious efforts produced the celebrity.\(^3^7\) In an effort to curtail unjust enrichment, under the Lockean theory the law should intervene when one individual’s appropriation of another’s work product directly interferes with the laborer’s

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\(^3^1\) Tan, supra note 2, at 927.
\(^3^3\) Tan, supra note 2, at 927.
\(^3^4\) See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge University Press 1988) (1690). John Locke was a 17th Century English philosopher whose theory considers property a natural right justified by the individual’s exertion of effort to produce the property or utilize the property for societal good. \(Id.\)
\(^3^5\) Compare NIMMER, THE RIGHT OF PUBLICITY, supra note 12, at 216, with Haemmerli, supra note 32, at 412 (author arguing for finding an innate right to one's persona and accompanying property right in use and control of its objectification in Kantian philosophy).
\(^3^7\) \(Id.\)
achievement of his particular objective.\textsuperscript{38} In this way, the availability of legal protection operates as an incentive to create and achieve while also promoting production efficiency—thus furthering the significant underlying economic considerations.\textsuperscript{39} This approach toward recognizing publicity rights is akin to the rationale behind trademark law’s prevention of consumer deception as it not only operates to promote creativity, but also works to protect the creator’s ability to freely enjoy the products of their creativity.\textsuperscript{40} However, while it is easy to recognize the commercial value attached to a “traditional” celebrity’s persona, these justifications are inadequate when applied to “non-traditional” publicity rights—those based upon misappropriation of an individual’s digital self as displayed on OSNs. Due to the evolving nature of the contemporary atmosphere through which fame and celebrity derive, this issue is of increasing significance.\textsuperscript{41}

### III. THE ILLINOIS RIGHT OF PUBLICITY ACT

In 1999, Illinois adopted the Right of Publicity Act (hereinafter referred to as the Illinois Publicity Act) broadly defining the right of publicity as “the right to control and to choose whether and how to use an individual’s identity for commercial purposes.”\textsuperscript{42} There are several elements of the Illinois Publicity Act that are necessary to distinguish in order to understand its applicability. First, akin to legislation adopted by a number of other states concerning publicity rights, under the Illinois Publicity Act the rights of the individual are considered property rights.\textsuperscript{43} Publicity rights in Illinois are freely transferable, divisible, and descendible.\textsuperscript{44} Second, it is important to note that under Illinois law, the Right of Publicity Act completely replaced

\textsuperscript{39} Tan, supra note 2, at 927-28.
\textsuperscript{40} Id.
\textsuperscript{41} See, e.g., McCarthy, supra note 12, at § 4:3.
\textsuperscript{42} 765 ILL. COMP. STAT. 1075/30(a) (1999).
\textsuperscript{43} Id.
\textsuperscript{44} Id.
common-law tort of appropriation of likeness,\textsuperscript{45} one of the four invasion of privacy prongs.\textsuperscript{46} Third, unlike the laws of some states pertaining to publicity, the Illinois statute does not require that the plaintiff’s identity have commercial value or intrinsic value.\textsuperscript{47} The following section provides an overview of the Illinois Publicity Act followed by an analysis of the three aforementioned elements.

A. DEFINITION OF KEY TERMS

In order to understand the general applicability of the statute, it is necessary to provide the statutory definitions of key terms as they appear in Section 5 of the Illinois Publicity Act.\textsuperscript{48} “Commercial purpose” is defined as “the public use or holding out of an individual’s identity (i) on or in connection with the offering for sale or sale of a product, merchandise, goods, or services; (ii) for purposes of advertising or promoting products, merchandise, goods, or services; or (iii) for the purpose of fundraising.”\textsuperscript{49}

“Identity” is defined as “any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener.”\textsuperscript{50} These attributes include but are not limited to “(i) name, (ii) signature, (iii) photograph, (iv) image, (v) likeness, or (vi) voice.”\textsuperscript{51} Further, “individual” is defined as “a living or deceased natural person, regardless of whether the identity of that individual has been used for a commercial purpose during the individual’s

\textsuperscript{45} Id. at 1075/60.
\textsuperscript{46} Id. at 1075/10. The four prongs of common-law invasion of privacy are unreasonable intrusion upon the seclusion of another, misappropriation of name or likeness, unreasonable publicity given to private life, and publicity that unreasonably places another in false light before the public. These are discussed in more detail later in Part III.
\textsuperscript{47} 765 ILL. COMP. STAT. 1075/10 (1999).
\textsuperscript{48} Id. at 1075/5.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
lifetime.”52 Finally, “name” is defined to include both an individual’s “actual” name as well as any “other name by which an individual is known that is intended to identify that individual.”53

B. PROPERTY RIGHTS

The Illinois Publicity Act treats publicity rights as rights of proprietary interest.54 These rights are freely transferrable and divisible.55 Unlike publicity right recognition in some states that do not extend these rights after the individual’s death, Illinois law considers these rights to be descendible, adopting a fifty-year postmortem duration.56

C. THE RIGHT OF PRIVACY

Another distinguishing element of the Illinois Act from those of other states is that the right of publicity, as defined by the Illinois Publicity Act, completely replaced the appropriation of likeness tort yet has no effect on the other three torts under the common-law right of privacy.57

Section 60 of the Right of Publicity Act provides that

The rights and remedies provided for in this Act are meant to supplant those available under the common law as of the effective date of this Act, but do not affect an individual’s common law rights as they existed before the effective date of this Act. Except for the common law right of publicity, the rights and remedies provided under this Act are supplemental to any other rights and remedies provided by law including, but not limited to, the common law right of privacy.58

The four prongs of common-law invasion of privacy are as follows: (1) unreasonable intrusion upon the seclusion of another, (2) misappropriation of name or likeness, (3) unreasonable publicity given to private life, and (4) publicity that unreasonably places another in

52 765 ILL. COMP. STAT. 1075/5 (1999).
53 Id.
54 Id. at 1075/15.
55 Id.
56 Id. at 1075/30.
57 Id. at 1075/60 (1999) (the Act does “not affect an individual's common law rights as they existed before the effective date of this Act.”). See, e.g., Blair v. Nevada Landing P’ship, 859 N.E.2d 1188, 1192 (Ill. 2006).
58 765 ILL. COMP. STAT. 1075/60 (1999).
false light before the public.\textsuperscript{59} To allege a statutory claim of appropriation of likeness under the Illinois Publicity Act, the individual must put forth essentially the same three elements required by the common-law appropriation claim: appropriation of one's name or likeness, without one's consent, and for another's commercial benefit.\textsuperscript{60} According to the Restatement of Torts, the purpose of this tort is to protect the “interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness.”\textsuperscript{61} In addition, “the Restatement of Torts makes it clear that it is not the use of the plaintiff's name which constitutes a tort but rather the appropriation of the value of his name and reputation.”\textsuperscript{62} Thus, “[i]t is not enough that the defendant has adopted for himself a name that is the same as that of the plaintiff, so long as he does not pass himself off as the plaintiff or otherwise seek to obtain for himself the values or benefits of the plaintiff's name or identity.”\textsuperscript{63} Courts also cite a fourth requirement of resulting harm to the individual.\textsuperscript{64} It is unclear what nature of harm qualifies and what degree of harm is necessary to satisfy this requirement.\textsuperscript{65}

D. COMMERCIAL VALUE AND INTRINSIC VALUE

The Illinois Act defines the right of publicity as “[t]he right to control and to choose whether and how to use an individual's identity for commercial purposes,”\textsuperscript{66} and provides that “[a] person may not use an individual's identity for commercial purposes during the individual's lifetime without having obtained previous written consent.”\textsuperscript{67} However, the language of the
Illinois Act does not require an individual’s identity to have intrinsic commercial value.\textsuperscript{68} Rather, as held by the District Court for the Northern District of Illinois in \textit{Villalovos v. Sundance Associates},\textsuperscript{69} it appears to cover all individuals by simply protecting their identity, “whether or not their identities have been used commercially.”\textsuperscript{70} Addressing an appropriation tort claim, the court in \textit{Villalovos} referred to the broad statutory language defining who constitutes an individual and what is an identity as well as the type of damages asserted.\textsuperscript{71} The court found that the approach taken by the Colorado Supreme Court\textsuperscript{72} which rejected the requirement of intrinsic value on the basis that, while requiring a plaintiff’s identity to have some initial value when a plaintiff alleges damage to her commercial interests may make sense, when a plaintiff alleges emotional damages, initial value is not necessarily relevant.”\textsuperscript{73} The court found this, in conjunction with the text of the Illinois statute, to be “more persuasive, particularly since the case at bar raises only issues of personal damages, not commercial damages.”\textsuperscript{74} Therefore, it was not necessary that the plaintiff allege her name had intrinsic value.\textsuperscript{75}

In \textit{PETA v. Bobby Berosini}, a Nevada court discussed the differences in treatment and value of the publicity and privacy interests of traditional celebrities and lesser-known plaintiffs:

When . . . the name of a famous or celebrated person is used unauthorizedly, that person's main concern is not with bruised feelings, but rather, with the commercial loss inherent in the use by another of the celebrated name or identity. The commercial or property interest that celebrities have in the use of their names and identities is protected under what has been termed the ‘right of publicity.’ There is a certain reciprocity between the two kinds of interests, personal and proprietary; and, accordingly, the more the aspects of one tort are present, the less likely are the aspects of the other tort to be present. The more obscure the plaintiffs

\textsuperscript{68} McCarthy, \textit{supra} note 12, at § 6:56.
\textsuperscript{70} Id. at *3.
\textsuperscript{71} Id. at *3.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Villalovos, 2003 WL 115243, at *5.
\textsuperscript{75} Id.
are, the less commercial value their names have and the more such
plaintiffs will be seeking to redress personal interests in privacy in a
common law appropriation action, and not commercial or property
interests in their name or likeness as a claimed violation of a right of
publicity.76

The court then discussed the injury to a celebrity’s interest as compared to the injury
to that of a lesser-known individual:

The more famous and celebrated the plaintiffs, the less injury is likely to
be claimed to their privacy interests, their interest in being ‘left alone,’
because their names and likenesses already have wide recognition and are
not appropriate subjects for invasion of personal privacy. Generally
speaking, a private person will be seeking recovery for the appropriation
tort, and a celebrity will be recovering for the right of publicity tort.77

As mentioned in the introduction to this Comment, some states’ statutes limit the right of
publicity to “celebrity” individuals, as the term is defined in a traditional sense.78 These states
argue that it is the commercial value of the celebrity’s persona that warrants protection, and thus
consider a finding of celebrity status as prerequisite to an actionable claim for damages.79 This
construction of the right of publicity, while narrow and highly exclusive, does have logical bases.
Take, for instance, the aforementioned point that under this approach if celebrity status is not
found, the cause of action fails and the court need not move on to the more intensive commercial
versus non-commercial use determination often requiring exhaustive discovery.80 Alternatively,
by treating celebrity status not as determinative to the availability of an actionable publicity
claim but as a factor in the damages calculation, the court must first determine commercial harm,
and if found, must then calculate damages in relation to the level of “celebrity” as arbitrarily and
vaguely defined in a non-traditional sense.81

77 Id. at 1284.
78 See discussion supra Part I.
79 McCarthy, supra note 12, at § 4:3.
80 See id.
81 See id.
In Illinois, the issue of what constitutes a “commercial purpose” arose in the 2007 *James Brown v. AMCI Pop Division* case where the estate of the late singer James Brown sued an image archive that owned the right under copyright law to license both the expressive and advertising uses of images in its archive. Brown's estate argued that the defendant’s licensing of images of Brown was a “commercial purpose” regardless of whether the licensee’s use was non-commercial or expressive. An Illinois Appellate Court affirmed the refusal to dismiss the case based on the fact that there was insufficient evidence at that stage to support a determination on the issue of commercial versus non-commercial use. Notably, this case involved James Brown—an individual who achieved uncontested celebrity status. As such, the celebrity analysis was easily bypassed and focus was then given to the commercial use determination.

However, recently the “celebrity” determination has increasingly become far less black and white. Due to a contemporary arena driven by OSNs, an individual can literally achieve “celebrity” overnight. Moreover, this status can be achieved from just about anywhere. Face time on traditional media is no longer necessary; one’s own living room will suffice. It is in this contemporary arena where Illinois courts (and courts outside Illinois alike) have struggled to operate, finding it difficult to analyze publicity claims involving OSNs using the traditional right of publicity framework.

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82 See Brown v. ACMI Pop Div., 873 N.E.2d 954, 954 (Ill. App. Ct. 2007); see also McCarthy, supra note 12, at § 6:56.
83 McCarthy, supra note 12, at § 6:56.
85 Note that this was an action intestate is irrelevant in the context of analyzing the court’s approach towards finding an actionable claim implicating the right of publicity.
86 Brown, 873 N.E.2d at 962.
87 See Nemet-Nejat, supra note 7, at 125.
88 Id.
89 Id. at 126. See, e.g., Muzikowski v Paramount Pictures Corp, 2003 WL 22872117, at *6 (N.D. Ill. 2003) (stating that to properly address the defendant’s contention that the First Amendment bars the plaintiff’s claim would require the court to “balance public interest in the free flow of ideas and creativity against [plaintiff’s] ability to control marketing of his claimed celebrity value”); Blair v. Nevada Landing P’ship, 859 N.E.2d 1188, 1188 (III. App. Ct. 2006) (former employee suing employer for using a photograph in which he appeared for promotional purposes after he resigned, alleging common law appropriation of likeness and violation of Right of Publicity Act. Appellate Court holding cause of action accrued when employer first displayed employee's image); Toney v. L'Oreal USA, Inc., 406 F.3d 905, 910-11 (7th Cir. 2005) (court reasoning that an individual’s
IV. DEFINING ONLINE SOCIAL NETWORKS AND THE DIGITAL PERSONA

Attempting to define an online social network is especially difficult given their recent development, even more recent metamorphoses, and inherently nebulous character. In a general sense, an OSN can be defined as any website where the main purpose is to connect users within the associated network. OSNs provide users a unique medium where active communication with other users is a click away: directly (i.e., through a private message or a posting on another user’s personal account) or indirectly (by sharing information publicly or inadvertently stumbling upon another user’s public post). One commentator has pointed out that employing such a sweeping definition can be seen to include the Internet in its entirety. Arguably OSN activities, such as those mentioned above, are simply avenues of communication, just as the Internet at large can be interpreted as the ultimate communication device for users around the globe. This viewpoint oversimplifies the exceptional characteristics that define and differentiate OSNs from broad communicative devices such as the Internet.

For instance, another unique characteristic of the OSN medium is the ability of users to construct pages specifically tailored to their own sense of self or, often times, the self they wish the public to see. In this way, OSNs function as “personal billboards representing one's managed, researched, and well-crafted identity.” Following this approach, it has also been argued that blogs can be similarly construed to incorporate an identity communicating function and, as such, represent another form of OSN. The blogosphere, like Facebook and MySpace, is

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90 Patricia S. Abril et. al., Famous for Fifteen Minutes: IP and Internet Social Networking, 6 NW. J. TECH. & INTELL. PROP. 355, 18 (2008) [hereinafter Abril II].
91 Abril I, supra note 26, at 36.
92 See Abril II, supra note 90, at 19.
93 Id.
94 Abril I, supra note 26, at 36.
95 Id.
96 See Nemet-Nejat, supra note 7, at 120.
a means to construct and communicate through the user’s cyber-self, whomever or whatever that may be.\textsuperscript{97} The concept of communal construction as applied to OSNs has been widely discussed by commentators and is generally recognized as one distinguishing factor that ultimately led to OSN popularity.\textsuperscript{98}

When applying the communal construction element to celebrities, it is argued by some that, unlike OSN users, a celebrity works unilaterally to craft his persona.\textsuperscript{99} Others take the opposite position and argue that both the celebrity and non-celebrity persona are products of communal construction.\textsuperscript{100} The former argument is illogical and ignores the umbrella concept that fame is a cultural construct.\textsuperscript{101} It is ingenuous to argue the carefully crafted celebrity persona is the handiwork of the celebrity and the celebrity alone. The persona of a celebrity is often a production requiring an entire cast and crew. One scholar termed the team of craftsmen (the producers, the audience, and the celebrity individual) “the celebrity trinity,” arguing that the traditional Lockean labor and unjust enrichment justifications fail to “address the substantial labor put in by those other than the individual celebrity—labor that can often exceed the labor put in by the celebrity.”\textsuperscript{102} This is especially relevant when considering performance artists—Lady Gaga representing a recent example of an intentionally and carefully produced persona. Many celebrities, like Lady Gaga, are the physical embodiment of a pre-conceived persona deemed to have commercial value related to cultural need.\textsuperscript{103}

However, these characteristics—peer-to-peer connection and communication through construction—have dual personalities. On the one hand, these characteristics are what have made

\begin{itemize}
\item \textsuperscript{97} See Abril I, supra note 26, at 36.
\item \textsuperscript{98} See id.; Nemet-Nejat, supra note 7, at 120.
\item \textsuperscript{99} Nemet-Nejat, supra note 7, at 122.
\item \textsuperscript{100} See Tan, supra note 2, at 931-32.
\item \textsuperscript{101} Id.
\item \textsuperscript{102} See id. at 931.
\item \textsuperscript{103} See id.
OSNs powerful social tools, while on the other hand, they are highly vulnerable to abuse. As stated by one business law professor, “the hallmarks of digital information and the ease of informational exchange facilitated by this medium lead to more noxious privacy and personality harms than ever before.” It is this vulnerability that has stimulated and become the focal point of much scholarly discussion as to legal implications surrounding OSNs.

Due to the innateness of these characteristics to OSNs, it has been argued that protection under the right of publicity should extend to our digital personas as constructed through OSNs. Logically, if we are to recognize a so-called digital persona the scope of this persona must be reasonably restricted and the characteristics of that persona carefully defined. Some supporters of the digital persona wish to stretch the boundaries beyond their logical end and thus uncover more issues than were initially identifiable. For instance, it has been argued that protection should extend beyond the persona constructed through OSNs to one’s persona in the virtual gaming world in the form of a personal avatar. The justification for such an extension is based upon the great value to “behavioral advertising practices”—i.e., using a person's online habits to determine his or her interests—due to the extent of connectivity and ease of accessibility to information. This argument ignores the underlying economic justification for the right of publicity in that the determination should not hinge on whether an entity other than the author of the identity received commercial gain from its appropriation, but rather whether the author has suffered harm attributable to the unauthorized appropriation.

104 See Matthew J. Hodge, Note, The Fourth Amendment and Privacy Issues on the “New” Internet: Facebook.com and MySpace.com, 31 S. Ill. U. L.J. 95, 106 (arguing it is the inherent nature of the activity of utilizing an OSN that often works against any notion of an expectation of privacy).
105 Abril I, supra note 26, at 8.
106 See id. at 11.
107 See id.
109 Id.
110 Id.
Achieving sweeping protection ignores the underlying bases for the legal recognition of publicity rights and must be addressed. Failing to clearly define the so-called bundle of rights within the statutory right of publicity as implicated by OSNs lessens the availability of legal remedy and effectively dilutes the existence of such rights. While it is true that the information stored and shared through the “virtual world” may prove commercially valuable to some, the use of that information does not implicate the individual’s personal ability to exploit their virtual identity in whatever manner they choose. For instance, with regard to a traditional celebrity, such as Justin Timberlake, allowing an individual or entity to appropriate Timberlake’s name or likeness for commercial benefit, without prior consent, would unfairly and directly deny Timberlake the ability to personally benefit from the same or similar use. Why? Because of the extent of Timberlake’s presence and “well knownness.” The use of the identity (in this example, the avatar) of a non-celebrity does not remove that individual’s ability to use it commercially (or otherwise) simply because not enough people will associate that identity with a particular product or service (or otherwise), or, due to the transient nature of modern memory, recall specific characteristics of that identity. Perhaps even more problematic to the “well knownness” aspect is the fact that an avatar is a visual representation of an individual that exists wholly in the digital world. In this sense, the avatar exists separately and distinctly from the individual making a showing of harm to that individual tenuous at best.

Attempting to establish an exclusive definition of what does and does not constitute a digital persona as existing through an OSN—in light of the foregoing characteristics—is highly difficult as well as equally unavailing. The focus of the inquiry as to whether a digital persona

112 See id.
113 See id.
should be afforded legal protection should not be the extent to which the individual or the public is found responsible for constructing the digital persona in question. The analysis should instead surround the question of whether the digital persona—as a concept—deserves legal recognition given the wide variation in which the digital persona mirrors the actual one. Thus, the factors that must remain at the forefront of the analysis of whether a digital persona deserves legal protection are that protection should only extend to those characteristics that can be readily distinguished as belonging to or inherent to that individual’s identity as recognized by the public, there must have been a misappropriation of those characteristics, there must exist commercial value belonging to the individual in those characteristics, and the misappropriation must have caused commercial harm to the individual.

V. CASE OVERVIEW: MAREMONT V. SUSAN FREDMAN DESIGN GROUP

The Northern District of Illinois for the Eastern Division broadly addressed the issue of whether an individual can maintain a publicity right under the Illinois Act based upon the alleged unauthorized use of that individual’s personal OSN pages in Maremont v. Susan Fredman Design Group. Although this case represents only one Illinois court’s interpretation, it raises many legal issues worthy of attention.

A. CASE SUMMARY

The plaintiff alleges in her complaint violations of the Lanham Act, the Illinois Right of Publicity Act, and the common law right of privacy after the defendants impersonated the plaintiff on the popular social networking sites Facebook.com (Facebook) and Twitter.com

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114 See Nemet-Nejat, supra note 7, at 114-15.
115 See id. at 115; see generally Sheldon W. Halpern, The Commercial Appropriation of Personality, 13 DUKE J. COMP. & INT’L L. 381, 863-64 (2003) (contrasting cases where the attributes of the plaintiffs were identifiable, with one where the attributes of the show, rather than of the plaintiff, were identifiable).
(Twitter).\textsuperscript{119} The defendant, Susan Fredman, is one of “Chicago’s most prominent residential interior designers.”\textsuperscript{120} Her corporation, Susan Fredman Design Group (SFDG) operates from offices and retail stores in Chicago and Harbor Country, Michigan as well as through an e-commerce site.\textsuperscript{121} The plaintiff, Jill Maremont, is a professional interior designer who was employed by SFDG as the Director of Marketing, Public Relations, and e-commerce.\textsuperscript{122} During the plaintiff’s employment, the plaintiff became well known in the Chicago design community and, because of this recognition, developed a popular personal following on Facebook and Twitter.\textsuperscript{123} The plaintiff also created and maintained a blog hosted by the SFDG website on which the plaintiff authored posts relating to and promoting SFDG.\textsuperscript{124} The plaintiff also authored SFDG-related posts on personal OSN accounts.\textsuperscript{125} The plaintiff’s picture appeared next to each post; a fact the complaint alleged “unmistakably distinguished her likeness.”\textsuperscript{126}

In mid-September of 2009, the plaintiff and a co-worker were seriously injured after being hit by a car while crossing the street.\textsuperscript{127} After undergoing surgery, the plaintiff was transferred to a rehabilitation facility until being discharged in October.\textsuperscript{128} While hospitalized, a visitor informed the plaintiff that the defendant had been authoring posts promoting SFDG on the plaintiff’s personal OSN pages.\textsuperscript{129} The plaintiff then asked the defendant and other SFDG employees to discontinue posting to her OSN pages because her followers could construe these posts to mean that the plaintiff was well and had returned to work.\textsuperscript{130} The defendant,
accompanied by various SFDG employees, visited the plaintiff and discussed design-related matters until December of 2009 when the plaintiff informed the defendant she had changed her OSN passwords. The plaintiff maintains that learning of these “impersonating” posts caused severe emotional distress. The plaintiff further claims that although she returned to work on a temporarily part-time basis in May, the defendant did not attempt to accommodate her injuries and felt the defendant attempted to force her to resign. However, as of March 2010 the plaintiff had not returned to work at SFDG, had not been terminated or resigned, and continued to receive disability and workers compensation. The defendant responded to the complaint by filing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and a motion for summary judgment under Rule 56(b). The district court denied the motion for summary judgment, and granted in part and denied in part the motion to dismiss. Only the 12(b)(6) motion is discussed below.

B. RELEVANT COUNTS

The following is a discussion of the relevant counts included in the complaint and an application of the court’s reasoning to those counts. In count II of the complaint, the plaintiff alleges violation of the Illinois Right of Publicity Act. The Right of Publicity Act states that a person may not use an individual’s identity for commercial purposes during the individual’s lifetime without having obtained previous written consent. The plaintiff contends that the defendant used her identity for a commercial purpose when promoting SFDG over the plaintiff’s

131 Id. at 970.
132 Id.
133 Id.
134 Id.
135 Maremont, 772 F. Supp. 2d at 968.
136 Id. (denying summary judgment because defendant relied solely on allegations in the complaint, which are not evidence for summary judgment purposes).
137 Id.
138 See Complaint, Maremont, 2010 WL 5414528, at *4. Plaintiff’s Lanham Act allegations are not discussed here as they are outside the scope of this Comment. For more information on the Lanham Act, refer to 15 U.S.C. § 1125(a).
139 765 ILL. COMP. STAT. 1075 (1999).
140 Id. at 1075/30(a).
personal OSN accounts without consent. According to the court, the plaintiff sufficiently alleged that the defendant “continually invaded her interest by impersonating her in multiple [p]osts . . . discussing different aspects of interior design.”

In count III, the plaintiff alleges the defendant “misappropriated her name and image for commercial purposes without [her] consent, and thus [is] liable under the common law right of privacy.” However, “[b]ecause the Illinois Right of Publicity Act replaced the common law appropriation of likeness claims,” the court granted the defendant’s motion to dismiss. The plaintiff also alleged two other prongs of invasion of privacy: unreasonable intrusion upon the seclusion of another and false light.

Of significance is the court’s denial of the motion to dismiss the right of publicity claim in count II, while granting the motion as to the common law claim in count III. Under the notice pleading standards contained in Federal Rule 8(a)(2), a plaintiff’s “factual allegations must be enough to raise a right to relief above the speculative level.” In other words, a complaint must contain sufficient facts when accepted as true “state a claim to relief that is plausible on its face.” The court also refers to the legal standard applied to a motion to dismiss wherein all facts are to be accepted as true and all inferences from those facts are to be made in the plaintiff’s favor.

When determining whether a commercial use violation of the publicity right has been sufficiently alleged as in count II, it appears the district court considers the mere fact that the

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141 Maremont, 772 F. Supp. 2d at 972.
142 Id.
143 Id.
144 Id.
145 Id.
146 Maremont, 772 F. Supp. 2d at 973.
148 Twombly, 550 U.S. at 570.
149 Id. at 969. See, e.g., Erickson v. Pardus, 551 U.S. 89, 94 (2007) (“[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.”); McGowan v. Halick, 612 F.3d 636, 638 (7th Cir. 2010) (stating court must accept factual allegations as true and draw all reasonable inferences in plaintiff's favor).
plaintiff’s employer posted design-related comments to what the plaintiff alleges her “personal” OSN pages to be sufficient, stating that the plaintiff alleged the defendants “continually invaded her interest by impersonating her in multiple [p]osts and [t]weets discussing different aspects of interior design.”\textsuperscript{150} The court here clearly adopts the majority approach by granting the plaintiff—a non-celebrity—presumed right of publicity.\textsuperscript{151} Under this approach, the level of celebrity does not go to the existence of the right, but is only considered when calculating damages resulting from the unauthorized commercial exploitation of the individual’s name or likeness.\textsuperscript{152}

Interestingly, in granting the defendant’s motion to dismiss count III, the court held the plaintiff failed “to develop her argument that [d]efendants’ intrusion into her personal ‘digital life’ [was] actionable under the common law theory of unreasonable intrusion upon the seclusion of another.”\textsuperscript{153} The court also denied the false light claim citing the plaintiff’s failure to allege special damages, or that the defendants “acted with actual malice.”\textsuperscript{154} Also of significance is the court’s subsequent analysis.

C. SUBSEQUENT HISTORY

After the district court’s ruling on the claims contained in the initial complaint, the plaintiff filed a second amended complaint\textsuperscript{155} alleging violations of the Lanham Act\textsuperscript{156} and Stored Communications Act\textsuperscript{157} against defendants SFDG and Susan Fredman (counts I and II).\textsuperscript{158} Pursuant to the court’s supplemental jurisdiction, the plaintiff also alleged a claim under the

\textsuperscript{150} \textit{Maremont}, 772 F. Supp. 2d at 972.
\textsuperscript{151} See id. Note that because this case is pending, the court has not addressed the issue of calculating damages.
\textsuperscript{152} \textit{McCarthy}, supra note 12, at § 4:19.
\textsuperscript{153} \textit{Maremont}, 772 F. Supp. 2d at 973.
\textsuperscript{154} Id.
\textsuperscript{155} See Complaint, \textit{Maremont}, 2011 WL 6101949.
\textsuperscript{156} 15 U.S.C. § 1125(a).
\textsuperscript{157} 18 U.S.C. § 2701, et seq.
\textsuperscript{158} See generally 28 U.S.C. § 1331.
Illinois Right of Publicity Act\textsuperscript{159} (count III), and filed an amended common law right to privacy claim\textsuperscript{160} (count IV). The defendants subsequently filed a motion for summary judgment and the plaintiffs filed a motion for partial summary judgment as to counts I, II, and III of the second amended complaint (both pursuant to Federal Rule of Civil Procedure 56).\textsuperscript{161} Faced with these motions, on December 11, 2001, the court granted in part and denied in part the defendants' motion for summary judgment and denied the plaintiff's motion for partial summary judgment.\textsuperscript{162} Most significantly, the court dismissed the plaintiff's Illinois Right of Publicity Act claim as alleged in count III and the common law right to privacy claim as alleged in count IV with prejudice.\textsuperscript{163}

VI. ANALYSIS OF \textit{MAREMONT v. SUSAN FREDMAN DESIGN GROUP: APPLICATION OF CURRENT TESTS REVEALS INHERENT INADEQUACIES}

There are several tests currently applied to right of publicity claims around the country. These tests include the relatedness test, the transformative use test, the actual malice test, the predominant use test, and the nature of the medium test.\textsuperscript{164} As discussed in Part III, the right of publicity in Illinois is “[t]he right to control and to choose whether and how to use an individual's identity for commercial purposes. . . .”\textsuperscript{165} Under the Right of Publicity Act, “[a] person may not use an individual's identity for commercial purposes during the individual's lifetime without having obtained previous written consent. . . .”\textsuperscript{166} Plaintiffs in Illinois have been able to bring suit under this statute in a variety of situations. For example, a well-published author who appeared on hundreds of infomercials could protect against the use of his image on a website that

\textsuperscript{159} 765 ILL. COMP. STAT. 1075, et seq (1999).
\textsuperscript{160} See 28 U.S.C. § 1367(a).
\textsuperscript{161} FED. R. CIV. P. 56.
\textsuperscript{162} \textit{Maremont}, 2011 WL 6101949 at *1.
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} 765 ILL. COMP. STAT. 1075/35 (b) (1999).
\textsuperscript{165} \textit{Id.} at 1075/10.
\textsuperscript{166} \textit{Id.} at 1075/30.
promoted products that he never consented to endorsing,\textsuperscript{167} or, individuals who were photographed riding a roller coaster at an amusement park could protect against the unauthorized use of their image on a television screen.\textsuperscript{168}

On the other hand, because the First Amendment bars laws abridging the freedom of speech,\textsuperscript{169} the right of publicity can “conflict with the First Amendment when an individual's identity is used by another in an artistic or creative expression.”\textsuperscript{170} Each of these several tests takes a slightly different approach toward striking a balance between publicity rights and First Amendment freedom of expression concerns.\textsuperscript{171} Recognizing the First Amendment implications inherent in regulating artistic and creative expression, the Illinois statute contains an exception to the right of publicity in that it does not apply to the “use of an individual's identity in an attempt to portray, describe, or impersonate that individual in a live performance, a single and original work of fine art, play [or] book. . . .”\textsuperscript{172} The following discussion analyzes each test as they have been applied by several courts and evaluates their applicability both generally (under the Illinois Right of Publicity Act) and specifically (as applied to the facts of the \textit{Maremont} case included in Part V).\textsuperscript{173} This analysis reveals inherent inadequacies when applying current tests to publicity cases involving OSNs due to the unique manner in which OSNs convey information and portray an individual user’s online persona—via an easily accessible and highly malleable interface.

A. THE RELATEDNESS TEST

In 2007, a federal district court applying Illinois law addressed the relationship of the right to publicity and the First Amendment in \textit{Christianson v. Henry Holt \\& Co., LLC},\textsuperscript{174} and

\begin{itemize}
\item \textsuperscript{167} Trudeau v. Lanoue, No. 04 C 7165, 2006 WL 516579 (N.D.Ill. March 2, 2006).
\item \textsuperscript{168} Leto v. RCA Corp., 341 F.Supp.2d 1001 (N.D.Ill. 2004).
\item \textsuperscript{169} U.S. CONST. amend. I.
\item \textsuperscript{171} 765 ILL. COMP. STAT. 1075/35 (b) (1999).
\item \textsuperscript{172} See id. at 1075/35 (b); see also Collier v. Murphy, No. 02 C 2121, 2003 WL 1606637 *2 (N.D.Ill.2003).
\item \textsuperscript{174} Christianson, 2007 WL 2680822, at *3.
\end{itemize}
applied what has become known as the relatedness test.\textsuperscript{175} Adopted from the third Restatement of
Unfair Competition, according to this test a person’s image must bear a “reasonable relationship”
to the relevant subject matter in order to warrant protection.\textsuperscript{176} Courts adopting this approach
infer commercial purpose from a failure to establish such a reasonable relationship.\textsuperscript{177}

In \textit{Christianson}, the court considered a right of publicity claim for the use of an image of
an individual on the cover of a book.\textsuperscript{178} Because Illinois publicity law expressly exempts
communicative and expressive works, the court sought to determine whether there was a subject
matter relationship between the book itself and the image on the cover of the book.\textsuperscript{179} This
determination informs the analysis as to the commercial versus non-commercial dichotomy: the
more relationship found, the less the use is considered commercially motivated.\textsuperscript{180}

The court held the claim did not fall within the statutory exemption because the creative
work in question did not attempt to portray, describe, or impersonate that individual, i.e., the
plaintiff.\textsuperscript{181} Because the image did not depict the story, nor was the subject matter of the image
ever mentioned in the book, the use of the image was not sufficiently communicative or
expressive and thus was not immunized by free speech principles.\textsuperscript{182} Put simply, even though the
plaintiff embodied the \textit{general} subject matter of the book, the image of that particular individual
did not bear a reasonable relationship to the book as a whole.\textsuperscript{183} Rather, these factors led to the
conclusion that the image was not used to further the author's storytelling role, and instead
supported finding the use was purely commercial.\textsuperscript{184} However, the court noted that if the plaintiff

\begin{footnotes}
\item[175] Touhy \& Noll, supra note 173, at 149.
\item[176] \textsc{Restatement (Third) of Unfair Competition} § 47, cmt. c (1995).
\item[178] \textit{Christianson}, 2007 WL 2680822, at *3.
\item[179] \textsc{Ill. Comp. Stat.} 1075/35 (b) (1999); \textit{McCarthy}, supra note 12, at § 3:2.
\item[180] \textit{McCarthy}, supra note 12, at § 3:2.
\item[181] \textit{Christianson}, 2007 WL 2680822, at *3.
\item[182] Id.
\item[183] Id.
\item[184] Id.
\end{footnotes}
“had been even mentioned in [the creative work], [the] cause of action might fit within this exception and [the plaintiff’s] claim under the IRPA could be barred.\textsuperscript{185}

The court then discussed another statutory exemption: claims against the “use of an individual's identity for non-commercial purposes, including any news, public affairs, or sports broadcast or account….”\textsuperscript{186} The \textit{Christianson} court considered the content of the book “non-commercial speech that focuses on public affairs” and again stated that if the “plaintiff's identity was incorporated into that non-commercial speech, [the] claim would fall within this exception.”\textsuperscript{187} Because the plaintiff was not mentioned in the book, “it follows that the purpose of her image [was] not to reflect the subject matter of the book, but instead to reflect the ideas of the book in such a way that it catches the eye of a prospective customer and leads to a possible sale.”\textsuperscript{188}

Due to their unique nature, cases involving OSN-related claims are distinguished from typical publicity cases. For instance, while the defendant in \textit{Christianson} appropriated the plaintiff’s likeness on a book cover without her consent,\textsuperscript{189} in \textit{Maremont} the defendant authored several posts to various OSNs beside which the plaintiff’s likeness appeared.\textsuperscript{190} Because the plaintiff’s misappropriation claim in \textit{Christianson} rested on the fact that the publisher lacked permission to use the plaintiff’s image in any manner, the court’s analysis centered on whether the use of the image was reasonably related to the content of the book and thus constituted a protected use.\textsuperscript{191} In \textit{Maremont}, given that some of the plaintiff’s OSN followers were due to the plaintiff’s official employment status and that some of the posts related to that employment, the

\begin{footnotes}
\item \textsuperscript{185} \textit{Id.}
\item \textsuperscript{187} \textit{Christianson}, 2007 WL 2680822, at *3.
\item \textsuperscript{188} \textit{Id.}
\item \textsuperscript{189} \textit{See id.}
\item \textsuperscript{190} \textit{See Maremont}, 772 F. Supp. 2d, at 970.
\item \textsuperscript{191} \textit{See Christianson}, 2007 WL 2680822, at *3.
\end{footnotes}
court first made a relevance determination and, in doing so, applied a form of the relatedness test.\textsuperscript{192}

The court then analyzed whether the appropriation element had been met and determined that because the defendants did not pass themselves off as the plaintiff in the relevant posts, the defendants did not appropriate the plaintiff’s identity.\textsuperscript{193} The court also cited the fact that the plaintiff herself recognized her temporary replacement during her absence as evidence against finding misappropriation.\textsuperscript{194} In other words, although the defendants did in fact author posts under the plaintiff’s name, because several posts stipulated the plaintiff’s absence and temporary replacement the appropriation element was not satisfied.\textsuperscript{195} As demonstrated by the court’s decision in \textit{Maremont} as to whether a claim based upon OSN posts can survive summary judgment, the nature of OSNs as a communicative medium allows such issues to be raised that uniquely implicate an individual’s right of publicity.\textsuperscript{196}

B. THE TRANSFORMATIVE USE TEST

Borrowing from copyright law, the transformative use test asks whether the new expressive work adds purpose or alters the character of the original by contributing original expression, meaning, or message or, alternatively, merely “supersedes” the original creative objects.\textsuperscript{197} Applying the transformative use test, the California Supreme Court in \textit{Comedy III Productions, Inc. v. Gary Saderup, Inc.} considered whether the work in question added “significant creative elements so as to be transformed into something more than a mere celebrity

\textsuperscript{192} See \textit{Maremont}, 2011 WL 6101949, at *7.
\textsuperscript{193} Id. (citing \textit{RESTATEMENT (SECOND) OF TORTS} § 652C, cmt. c (1977)).
\textsuperscript{194} \textit{Maremont}, 2011 WL 6101949, at *7.
\textsuperscript{195} See id.
\textsuperscript{196} See id.
\textsuperscript{197} \textit{Comedy III Prods., Inc. v. Gary Saderup, Inc.}, 21 P.3d 797, 799 (Cal. 2001).
likeness or limitation” and found a realistic drawing of “the Three Stooges,” later used on clothing, was not sufficiently “transformative” to justify First Amendment protection.198

The court in ETW Corporation v. Jireh Publishing, Inc. applied a variation of the transformative use test in finding a realistic painting of Tiger Woods conveyed enough expressive content to qualify as a protected use. In doing so, the court emphasized the source of value stating that the work did “not capitalize solely on a literal depiction” of the individual but was instead an artistic collage describing a historic sports event and the individual's significant achievement at that event.199 Therefore, under this court’s interpretation of the test, if the value of the work derives principally from a source other than the fame of the celebrity—from the creativity, skill, and reputation of the artist—it may be presumed that sufficient transformative elements are present to warrant protection.200

On the other hand, it has been argued that this test is logically flawed because it allows and even encourages potential infringers to simply “add some sort of artistic or creative aspect to even a clearly commercial use of a celebrity name or likeness to deserve protection.”201 Applied to the right of publicity and online social networks, this test could create a situation where the more aspects of another’s persona an infringer incorporates into a creative, fictional construction, the more likely the infringer’s activities warrant protection.202 Furthermore, the partially pre-constructed nature of OSN pages places physical restrictions upon a user’s artistic capabilities thus limiting the availability of creative aspects at the user’s disposal.203 Therefore, by allowing

198 Id. at 800-01, 811.
199 ETW Corp. v. Jireh Publ’g, Inc., 332 F.3d 915, 938 (6th Cir. 2003).
200 See id.
201 Symposium, supra note 111, at 412.
202 Id.
203 Id.
limitless borrowing of aspects of an individual’s persona this test fails to provide an appropriate analytical framework for claims involving OSNs.\textsuperscript{204} 

C. THE NATURE OF THE MEDIUM TEST

The Restatement (Second) of Torts states that publicity occurs when a “matter is made public” and mentions two distinct avenues available to satisfy the publicity requirement: communicating a matter 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.”\textsuperscript{205} In other words, publicity is analyzed first by “determining if the instrument used to communicate the disputed information is a private or public medium.”\textsuperscript{206} Applied to OSNs, if the communication occurred via a private medium, the court would then consider the number of individuals contacted through the medium.\textsuperscript{207} In this instance, the information contained in the communication must have reached “so many persons that the matter must be regarded as substantially certain to become one of public knowledge.”\textsuperscript{208} On the other hand, if the communication occurred via a public medium, the court would look to whether the information was wholly transferred to the public at large.\textsuperscript{209} Arguably, OSNs can generally be described as public forums because of their similarity to other mediums of expression that communicate to the public at large as well as the ease by which information is able to be transferred to the public.\textsuperscript{210}

1. Public Versus Private Media

Several courts have considered whether republishing or posting various types of information on OSNs constitutes a common law invasion of privacy and have generally found no

\textsuperscript{204} Id.
\textsuperscript{205} \textsc{Restatement (Second) of Torts} § 652 (1977).
\textsuperscript{207} Id.
\textsuperscript{208} \textsc{Restatement (Second) of Torts} § 652D cmt. a (1997).
\textsuperscript{209} Id.
\textsuperscript{210} Decker, supra note 206, at 11-13.
reasonable expectation of privacy as to voluntarily posted content.\textsuperscript{211} For example, in \textit{Yath v. Fairview Clinics} the court ruled against a health care provider and employees finding the temporary internet posting of information from a patient's medical file on a public social networking web page satisfied the publicity element of the patient's invasion of privacy claim based on publication of private fact.\textsuperscript{212} However, in \textit{Maremont}, the court dismissed the plaintiff's Illinois common law intrusion upon seclusion claim—the elements of which are (1) an unauthorized intrusion into seclusion; (2) the intrusion would be highly offensive to a reasonable person; (3) the matter intruded upon was private; and (4) the intrusion caused the plaintiffs anguish and suffering—citing the third element was not met.\textsuperscript{213} The court reasoned that in order for the matter to be considered private under the third element, the matter must not be openly displayed and the plaintiff must show an attempt to keep such matters private.\textsuperscript{214}

In making this determination, the court cited the following undisputed facts contained in the plaintiff’s statement: that the plaintiff had a Twitter following of approximately 1,250 people, had Facebook followers, that the plaintiff’s Twitter posts were targeted towards the design community, that the plaintiff signed business emails as “SFDG's Marketing Director” with an invitation to “Become a fan of SFDG on Facebook” and to “Follow us on Twitter,” and that the plaintiff’s OSN posts were often linked to the—publicly accessible as well as promotional—SFDG blog, “Designer Diaries: Tales from the Interior.”\textsuperscript{215} In a footnote, the court differentiated the degree to which Facebook and Twitter posts are “public” stating that “Facebook posts are

\textsuperscript{211} See, e.g., Moreno v. Hanford Sentinel, Inc., 91 Cal. Rptr. 3d 858, 864 (Cal. Ct. App. 2009) (court considering whether principal’s submission to local newspaper of student’s OSN journal entry constituted an invasion of privacy, holding it did not because information was readily available to anyone with a computer and thus was not private fact.); Yath v. Fairview Clinics, N.P., 767 N.W.2d 34 (Minn. Ct. App. 2009).

\textsuperscript{212} See \textit{Yath}, 767 N.W.2d, at 158.

\textsuperscript{213} See \textit{Maremont}, 2011 WL 6101949, at *7 (citing Cooney v. Chicago Public Sch., 943 N.E.2d 23 (1st Dist. 2010)).

\textsuperscript{214} See id. (citing Acosta v. Scott Labor, LLC, 377 F.Supp.2d 647, 650 (N.D.Ill. 2005) (“[P]ersons cannot reasonably maintain an expectation of privacy in that which they display openly… ”)).

\textsuperscript{215} \textit{Maremont}, 2011 WL 6101949, at *7.
accessible only to those whom the user selects, and thus they are not strictly public.”216 while Twitter posts “are usually visible and accessible to the general public.”217

The court went on to state “[v]iewing these facts and all reasonable inferences in [the plaintiff’s] favor, there is no dispute as to the material facts that the matters discussed in [the relevant] Facebook and Twitter posts were not private and that [the plaintiff] did not try to keep any such facts private.”218 Therefore, the court concluded the plaintiff failed to put forth any private information upon which the defendants intruded.219 This court’s reasoning suggests that due to the public nature of OSN pages, an individual cannot maintain a reasonable expectation of privacy as to any information posted to that individual’s OSN page.220

However, it is unclear which of the several factors the court listed carries the most weight: the number of followers the plaintiff had amassed, the fact that the audience the plaintiff sought to reach through OSN posts was the same audience targeted through the defendants’ posts, or that the plaintiff often directed that audience toward these OSN pages.221 This case contains significant implications concerning the court’s future treatment of privacy cases involving OSNs; by focusing on the third element, posting information on such sites implicates zero expectation of privacy, thereby leaving such claims with a minimal likelihood of success.222 This high degree of difficulty in maintaining a common law privacy claim based upon OSNs

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216 Id. at n. 2 (citing Crispin v. Christian Audigier, Inc., 717 F.Supp.2d 965, 980 (C.D.Cal.2010); Cohen v. Facebook, Inc., 2011 WL 3100565, at *1 (N.D.Cal. June 28, 2011) (“As a ‘social networking’ internet site, Facebook exists because its users want to share information—often about themselves—and to obtain information about others, within and among groups and subgroups of persons they already know or with whom they become acquainted through using Facebook.”)).

217 Maremont, 2011 WL 6101949, at n. 2.

218 Id. at * 8 (citing Cooney, 943 N.E.2d 23). See Lovgren v. Citizens First Nat'l Bank of Princeton, 534 N.E.2d 987 (Ill. 1989) (“[T]he core of this tort is the offense prying into the private domain of another.”).


220 See id.

221 See id.

222 See Kathleen Elliot Vinson, The Blurred Boundaries of Social Networking in the Legal Field: Just “Face” It, 41 U. MEM. L. REV. 355, 374-75 (2010) (“It is possible that any postings on social network sites may defeat users' expectations of privacy, regardless of their individual privacy settings. Even if a user utilizes privacy settings, it may not protect her from blurred boundaries that result in subpoenas, discovery, ethical and legal issues, and private postings becoming public.”).
effectively removes it as an avenue for OSN-based claims, giving the statutory publicity route even greater significance for a plaintiff seeking legal recognition of such claims.223

2. The Principle of Separability

Addressing the First Amendment issues apparent in regulating communication in the form of OSN posts, some commentators argue the principle of separability provides a useful framework for courts to employ when considering OSN-related cases. By limiting the scope of the persona, this principle can assist in pinpointing personal attributes deserving protection while also protecting speech.224 When analyzing a particular online social network, a court could consider all of its components—including the host's template, the user's posts, comments, uploaded photos, audio, and video files—within the framework of separability in order to identify the personal attributes that create the online persona in question.225 For example, if a court were to determine a Facebook user's persona consisted of only his personal information, photos, videos, and status updates he or she could only control exploitation of these elements; elements such as wall posts by others would remain in the public domain and Facebook would maintain ownership of the profile template.226 Applying the separability principle to OSNs could help ensure that only these varying elements of personality receive protection.227 Furthermore, while the persona's creator would receive the legal benefits of the right of publicity, its limited

223 For detailed discussions of the reasonable expectation of privacy online, see Bryce Clayton Newell, Rethinking Reasonable Expectations of Privacy in Online Social Networks, 17 RICH. J.L. & TECH. 12 (2011) (arguing for adoption of a more contemporary conception of what constitute reasonable expectations of privacy); see also Avner Levin & Patricia Sanchez Abril, Two Notions of Privacy Online, 11 VAND. J. ENT. & TECH. L. 1001, 1002 (2009) (arguing “OSNs, as businesses profiting from socializing online, are best positioned to offer online socializers, often the young and vulnerable, effective protection in accordance with their notion of network privacy above and beyond regular measures of personal information control, and they should be required to do so.”).
224 Nemet-Nejat, supra note 7, at 130-31.
225 Id.
226 Id.
227 Id.
scope—encompassing only the identifiable personable attributes—would guard against impoverishment of speech.228

In dismissing a right of publicity claim based on several OSN posts, the court in Maremont focused not on the public or private nature of the medium, but on whether the plaintiff’s identity was appropriated through the defendant’s posts.229 The posts in question were made to the plaintiff’s OSN account and contained promotional information similar to posts previously authored by the plaintiff on that account. What is unclear is how much weight the court placed on the context and content of the posts in question.

D. APPLICATION OF TRADEMARK LAW

It has also been argued that trademark law presents an applicable model for the right of publicity.230 An application of trademark law to publicity views celebrities as symbols (in that much of a celebrity's symbolic power comes from cultural associations granted by the public audience).231 Supporters of this approach contend that both trademark law, which protects a business's name and identifying marks, and the right of publicity, which safeguards a celebrity's interest in her name and likeness, “give rights-holders some measure of control over the meaning of their identities by permitting them to control the use of associated symbols” while providing a limiting principle to the scope of protection.232 Further, both right of publicity and trademark claims are restricted to instances of commercial use by an alleged infringer. Supports of this approach contend a right of publicity modeled on trademark law would better balance the

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228 Id.
229 Nemet-Nejat, supra note 7, at 130-31.
231 Id. at 1172-74.
232 Id.
interests of rights holders with the First Amendment.\textsuperscript{233} Indeed, many right of publicity cases have relied on the Lanham Act to protect personal images.\textsuperscript{234}

The structure and content of trademark law also lend to its application to publicity rights cases. Both publicity and trademark laws are concerned not with the encouragement of new creation (like other forms of IP rights), but with the protection of names in the context of commercial uses.\textsuperscript{235} Trademark law is designed to protect the integrity of a mark's meaning by preventing uses of the mark that confuse or mislead consumers.\textsuperscript{236} The proper inquiry, however, is not whether a likelihood of confusion on the part of the audience/consumer or Lockean labor theory supports finding a celebrity individual is entitled to the full value of the celebrity identity; the inquiry should focus on whether the predominant purpose of the defendant is to exploit the economic associative value of the celebrity without paying an appropriate fee.\textsuperscript{237} This inquiry correctly questions the subjective intent of the defendant rather than the expressive content or nature of the use of identity.\textsuperscript{238}

The trademark analogy provides one reason to protect publicity rights as well as an avenue toward understanding the limits on those rights. If we are to follow the rationale behind trademark claims, so should follow the substantive scope of publicity claims.\textsuperscript{239} Unfortunately, while the vast majority of right of publicity cases fit within the established framework of trademark law, these cases apply the doctrine in ways that diverge significantly from what the trademark analogy might suggest.\textsuperscript{240} For example, the current approach adopted by several courts presents the right of publicity as a competing right weighed against the right to free speech and,

\textsuperscript{233} Id. at 1162.  
\textsuperscript{234} Id.  
\textsuperscript{235} Dogan & Lemley, supra note 230, at 1191.  
\textsuperscript{236} Id. at 1193.  
\textsuperscript{237} See Tan, supra note 2, at 982.  
\textsuperscript{238} Id.  
\textsuperscript{239} Dogan & Lemley, supra note 230, at 1191.  
\textsuperscript{240} Id.
as a result, does not sufficiently consider the inherent social and cultural significance of the
celebrity personality in identity formation.  

While this concern is especially relevant to a celebrity in a traditional sense, it is not so
relevant when applied to the concept of an OSN-born celebrity. A traditional celebrity embodies
“attributes like glamour, beauty, and prestige,” and thus becomes a “cultural sign” able to be
manipulated by individuals as a means of personal expression. Due to the characteristics
previously discussed, this is not true when applied to the level of celebrity achieved through
one’s OSN persona simply because there exists no expressive embodiment of a “cultural sign”
through which public identity is formulated. Put another way, the level of well-knownness does
not give rise to or invite common cultural cognizance.

Promoting integrity of meaning represents a legitimate justification for the right of
publicity as applied to celebrities, but this same justification does not correlate in the context of
non-celebrities. It is uncontroversial that if an individual is misled by the use of a celebrity name
or likeness, both the individual and the celebrity are injured. What is not so widely accepted is
the assertion that a non-celebrity can establish recognizable injury (commercial or otherwise)
deserving legal protection. In other words, due to the (increasingly) permeating nature of fame
and celebrity in contemporary society, the question remains whether the growth and visibility of
OSNs presents a similar opportunity for an individual, not considered a celebrity in a traditional
sense, to maintain a level of visibility evidencing substantial commercial value on par with that
of a traditional celebrity therefore justifying legal protection.

241 See Tan, supra note 2, at 974-75.
242 See id. at 973.
243 Id.
The court in *Maremont* addressed a false association claim (also known as a false endorsement claim) under the Lanham Act\(^{244}\) contained in the plaintiff’s second amended complaint and referred to the language of the ninth circuit in *Waits v. Frito–Lay, Inc.*, defining a false endorsement claim based upon the unauthorized use of a person's identity as “a type of false association claim, [alleging] the misuse of a trademark, i.e., a symbol or device such as a visual likeness, vocal imitation, or other uniquely distinguishing characteristic, which is likely to confuse consumers as to the plaintiff's sponsorship or approval of the product.”\(^{245}\) By rejecting the defendants’ motion for summary judgment and the defendants’ argument that the plaintiff lacked standing because she did not suffer financial injury,\(^{246}\) the court recognized the plaintiff had a protected, commercial interest in her name and identity within the Chicago design community.\(^{247}\) The court also refused to address the issue of actual injury or unjust enrichment because the parties had not yet completed discovery, especially as it related to the issue of damages.\(^{248}\) As such, while the court dismissed the plaintiff’s Right of Publicity claim under the Illinois Right of Publicity statute, the Lanham Act claim remains.\(^{249}\)

E. THE ACTUAL MALICE TEST

Under the actual malice test, a plaintiff must demonstrate by clear and convincing evidence that the defendant intended to create a false impression in viewers’ minds that the work before them was in fact the original image or likeness in order to sustain a right of publicity

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\(^{245}\) See *Maremont*, 2011 WL 6101949, at *4 (citing *Waits v. Frito–Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir.1992)).
\(^{246}\) See *Maremont*, 2011 WL 6101949, at *4 (citing *L.S. Heath & Son, Inc. v. AT & T Info. Sys., Inc.*, 9 F.3d 561, 575 (7th Cir.1993); *Web Printing Controls Co. v. Oxy—Dry Corp.*, 906 F.2d 1202, 1204–05 (7th Cir.1990)).
\(^{247}\) See *Maremont*, 2011 WL 6101949, at *4 (stating in order to “recover damages for a purported Lanham Act violation, the plaintiff ‘must demonstrate that it has been damaged by actual consumer reliance on the misleading statements…”’ (quoting *L.S. Heath & Son, Inc.*, 9 F.3d at 575)).
\(^{248}\) See *Maremont*, 2011 WL 6101949, at *5.
\(^{249}\) Id. at *5, *7.
The central inquiry of this test concerns the subjective intent of the defendant. Arguably, this test makes First Amendment protection far too easy: a defendant may warrant constitutional protection if he unintentionally or unknowingly misled or warned other OSN users able to access the relevant posts.\footnote{See Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1186-87 (9th Cir. 2001); see also Eastwood v. Nat'l Enquirer, Inc., 123 F.3d 1249, 1252 (9th Cir. 1997) (vaguely referring to the “actual malice” test).} Applied to OSN publicity claims, due to the nature of the medium of OSNs—existing in the virtual world—demonstrating intent is highly difficult.\footnote{Symposium, supra note 111, at 411.} The ease of online accessibility as well as the communally constructed nature of OSNs lend to the difficulty in finding malicious intent (with the exception, perhaps, of posts clearly untrue or facially offensive) or the specific intent to mislead.\footnote{See id.}

In the *Maremont* case, the defendants’ posting to the plaintiff’s personal OSN accounts fails to satisfy this test because several of the posts informed potential readers of the plaintiff’s temporary absence thus removing any reasonable false impression as to source.\footnote{See *Maremont*, 2011 WL 6101949, at *7.} Although the defendants continued to post to the plaintiff’s OSN accounts against the plaintiff’s request, the court found the identity appropriation element not satisfied because the defendants did not “pass themselves off” as the plaintiff in the relevant posts.\footnote{Id.} While not expressly referring to actual malice or intent, the court’s reasoning suggests their finding a lack of intent due to the defendants’ attempt to inform potential readers of the posts’ authorship. As such, because the court inferred good intent from the defendants’ actions, the need to determine whether any third party was actually misled was not pertinent.
Much like the application of trademark law previously discussed, the actual malice test considers the projected impression upon third parties as to the source of the image or likeness. There are two issues with this approach: (1) the consideration of third party impression is secondary to a finding of intent, and (2) there is no requirement to put forth evidence that third parties were actually misled. In light of the difficulties of demonstrating intent when analyzing a publicity claim based upon OSN appropriation, such an onerous task outweighs its purpose, thus making the process unavailing.

VII. CONCLUSION: THE RIGHT OF PUBLICITY AND THE DIGITAL PERSONA IN ILLINOIS

In light of the several unique features of OSNs discussed in Part IV, the efforts made by Illinois courts (and elsewhere) toward resolving the novel issues relating to OSNs are inadequate and fail to provide an appropriate analytical framework. Notably, “[t]he difficulty that courts have experienced in ascribing precise meaning to the privacy and publicity rights and applying them to the facts presented by the cases would suggest that they are not [so distinct].”256 Thus, efforts to forge such a distinction are ineffective when analyzing the claims of such cases. This is especially true when applied to cases involving one’s digital persona. For instance, given the easy accessibility and malleability of OSN pages, existing within a relentlessly commercial society, “‘commercial’ and ‘noncommercial’ are supremely inexact terms.”257 As such, attempting to distinguish between purely commercial versus expressive use is a matter of degrees not defined categories.258

Furthermore, while a non-traditional celebrity claiming misappropriation of his or her digital persona may put forth evidence of “commercial” value, and while the population of non-

256 Peter L. Felcher & Edward L. Rubin, Privacy, Publicity, and the Portrayal of Real People by the Media, 88 YALE L.J. 1577, 1595-96 (1979) (arguing it is almost impossible to isolate the qualities that, when misappropriated, give rise to either a right of publicity or right of privacy claim).
257 See Haemmerli, supra note 32, at 242.
258 See Haemmerli, supra note 32, at 399.
traditional celebrities born overnight has radically increased due to the growing prevalence of online social networks, traditional celebrity personas “wield significantly greater power in contemporary society” through their “ubiquitous presence in the mass media” and “associations with causes, products and events.” All of which lend to their commercial value and their inevitable exploitation. Put simply, while it might be possible to state that the right of publicity is every person’s inherent right to control the commercial use of his or her identity, celebrity sells, plain and simple. There exists significant economic associative value of identity, existing regardless of the definition or meaning of celebrity or the complex manner in which the celebrity’s identity is constructed in contemporary society. A digital persona evidencing the same level of associative value begs recognition, in limited circumstances, within the Illinois Right of Publicity.

Due to the unique nature of the media providing the platform for the development of this digital right, such a right does not fit neatly within the current framework provided by the Illinois Right of Publicity statute. Instead, the Illinois court should adopt a two-part analysis to be applied specifically to claims implicating the digital right. The first part of the analysis outlines a threshold test for determining whether an actionable claim of appropriation of one’s “digital” right of publicity exists. This determination requires the use of the plaintiff’s digital persona be immediately, specifically, and personally or privately appropriated without consent. The plaintiff’s identity must be readily identifiable, not simply evoked or suggested.

If an actionable claim is found, the second part of the analysis is applied when determining and calculating damages. It is here that the court must determine whether those

259 See McCarthy, supra note 12, at § 1:3.
260 Id.
261 Id.
262 See Tan, supra note 2, at 913, 980.
263 See Haemmerli, supra note 32, at 463.
264 See id.
characteristics—identified by the court through the threshold test—possess value to the individual, as well as whether that value is commercial. Again, protection should only extend to those characteristics that can be readily distinguished as belonging to or inherent to that individual’s identity (i.e. immediate, specific). Establishing these requirements supports a more relevant inquiry asking not whether there is a likelihood of confusion on the part of the audience or consumer, rather, whether the individual has suffered harm attributable to the unauthorized appropriation of their digital persona. Further, by focusing on the immediacy, specificity, and degree to which the appropriation involves private facts or issues, this inquiry better questions the subjective intent of the defendant rather than the expressive content or nature of the use of the identity and thus provides an effective approach toward right of publicity claims under the Illinois Right of Publicity Act involving an individual’s so-called digital persona.265

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265 See Haemmerli, supra note 32, at 463.
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