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Being Blonde in China and How to Protect My Right of Publicity Abroad

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Being Blonde in China and How to Protect My Right of Publicity Abroad

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Imagine shopping in a grocery store and a stranger snaps a photo of you examining avocados. Your photo is then turned into a viral meme, and now you have to explain to your employer that you do not endorse the words or phrases that now accompany your candid grocery shopping photo. Or worse, your photo could end up as a deep fake that has manipulated the image of your face into doing something that is "Not Safe for Work." You would want a legal remedy for the emotional distress you've endured as your "paparazzi" photo in the grocery store has turned into a global meme. With technological advancements and the innovative ways people's privacy can be invaded, it is important to know whether one's right of publicity in the United States and in other countries can protect an individual from such harm caused by deep fakes and other unauthorized uses of a photo.

This article discusses the history and development of the right of publicity in the United States, its underlying rationales, and remedies for a right of publicity cause of action. This article compares the recognition of the right of publicity in various countries, with an emphasis on China, to the United States. The findings of a global recognition of the right of publicity in other countries is linked to their perspective of how they view the individual. The United States' right of publicity is inextricably linked to the hub of celebrities in Hollywood and has even expanded to non-celebrities. Other regions, such as countries in Asia, view the individual as being part of a collective whole. This ideological shift reflects the gaps in the legal understanding of the right of publicity. This article calls for an international standard to protect the right of publicity to celebrities and non-celebrities in the United States and various countries, with a focus on China.

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I. INTRODUCTION

Imagine being in public and being stopped by a crowd of people asking to take your picture. Their eager faces hang on your every word while they wait anxiously for you to accept their request. *Am I being mistaken for someone famous? Did I somehow become a celebrity overnight? The video of my dog saying "I love you" must have gone viral. That's it. That's why I am suddenly the center of attention. That's how they know who I am.*

I felt like I had become famous overnight on my trip throughout Asia, which included China. The staring first began in Beijing during a tour of the Ming Dynasty Tombs. Our tour group was at the entrance of the tombs when an elderly man stopped abruptly in his tracks to stare at me. Perhaps I had formed a pool of sweat on my back or a trail of toilet paper had followed me from the bathroom on the bottom of my shoe. I self-consciously checked myself out only to discover that nothing was amiss.

At the Summer Palace, a group of older women giggled before asking if they could take a picture with me. "Of course," I managed to say, stunned. I asked the group why they wanted to take a picture with me and they pointed to my blonde hair, blue eyes, and fair skin. *Ah-ha! So the video of my dog was not the reason for my sudden fame.* I could now see that the main attraction was my goldilocks hair and eyes that mirrored the sky.

The phenomenon I experienced of becoming a celebrity overnight is not unusual for other travelers. Shanghai and Beijing are visited by increasing numbers of international travelers, but they are also receiving more and more Chinese tourists from the rural provinces who now have the means to travel, and whose only prior exposure to tourists from outside China might be through their television set.[1] In China, "a country of 1.3 billion, over 91% of the population is Han (or ethnic "Chinese"), and any variation in hair color from the standard black pretty much sticks out like a sore thumb."[2]

Is this what celebrities feel like? Everywhere I went in China, I was stared at intensely, approached by flocks of tourists, and even had my arm stroked. Although I was not used to this kind of attention, I did not mind it one bit until one night when I was in the lobby of my hotel. I could hear whispers and snickering. Instantly, I felt multiple pairs of eyes staring at me. I was ready to pose for another photo with eager tourists, but when I looked up it was a group of men towering over me. A group of men that could easily overpower me in an instant. I tried to avert their eyes by looking back

[1] Heather Hall, *Becoming a Celebrity in China,* FERRETING OUT THE FUN (Mar. 5, 2014), https://www.ferretingoutthefun.com/2014/03/05/being-blond-in-china/.
[2] *The Notoriety of Being Blonde in China,* THIRDEYEMOM (Jan. 13, 2012), https://thirdeyemom.com/2012/01/13/the-notoriety-of-being-blonde-in-china/.

down, but I realized they were taking photos of me, so I got up and left, visibly upset.

What if the group of men had done more than just take my photo? My thoughts were never-ending. But what's so bad about a few photos they managed to snap of me while I was sitting in the lobby? Sure, the group of men may have not asked my permission for my photo like the others I had encountered, but what harm is there in possessing a photo of me?

The possibility of my photographs being shared among the eager tourists' scrapbooks or on Facebook seemed innocent. But what if my photos were manipulated to create a false narrative where I was performing something X-rated? The group of men could have taken a video of me without me knowing the details of the images or videos of me they now possessed on their phones. The possibilities are endless. Although I was in a public space and should not be expected to have the same level of privacy as if I were behind closed doors, I did not like the idea that my image could be floating somewhere on the dark web for anyone to view and potentially mold into something new.

Should I, a normal individual, be entitled to a right of publicity that is typically afforded to celebrities? And if I am entitled to a right to protect my name, image, and likeness, how does this hold up in another country whose right of publicity laws are nonexistent compared to the United States?

In this article, I aim to explore intellectual property and privacy laws with an emphasis on comparing the right of publicity in the United States with the right of publicity in China. I will provide a brief survey as to how other countries view the right of publicity, explore the potential liabilities of how the expansion of technology can lead to dire consequences such as photo manipulation and propose a systematic change to the general outlook on the rights of celebrities and non-celebrities as it pertains to published images and videos on the Internet.

II. OVERVIEW OF PRIVACY LAWS IN THE U.S.

I will first explore the right of publicity in the United States in order to compare U.S. laws with countries abroad, with an emphasis on China. Later, I will make suggestions for all countries in the development of the right of publicity.

A. History of the Right of Publicity in the United States

When studying the right of publicity, it is best to begin with the tort of appropriation. "The tort of appropriation protects '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, and in so far as the use may be of benefit to him or to others.'"[3]

"To be liable for appropriation, 'the defendant must have appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness.'"[4]

In response to *Roberson v. Rochester Folding Box Co.,* a case about a woman whose image appeared on an advertisement for flour in which her right of privacy was not recognized by the court, the New York state legislature passed a statute to recognize the right of privacy for a person's name or portrait.[5] California's similar statute states that, "Any person who knowingly uses another's name, . . . photograph, or likeness, in any manner, . . . for purposes of advertising . . . or soliciting purchases of, products . . . without . . . prior consent . . . shall be liable for any damages." [6] In addition, there is a California statute for post-mortem rights of publicity.[7]

The original rationale for the appropriation was based on the right of privacy.[8] However, the case *Haelan Labs Inc. v. Topps Chewing Gum Co.,* first developed a property-based rationale, which introduced the right of publicity.[9]

B. The Right of Privacy

The development of the right of publicity began with the idea of the right of privacy. This idea was first introduced by Samuel Warren and Louis Brandeis in *The Right to Privacy,* a Harvard Law Review article where they argued for the creation of a new right to protect a person's private life.[10] According to Warren and Brandeis, "[r]ecent inventions and business methods call attention to the next step which must be taken for the protection of the person . . . [and for the right] 'to be let alone.'"[11] With the influx of new technology, Warren and Brandeis warned that "[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life . . . [and] threaten to make good the prediction that

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[3] DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 213 (2003) (citing Restatement (Second) of Torts §652C, cmt. a (Am. Law Inst. 1977)).
[4] *Id.* (citing Restatement (Second) of Torts §652C, cmt. c (Am. Law Inst. 1977)).
[5] *Id.* at 26-27 (citing *Roberson v. Rochester Folding Box Co., 64 N.E. 422* (N.Y. 1902)).
[6] Cal. Civ. Code § 3344(a) (West 1971).
[7] Cal. Civ. Code § 3344.1(a)(1) (West 2012).
[8] Professor Tyler Ochoa, Lecture on Rights of Publicity at Santa Clara University School of Law (Jan. 13, 2020).
[9] *See Haelan Labs. Inc. v. Topps Chewing Gum Co.*, 202 F.2d 866 (2d Cir. 1953).
[10] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
[11] *Id.* at 195.

'what is whispered in the closet shall be proclaimed from the housetops.'"[12] When their article was published, "Warren and Brandeis specified that invasions of privacy could only occur through written or printed publication."[13] "[W]ith the development and popularization of radio in the 1930s and 1940s, courts eliminated the distinction between printed and oral publication in the context of invasion of privacy claims."[14] Although, "with the invention of television and the expansion of the Hollywood film industry (both of which made it possible to mass-market celebrity personalities), Melvin Nimmer recognized that the privacy tort was 'not adequate to meet the demands of the twentieth century, particularly with respect to the advertising, motion picture, television, and radio industries.'" [15] The emerging technologies strengthened the property interests that celebrities held in their identities which led to the property-based, right of publicity.[16]

C. The Emergence of a Property-Based Right

The alternative rationale became known as the right of publicity and was first referred to as such in *Haelan,* where Judge Jerome Frank held that New York recognized a common law tort of "publicity" distinct from §§ 50-51's remedy for appropriation.[17] In *Haelan*, a chewing gum company bought the exclusive right to the image of a particular baseball player and sued a rival company for producing and selling cards with that player's picture.[18] The defendant's company claimed that the plaintiff could not prevail on a claim of invasion of privacy because the right of privacy was held by the player and was unassignable.[19] However, the court held that in addition to a 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, and that such grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else."[20]

Expanding on the holding and in praise of the outcome in *Haelan*, Melville Nimmer explained the inadequacy of the right of privacy and the need for the courts to establish legislation on the right of publicity.[21] Nimmer stated that substance of a right of publicity can be established first by "the economic reality in pecuniary values inherent in publicity and, second, the

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[12] *Id.*
[13] Jennifer L. Carpenter, *Internet Publication: The Case for an Expanded Right of Publicity for Non-Celebrities*, 6 VA. J.L. & TECH 3, ¶ 4 (2001).
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Haelen*, 202 F.2d at 868.
[18] *Id.* at 866.
[19] *Id.*
[20] *Id.* at 868.
[21] *See* Melville B. Nimmer, *The Right of Publicity*, 19 LAW AND CONTEMP. PROBS. 203 (1954).

inadequacy of traditional legal theories in protecting such publicity values."[22] Nimmer believed "that in most instances a person achieves publicity values of substantial pecuniary worth only after he has expended considerable time, effort, skill, and even money."[23] To Nimmer, it seemed fundamental "that every person [be] entitled to the fruit of his labors" but people "who have long and laboriously nurtured the fruit" may be deprived of the right to control and profit from the publicity values.[24] Finally, Nimmer argued "[t]he right of publicity must be recognized as a property (not a personal) right," and must be "capable of assignment and subsequent enforcement by the assignee."[25]

D. Policy Rationales for the Right of Publicity

The rationales to justify the right of publicity are both economic and noneconomic as discussed in *Cardtoons, L.C. v. Major League Baseball Players Assn'n*.[26] Under the economic prong, the leading three theories are (1) incentive, (2) efficiency, and (3) avoidance of consumer deception.[27] Under the noneconomic prong, the three theories are (1) natural rights, (2) fruits of their labors, (3) unjust enrichment, and (4) emotional distress.[28]

The first economic theory discussing the incentive is a rationale that underlies patent and copyright law.[29] For example, patents are expensive to innovate and cheap for someone else to copy.[30] Therefore, no one will invest in research and development if people are copying the invention.[31] From a copyright perspective, someone has to finance the product, whether it be a song or a motion picture.[32] If we, as a society, want to have professionals, then the professionals should have an exclusive right to sell and make a living.[33]

[22] *Id.* at 215.
[23] *Id.* at 216.
[24] *Id.*
[25] *Id.*
[26] *Cardtoons, L.C. v. Major League Baseball Players Assn'n*, 95 F.3d 959, 973 (10th Cir. 1996).
[27] *Id.* at 973-75
[28] *Id.* at 975-76.
[29] Professor Tyler Ochoa, Lecture on Rights of Publicity at Santa Clara University School of Law (Jan. 27, 2020).
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*

The efficiency theory is simply economics.[34] No one will pay to endorse a product if everyone can use the same person or celebrity to endorse it.[35] To advertise a product, exclusivity must exist.[36]

The final economic theory discussed, avoiding consumer deception, addresses how consumers respond to product endorsements and the importance of marketing integrity.[37] The Lanham Act provides protection against false or misleading representations in connection with the sale of products.[38] The cause of action for consumer deception is false endorsement under Section 43 of the Lanham Act.[39] Under a right of publicity claim, an absolute right, consumer confusion is not required to be successful.[40]

Under the noneconomic theories, natural rights stems from one of the first right of publicity cases: *Pavesich v. New England Life Ins. Co*.[41] In *Pavesich,* the court recognized a person's natural right to their name and likeness being used.[42] A strong argument against this is the First Amendment, which protects a person's natural right to talk about you and publish pictures about you.[43]

The second noneconomic theory, fruits of their labors, rests on John Locke's theory that the work a person did to become famous is hers alone and only she deserves the rewards or benefits derived from her work.[44] "People deserve the right to control and profit from the commercial value of their identities because, quite simply, they've earned it."[45] Under this theory, the court would look to the plaintiff's side in determining a cause of the right of publicity.[46]

On the other hand, the court looks to the defendant's side under the third noneconomic rationale for the right of publicity: unjust enrichment.[47] Here, the court decides whether there is a sufficient reason as to why the

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[34] *Id.*
[35] Professor Tyler Ochoa, Lecture on Rights of Publicity at Santa Clara University School of Law (Jan. 27, 2020).
[36] *Id.*
[37] *Cardtoons*, 95 F.3d at 975.
[38] *Id.*
[39] Ochoa, *supra* note 29.
[40] Ochoa, *supra* note 29.
[41] Ochoa, *supra* note 29.
[42] *See Pavesich v. New England Life Ins. Co*, 122 Ga. 190, 50 S.E. 68 (1905).
[43] Ochoa, *supra* note 29.
[44] Ochoa, *supra* note 29.
[45] *Cardtoons*, 95 F.3d at 975.
[46] *Id.*
[47] *Id.* at 976.

plaintiff might not deserve their reward.[48] According to actor Jack Nicholson, "Only th[e] audience out there makes a star. It's up to them."[49]

The final noneconomic rationale, emotional distress, identifies a person's embarrassment over the use of their identities.[50] In *O'Brien v. Pabst Sales Co.,* although the court found for Pabst, O'Brien was humiliated by his image on a calendar promoting beer as he was an advocate for discouraging the use of alcohol by young people.[51]

Today, "the growth of social media and technology has allowed companies and advertisers to break national barriers and reach international consumers."[52] The expansion of the "globalization of cultural influencers make[s] merchandising of celebrities a huge international business."[53] For instance, it appeared as if Kylie Jenner's cosmetic business grew overnight. Although she was born into a famous family, starring in *Keeping Up With the Kardashians,* Jenner credits the rapid growth of her cosmetic line to publicity from social media platforms such as Instagram and Twitter.[54] Both social media platforms are free to use and thus eliminated Jenner's need for paid advertising.[55] This further proves that endorsers have the power to reach millions of consumers through multiple sources of media at no cost.[56] As a result, and as the market for celebrity endorsement expands, "the opportunities for 'unauthorized third parties to profit from the [images of celebrities]' increase."[57]Accordingly, the right of publicity has become the "essential legal right in protecting the entertainment industry."[58]

E. The Right of Publicity to Celebrities

As discussed above in the development of the right of publicity, it is still a question as to who exactly enjoys the right of privacy. Case law has proven that the expansion of the right of publicity is fairly new, but still

[48] *Id.*
[49] *Id.* at 975.
[50] *Id.* at 976.
[51] *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 169-170 (5th Cir. 1941).
[52] Eliana Torres, *The Celebrity Behind the Brand International Protection of the Right of Publicity*, 6 PACE. INTELL. PROP. SPORTS & ENT. L.F. 116, 121 (2016).
[53] *Id.* at 122-23.
[54] *See* Natalie Robehmed, *At 21, Kylie Jenner Becomes The Youngest Self-Made Billionaire Ever,* (Mar. 5, 2019), https://www.forbes.com/sites/natalierobehmed/2019/03/05/at-21-kylie-jenner-becomes-the-youngest-self-made-billionaire-ever/#413bcb2e2794.
[55] *Id.*
[56] Torres, *supra* note 52, at 122.
[57] Torres, *supra* note 52, at 122.
[58] Torres, *supra* note 52, at 122.

developing.[59] The increasing "technology advancement and the global rise of social media have opened the door for the commercial exploitation of one's name or likeness to become part of international transactions."[60]

Although the development of the right of publicity has been successfully accepted by courts, the precise nature of who enjoys the right of publicity remains unclear. Courts have held that the appropriation tort has extended to celebrities in increasing cases since the initial recognition of the right of publicity in *Haelan*.[61]

F. Expanding the Right of Publicity to Non-Celebrities

The majority of commentators agree that the right of publicity applies to any person, not just someone who has achieved fame or notoriety.[62] The purpose of the right of publicity is to protect the commercial value of a person's identity, and in determining whether a person's publicity rights have been violated is to determine whether the identifying characteristics that have been appropriated are marketable and publicly identifiable (i.e., commercially valuable).[63] Thomas McCarthy, a scholar on the rights of publicity, argued that the protection is not limited to celebrities.[64] Protecting non-celebrities via the right of publicity "demonstrates the willingness of courts and legislatures to protect private individuals against both the moral improprieties resulting from the misappropriation," and the right for a private plaintiff to seek remedies for harms to her reputation or property-type economic injury.[65] The fact that a person's likeness does not hold a celebrity value at the time of misappropriation does not bar the remedy if its use was used for commercial gain.[66]

The famous image of the couple kissing in Times Square in New York post-war is an image of a soldier and a nurse who were entirely anonymous until their photograph was featured in *Time* magazine.[67] In *Mendonsa v. Time Inc.*, the defendant offered $1,600 for copies of the two strangers' famous kiss.[68] When the defendant decided to sell the pictures in 1987, over forty years after the original image was initially published, the picture held value

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[59] *See generally* WELKOWITZ & OCHOA, CELEBRITY RIGHTS: RIGHTS OF PUBLICITY AND RELATED RIGHTS IN THE UNITED STATES AND ABROAD (2010).
[60] Torres, *supra* note 52, at 119.
[61] Torres, *supra* note 52, at 119.
[62] Carpenter, *supra* note 13, ¶ 41.
[63] Carpenter, *supra* note 13, ¶ 41.
[64] Alain J. Lapter, *How the Other Half Lives (Revisited): Twenty Years Since Midler v. Ford A Global Perspective on the Right of Publicity,* 15 TX. J.L. & INTELL. PROP. 239, 267 (2007).
[65] *Id.*
[66] *Id.*
[67] *Id.* (citing *Mendonsa v. Time Inc*., 678 F. Supp. 967, 967 (D.R.I. 1988)).
[68] *Id.*

because of its fame.[69] The Court denied the defendant's motion to dismiss because the nature of the sale of the photographs was commercial.[70] The Court deemed it acceptable to reproduce the image as newsworthy content due to the First Amendment protection, but it was required to obtain consent of the plaintiff before commercially selling the photographs.[71] Therefore, the idea that in order to have a cause of action for the right of publicity to extend to non-celebrities, a person's name, image, or likeness must equate to some commercial usage.[72] To further explore the commercial nature of the use of non-celebrity images, the Court also determined that the plaintiff is not required to show that the defendant made money off the commercial use, but must prove that defendant received a commercial benefit he would otherwise not have received.[73] The Court described the benefit to advertisers as being able to catch the eye of the consumer and make the advertisement more interesting.[74]

G. Jurisdictional Approach to Right of Publicity in the U.S.

The right of publicity has developed and transformed within the United States. Naturally, "[t]here is a broad range of protection among the states."[75] "The states that recognize the right [of publicity] extend the protection only to the individual's name and . . . likeness," with exceptions in New York and California.[76] New York protects the name, picture, and voice of an individual, whereas California protects "any aspect . . . of an individual's persona that serves to identify [them]."[77] California has both statutory laws that cover a person's right of publicity while living and in their afterlife.[78]

H. Remedies of the Right of Publicity in the U.S.

Depending on the precise jurisdiction, compensatory and punitive damages are typically available in the states recognizing the right.[79] Injunctive relief may also be available and may extend nationwide, "even extending over states that do not recognize the right of publicity."[80] "In determining

[69] Lapter, *supra* note 64, at 267.
[70] Lapter, *supra* note 64, at 267.
[71] Lapter, *supra* note 64, at 267-68.
[72] Ochoa, *supra* note 8.
[72] Ochoa, *supra* note 8.
[73] Ochoa, *supra* note 8.
[74] Ochoa, *supra* note 8.
[75] Torres, *supra* note 52, at 123.
[76] Torres, *supra* note 52, at 123.
[77] Torres, *supra* note 52, at 123.
[78] Ochoa, *supra* note 29.
[79] Torres, *supra* note 52, at 125.
[80] Torres, *supra* note 52, at 125.

compensatory damages, the court will try to determine the fair market value of the use of the image of the individual harmed."[81]

"The most common form of relief awarded in rights of publicity cases is an injunction."[82] "Both U.S. and foreign courts will issue injunctions in proper cases."[83] Injunctions are a form of equitable relief.[84] "Therefore, even if a court finds that a defendant infringed upon a plaintiff's right of publicity, an injunction does not issue as a matter of course."[85] "For instance, in *Comedy III Productions,* the Court of Appeals vacated the trial court's injunction on the grounds that it was unlikely that the defendant would violate the plaintiff's right of publicity in the future."[86]

III. INTERNATIONAL RIGHT OF PUBLICITY

A. International Overview

"The most critical function of the Right of Publicity is control."[87] Therefore the idea of the right of publicity is interesting across borders as the idea of control has different meanings, even among states in the United States, but especially in other countries whose cultures vary widely.

"There are significant differences around the world in protection of the right of publicity."[88] The difference in culture, philosophies, and history play a huge role in the varying approaches to the right of publicity.[89] Looking across the globe reveals that the right of publicity is present, but unaccounted for in most other nations.[90]

Great Britain and Australia "do not allow claims for infringement of publicity rights."[91] "Other countries, such as Germany, France, Italy, Spain, and the Netherlands, recognize some form of … rights, which protect 'a person's commercial interest in having protection against the unauthorized commercial use of identifiable characteristics.'"[92] Generally, these rights do

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[81] Torres, *supra* note 52, at 125.
[82] WELKOWITZ & OCHOA, *supra* note 59, at 571.
[83] WELKOWITZ & OCHOA, *supra* note 59, at 571.
[84] WELKOWITZ & OCHOA, *supra* note 59, at 571.
[85] WELKOWITZ & OCHOA, *supra* note 59, at 571.
[86] WELKOWITZ & OCHOA, *supra* note 59, at 571.
[87] Jonathan L. Faber, *Recent Right of Publicity Revelations: Perspective from the Trenches*, 3 SAVANNAH L. REV. 37, 40 (2016) (emphasis omitted).
[88] Torres, *supra* note 52, at 126.
[89] Torres, *supra* note 52, at 126.
[90] Torres, *supra* note 52, at 126.
[91] Emily Grant, *The Right of Publicity: Recovering Stolen Identities under International Law*, 7 SAN DIEGO INT'L L.J. 559, 564 (2006).
[92] *Id.* (quoting Julius C.C. Pinckaers, *From Privacy Toward A New Intellectual Property Right in Persona* 423 (1996)).

not encompass the right of publicity for the person, but merely characteristics.[93]

Most notably, Japan recognizes the right of publicity. In 1976, *Mark Lester* was the first case in Japan that directly referenced the right of publicity as an issue.[94] Mark Lester, a British film star became popular in Japan and signed a publicity agreement to advertise one film with a Japanese film company.[95] When the company used Lester's film clips for unrelated and unauthorized candy advertisements, he sued for property damage to his commercial identity and mental suffering.[96] The Japanese court elaborated on its new cause of action which derived from traditional Japanese rights in one's name and portrait. [97] The court stated, "[A]ctors …have interests to exclusively license a third party to use their names or likenesses in exchange for monetary compensation because they obtained their reputation by their own efforts.[98] Although the court paid attention to the economic value of the name or likeness of famous actors, the court did not explicitly reference the concept of the right of publicity.[99]

Another perspective of international rights of publicity is in South Korea. The first case in South Korea to mention the right of publicity was the *Benjamin Lee* case.[100] In *Benjamin Lee,* Lee's post-mortem rights were being commercially exploited when an author published a book about Lee.[101] Like the above-described *Roberson* case in the United States, the Korean court did not award a remedy on the basis of the right of the publicity but the decision created a debate among Korean legal scholars and caused the legislature to reevaluate and propose new laws.[102]

Following *Benjamin Lee*, the key case was *Good People Inc*, a case involving the posthumous usage of James Dean's name on underwear, recognized the right of publicity in South Korea but did not yet recognize post-mortem rights of publicity.[103]

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[93] *Id.* at 564-65.
[94] Tamotsu Takura, *The Right of Publicity in Japan*, 27 L. JAPAN 37 (2001).
[95] *See* Grant, *supra* note 91, at 565.
[96] Grant, *supra* note 91, at 565.
[97] Grant, *supra* note 91, at 565.
[98] *See* Tankura, *supra* note 94, at 40.
[99] Tankura, *supra* note 94, at 40.
[100] Hyung Doo Nam, *The Emergence of Hollywood Ghosts on Korean TVS: The Right of Publicity from the Global Market Perspective*, 19 PAC. RIM L. & POL'Y J. 487, 503 (2010).
[101] *Id.*
[102] *Id.* at 504.
[103] *Id.*

B. The Right of Publicity in China

The right of publicity in China is a focus of this article. Due to the lack of case law in China, I have examined other countries, and the greater purpose of this article calls for a better understanding of the importance of the right of publicity and its implications for celebrities, and non-celebrities.

i. Cultural Perspectives of China

Chinese laws differ extensively from United States laws because, besides geographical differences, China's interpretation of law is deeply rooted in a Confucian collectivist ideology.[104] Confucianism emphasizes societal harmony and the avoidance of conflict and litigation, which differs greatly from the Western emphasis on the rule of law and the litigation process.[105] Confucianism dominates China's political, social and cultural environment, and therefore emphasizes placing the collective or group before the individual.[106]

Additionally, in China, copying is a form of flattery.[107] Westerners value the development of critical thinking and innovation in the educational setting which differs from the educational ideology in China where their teaching methods consists of replication.[108]

The differences between the Western and Chinese laws boils down to societal and personal values. Westerners have accepted a model of humanity based on economic and legal rights and the order of society follows based on people who have economic power who enforce those rights.[109] Whereas the societal value imparted in China is based on relationships and networks with a loyalty to family and political influence.[110] Chinese culture generally views the Westerner's concept of law as a last resort because Chinese culture emphasizes resolution of problems through personal relationships with an emphasis on the interest of the group as a whole.[111] As a result, China's legal culture generally discourages litigation and encourages dispute resolution through compromise.[112]

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[104] Jeffrey F. Levine, *Meeting the Challenges of International Brand Expansion in Professional Sports: Intellectual Property Right Enforcement in China through Treaties*, Chinese Law and Cultural Mechanisms, 9 Tex. Rev. Ent. & Sports L. 217 (2007).
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 217-18.
[109] Levine, *supra* note 104, at 217-18.
[110] Levine, *supra* note 104, at 217-18.
[111] Levine, *supra* note 104, at 217-18.
[112] Levine, *supra* note 104, at 217.

ii. Portrait Right in China

In contrast to the United States, China does not explicitly allow for a right of publicity.[113] Chinese law provides for a similar protection called the portrait right "which prevents use of a citizen's portrait for profit without consent."[114]

The acknowledgement of a similar right in China has been used primarily for famous sports stars as the popularity of professional sports in China has increased.[115] A recent case in 2004 involved a professional hurdler, Liu Xiang.[116] Liu sued a newspaper for infringing on his rights when a photo of him was placed in a department store without his consent.[117] He was fearful that his fans would assume that he endorsed the specific department store and sued.[118] The People's Intermediate Court, in adjudicating the claim, expanded the portrait right doctrine by creating two categories: (1) a portrait that is independent of any special significant public event, which is entitled to absolute protection, and (2) a portrait that is associated with a special significant public even, which is subject to limitation.[119] Here, the court sided with the newspaper and categorized Mr. Xiang's right as subject to limitations as his picture that was used was associated with a major event, the Olympics.[120] This case example provides that the right of portrait in China is a developing doctrine that should be further refined through litigation and new laws sought to protect the individual.

The right of publicity is not mentioned in any international treaty by the WTO such as The Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs").[121] Thus, nations are not required to offer protection to foreign citizens.[122] The WTO's purpose is to encourage trade without discrimination, and nations must provide the same level of protection offered to their citizens to foreign individuals.[123] Unlike other forms of Intellectual Property, the right of publicity remains excluded from this principle.[124] Until recently and as a result of the lack of recognition of the right of publicity, it has been proposed that there should be a statute within TRIPs that recognizes the right of publicity.[125] TRIPs is, however, viewed as the

[113] Levine, *supra* note 104, at 222.
[114] Levine, *supra* note 104, at 222-23.
[115] Levine, *supra* note 104, at 223.
[116] Levine, *supra* note 104, at 223.
[117] Levine, *supra* note 104, at 223.
[118] Levine, *supra* note 104, at 223.
[119] Levine, *supra* note 104, at 223.
[120] Levine, *supra* note 104, at 223.
[121] *See generally* Torres, *supra* note 52.
[122] Torres, *supra* note 52, at 118.
[123] Torres, *supra* note 52, at 118.
[124] Torres, *supra* note 52, at 118.
[125] Torres, *supra* note 52, at 118,

most likely efficient avenue for enforcing intellectual property rights in China.[126]

C. Extraterritorial Enforcement of Rights of Publicity

Lastly, the review of international law pertaining to the right of publicity requires a brief summary of the extraterritorial enforcement of rights of publicity. The general idea is that where the infringement of the intellectual property rights occurs is where the enforcement should incur.[127] Following the idea of territoriality is present in international treaties relating to intellectual property rights, such as the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Agreement on the Trade Related Aspects of Intellectual Property Rights or TRIPs.[128] It is generally inappropriate for one country to attempt to control and implement the proper intellectual property standards to actions occurring outside of the country.[129] Although, this is not absolute and there are exceptions to when countries step out of bounds to enforce their own standards.[130]

IV. ISSUES CAUSED BY THE LACK OF INTERNATIONAL STANDARDS

Two major problems arise from lack of harmonization between the United States and countries abroad.[131] First, there are too many substantive differences between jurisdictions, and second, this results in a huge problem caused by the lack of national treatment.[132]

The globalization of celebrities and the growing technological landscape creates opportunity for more infringement worldwide.[133] The Anti-Counterfeiting Trade Agreement (ACTA) was established as a response to lack of international harmonization of anticounterfeiting measures.[134] The arguments made in favor of ACTA by the European Commission are similar to the arguments that can be made in favor of the harmonization of the right of publicity.[135] The European Commission stated:

> The proliferation of intellectual property rights (IPR) infringements poses an ever-increasing threat to the sustainable development of the world economy. It is a problem with serious economic and social

[126] Levine, *supra* note 104, at 223.
[127] WELKOWITZ & OCHOA, *supra* note 59, at 587.
[128] WELKOWITZ & OCHOA, *supra* note 59, at 587.
[129] WELKOWITZ & OCHOA, *supra* note 59, at 587.
[130] WELKOWITZ & OCHOA, *supra* note 59, at 587.
[131] Torres, *supra* note 52, at 129.
[132] Torres, *supra* note 52, at 130.
[133] Torres, *supra* note 52, at 130.
[134] Torres, *supra* note 52, at 130.
[135] Torres, *supra* note 52, at 130.

> consequences. Today, we face a number of new challenges…the speed and ease of digital reproduction; the growing importance of the Internet as a means of distribution...[a]ll these factors have made the problem more pervasive and harder to tackle.[136]

For instance, in Italy, the Court of First Instance of Milan decided in a case involving Audrey Hepburn that the right of publicity "extended to the use of elements that merely evoke the celebrity involved."[137] The elements used in the pictures evoked Audrey's persona.[138] Another example is the Pope Francis doll.[139] Although the court did not find that the company had a license to create these dolls, it was almost impossible to decipher because of the Pope's popularity transcending territorial boundaries.[140] Therefore, the wide range of protection available would make a legitimate claim for the right of publicity a complex matter because of the lack of harmonization.[141]

Another issue is the lack of national or international consistency in the right of publicity.[142] Even within the United States, the right of publicity is primarily statutory, though case law plays an important role in deciphering the statutes and the scope of protection for these rights.[143] Most states recognize the right of publicity as grounded in the common law.[144] The two states where the right of publicity is most developed are California and New York.[145]

The main issue with inconsistent treatment on a national or international level is the potential to harm litigants and the judicial system as a whole.[146] Important international treaties have provided some harmonization, such as the Paris Convention, Berne Convention, and TRIPs.[147] The reason for the international treaties stem from fairness principles.[148] According to the World Intellectual Property Organization (WIPO), the reason is that authors by nature should be able to benefit everywhere from their natural property and recognized as authors in foreign countries with their given rights.[149] Although these international treaties have

[136] Torres, *supra* note 52, at 130.
[137] Torres, *supra* note 52, at 130-31.
[138] Torres, *supra* note 52, at 131.
[139] Torres, *supra* note 52, at 131.
[140] Torres, *supra* note 52, at 131.
[141] Torres, *supra* note 52, at 131.
[142] Torres, *supra* note 52, at 118.
[143] Ochoa, *supra* note 8.
[144] Ochoa, *supra* note 8.
[145] Ochoa, *supra* note 8.
[146] Torres, *supra* note 52, at 131.
[147] Torres, *supra* note 52, at 131.
[148] Torres, *supra* note 52, at 132.
[149] Torres, *supra* note 52, at 132.

afforded great movements towards harmonization, the right of publicity is not mentioned.[150]

In the case of *Bi-Rite Enterprises Inc. v. Bruce Miner Co.,* members of a pop group succeeded in bringing an injunction to prohibit the use of their image in commercial posters.[151] "However, the same result may not be achieved if the same claim was brought in a country where there is no protection."[152]

A possible solution would be to set minimum standards to recognize the right of publicity under the TRIPs agreement.[153] As one author wrote, a proposed section should draw various elements from court decisions in the United States, as well as state statutes.[154]

V. IMPLICATIONS FOR IMAGE ALTERATIONS AND DISSEMINATION ONLINE

The lack of national and international legal harmonization of right of publicity laws also creates implications for the misuse and alteration of images of people, even non-celebrities for advertisements and on X-rated websites.

For example, the cellphone picture of me in the lobby of a hotel in China could be uploaded to a computer by the group of men and subsequently cut and pasted onto the body of a person engaged in sexually explicit acts.[155] This hypothetical reflects a real scenario that could happen to anyone.[156] An emerging phenomenon referred to as "revenge porn" and "deep fakes" is a possible result to the advancements in technology and the oversharing of images and videos online. The shock factor is that it does not require a mastering of Photoshop and can be done in an instant, which can ruin a person's reputation in minutes.

"Deep fake" is the term for a video that has been doctored to present real people doing unreal things.[157] The false image is generated by combining two sets of data, one of the face of the targeted person and the other of the body derived from a stock photo or video.[158] By using such technology,

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[150] Torres, *supra* note 52, at 118.
[151] Torres, *supra* note 52, at 132.
[152] Torres, *supra* note 52, at 132.
[153] Torres, *supra* note 52, at 133.
[154] Torres, *supra* note 52, at 135.
[155] Rebecca A. Delfino, *Pornographic Deepfakes: The Case for Federal Criminalization of Revenge Porn's Next Tragic Act*, 88 FORDHAM L. REV. 887 (2019).
[156] *Id.*
[157] Erin Cook, *Deep Fakes Could Have Real Consequences for Southeast Asia*, THE INTERPRETER (Aug. 23, 2019), https://www.lowyinstitute.org/the-interpreter/deep-fakes-could-have-real-consequences-southeast-asia/.
[158] *Id.*

anyone can use artificial intelligence to mold the targeted person to say or do whatever they please.[159]

Using a combination of open-source AI software "deep fakes" (a Reddit user's name but also the name of the technology/phenomenon) pasted the faces of celebrities like Scarlett Johansson, Taylor Swift, and Maisie Williams onto X-rated GIFS.[160] The anonymous user created a full length video with the star of Wonder Woman*,* Gal Gadot, pasting an image of her face onto the body of an incest-themed porn scene.[161] The deep fakes user said he wasn't a professional researcher, but just a programmer curious about machine learning, remarking that he "found a clever way to do face-swap."[162]

The reality of such crime is that your image could be used anywhere online, even when you are a not a member of the given social media platform such as a dating site. For example, a victim in Florida sued Match.com because her image appeared on the website in the form of an advertisement.[163] The suit alleges that thousands, perhaps even millions, of photos are stolen off of the Internet and are being posted as false ads in the form of fake profiles.[164] The threat this poses to individuals seems endless, taking a toll on their mental health because it is impossible to recognize the extent of damages caused by deep fakes.

As another example in the United States, lawmakers rushed to limit the impact of similar technology affecting the 2020 elections. Democratic Congressman Adam Schiff advocated for social media companies to put in place policies to protect users from misinformation.[165]

Though the idea of fake news is not new, and given the advancing technology, the believability of deep fakes becomes more real than ever before. For example, when people see a video of former President Trump shooting at reporters, viewers need to check the source and their own version

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[159] *Id.*
[160] James Vincent, *AI Tools Will Make it Easy to Create Fake Porn of Just About Anybody*, THE VERGE (Dec. 12, 2017), https://www.theverge.com/2017/12/12/16766596/ai-fake-porn-celebrities-machine-learning/.
[161] *Id.*
[162] *Id.*
[163] Rich Calder, *Model Sues Match.com For $1.5B Over Fake Profiles,* NEW YORK POST (Nov. 22, 2013), https://nypost.com/2013/11/22/model-suing-match-com-for-1-5b-over-fraudulent-fake-profiles/.
[164] *Id.*
[165] Cook, *supra* note 157.

of reality.[166] Fake news has gone to new levels, and the possibilities are endless along with the harm that is caused by such manipulation.[167]

In Malaysia, a sex tape scandal regarding a politician is another example of the prevalence of deep fake images.[168] While the tape was determined by the police to be authentic and not a forgery, its authenticity was still questioned due to the issue of deep fakes.[169] The controversy in Malaysia was one of the first cases where the suspicion of deep fakes undermined the authenticity and factual accuracy of news reporting.[170] There is not a one-size-fits-all response to this problem.[171] But with the ever-growing use of social media, there is an urgent need for action.[172]

Interestingly, Chinese regulators have announced new rules governing video and audio content online, including a ban on the publishing and distribution of fake news created with technologies such as artificial intelligence and virtual reality.[173] Any use of AI or virtual reality also needs to be clearly marked in a prominent manner and failure to follow the rules could be considered a criminal offense.[174] The Cyberspace Administration of China (CAC) are the main regulators of these new rules, and they are in effect as of January 1, 2020.[175] CAC comments that the outcome of deep fake technology could endanger national security, disrupt social stability, disrupt social order and infringe upon the legitimate rights and interests of others.[176]

The consequences and ways upon which the deep fake technology is created draws parallels to the right of publicity. It makes sense to close the gap between the differing laws and utilize precedent from right of publicity case law to the emerging deep fake and revenge porn market.

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[166] Chris Mills Rodrigo, *Video of Fake Trump Shooting Members of Media Shown at His Miami Resort: Report*, THE HILL, (Oct. 13, 2019), https://thehill.com/homenews/administration/465625-fake-video-of-trump-shooting-members-of-media-shown-at-miami-resort; Chris Mills Rodrigo, *Video of Fake Trump Shooting Members of Media Shown at His Miami Resort: Report*, THE HILL, (Feb. 24, 2021), https://thehill.com/homenews/administration/465625-fake-video-of-trump-shooting-members-of-media-shown-at-miami-resort.

[167] *Id.*

[168] *Id.*

[169] Cook, *supra* note 157.

[170] Cook, *supra* note 157.

[171] Cook, *supra* note 157.

[172] Cook, *supra* note 157.

[173] *Fake News: Deepfakes New Online Content Rules,* JAPAN TIMES (Dec. 2, 2019), https://www.japantimes.co.jp/news/2019/12/02/asia-pacific/china-fake-news-deepfakes-new-online-content-rules/#.XjHuMy3Mzxg/.

[174] *Id.*

[175] *Id.*

[176] *Id.*

VI. CONCLUSION

With the increase in technological innovations coupled with the pervasiveness of advertising, there are no longer geographical restrictions in respect to the information that transcends borders.[177] Therefore, a call to action regarding the expansion of the right of publicity to non-celebrities in other countries and a unifying approach to these types of situations is needed.

The Right of Publicity by its nature is inextricably linked to American tradition and culture.[178] The United States' policies regarding the Right of Publicity appear to conflict with the interests of other countries due to differing cultural beliefs.[179] However, the establishment of an international legal regime for the Right of Publicity can no longer be delayed.[180] Ultimately, the recognition and scope of protection of the Right of Publicity are issues that will probably have to be settled through a compromise between the United States and other countries.[181]

[177] *Id.*
[178] Nam, *supra* note 100, at 518.
[179] Nam, *supra* note 100, at 518.
[180] Nam, *supra* note 100, at 518.
[181] Nam, *supra* note 100, at 518.