
COMMENT

INSTAGRAM LOOKALIKES AND CELEBRITY INFLUENCERS:
RETHINKING THE RIGHT TO PUBLICITY
IN THE SOCIAL MEDIA AGE

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Don't scoff at influencers. They're taking over the world.
—Kevin Roose¹

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¹ Kevin Roose, *Don't Scoff at Influencers. They're Taking over the World.*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/technology/vidcon-social-media-influencers.html> [<https://perma.cc/2APL-GXLS>].

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INTRODUCTION

Kim Kardashian-West, in March 2019, launched the sale of her sunglasses collection with an eerie series of photos portraying herself and five lookalike models, all wearing identical makeup and clothes.² A year prior, Kardashian-West’s husband, Kanye West, hired fourteen Kim lookalikes to advertise his clothing line Yeezy.³ The advertisements, shared on the social media website Instagram, featured the lookalikes in Kardashian-West’s stomping grounds, recreating her signature hairstyle and camera poses.⁴ Many of these Kim lookalikes are influencers⁵—individuals with significant social media followings that leverage those followers into endorsements and advertising deals. These Kim lookalikes, and many like them, have spent thousands of dollars to look like a Kardashian-West clone.⁶ And businesses noticed, hiring

² See Alyssa Bailey, *Kim Kardashian Enlisted a Squad of Lookalikes to Sell You Her Carolina Lemke Eyewear Collection*, ELLE (Mar. 12, 2019), <https://www.elle.com/culture/celebrities/a26797227/kim-kardashian-carolina-lemke-sunglasses-collection-lookalike-ads/> [<https://perma.cc/C4G5-JWZP>] (noting that Kardashian-West models her sunglasses in “a lineup of models that look so much like her it’s almost hard to pick her out”).

³ See Eviana Hartman, *Kanye West Breaks the Internet with an Army of Kim Clones that Includes Paris Hilton*, VOGUE (Jan. 31, 2018, 8:33 AM), <https://www.vogue.com/article/yeezy-season-6-kanye-west-instagram-takeover-kim-kardashian-west-clones-lookbook> [<https://perma.cc/7LFA-BKQF>] (explaining that West recreated paparazzi-style images of Kardashian-West “with a gaggle of social-media glamour models and other lowbrow luminaries”).

⁴ *Id.*

⁵ See, e.g., Amina Blue (@amina.blue), INSTAGRAM, <https://www.instagram.com/amina.blue/> [<https://perma.cc/9GLX-KS5G>] (last visited Nov. 7, 2019); Kristen Noel Crawley (@kristennoelcrawley), INSTAGRAM, <https://www.instagram.com/kristennoelcrawley/> [<https://perma.cc/HPF3-KW9R>] (last visited Nov. 7, 2019); @sffoxx, INSTAGRAM, <https://www.instagram.com/sffoxx/> [<https://perma.cc/CXP9-XXEM>] (last visited Nov. 7, 2019).

⁶ Many Kardashian-West lookalikes “go under the knife, get their cheeks sculpted, foreheads frozen, noses streamlined, necks and chins contoured, [and] lips filled” in order to recreate Kardashian-

those lookalikes when they can't afford an advertising deal with the real Kim Kardashian-West.⁷

While Kardashian-West is perhaps the most famous social media influencer, she isn't the only one. Social media influencers are everywhere.⁸ These influencers have perfected the art of self-commodification, turning their personal image or reputation (also known as their "brand" or "persona") and their recommendations into highly valuable tools. They influence the decisions of millions of consumers around the world.⁹ And they have done so with great success—influencers are one of the most effective marketing tools in the twenty-first century.¹⁰

Influencers, like traditional celebrities, naturally want to protect their highly valuable brands against misappropriation by brands and copycats. To do so, influencers can bring lawsuits under contract law.¹¹ Or they can bring trademark or copyright infringement suits.¹² Influencers have copyrights in their photos, posts, and blogs they share online.¹³ Some even trademark their

West's iconic look. Rachel Strugatz, *Influencer Subculture: The Kim Kardashian Lookalikes*, L.A. TIMES (Jan. 12, 2018, 10:55 AM), <https://www.latimes.com/fashion/la-ig-wwd-kim-kardashian-lookalikes-20180112-story.html> [<https://perma.cc/7SGB-46C2>].

⁷ See *id.* ("[B]rands seeking influencer support for product launches or to raise awareness that can't afford [to hire Kardashian-West herself] now have their pick when it comes to Kardashian-esque types.").

⁸ See INFLUENCER MKTG. HUB, INFLUENCER MARKETING BENCHMARK REPORT: 2019, at 14 (2019), https://influencermarketinghub.com/IM_Benchmark_Report_2019.pdf [<https://perma.cc/P4LW-CLA9>] [hereinafter 2019 BENCHMARK REPORT] (finding that influencers are spread across all major social networks, including Facebook, Instagram, Twitter, YouTube, LinkedIn, as well as "less popular or more specialist social networks," including blogs).

⁹ See Grace O'Neill, *The 10 Most Followed Fashion Bloggers on Instagram*, HARPER'S BAZAAR (Aug. 27, 2018, 12:47 AM), <https://www.harpersbazaar.com.au/fashion/most-followed-fashion-bloggers-2018-17235> [<https://perma.cc/5TEH-VQBR>] (listing influencers with "follow counts" ranging from 3 million to 18.7 million followers).

¹⁰ See 2019 BENCHMARK REPORT, *supra* note 8, at 4 (estimating that influencer marketing was a \$4.6 billion industry in 2018); INFLUENCER MKTG. HUB, INFLUENCER MARKETING BENCHMARK REPORT: 2020, at 14 (2020) (estimating that influencer marketing was a \$6.5 billion industry in 2019 and predicting that it would be a \$9.7 billion industry in 2020).

¹¹ See, e.g., Complaint, *Amanda Cerny v. Valerian Bennett*, No. 19SMCV00417 (Cal. Sup. Ct. Mar. 1, 2019) (suing a video platform for breach of contract after the platform hired a popular influencer to produce videos of herself to air exclusively on the new platform and then refused to pay influencer).

¹² See, e.g., Complaint, *Oreto v. Facebook*, No. 18-2328 (E.D. Pa. June 4, 2018) (suing for federal trademark infringement on behalf of tattoo artist with over 1 million followers on social media); Complaint, *O'Brien v. PopSugar*, No. 18-4405, 2019 WL 462973 (N.D. Cal. 2018) [hereinafter *O'Brien Complaint*] (suing for copyright and trademark violations on behalf of class action of influencers); Complaint, *Jenner v. Cutera*, No. 16-0936 (C.D. Cal. Feb. 10, 2016) [hereinafter *Jenner Complaint*] (suing for both federal and common law trademark infringement on behalf of Kendall Jenner).

¹³ Certain social media platforms may require users to waive those copyrights when they share content via the platform. See Malathi Nayak, *Influencers Find It's Tricky to Keep Content and Fan Following*, BLOOMBERG LAW (June 27, 2019, 4:46 AM), <https://news.bloomberglaw.com/ip->

names¹⁴ or catchphrases.¹⁵ But contract, copyright, and trademark law provide only limited protection for an influencer's brand.

That's where the right of publicity comes in. At its core, the right of publicity protects an individual's right to use one's "name, likeness, or other indicia of identity" for commercial use.¹⁶ A "celebrity's right,"¹⁷ the right of publicity is almost exclusively used by "traditional" celebrities—actors, singers, athletes, models.¹⁸ But, over the past few years, influencers—the "new" celebrities—have begun to wield the right of publicity as a tool to police the use of their brands.¹⁹ This incremental creep has gone unexamined by courts and scholars. So far, courts have assumed that influencers have a right of publicity. They're correct. But influencers are notably different from "traditional" celebrities, and courts should not blindly apply current right-of-publicity doctrine to influencers. The right of publicity must be updated for the social media age.

law/influencers-find-its-tricky-to-keep-content-and-fan-following [https://perma.cc/H8MB-WPL2] (explaining that the law is unsettled on the extent to which influencers waive their copyright and trademark rights by posting content on social media).

¹⁴ For example, fashion influencer Chiara Ferragni has registered the use of her name for bags, clothes, soaps, sunglasses, jewelry, and footwear. CHIARA FERRAGNI, Registration No. 5,051,767; CHIARA FERRAGNI, Registration No. 4,838,699; CHIARA FERRAGNI, Registration No. 4,570,413. Even if an influencer doesn't have a trademark in their name, they can attempt to police "username jackers" who establish social media accounts using the influencer's name by bringing cybersquatting claims or even by simply asking the social media site "nicely." Dan Malachowski, *Username Jacking in Social Media: Should Celebrities and Brand Owners Recover from Social Networking Sites When Their Social Media Usernames Are Stolen*, 60 DEPAUL L. REV. 223, 225-30, 247 (2010).

¹⁵ See Kaitlyn Tiffany, *Why Celebrities Try to Trademark Their Catchphrases and Baby Names*, VOX (Apr. 19, 2019, 2:40 PM), <https://www.vox.com/the-goods/2019/4/19/18507920/celebrity-trademark-history-baby-names-taylor-swift> [https://perma.cc/5VFG-BP5W] (listing examples of celebrities registering trademarks for signature phrases like "That's hot" and "This sick beat," prayer poses, pet names, album titles, and even birthday party themes).

¹⁶ RESTATEMENT (THIRD) OF UNFAIR COMPETITION §46 (AM. LAW INST. 1995).

¹⁷ Alicia Hunt, *Everyone Wants to Be a Star: Extensive Publicity Rights for Noncelebrities Unduly Restrict Commercial Speech*, 95 NW. U. L. REV. 1605, 1606 (2001).

¹⁸ See, e.g., Complaint, Knowles-Carter v. Eleven LLC, No. 15-7890 (S.D.N.Y. Oct. 6, 2015) (alleging right-of-publicity violations on behalf of musicians Beyoncé, Kanye West, Pharrell Williams, Rihanna, and Jay-Z); *Wendt v. Host Int'l*, 125 F.3d 806 (9th Cir. 1997) (involving cast members of the show *Cheers*); *Abdul Jabbar v. Gen. Motors*, 85 F.3d 407 (9th Cir. 1996) (involving a basketball star); *Carson v. Here's Johnny Portable Toilets*, 698 F.2d 831 (6th Cir. 1983) (involving the host of the late-night talk show "The Tonight Show"); *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10 (App. Div. 1975) (involving professional football player).

¹⁹ See, e.g., Complaint, Kimsaprincess Inc. v. Missguided Inc., No. 19-1258 (C.D. Cal. Feb. 20, 2019) (filing a complaint on behalf of Kim Kardashian-West for violation of her statutory and common law right of publicity).

This Comment is the first comprehensive scholarship exploring the influencer’s right of publicity.²⁰ It has two goals: One, it seeks to provide a roadmap to courts faced with influencer right-of-publicity suits. Two, this Comment also reveals the gap between the outdated right-of-publicity doctrine and its modern plaintiffs and provides some solutions to bridge that gap. Part I defines influencers and explains their immense commercial power and public appeal. Part II provides a brief primer on the right of publicity. Part III brings the right of publicity into the influencer age. Influencers fall within most current statutory and common law right-of-publicity regimes. And influencers fit nicely within the right’s traditional justifications. But celebrity today is not the same as it was at the right’s origins; the public owns influencers in a way that it never owned celebrities. So, upon a closer examination of the right’s justifications, influencers deserve only a narrow right of publicity. But current right of publicity doctrine reaches too far; it doesn’t account for the nuances—the widespread mimicry, the influencer “public domain”—inherent to the vibrant world of influencers. So how do we fix that? We can borrow from other areas of intellectual property law to bring the right of publicity into the social media age. But there is an easier solution—limit the influencer’s right of publicity to exact replications of their name or likeness.

I. THE POWER AND APPEAL OF SOCIAL MEDIA INFLUENCERS

Instagram has over one billion users.²¹ Of those users, 175 million “follow” Kim Kardashian-West’s Instagram account.²² Nearly 45 million follow Huda Kattan, a beauty influencer.²³ Twenty million follow Chiara Ferragni, a

²⁰ The limited scholarship available on influencers mostly focuses on how the Federal Trade Commission’s rules on advertising and endorsement affects influencers. *See, e.g.*, Adrienne Sconyers, Note, *Corporations, Social Media, & Advertising: Deceptive, Profitable, or Just Smart Marketing*, 43 J. CORP. L. 417 (2018) (addressing the FTC’s efforts to regulate influencers and the companies that hire them). Lindsay Korotkin explored issues similar to those discussed here in her work on right of publicity and reality TV stars. *See generally* Lindsay Korotkin, *Finding Reality in the Right of Publicity*, 34 CARDOZO L. REV. DE NOVO 268 (2018). Reality TV stars, however, are much more akin to “traditional” celebrities than are influencers. *See id.* at 290-93 (defining reality TV stars as individuals who “publicize their personalities and consent to some level of invasion in their private lives” and who may “monetize their fame in different ways”). And Korotkin proposes a drastically different solution to the right of publicity’s failures than I do. *See id.* at 309-12 (advocating for a “broad fair use limit” on reality TV stars’ right of publicity).

²¹ Ashley Carman, *Instagram Now Has 1 Billion Users Worldwide*, VERGE (June 20, 2018, 2:02 PM), <https://www.theverge.com/2018/6/20/17484420/instagram-users-one-billion-count> [<https://perma.cc/7WTA-LTQH>].

²² Kim Kardashian-West (@kimkardashian), INSTAGRAM, <https://www.instagram.com/kimkardashian> [<https://perma.cc/3ACB-82NU>] (last visited June 13, 2020).

²³ Huda Kattan (@hudabeauty), INSTAGRAM, <https://www.instagram.com/hudabeauty/> [<https://perma.cc/28GW-8LHU>] (last visited June 13, 2020).

fashion blogger.²⁴ In comparison, former President Barack Obama has nearly 30 million followers.²⁵ President Donald Trump has 20 million.²⁶

Social media influencers are immensely popular. And they wield notable social power over their followers—the power to persuade, the power to inspire, the power to sell. Influencers, despite their wide-ranging popularity, are not celebrities in the traditional sense; they are a product of the social media age. Celebrity was traditionally for a select few, chosen by Hollywood’s well-oiled fame machine. Now, anybody can become an influencer—with a good camera, an Instagram account, and the willingness to convert their social media following into cash.²⁷ This Part defines and characterizes “influencers,” explaining their success, justifying their social value, and situating their role in a fame-obsessed society.

A. Defining “Influencer”

An influencer is any person with a social media account who (1) has a relationship with their followers and can influence those followers’ purchasing decisions—hence, an “influencer”—and (2) commercially benefits from that influence.²⁸ Some traditional celebrities can technically be considered influencers.²⁹ Those celebrities, like pop star Selena Gomez, often

²⁴ Chiara Ferragni (@chiaraferragni), INSTAGRAM, <https://www.instagram.com/chiaraferragni/> [<https://perma.cc/JZ6P-HA2B>] (last visited June 13, 2020).

²⁵ Barack Obama (@barackobama), INSTAGRAM, <https://www.instagram.com/barackobama/> [<https://perma.cc/QF2B-NHC5j>] (last visited June 13, 2020).

²⁶ Donald Trump (@realdonaldtrump), INSTAGRAM, <https://www.instagram.com/realdonaldtrump/> [<https://perma.cc/MEU7-2MEW>] (last visited June 13, 2020).

²⁷ See Gregory Kennedy, *The End of Hollywood and the Rise of Social Media Celebrities*, VENTUREBEAT, (Mar. 12, 2015, 6:00 PM), <https://venturebeat.com/2015/03/12/the-end-of-hollywood-and-the-rise-of-social-media-celebrities/> [<https://perma.cc/9CNK-RVY6>] (documenting how influencers on YouTube, Twitter, Vine, and Instagram have “succeeded in breaking Hollywood’s long-held monopoly on celebrity creation”).

²⁸ See DANIEL CHANDLER & ROD MUNDAY, *A DICTIONARY OF SOCIAL MEDIA* (2016) (ebook) (defining influencer as “anyone in a position to have a direct impact on those who purchase products or services” or a “trusted subject-matter expert within an online community”); Chavie Lieber, *How and Why Do Influencers Make So Much Money? The Head of an Influencer Agency Explains.*, VOX (Nov. 28, 2018 6:00 PM), <https://www.vox.com/the-goods/2018/11/28/18116875/influencer-marketing-social-media-engagement-instagram-youtube> [<https://perma.cc/F4MN-MQ6M>] (defining influencers as “people with a strong relationship to an audience who can heavily sway decisions like purchasing habits”).

²⁹ As Ellie Krupnick explains,

The definition of an influencer is loose, often defined more by the setting in which an individual promotes a brand rather than the individual her- or himself. . . . Put Selena Gomez in a Pantene commercial and she’s a celeb with an endorsement deal; pay her to post on her Instagram, and suddenly she’s an influencer.

Ellie Krupnick, *The Sneaky Allure of the ‘Bachelor’ Instagram Influencer*, RACKED (Dec. 27, 2017, 10:08 AM), <https://www.racked.com/2017/12/27/16307098/bachelor-instagram-influencers-ads> [<https://perma.cc/R329-M7WW>].

have large social media presences³⁰ and can be paid nearly a million dollars for each sponsored “post” on their social media accounts.³¹ For the purposes of this Comment, I limit the term “influencer” to (1) “normal” influencers, individuals who achieve popularity based on their social media presence and not because of prior fame through television, music, or sports;³² and (2) “celeb-influencers” who, like Kim Kardashian-West, may have gotten their start in the traditional celebrity path but whose current success, popularity, and monetary income are primarily derived from their meticulously curated social media brand.³³

Influencers wield their influence through the Internet. In comparison to celebrities, who can reach their audiences through movies, television commercials, print and radio advertisements, and gossip magazines, influencers almost exclusively use social media platforms—primarily Instagram, TikTok, Facebook, Snapchat, Twitter—blogs, and streaming sites to reach their audiences.³⁴ Influencers pick the social media platforms that best fit their persona and content. Instagram appeals to many beauty and fashion influencers because its image-focused platform, replete with clean lines, standard color palettes, and photo filters, best frames photos of beautiful people, places, and

³⁰ *E.g.*, Selena Gomez (@selenagomez), INSTAGRAM, <https://www.instagram.com/selenagomez/> [<https://perma.cc/CX28-J2ZQ>] (last visited June 13, 2020) (showing that pop star Selena Gomez has nearly 180 million followers on Instagram).

³¹ *E.g.*, O’Neill, *supra* note 9 (reporting that Selena Gomez charges \$800,000 per sponsored post).

³² *See* S. Venus Jin et al., *Instafamous and Social Media Influencer Marketing*, 37 *MARKETING INTELLIGENCE & PLAN.* 567, 568 (2019) (“Social media celebrities refer to individuals who became famous via their social media presence, as opposed to traditional celebrities who are famous from film, music and TV shows.” (internal citation omitted)); Sapna Maheshwari, *Are You Ready for the Nanoinfluencers?*, *N.Y. TIMES* (Nov. 11, 2018), <https://www.nytimes.com/2018/11/11/business/media/nanoinfluencers-instagram-influencers.html> [<https://perma.cc/2HTS-VJQ8>] (defining influencers as “that group of internet-famous people who have more than a million social media followers and can make big money by plugging various brands”).

³³ Take, for example, Kylie Jenner. Jenner got her start the “traditional way,” as a junior member of the reality TV show “Keeping Up with the Kardashians.” *See* Susanna Heller, Chloe Pantazi & Olivia Singh, *Then and Now: How Every “Keeping Up With the Kardashians” Family Member Has Changed in the 11 Years Since the First Season*, *INSIDER* (Aug. 3, 2018, 2:59 PM), <https://www.insider.com/keeping-up-with-the-kardashians-then-and-now-2017-9> [<https://perma.cc/5RDT-AzZK>] (reporting that Jenner was nine years old when she appeared in the show’s premiere). Jenner turned that limited fame into almost 180 million followers, top-dollar endorsements, and her own wildly popular makeup line. Molly Borman Heymont, *Kylie Jenner and the End of the Instagram Influencer Business Model*, *N.Y. POST* (June 6, 2020, 11:16 PM), <https://nypost.com/2020/06/06/kylie-jenner-and-the-end-of-the-instagram-influencer-business-model/> [<https://perma.cc/JJ3N-4KQP>]. Now, Jenner and her sisters are “Instagram’s first family,” the “Holy Grail” of influencers. *Id.*

³⁴ For a helpful overview of social media “platforms, terminology, and structures,” see Hannah L. Cook, Comment, *#Liability: Avoiding the Lanham Act and the Right of Publicity on Social Media*, 83 *U. CHI. L. REV.* 457, 460-65 (2016).

products.³⁵ Meanwhile, YouTube, with its long-form video streaming, is more popular with influencers who produce extended, in-depth content, such as video game streams, comedic skits, or tutorials.³⁶

Social media defines an influencer's "influence." That influence is primarily measured via an influencer's number of "followers" on social media sites.³⁷ Influencers and marketing agencies also track "views, likes, engagement rates, watch times, click-through rates, [and] comments."³⁸ Still, follower count reigns supreme; influencers are even divided into categories based on their number of followers. These categories are loose. But, in general, nanoinfluencers have between 1000 and 5000 followers.³⁹ Microinfluencers range from 10,000 to 250,000 followers.⁴⁰ Celeb-influencers have 250,000 followers and up;⁴¹ they are what most people think of when they envision an influencer—the Huda Kattans, Chiara Ferragnis, and Kim Kardashian-Wests of the world. In general, high follower counts correspond to more influence, more "sponsored content," and more money per post.⁴²

³⁵ See Jin et al., *supra* note 32, at 567 (characterizing Instagram as "a suitable ecosystem for promoting beauty products, popularizing certain body images and advocating luxurious lifestyles and prominent luxury brands").

³⁶ See Alison Coleman, *Why It's YouTube over Instagram for This Influencer Marketing Entrepreneur*, FORBES (Feb. 26, 2019, 8:35 AM), <https://www.forbes.com/sites/alisoncoleman/2019/02/26/why-its-youtube-over-instagram-for-this-influencer-marketing-entrepreneur/#108380381876> [<https://perma.cc/L4WL-W35S>] (noting that YouTube has "the deepest engagement of any social platform" because consumers "watch content for the longest" on YouTube).

³⁷ See Chavie Lieber, *The Dirty Business of Buying Instagram Followers*, VOX (Sep. 11, 2014, 2:30 PM), <https://www.vox.com/2014/9/11/7577585/buy-instagram-followers-bloggers> [<https://perma.cc/U6S8-2U6E>] (describing how some influencers buy Instagram followers to increase their exposure); see also Complaint ¶ 81, Ratchford v. AEG Ventures LLC, No. 17-7368 (N.D. Ill. Oct. 12, 2017) [hereinafter Ratchford Complaint] (listing the plaintiff's number of followers on Instagram, Facebook, and Twitter to indicate value of her personal brand in a right-of-publicity lawsuit).

³⁸ Lieber, *supra* note 28.

³⁹ Maheshwari, *supra* note 32.

⁴⁰ See Lieber, *supra* note 28 (defining "microinfluencer" as an individual with 10,000 to 50,000 followers); Maheshwari, *supra* note 32 (defining "microinfluencer" as an individual with "tens to low hundreds of thousands" of followers); Krupnick, *supra* note 29 (defining "microinfluencer" as an individual with 50,000 to 250,000 followers).

⁴¹ Commentators often divide what I call "celeb-influencers" into subcategories. For example, Mediakix, a prominent influencer marketing agency, defines "mid-tier" influencers as those with 50,000 to 500,000 followers, "macro" influencers as those with 500,000 to 1 million followers, and "mega" or "Icon" influencers as those with over 1 million followers. *Influencer Tiers for the Influencer Marketing Industry*, MEDIKIX, <https://mediakix.com/influencer-marketing-resources/influencer-tiers/> [<https://perma.cc/Z8EL-JR7Q>] (last visited June 13, 2020). Cf. *What Is an Influencer*, INFLUENCER MARKETING HUB (May 26, 2020), <https://influencermarketinghub.com/what-is-an-influencer/> [<https://perma.cc/67LG-HWRM>] (defining "macro" influencers as those with 40,000 to 1 million followers and "mega" influencers as those with over 1 million followers). For simplicity, I group all these extremely popular influencers into the single category of "celeb-influencers."

⁴² Lieber, *supra* note 28. But saturation of followers can also lead to less authentic engagement with those followers. 2019 BENCHMARK REPORT, *supra* note 8, at 6.

To wield influence over their followers, influencers have to *obtain* followers first. To attract followers, influencers produce content.⁴³ Influencers can be video game streamers, transmitting livestreams of themselves playing video games to followers while providing colorful commentary.⁴⁴ Others produce humorous content, performing skits or practical jokes.⁴⁵ Beauty influencers show off creative makeup and hairstyles, often providing tutorials.⁴⁶ Fitness influencers share workout plans and videos of themselves performing impressive fitness feats.⁴⁷ Fashion bloggers share daily outfit photos and introduce their followers to new brands and styles.⁴⁸ Lifestyle bloggers relate everyday details of their lives.⁴⁹ Some influencers provide comprehensive reviews of new technologies⁵⁰ and luxury goods.⁵¹ The list goes on. Some influencers occupy particularly “niche” areas. For example, influencer Jessica Quirk shares sewing patterns and “historic costuming” on her blog, Stars + Field.⁵² Chris Brugnola reviews weird and quirky new junk foods on his Instagram account, Junk Banter.⁵³ Even those influencers who

⁴³ See Daniel Carter, *Hustle and Brand: The Sociotechnical Shaping of Influence*, SOC. MEDIA + SOC'Y, July–Sept. 2016, at 1, 2 (“[I]nfluencers act as both production and distribution channels; brands look to these individuals to produce compelling text, images, and videos and also to distribute that content to a network of followers.”).

⁴⁴ E.g., SSSniperWolf, YOUTUBE, <https://www.youtube.com/channel/UCpB959t8iPrxQWj7G6noctQ> [<https://perma.cc/DUV2-Z4S8>] (last visited June 13, 2020); Tyler “Ninja” Blevin, YOUTUBE, <https://www.youtube.com/channel/UCAW-NpUFkMyCNrvRSSGIvDQ> [<https://perma.cc/HJ9C-CRLQ>] (last visited June 13, 2020).

⁴⁵ E.g., Ryan Higa, YOUTUBE, <https://www.youtube.com/c/ryanhiga/featured> [<https://perma.cc/D669-ESF5>] (last visited June 13, 2020); Liza Koshy, YOUTUBE, <https://www.youtube.com/channel/UCxSz6JVYmzVhtkraHWZC7HQ> [<https://perma.cc/UW5L-BK8M>] (last visited June 13, 2020).

⁴⁶ E.g., Irishcel507, YOUTUBE, <https://www.youtube.com/user/Irishcel507> [<https://perma.cc/6VDE-279B>] (last visited June 10, 2020); Kattan, *supra* note 23.

⁴⁷ E.g., Alexa Jean Brown (@alexajeantfitness), INSTAGRAM, <https://www.instagram.com/alexajeantfitness/> [<https://perma.cc/MSA5-H6Z3>] (last visited June 13, 2020); Simeon Panda (@simeonpanda), INSTAGRAM, <https://www.instagram.com/simeonpanda/> [<https://perma.cc/63PC-PCBR>] (last visited June 13, 2020).

⁴⁸ Jin et al., *supra* note 32, at 567.

⁴⁹ See Callie Coker, *Million Dollar Bloggers Club: How the Copyright Act Fails the Blogging Phenomenon and a Proposal for More Effective Protection*, 10 AM. U. INTELL. PROP. BRIEF 1, 5 (2019) (reporting that a “lifestyle” blog is “a website where its author shares her everyday life and interests”). Lifestyle blogs often involve posts about food, clothing, family, and friends. E.g., EAT.SLEEP.WEAR, <https://www.eatsleepwear.com/> [<https://perma.cc/3Q28-G7KZ>] (last visited June 13, 2020).

⁵⁰ E.g., Unbox Therapy, YOUTUBE, <https://www.youtube.com/user/unboxtherapy> [<https://perma.cc/8U6C-ZJUA>] (last visited June 13, 2020).

⁵¹ E.g., Anish Bhatt (@watchanish), INSTAGRAM, <https://www.instagram.com/watchanish/> [<https://perma.cc/MRC2-RWEX>] (last visited June 13, 2020).

⁵² STARS & FIELD, <https://www.starsandfield.com/> [<https://perma.cc/9Y5J-WFQE>] (last visited June 13, 2020).

⁵³ Chris Brugnola (@junkbanter), INSTAGRAM, <https://www.instagram.com/junkbanter/> [<https://perma.cc/2CJW-63ZU>] (last visited June 13, 2020); see also Amanda Fama, *Junk Banter's*

exclusively focus on sharing (attractive) photos of themselves work to produce “compelling text, images, and videos” to peddle their products.⁵⁴

How does a social media user become an influencer? For most, it’s a slow and steady process, often taking years to develop a sizeable and committed following.⁵⁵ Phoebe McPherson, a microinfluencer, began developing her brand, *Honestly, Though*, “on a whim.”⁵⁶ McPherson began with less than 500 followers.⁵⁷ Now, a year and a half later, she has become a microinfluencer with over 60,000 followers.⁵⁸ She gradually increased follower engagement by “developing strategy around hashtags,” “post[ing] photos of food and clothing from companies who would [then] repost her,” and participating in influencer networks and “Instagram pods, where people engage with each other’s content.”⁵⁹ Chris Brugnola, the microinfluencer behind *Junk Banter*, saw his account grow similarly—he gained 10,000 followers in the first year, and 90,000 in the second.⁶⁰

For many microinfluencers and celeb-influencers, influencing is their full-time job.⁶¹ Other influencers keep their day jobs. Gerry Brooks, with 1.2 million Facebook followers, is an elementary school principal.⁶² Chris Brugnola, of *Junk Banter*, still works for the Department of Defense.⁶³ Many nanoinfluencers view influencing as a “hobby-slash-gig,” something to get free products or make a little extra cash.⁶⁴

Instagram Is a Go-To for Foodies & You’ll Never Guess Who Runs It, ELITE DAILY (July 18, 2018), <https://www.elitedaily.com/p/junk-bantern-instagram-is-a-go-to-for-foodies-youll-never-guess-who-runs-it-9175723> [<https://perma.cc/UW7W-55W6>] (describing how Brugnola selectively advertises for companies in order to fund his many food purchases).

⁵⁴ Carter, *supra* note 43, at 2.

⁵⁵ See Lieber, *supra* note 28 (“[Y]ou could be working at [becoming an influencer] for four years before you hit it big.”); Roose, *supra* note 1 (noting that influencers “have typically spent years working their way up the ladder”).

⁵⁶ Kate Gardner, *How Influencers Build Instagram Followings*, TEEN VOGUE (Feb. 7, 2018), <https://www.teenvogue.com/story/how-influencers-build-instagram-following> [<https://perma.cc/E2SF-JHXP>].

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Fama, *supra* note 53.

⁶¹ See Gardner, *supra* note 56 (“Between her blog, Instagram, and social media consultancy, [microinfluencer Phoebe] McPherson has reached the point where she no longer needs to work a full-time job.”); Candace Jackson, *Hashtag Open House*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/style/hashtag-open-house.html?searchResultPosition=1> [<https://perma.cc/AA8N-KNHB>] (noting that influencer Ayla Woodruff had been “making a full-time living off Instagram posts for about six months”).

⁶² Gerry Brooks, FACEBOOK, https://www.facebook.com/pg/gerrybrooksprin/posts/?ref=page_internal [<https://perma.cc/Z5X3-BPMW>]; see also Lieber, *supra* note 28 (noting that Brooks reaches a “unique, and lucrative, audience” of mostly middle-aged teachers).

⁶³ Fama, *supra* note 53.

⁶⁴ Maheshwari, *supra* note 32.

With or without a day job, influencers stay busy. For one, they produce “a constant stream of new content.”⁶⁵ YouTube stars film videos. Makeup artists brainstorm new looks. Fashion bloggers pose for photo shoots. Influencers also spend much of their time managing their own lucrative business relationships.⁶⁶ Brands and marketing agencies will aggressively seek out established influencers. But new or wannabe influencers must hunt down sponsorships themselves.⁶⁷ Influencers also must always be on the cutting edge, “spot[ting] trends, experiment[ing] relentlessly with new formats and platforms, build[ing] an authentic connection with an audience, pay[ing] close attention to their channel analytics, and figur[ing] out how to distinguish themselves in a crowded media environment.”⁶⁸ Most influencers do all this work on their own, as “essentially one-person start-ups.”⁶⁹

Influencers work hard to attract followers. And once they have followers, they use their influence to peddle products. To do that, influencers post “sponsored content”—posts or videos that advertise a particular product or company. Originally, influencers were recruited by online-only, direct-to-consumer brands, such as Glossier, a beauty company, or Away, a luggage start-up.⁷⁰ Many influencers still almost exclusively peddle these “Instagram-brands.”⁷¹ But many others work with national companies and organizations—Old Navy, the NFL, St. Ives, Orbit Gum—that historically worked with “traditional” celebrities.⁷² Influencers can provide one-off product promotions, participate in a short-term advertising campaign, or become brand ambassadors, with long-term public partnerships with a particular brand. For example, influencer Tavi Gevinson was once paid to live in and promote a luxury apartment building in Brooklyn for a year.⁷³ Influencers

⁶⁵ Roose, *supra* note 1.

⁶⁶ See Gardner, *supra* note 56 (noting how much time influencers spend “hashing out sponsorship agreements with companies”).

⁶⁷ *Id.*

⁶⁸ Roose, *supra* note 1.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Krupnick, *supra* note 29.

⁷² See *id.* (describing influencer posts promoting brands like Ponds, Vera Bradley, Reebok, Dermalogica, Juicy Couture, Olive Garden, and McDonald’s).

⁷³ Tavi Gevinson, *Who Would I Be Without Instagram? An Investigation.*, CUT (Sept. 16, 2019), <https://www.thecut.com/2019/09/who-would-tavi-gevinson-be-without-instagram.html> [<https://perma.cc/H2WY-HP25>]; Sarah Spellings, *Tavi Gevinson Bids Farewell to Her Spon-Con Apartment*, CUT (June 4, 2018), <https://www.thecut.com/2018/06/rookie-founder-tavi-gevinson-ends-sponsorship-with-apartment.html> [<https://perma.cc/44H6-YV56>].

even collaborate with brands to produce specific collections, and a lucky few strike out on their own and begin selling their own products.⁷⁴

Influence pays. Influencers can turn large profits by endorsing or advertising products.⁷⁵ The amount that influencers are paid generally depends on their number of followers. Nanoinfluencers “can make between \$30,000 and \$60,000 a year.”⁷⁶ Microinfluencers can earn “anywhere from \$40,000 to \$100,000” a year.⁷⁷ And “[c]eleb influencers make way, way more” — ranging from the hundred thousands to millions.⁷⁸ Kim Kardashian-West, the ultimate celeb-influencer, has turned her personal brand into a \$350 million enterprise that involves both advertising products for other brands and advertising her own products, including makeup palettes, a mobile game, and children’s clothing.⁷⁹

Influencers are often paid per “post.” Taylor Camp, a “men’s clothing/grooming/lifestyle” microinfluencer,⁸⁰ reported being paid \$500 for just two sponsored Instagram posts.⁸¹ Luka Sabbat, a celeb-influencer with 2.2 million followers,⁸² was allegedly paid \$60,000 for one sponsored Instagram post, three Instagram stories, and “for being photographed during fashion weeks while wearing” a particular product.⁸³ But influencers aren’t always paid in money. Nanoinfluencer Haley Stutzman reported earning a free couch and beach vacation for posting sponsored content.⁸⁴ In fact, nanoinfluencers often receive free products rather than being directly paid for social media posts.⁸⁵

⁷⁴ See Marina Liao, *10 Fashion Influencers Who Run Their Own Brands Like a Boss*, MARIE CLAIRE (Jan. 3, 2019), <https://www.marieclaire.com/fashion/a25682449/fashion-bloggers-with-clothing-lines/> [<https://perma.cc/E65Z-MTCT>] (describing influencers such as Gabi Gregg and Chriselle Lim who have their own clothing and accessory lines, often in partnership with big name brands).

⁷⁵ See Coker, *supra* note 49, at 3 (describing bloggers who generate over a million dollars a year).

⁷⁶ Lieber, *supra* note 28.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Natalie Robehmed, *Why Kim Kardashian West Is Worth \$350 Million*, FORBES (July 11, 2018, 6:45 AM), <https://www.forbes.com/sites/natalierobehmed/2018/07/11/why-kim-kardashian-west-is-worth-350-million/#3ea133454f7b> [<https://perma.cc/E77X-TDVM>].

⁸⁰ Taylor Camp (@thetieguy), INSTAGRAM, <https://www.instagram.com/thetieguy/> [<https://perma.cc/5JHU-KW68>] (last visited June 14, 2020).

⁸¹ Maheshwari, *supra* note 32.

⁸² Luka Sabbat (@lukasabbat), INSTAGRAM, <https://www.instagram.com/lukasabbat/> [<https://perma.cc/QF6P-CLUJ>] (last visited June 13, 2020).

⁸³ Maheshwari, *supra* note 32.

⁸⁴ *Id.*

⁸⁵ *Id.*; see Kenny Wassus, *How Influencers Get Free Products, and You Can Too!*, N.Y. MAG. (June 26, 2018), <http://nymag.com/intelligencer/2018/06/how-influencers-get-free-cosmetic-products-and-you-can-too.html> [<https://perma.cc/MND6-4YRD>] (noting that “[b]oth parties benefit” when a brand sends a nanoinfluencer free product—the influencer “nets followers and product” and the brand “gets cheap creative assets and a new loyal follower”).

B. *The Power of Influencers*

Why do social media users follow influencers? For many, it's fun.⁸⁶ Many influencers "trade on their glamorous, utterly unrelatable lifestyles"⁸⁷ — who doesn't want to see photos of beautiful, fashionable individuals on their Instagram feed? Second, influencers are informative. Influencers use their "expertise" to teach tangible skills.⁸⁸ Beauty blogger Nikkia Joy teaches viewers how to contour their cheekbones and how to blend eyeshadows.⁸⁹ Fitness gurus like Simeon Panda share detailed workout plans.⁹⁰ Food influencers like Michaela Vais share recipes.⁹¹ Third, social media users can develop fulfilling online relationships with influencers.⁹² Influencers foster relationships with their followers by sharing intimate details of their lives.⁹³ For example, influencer and poet Demetrius Harmon often talks publicly with his followers about mental illness.⁹⁴ Other influencers have broadcasted surgical procedures⁹⁵ or marriage proposals⁹⁶ or simply constantly "update their readers about day-to-day activities."⁹⁷ Just as influencers share details of their lives, their followers share back, through comments on posts or direct

⁸⁶ See Krupnick, *supra* note 29 (arguing that following Instagram influencers is "soothing in a mindless sort of way: Instagram . . . rewards the beautiful, the simple, and the inoffensive").

⁸⁷ *Id.*

⁸⁸ See Coker, *supra* note 49, at 10 ("Young college students may turn to a popular college blogger for advice on how to improve their college experience. An aspiring stylist may frequent fashion blogs to see what trends are popular." (footnote omitted)).

⁸⁹ Nikkia Joy, YOUTUBE, <https://www.youtube.com/user/nikkiajoy> [<https://perma.cc/J269-ZB2F>] (last visited Nov. 9, 2019).

⁹⁰ Panda, *supra* note 47.

⁹¹ Ela Vegan, <https://elavegan.com/> [<https://perma.cc/K8A9-BM97>] (last visited Nov. 9, 2019).

⁹² See Jin et al., *supra* note 32, at 571 (noting that influencers build relationships by "interact[ing] directly with followers on a regular basis"); Strugatz, *supra* note 6 (detailing how many individuals, through constant use of social media, can "develop 'weirdly personal' relationships with . . . influencers").

⁹³ Cf. Gevinson, *supra* note 73 ("The next era of Instagram is all about the 'relatable influencer,' with trends like #nomakeup, #nofilter, #mentalhealth, [and] #bodyimage . . .").

⁹⁴ Lieber, *supra* note 28; *Speaking*, DEMETRIUS HARMON, <https://www.demetriusharmon.com/speaking> [<https://perma.cc/B4TJ-JNQR>] (last visited Nov. 10, 2019) (collecting Harmon's speaking engagements, which deal with subjects like "the obstacles of being Black in America and how it effects [sic] our psyche"); see also Demetrius Harmon (@demetriusharmon), INSTAGRAM, <https://www.instagram.com/demetriusharmon/> [<https://perma.cc/6SXY-D48U>] (last visited June 14, 2020) (sharing content on racism, social justice, and mental health).

⁹⁵ See Blake Montgomery, *YouTube Influencers Are Oversharing Their Surgeries*, DAILY BEAST (Sept. 22, 2019, 11:58 AM), <https://www.thedailybeast.com/youtube-influencers-are-oversharing-their-surgeries> [<https://perma.cc/MW6E-TBGF>] (describing influencers who posted videos of their plastic surgeries, wisdom teeth removals, and egg-freezing surgeries).

⁹⁶ *It's Been A Minute with Sam Sanders: 'The New Celebrity': The Rise of Influencers—and How They Changed Advertising*, NPR (Sept. 10, 2019, 3:00 AM), <https://www.npr.org/2019/09/09/759127302/the-new-celebrity-the-rise-of-influencers-and-how-they-changed-advertising> [<https://perma.cc/76L4-U652>] [hereinafter *The New Celebrity*].

⁹⁷ Coker, *supra* note 49, at 11.

messages to the influencer. Finally, many influencers keep followers coming back for more content because they provide content that is both “relatable” but captivating.⁹⁸ Microinfluencer Phoebe McPherson notes, “I try to make myself look cute and approachable, but also always busy and unattainable.”⁹⁹ Influencers, with their “cute” and “unattainable” lifestyles, inspire jealousy in their followers—in fact, scholars hypothesize that social media users are more likely to be jealous of influencers than traditional celebrities.¹⁰⁰ This jealousy, in turn, inspires users to imitate those influencers and (presumably) improve their own lives.¹⁰¹

Influencers genuinely influence consumer purchasing decisions.¹⁰² This is because influencers can connect with consumers in unprecedented ways.¹⁰³ This is particularly true with nano- and microinfluencers, who have smaller follower accounts, post less sponsored content, and thus appear “more authentic” and their recommendations more trustworthy.¹⁰⁴ This power hasn’t gone unnoticed. Thousands of brands, including large pharmaceutical companies¹⁰⁵ and real estate companies,¹⁰⁶ recruit influencers. Even scientists

⁹⁸ See Krupnick, *supra* note 29 (describing influencers as providing “a kind of ordinary we can relate to, but also aspire to enough to stay enthralled”).

⁹⁹ Gardner, *supra* note 56.

¹⁰⁰ People are more likely to envy individuals “whom we identify with.” See Jin et al., *supra* note 32, at 571. Social media users view an influencer’s (still glamorous) lifestyle as “more feasible and attainable” than that of the traditional celebrity. *Id.*

¹⁰¹ *Id.* at 571-72. This “inspirational” nature of influencers can have a dark side: Social media users can suffer body dissatisfaction when contrasting their own lives with those of influencers. *Id.* at 572.

¹⁰² See 2019 BENCHMARK REPORT, *supra* note 8, at 4 (reporting that companies earned, on average, \$5.20 for each dollar they spent on sponsored content).

¹⁰³ See Lieber, *supra* note 28 (finding that influencers can “connect with people more deeply than a page in a magazine and can therefore sway potential customers”).

¹⁰⁴ See Yuyu Chen, *The Rise of “Micro-Influencers” on Instagram*, DIGIDAY (Apr. 27, 2016), <https://digiday.com/marketing/micro-influencers/> [<https://perma.cc/STT9-VEQU>] (“[M]icro-influencers get an average of two-to-five times more organic engagement per Instagram post, compared to those with more than 100,000 followers.”).

¹⁰⁵ Suzanne Zuppello, *The Latest Instagram Influencer Frontier? Medical Promotions*, VOX (Feb. 15, 2019, 8:00 AM), <https://www.vox.com/the-goods/2019/2/15/18211007/medical-sponcon-instagram-influencer-pharmaceutical> [<https://perma.cc/H2HX-F8UX>].

¹⁰⁶ Jackson, *supra* note 61.

have encouraged influencer partnerships.¹⁰⁷ In 2017, brands spent \$1 billion on 12.9 million posts by influencers.¹⁰⁸

Where does this power come from? Scholars have identified a few sources. One, association. When an influencer endorses a brand, they impart their “symbolic power” to the brand.¹⁰⁹ Influencers carefully cultivate their social media presences in order to create a personal brand with “positive and culturally desirable traits.”¹¹⁰ Those traits will vary based on the particular influencer: Some influencers trade on their high-end lifestyle; their endorsement of a product imparts glamour to that product. Other influencers trade on realism and relatability; their endorsement of a product imbues it with a sense of practicality. Consumers, seeing this imparted power, purchase these products “as a way of showing cultural identification with what that [influencer] has come to represent.”¹¹¹

Two, trust. Followers trust influencers’ recommendations.¹¹² To a new follower, an influencer’s existing followers, shares, and likes verify that the influencer is trustworthy and dependable.¹¹³ It’s the herd mentality—if other people trust the influencer, the new follower can too.¹¹⁴ This trust is then amplified as the follower develops a relationship of their own with the influencer: The follower finds that the influencer has similar interests and habits; so they view themselves as being in the same “social group” as the influencer. This perceived similarity—a connection between the influencer

¹⁰⁷ See Mauro Galetti & Raul Costa-Pereira, *Scientists Need Social Media Influencers*, 357 SCIENCE 880, 880-81 (2017) (encouraging scientists to recruit influencers “to inspire people to embrace more rational and scientific-based attitudes”). In fact, public health officials recruited influencers to disseminate health and safety messages during the coronavirus pandemic. See Frances Stead Sellers, *On Social Media, Influencers Put the Coronavirus in the Spotlight*, WASH. POST (June 6, 2020, 10:00 AM), https://www.washingtonpost.com/national/social-media-influencers-put-the-coronavirus-in-the-spotlight/2020/06/05/ad22a3ae-a218-11ea-b5c9-570a91917d8d_story.html [<https://perma.cc/5U7P-DQMU>].

¹⁰⁸ See Jelle Fastenau, *Under the Influence: The Power of Social Media Influencers*, MEDIUM (Mar. 6, 2018), <https://medium.com/crobox/under-the-influence-the-power-of-social-media-influencers-5192571083c3> [<https://perma.cc/5NFG-JNDE>] (stating that there were 12.9 million sponsored posts in 2017); Jackson, *supra* note 61 (reporting that companies spent \$1 billion on sponsored content in 2017).

¹⁰⁹ Jin et al., *supra* note 32, at 569.

¹¹⁰ *Id.*

¹¹¹ Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891, 941 (2017); accord Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1175-76 (2006) (arguing that consumers buy products associated with celebrities because “they admire the celebrity and seek to associate themselves with her”).

¹¹² Jin et al., *supra* note 32, at 569-70.

¹¹³ See Fastenau, *supra* note 108 (stating that influencers generally have “a large number of followers, shares, and likes” which “provide viewers with a form of social proof”).

¹¹⁴ See Maheshwari, *supra* note 32 (“When they recommend a shampoo or a lotion or a furniture brand on Instagram, their word seems as genuine as advice from a friend.”).

and the consumer—overcomes the consumer’s hesitation about the product.¹¹⁵ As one nanoinfluencer describes it, “It’s like one of your friends telling you a new skin care product is amazing, but instead of me telling my friends at happy hour, it’s me telling them on Instagram.”¹¹⁶ Influencers then leverage this trust into sales. Consumers are bombarded with advertisements;¹¹⁷ still, they struggle to identify which products to buy.¹¹⁸ Influencers help them make those decisions, telling them which products to buy (and often offering a discount code to try the product).

Three, jealousy. Social media users purchase the endorsed brands because they are envious of the influencers. As with any celebrity advertising, “[e]nvy enhances the desire” for an advertised product.¹¹⁹ But this envy is enhanced with influencers. Because influencers are “identifiable and likeable,” social media users think that influencers’ possessions “are attainable, which increases envy and the desire for that possession.”¹²⁰ A social media user may think it pointless to emulate Kim Kardashian-West’s lifestyle—the expensive vacations, luxurious facials, glamorous parties. But they can easily emulate the many nanoinfluencers they see on their Instagram feed; they simply need to buy a few new outfits and find a good photo background.

C. *The New Celebrity*

So influencers collect followers, fame, and endorsements through social media. They then use that influence to peddle products to their followers. But traditional celebrities—professional athletes, models, actors, musicians—also have fans and advertising deals. What makes influencers so different from traditional celebrities?¹²¹

¹¹⁵ See Jin et al., *supra* note 32, at 570 (explaining that consumers don’t as carefully scrutinize information from individuals who *seem* similar to themselves).

¹¹⁶ Maheshwari, *supra* note 32. Another reason why influencers earn so much trust from their followers is their attractiveness. See Fastenau, *supra* note 108. Science has repeatedly found that consumers trust attractive people more than unattractive people. See, e.g., Raluca Petrican et al., *Personality at Face Value: Facial Appearance Predicts Self and Other Personality Judgments Among Strangers and Spouses*, 38 J. NONVERBAL BEHAV. 259, 266 (2015).

¹¹⁷ Jessica Davies, “People Are Bombarded with Ads”: Confessions of a Publishing Vet on User Experience, DIGIDAY (Nov. 24, 2017), <https://digiday.com/media/people-bombarded-ads-confessions-publishing-vet-user-experience/> [<https://perma.cc/QJR2-QQU6>].

¹¹⁸ Rachel Layne, *Why Do Consumers Make Bad Decisions?*, FORBES (Apr. 19, 2018, 10:00 AM), <https://www.forbes.com/sites/hbsworkingknowledge/2018/04/19/why-do-consumers-make-bad-decisions/#24463f4d2f8c> [<https://perma.cc/MJX2-NTD>].

¹¹⁹ Jin et al., *supra* note 32, at 571.

¹²⁰ *Id.*

¹²¹ Marketing, sociology, psychology, and media scholars all recognize a distinction between traditional celebrities and influencers. E.g., Carter, *supra* note 43, at 6; Jin et al., *supra* note 32, at 568; Pedro Torres et al., *Antecedents and Outcomes of Digital Influencer Endorsement: An Exploratory*

While celebrities create value *then* advertise, influencers create value *as* they advertise.¹²² Celebrities “deserve” their fame, or so the story goes, having earned it “because of achievement, merit, talent, or special internal qualities.”¹²³ Once they create value for society, then they star in commercials.¹²⁴ For example, Peyton Manning, former champion quarterback for the Denver Broncos and Indianapolis Colts, was a highly accomplished professional football player well before he started earning \$12 million a year advertising for brands like Nationwide Insurance, Papa John’s Pizza, and DirecTV.¹²⁵

In comparison, influencers are “nothing special”—“ordinary [people] elevated to actual fame by some combination of savvy self-branding and other people’s voyeurism.”¹²⁶ An influencer starts small. An aspiring influencer with a few hundred followers may begin posting photos of their outfits each day. Slowly, with the right poses and hash tags and filters, the wannabe influencer could reach a thousand followers. They may reach out to brands, seeking free products in exchange for posts. The wannabe influencer then gains credibility with social media users; to users, the “sponsored content” tag means that “you’re producing good content and you’re worthy of approaching and offering these opportunities to.”¹²⁷ In essence, advertising deals serve to verify and authenticate an influencer.¹²⁸ That credibility leads to more followers, which in turn leads to more sponsored content, and then more followers. Ultimately, influencers depend on the brands they promote¹²⁹—what came first, the influencers or the endorsements?

Study, 36 PSYCHOL. & MARKETING 1, 1 (2019). So does the consuming public. See Jin et al., *supra* note 32, at 573. And so do influencers themselves. See Gevinson, *supra* note 73 (“I saw a clear line between those whose careers would not have existed without the internet (YouTubers, bloggers like me) and those who had already been approved by the pre-internet legacy-media Establishment (most celebrities).”). It’s time for legal scholarship to recognize that distinction too.

¹²² See Jin et al., *supra* note 32, at 568 (arguing that influencers “create value for their personal brands while engaging in quasi-promotional activities”).

¹²³ Joshua Gamson, *The Unwatched Life Is Not Worth Living: The Elevation of the Ordinary in Celebrity Culture*, 4 PMLA 1061 (2011); see also Jin et al., *supra* note 32, at 568 (characterizing celebrities as those who “created value for themselves through sports, music or movies”).

¹²⁴ *Id.*

¹²⁵ Ben Miller, *All Those TV Spots Make Peyton Manning NFL’s Top-Paid Endorser*, DENVER. BUS. J. (Oct. 14, 2015, 10:09 AM), <https://www.bizjournals.com/denver/news/2015/10/14/all-those-tv-spots-make-peyton-manning-nfls-top.html> [<https://perma.cc/WB5P-MZMG>].

¹²⁶ Caitlin Dewey, *Inside the World of the “Instafamous,”* WASH. POST (Feb. 19, 2014, 12:24 PM), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2014/02/19/inside-the-world-of-the-instafamous/> [<https://perma.cc/FDN8-4W6L>].

¹²⁷ Taylor Lorenz, *Rising Instagram Stars Are Posting Fake Sponsored Content*, ATLANTIC (Dec. 18, 2018), <https://www.theatlantic.com/technology/archive/2018/12/influencers-are-faking-brand-deals/578401/> [<https://perma.cc/5KVT-K83K>].

¹²⁸ *Id.*

¹²⁹ See Jin et al., *supra* note 32, at 568 (“[Influencers] have a highly integrated relationship with and critical reliance on the brands they choose to feature, because their livelihood and fame are mainly dependent on those factors.” (internal citation omitted)).

Influencers aren't just walking advertisements. They entertain us. They teach us. They inspire us. They force us to reconsider our values in a fame-obsessed world. They are the "new" celebrity. But to create value, influencers need control over their brands and personas: they must regulate the use of their persona by brands, other influencers, and the public. Enter, the right of publicity—a celebrity's right that isn't designed or prepared for its newest litigants.

II. THE RIGHT OF PUBLICITY

The right of publicity is an uneasy right. Scholars and courts have sharply criticized the right and its doctrine:

"Right of publicity law is famously a mess."¹³⁰

"[M]any of [right of publicity's] critical elements remain either disputed or undeveloped."¹³¹

"[The right of publicity] is wildly unpredictable in practice."¹³²

"[T]he right of publicity's doctrinal scope has not been clearly articulated, and its theoretical grounding remains shaky."¹³³

"[The right of publicity] has been likened to a haystack in a hurricane."¹³⁴

At its core, the right of publicity protects unauthorized use of a person's name, likeness, or persona for commercial use.¹³⁵ But many of the basic aspects of the right are in dispute. Is it a form of intellectual property, or is it a privacy-based tort?¹³⁶ Is the right primarily concerned with privacy or economic harm?¹³⁷ What does it mean for a use to be commercial?¹³⁸

¹³⁰ Ashley Messenger, *Rethinking the Right of Publicity in the Context of Social Media*, 24 WIDENER L. REV. 259, 259 (2018).

¹³¹ Brian D. Wasson, *Uncertainty Squared: The Right of Publicity and Social Media*, 63 SYRACUSE L. REV. 227, 228 (2013).

¹³² Johnson, *supra* note 111, at 892.

¹³³ Dustin Marlan, *Unmasking the Right of Publicity*, 71 HASTINGS L.J. 419, 421-22 (2020) (footnote omitted).

¹³⁴ *McFarland v. Miller*, 14 F.3d 912, 918 (3d Cir. 1994) (internal quotation marks omitted).

¹³⁵ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. LAW INST. 1995) ("One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability . . .").

¹³⁶ See Johnson, *supra* note 111, at 897 ("[T]he right of publicity is said to have evolved progressively from a tort cause of action to a form of intellectual property."); Messenger, *supra* note 130, at 261-62 (expressing the need to resolve the "extremely important philosophical issue" of whether right to publicity is a privacy or property right); Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1888-90 (2010) (noting how Prosser originally classified "appropriation . . . of the plaintiff's name or likeness" as a category of privacy tort).

¹³⁷ See Messenger, *supra* note 130, at 261 ("One question that continues to perplex the courts is what the right [of publicity] actually protects: Is it privacy or economic harm? Both? Does it matter?").

¹³⁸ See *id.* at 263-66 (explaining that courts have struggled to "draw a clear line" to define commercial use); see also Cook, *supra* note 34, at 475-77 (explaining that this struggle to define "commercial use" is, at least in part, a result of creative advertising strategies from companies).

Originating at the turn of the twentieth century as an outgrowth of the right of privacy,¹³⁹ the right of publicity was initially intended to serve celebrities whose name or image was used for advertising without their permission.¹⁴⁰ And that is how the right has been primarily used—to protect celebrities.¹⁴¹ While the beneficiaries of the right have generally stayed the same, the right’s scope has not. Over the last century, the right of publicity has expanded from protecting only exact replications of an individual’s name or likeness to encompassing anything that “evokes” an individual’s persona.¹⁴² As the right’s scope has expanded, its boundaries have blurred, resulting in disparate court decisions that have evoked outrage from scholars and the public.

A. Modern Scope

The right of publicity originates in state law, and a majority of states have recognized some version of a right of publicity.¹⁴³ Many states provide a statutory right of publicity.¹⁴⁴ Section 3344 of the California Civil Code, the exemplary right-of-publicity statute, provides that “[a]ny person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling . . . shall be liable for any damages sustained by the

¹³⁹ See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (formulating, for the first time, a right of privacy for individuals affected by the “gossip[ing]” press).

¹⁴⁰ See *Haelen Labs., Inc. v. Topps Chewing Gum*, 202 F.2d 866, 868 (2d Cir. 1953) (recognizing, for the first time, a right of publicity to protect “many prominent persons (especially actors and ball-players)”).

¹⁴¹ Noncelebrities have used the right to protect the use of their name or likeness, but such suits have been few and far between. See, e.g., *Bullard v. MRA Holding, LLC*, 740 S.E.2d 622, 625-27 (Ga. 2013). (holding that plaintiff stated a valid claim for appropriation of likeness under Georgia law when defendants used indecent video footage of plaintiff for economic gain without plaintiff’s consent). Noncelebrities’ names and likenesses are rarely worth appropriating. And when they are appropriated, there usually isn’t enough potential recovery to make the lawsuit worthwhile.

¹⁴² For an in-depth look at the “expansion of the right of publicity,” see Dogan & Lemley, *supra* note 111, at 1167-80.

¹⁴³ Daniel Gervais & Martin L. Holmes, *Fame, Property & Identity: The Purpose and Scope of the Right of Publicity*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 181, 186-88 (2014). Note, several states structure their protections as the right to privacy. See, e.g., NEB. REV. STAT. § 20-202 (2020) (“Any person . . . that exploits a natural person, name, picture, portrait, or personality for advertising or commercial purposes shall be liable for invasion of privacy.”). No matter the classification, the protections operate almost identically: both protect against commercial use of a person’s name or likeness. See *Gignilliat v. Gignilliat, Savitz & Bettis*, 684 S.E.2d 756, 759 (S.C. 2009) (“Jurisdictions have recognized a right of publicity either by expressly acknowledging a separate tort for the right of publicity or by finding it encompassed within the four classic privacy torts, specifically, wrongful appropriation.”).

¹⁴⁴ See, e.g., ALA. CODE § 6-5-771 (2020); 765 ILL. COMP. STAT. 1075/10 (2020); IND. CODE § 32-36-1-6 (2020); NEV. REV. STAT. § 597.790 (2020); OKLA. STAT. tit. 12, § 1449 (2020); 42 PA. CONS. STAT. § 8316 (2020).

person”¹⁴⁵ Other states provide a common law right of publicity.¹⁴⁶ A few states provide both statutory and common law rights of publicity.¹⁴⁷ New York has even criminalized violations of an individual’s right of publicity.¹⁴⁸

Most right-of-publicity claims boil down to proving two elements: (1) unauthorized commercial use (2) of an individual’s name or likeness. I examine each of these in turn.

1. Commercial Use

Right of publicity polices only *commercial* uses of an individual’s name or likeness.¹⁴⁹ A deep dive into commercial use is beyond the scope of this Comment. For our purposes, it is sufficient to note that a use is commercial if it is “for the purposes of advertising”¹⁵⁰ and there is a “connection between the alleged use and the commercial purpose.”¹⁵¹ This is a low bar: the connection can be as tenuous as “attract[ing] . . . viewers’ attention.”¹⁵²

¹⁴⁵ CAL. CIV. CODE § 3344 (West 2020). California, as the home of Hollywood, unsurprisingly led the development of the doctrine over the course of the twentieth century. *Cf.* *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1521 (9th Cir. 1993) (Kozinski, J., dissenting) (referring to the Ninth Circuit, in a right-of-publicity case, as “the Court of Appeals for the Hollywood Circuit”).

¹⁴⁶ *See, e.g., In re Estate of Reynolds*, 327 P.3d 213, 216 (Ariz. Ct. App. 2014) (“We . . . hold that an individual has a right of publicity that protects his or her name and/or likeness from appropriation for commercial or trade purposes.”); *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 703 (Ga. 1982) (“[W]e hold that the appropriation of another’s name and likeness, whether such likeness be a photograph or sculpture, without consent and for the financial gain of the appropriator is a tort in Georgia”); *Gignilliat*, 684 S.E.2d at 759 (“We hold South Carolina does recognize the tort of infringement on the right of publicity.”).

¹⁴⁷ Edward C. Wilde, *The Scope of Liability Under California’s Right of Publicity Statutes: Civil Code Sections 990 and 3344*, 5 UCLA ENT. L. REV. 167, 170 (1998). In *Midler v. Ford Motor Co.*, the court allowed Bette Midler to proceed on a common law right-of-publicity claim when her claim under section 3344 of the California Civil Code failed. 849 F.2d 460, 463 (9th Cir. 1988).

¹⁴⁸ *See* N.Y. CIV. RIGHTS LAW § 50 (McKinney 2020) (“A person . . . that uses . . . the name, portrait, or picture of any living person [without authorization] is guilty of a misdemeanor.”). For a helpful, state-by-state breakdown of right of publicity protections, see Jennifer Rothman, *The Law, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY*, <https://www.rightofpublicityroadmap.com/law> [https://perma.cc/U4TF-VKJM] (last visited June 13, 2020).

¹⁴⁹ *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION §46 (AM. LAW INST. 1995) (defining the cause of action to apply to those “who appropriate[] the commercial value of a person’s identity”). California’s common law right is the exception, policing both commercial and noncommercial uses. *See* *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001) (allowing recovery under California common law when “the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise”).

¹⁵⁰ CAL. CIV. CODE § 3344(a).

¹⁵¹ *Downing*, 265 F.3d at 1001 (citing *Eastwood v. Superior Court, Cty. of L.A.*, 149 Cal. Rptr. 342, 347 (Ct. App. 1983)).

¹⁵² *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 415-16 (9th Cir. 1996).

2. Name or Likeness

The right of publicity in all states protects at least an individual's name or likeness (i.e., their exact image).¹⁵³ But many states have found protections beyond that, protecting attributes,¹⁵⁴ voices,¹⁵⁵ signatures,¹⁵⁶ gestures,¹⁵⁷ mannerisms,¹⁵⁸ or distinctive appearances.¹⁵⁹ Courts (and litigants) have stretched these categories to include things like catchphrases¹⁶⁰ and dance moves.¹⁶¹

Right of publicity claims can be sorted into two categories: exact takings and nonexact takings. Courts almost always forbid exact takings—the direct copying of names or likenesses.¹⁶² Things get trickier with nonexact takings, or takings that impersonate or “evoke” an individual's persona or attributes; courts are more hesitant to punish copycats and lookalikes.

The two canonical cases involving nonexact takings are *Midler* and *White*. Let's start with *Midler*. There, the Ninth Circuit found that Ford's use of an imitation of singer Bette Midler's voice violated her common law right of publicity.¹⁶³ Ford had approached Midler about singing her song “Do You Want to Dance” in a commercial and, when Midler refused, recruited a “sound alike” to sing the song.¹⁶⁴ The “sound alike” was similar enough to fool even personal friends of Midler, and Midler sued Ford for violation of her right of publicity.¹⁶⁵ The Ninth Circuit agreed with Midler, noting that “[a] voice is as distinctive and personal as a face”¹⁶⁶ and finding that a right of publicity was violated “when a distinctive

¹⁵³ *E.g.*, OKLA. STAT. tit. 12, § 1449 (2020); 42 PA. CONS. STAT. § 8316 (2020).

¹⁵⁴ *E.g.*, 765 ILL. COMP. STAT. 1075/5 (2020).

¹⁵⁵ *E.g.*, ALA. CODE § 6-5-771 (2020); IND. CODE § 32-36-1-6 (2020); NEV. REV. STAT. § 597.770 (2020); OKLA. STAT. tit. 12, § 1449.

¹⁵⁶ *E.g.*, ALA. CODE § 6-5-771; IND. CODE § 32-36-1-6; NEV. REV. STAT. § 597.770; OKLA. STAT. tit. 12, § 1449.

¹⁵⁷ *E.g.*, IND. CODE § 32-36-1-6.

¹⁵⁸ *E.g.*, *id.*

¹⁵⁹ *E.g.*, *id.*; OHIO REV. CODE ANN. § 2741.02 (West 2020).

¹⁶⁰ *Carson v. Here's Johnny Portable Toilets*, 698 F.2d 831, 836 (6th Cir. 1983) (enforcing right of publicity in Johnny Carson's famous catchphrase, “Here's Johnny”).

¹⁶¹ *See* Anne Friedman et al., *Fortnite, Copyright and the Legal Precedent that Could Still Mean Trouble for Epic Games*, TECHCRUNCH (Mar. 25, 2019, 9:31 AM), <https://techcrunch.com/2019/03/25/fortnite-copyright-and-the-legal-precedent-that-could-still-mean-trouble-for-epic-games/> [<https://perma.cc/F78T-XYKF>] (“There remains an open question on whether the courts will be willing to take another step and find that a game avatar having no physical resemblance to a performer misappropriates the performer's publicity rights just because the avatar does a dance popularly associated with the performer.”).

¹⁶² *See, e.g.*, *Bi-Rite Enters., Inc. v. Bruce Miner Poster Co.*, 616 F. Supp. 71, 73 (D. Mass. 1984) (issuing an injunction against a pair of music merchandisers for distributing posters and other memorabilia “bearing the names, trademarks, logos and likenesses” of members of Duran Duran, Judas Priest, and Iron Maiden, three popular rock bands).

¹⁶³ *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 461-62.

¹⁶⁶ *Id.* at 463.

voice of a professional singer is widely known and is deliberately imitated in order to sell a product.”¹⁶⁷ A few years later, the Ninth Circuit stretched the right of publicity even further in *White*. In *White*, a Samsung commercial depicted a robot, “dressed in a wig, gown, and jewelry” chosen to look like Vanna White’s hair and dress, that was posed next to an imitation of the Wheel-of-Fortune game board.¹⁶⁸ White sued for violation of her right of publicity, arguing that Samsung had “appropriated her identity.”¹⁶⁹ The Ninth Circuit agreed, finding that right of publicity applied to appropriations of a celebrity’s identity that “evoke” that celebrity’s personality or image.¹⁷⁰

White constituted what many commentators considered the outer bounds of the right.¹⁷¹ Other courts have not been so generous. But, decades after *Midler* and *White*, courts have still not settled on a definitive test to assess nonexact takings.¹⁷²

Some courts have adopted a “reasonably identifiable” test. For example, in 2016, Lindsey Lohan brought suit against Rockstar, the manufacturer of the video game “Grant Theft Auto V,” for allegedly using “a look-alike model to evoke Lohan’s persona and image” when they created a character in the game with a “bikini, shoulder length blonde hair, jewelry, cell phone, and signature ‘peace sign’ pose.”¹⁷³ The New York high court dismissed her lawsuit, arguing that there could be no misappropriation of Lohan’s image “because the artistic renderings are indistinct, satirical representations of the style, look, and persona of a modern, beach-going young woman that are not *reasonably identifiable* as plaintiff.”¹⁷⁴ The Alabama legislature has set out a similar test, protecting only “those attributes of a person that serve to identify that person to an ordinary, reasonable viewer or listener.”¹⁷⁵

¹⁶⁷ *Id.*

¹⁶⁸ *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992).

¹⁶⁹ *Id.* at 1399.

¹⁷⁰ *Id.* at 1398-99.

¹⁷¹ See David S. Welkowitz, *Catching Smoke, Nailing Jell-o to a Wall: The Vanna White Case and the Limits of Celebrity Rights*, 3 J. INTEL. PROP. L. 67, 67-68 (1995) (“The suit brought by Vanna White against Samsung already has achieved considerable notoriety, both in legal circles and in the media. . . . *White* gives protection to a celebrity far beyond what ought to be the core concerns of any right of publicity.”).

¹⁷² See Gervais & Holmes, *supra* note 143, at 211 (“There is no settled, structured legal framework for evaluating right-of-publicity claims . . .”).

¹⁷³ *Gravano v. Take-Two Interactive Software, Inc.*, 37 N.Y.S.3d 20, 21 (App. Div. 2016) (internal quotation marks omitted).

¹⁷⁴ *Lohan v. Take-Two Interactive Software, Inc.*, 97 N.E.3d 389, 394 (N.Y. 2018) (emphasis added).

¹⁷⁵ ALA. CODE § 6-5-771(1) (2020); see also 765 ILL. COMP. STAT. 1075/5 (2020) (protecting “any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener”); 42 PA. CONS. STAT. § 8316 (2020) (setting out a similar “ordinary, reasonable viewer or listener” standard).

Yet other states follow the “transformative use” test, which forbids nonexact takings unless “the work sufficiently transforms the celebrity’s identity or likeness.”¹⁷⁶ In *Hart v. Electronic Arts*, Ryan Hart, a college quarterback, sued Electronic Arts, a video games manufacturer that specialized in life-like sports video games, for violating his right of publicity.¹⁷⁷ Without Hart’s permission, EA included a character in the game who closely mirrored Hart’s likeness—the avatar was “6’2” tall, weigh[ed] 197 pounds and resemble[d] Hart”—and shared his jersey number.¹⁷⁸ The Third Circuit, adopting the transformative use test, found that EA’s replication of Hart’s “hair color, hair style[,] . . . skin tone, . . . [and] accessories” closely mimicked Hart and thus was not transformative.¹⁷⁹ It didn’t matter that the video game’s “dated or overly computerized” graphics minimized some of the similarity between the avatar and Hart.¹⁸⁰ Nor did it matter that the game users could make “minor alterations” to the avatar’s “basic biographical information, playing statistics, or uniform accessories.”¹⁸¹ To count as transformative, the alterations must be more than “merely trivial variation[s].”¹⁸²

Some courts take more of a “know it when we see it” approach. In *Landham v. Lewis Galoob Toys, Inc.*, Landham, an actor, brought suit against a toy maker for producing an action figure that, according to Landham, imitated his character from the movie *Predator*.¹⁸³ The Sixth Circuit, unconvinced, held that Landham’s right of publicity claim failed because he didn’t show that the accused action figure “invoke[d]” his persona.¹⁸⁴ The court gave no guidance on how Landham was supposed to show this. Instead, it cursorily noted that the plaintiff should provide “direct evidence” of misappropriation or at least show misappropriation “by virtue of” defendant’s use of the plaintiff’s movie character.¹⁸⁵ But the lack of a defined standard didn’t prevent the court from using a “know it when I see it” test to assess misappropriation of Landham’s persona, noting earlier in the opinion that

¹⁷⁶ *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 163 (3d Cir. 2013).

¹⁷⁷ *Id.* at 145-46.

¹⁷⁸ *Id.* at 146.

¹⁷⁹ *Id.* at 165-66.

¹⁸⁰ *Id.* at 166.

¹⁸¹ *Id.* at 168.

¹⁸² *Id.* at 169 (internal quotations omitted). The Third Circuit did note, however, that bigger changes, “such as a different body type, skin tone, or face,” would be sufficiently transformative. *Id.* at 168-69.

¹⁸³ *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 621-22 (6th Cir. 2000).

¹⁸⁴ *Id.* at 626.

¹⁸⁵ *Id.* at 624-26.

“[b]ecause the toy is only 1.5 inches tall and has no eyes or mouth, it bears no personal resemblance to Landham.”¹⁸⁶

B. *The First Amendment*

With or without a defined test, the right of publicity remains a broad, amorphous right. But the right of publicity does have a few release valves. First, newsworthiness. The right of publicity does not prohibit news reporting or other news-focused uses.¹⁸⁷ For example, a California court recently rejected actress Olivia de Havilland’s suit against FX, the TV network that produced a docudrama depicting de Havilland in a negative light.¹⁸⁸ The court found that, even assuming that de Havilland’s claim fell within the scope of her right of publicity, FX’s accurate historical portrayal provided a complete defense to their use under the First Amendment.¹⁸⁹ Second, transformative use. In some states, transformative use is an affirmative defense, allowing content creators to caricature, parody, and creatively modify names or likenesses.¹⁹⁰ To satisfy this defense, the creator must show its work containing the plaintiff’s likeness “is so transformed that [the work] has become primarily the defendant’s own expression rather than the celebrity’s likeness.”¹⁹¹ So an artist cannot sell “literal, conventional depictions of the Three Stooges” on t-shirts.¹⁹² But a comic book can depict popular musicians as “villainous half-human, half-worm” cartoon characters.¹⁹³

Both of these release valves originate in the First Amendment. The right of publicity, on its face, covers any commercial use. That includes “news reporting, commentary, entertainment, [and] works of fiction or nonfiction” about a particular person, all of which involve some sort of commercial gain

¹⁸⁶ *Id.* at 622; *see also* *Donchez v. Coors Brewing Co.*, 392 F.3d 1211, 1221 (10th Cir. 2004) (cursorily assessing that “a review of the [defendant’s] commercials reveals that none of the [allegedly infringing characters] portrayed therein bear a close resemblance to [plaintiff]”).

¹⁸⁷ *See, e.g.*, IND. CODE § 32-36-1-1(c)(1)(B) (2020) (excepting “political or newsworthy” uses of an individual’s name or likeness).

¹⁸⁸ *See Supreme Court Rejects Olivia De Havilland’s ‘Feud’ Lawsuit*, FORBES (Jan. 7, 2019, 8:38 PM), <https://www.forbes.com/sites/legalentertainment/2019/01/07/supreme-court-rejects-olivia-de-havillands-feud-lawsuit/#78fe08bf6beb> [<https://perma.cc/L4F8-EEBH>] (discussing the Supreme Court’s denial of certiorari for de Havilland’s suit, which accused FX of portraying her as “a gossip who casually disparaged friends and family”).

¹⁸⁹ *De Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625, 637-40 (Ct. App. 2018), *cert. denied*, 139 S. Ct. 800 (2019).

¹⁹⁰ *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (Cal. 2001). Contrast this with the Third Circuit’s “transformative use” test, which assesses transformativeness in deciding whether a name or likeness was appropriated in the first place. *See supra* notes 179–182 and accompanying text.

¹⁹¹ *Comedy III Prods.*, 21 P.3d at 809.

¹⁹² *Id.* at 811.

¹⁹³ *Edgar Winter v. DC Comics*, 69 P.3d 473, 476, 479 (Cal. 2003).

to the speaker.¹⁹⁴ But these forms of speech are incredibly important for our modern society. “Speakers often use others’ names and likenesses in their expression, and often do so without the subject’s permission.”¹⁹⁵ Specifically, we speak a lot about celebrities.¹⁹⁶ Celebrities are, in a sense, a public good.¹⁹⁷ They are role models. They are a way to vent public thought.¹⁹⁸ They are symbols of “individual aspirations, group identities, and cultural values.”¹⁹⁹ As a society, we process things through celebrity; so “[w]e must be allowed to speak about them.”²⁰⁰ Expansive application of the right of publicity disrupts “the existing balance between the interests of the celebrity and those of the public.”²⁰¹

Thankfully, the First Amendment interjects, preempting some of the right of publicity’s more egregious intrusions into free speech. As explored in the next Part, individuals have strong property and moral interests in protecting use of their persona.²⁰² Courts, in assessing right of publicity claims, must weigh those interests against the public’s right to speak freely about important public figures.²⁰³ And courts have repeatedly denied right of publicity claims on First Amendment grounds.²⁰⁴

Thus, the First Amendment does provide some protections. But it doesn’t prevent all intrusions.²⁰⁵ Scholars have criticized the few available exceptions as “ad hoc exceptions in cases where the sweeping logic of the right of

¹⁹⁴ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (AM. LAW INST. 1995).

¹⁹⁵ Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 904 (2003).

¹⁹⁶ See Gervais & Holmes, *supra* note 143, at 184 (“[C]elebrities are . . . objects of social discourse. They fascinate us.”).

¹⁹⁷ Cf. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 128 (1993) (“[C]elebrities are the leading players in our Public Drama.”)

¹⁹⁸ See *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 972 (10th Cir. 1996) (characterizing celebrities as “an important element of the shared communicative resources” in modern society); Madow, *supra* note 197, at 128 (same).

¹⁹⁹ Madow, *supra* note 197, at 128 (same).

²⁰⁰ Gervais & Holmes, *supra* note 143, at 184.

²⁰¹ *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1515 (9th Cir. 1993) (mem.) (Kozinski, J., dissenting); see also Madow, *supra* note 197, at 138 (“[P]ublicity rights facilitate private censorship of popular culture . . .”)

²⁰² *Supra* Section III.B.

²⁰³ Cf., e.g., *Doe v. TCI Cablevision*, 110 S.W.3d 363, 372 (Mo. 2003) (en banc) (“[C]ourts often will weigh the state’s interest in protecting a plaintiff’s property right to the commercial value of his or her name and identity against the defendant’s right to free speech.”).

²⁰⁴ See, e.g., *Ross v. Roberts*, 166 Cal. Rptr. 3d 359, 366-70 (Cal. Ct. App. 2013) (denying a right-of-publicity claim because the defendant’s use was transformative and therefore protected by the First Amendment). For deeper exploration of the clash between right of publicity and the First Amendment, see generally Volokh, *supra* note 195.

²⁰⁵ Cf. *TCI Cablevision*, 110 S.W.3d at 372 (noting that “[c]ourts throughout the country have struggled with” balancing the right of publicity and the First Amendment).

publicity seems to lead to results they consider unfair.”²⁰⁶ And, given the right’s uncertain scope, even the threat of a lawsuit can chill speech, encouraging “filmmakers, videogame creators, biographers, journalists, and others . . . to censor themselves rather than risk liability.”²⁰⁷

The First Amendment can’t fix all problems with the right of publicity. Instead, courts and legislatures must think carefully about the right’s scope and its beneficiaries; they must decide how to best balance public needs and a celebrity’s property interest. As we see in the next Part, influencers complicate that balancing act.

III. THE INFLUENCER’S RIGHT OF PUBLICITY

Influencer Maren Jensen runs a popular fashion blog, *Midwest in Style*.²⁰⁸ On her blog, she often posts pictures of her and her children.²⁰⁹ She never gave permission to PopSugar, a fashion and lifestyle website, to repost her photos.²¹⁰ So she was shocked when she found out that PopSugar had shared several hundreds of her photographs on their own website without her permission.²¹¹ PopSugar, it turns out, had reposted millions of images from influencers without permission.²¹² At the time, the affected influencers were uncertain whether they had any legal recourse.²¹³

You can’t blame them. Influencers are a new phenomenon.²¹⁴ Right of publicity isn’t necessarily at the top of most attorney’s toolboxes. And courts have not yet explicitly addressed whether influencers, in particular nano- and microinfluencers, have a right of publicity. That’s not surprising; “right of publicity cases are still in their infancy when it comes to social media.”²¹⁵ The few cases that have addressed influencers’ right of publicity have

²⁰⁶ Dogan & Lemley, *supra* note 111, at 1162; *accord* JENNIFER ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 138 (2018) (“[N]o magic pill has been found to determine when the First Amendment bars right-of-publicity claims.”); Johnson, *supra* note 111, at 912 (“[T]he First Amendment often seems to be the first thing courts reach for in explaining why a plaintiff must lose in everyday cases . . .”).

²⁰⁷ Alex Wyman, *Defining the Modern Right of Publicity*, 15 TEX. REV. ENT. & SPORTS L. 167, 174 (2014).

²⁰⁸ MIDWEST IN STYLE, <https://www.midwestinstyle.com/> [<https://perma.cc/H5LC-W76V>] (last visited Nov. 10, 2019).

²⁰⁹ *Id.*

²¹⁰ Hilary George-Parkin, *PopSugar Stole Influencers’ Instagrams — Along with Their Profits*, Racked (Apr. 18, 2018, 12:50 PM), <https://www.racked.com/2018/4/18/17252470/popsugar-influencers-monetize> [<https://perma.cc/Y3SV-39CD>].

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Cook, *supra* note 34, at 460.

generally assumed that influencers have a right to prevent misappropriation of their likeness.²¹⁶

This Part takes the first comprehensive scholarly look at the influencer’s right of publicity. Do influencers have a right of publicity? In most states, yes. Should influencers have a right of publicity? Influencers, under traditional justifications for the right, deserve *a* right of publicity, but not a *strong* right. How do we assess influencer right of publicity suits? It’s easy to assess exact takings. Nonexact takings, not so much—all current tests for assessing nonexact takings overprotect influencer personas, chilling expression and discouraging the creation of valuable influencer personas. Finally, how do we update the right of publicity for the influencer age? It’s simple: the influencer’s right of publicity should be limited to exact takings to encourage a vibrant marketplace of influencers.

A. Do Influencers Have a Right of Publicity?

Influencers have statutory rights of publicity in many states. Take Alabama, California, Illinois, and Nevada as examples—these states protect the right of publicity for *any* person, whether or not they are a celebrity.²¹⁷ Influencers, as persons,²¹⁸ clearly fall within these statutory schemes.²¹⁹ But things get trickier in states that don’t extend the right of publicity to all persons. These states only protect individuals whose personas have *prior* commercial value—i.e., “celebrities.” For example, Indiana only protects “personalit[ies].”²²⁰ Likewise, Ohio only protects “aspect[s] of an individual’s persona” if “any of these aspects have *commercial value*.”²²¹ This “commercial

²¹⁶ See, e.g., *Kardashian West v. Misguided Ltd.*, No. 19-1258, slip op. at 14-15 (C.D. Cal. July 2, 2019) (finding that Kardashian-West “has adequately pled common law and statutory right-of-publicity claims”).

²¹⁷ E.g., ALA. CODE § 6-5-772 (2020) (protecting “the indicia of identity of a person”); 765 ILL. COMP. STAT. 1075/5 (2020) (protecting individuals from misappropriation, “regardless of whether the identity of that individual has been used for a commercial purpose during the individual’s lifetime”); NEV. REV. STAT. § 597.770 (2020) (prohibiting “the use of the name, voice, signature, photograph or likeness of a person”).

²¹⁸ Cf. Reena Jain & Carly Kessler, *The Rise of Virtual Influencers: Key Legal Issues for Brands*, LAW360 (Sept. 30, 2019, 1:51 PM), <https://www-law360-com.pennlaw.idm.oclc.org/articles/1203400/-the-rise-of-virtual-influencers-key-legal-issues-for-brands> [<https://perma.cc/C6M5-7RTA>] (noting the rise of “virtual” influencers, or highly life-like computer-generated influencers, and explaining that some right-of-publicity statutes currently only protect living persons).

²¹⁹ See, e.g., *KNB Entersps. v. Matthews*, 92 Cal. Rptr. 2d 713, 717 (Ct. App. 2000) (“California’s [right-of-publicity statute] is not limited to celebrity plaintiffs.”); *Hetter v. Eighth Judicial Dist. Court of Nev.*, 874 P.2d 762, 765 (Nev. 1994) (finding that Nevada’s right-of-publicity statute “has not limited the cause of action to celebrities”).

²²⁰ E.g., IND. CODE § 32-36-1-6 (2020).

²²¹ OHIO REV. CODE ANN. § 2741.01–2741.02 (West 2020) (emphasis added); see also 42 PA. CONS. STAT. § 8316 (2020) (protecting “[a]ny natural person whose name or likeness has commercial value”).

value” requirement isn’t hard to satisfy, however. In Ohio, “commercial value” simply means that “there is value in associating an item of commerce with” the individual’s identity—the individual “need not be [a] national celebrit[y].”²²² In fact, the “act of misappropriating” the identity “may be sufficient evidence of commercial value.”²²³ In Pennsylvania, “commercial value” is any “[v]aluable interest in a . . . name or likeness that is developed through the investment of time, effort and money.”²²⁴ Influencers can easily satisfy this “commercial value” requirement, as they often get paid, in money or in products, and they dedicate significant time and resources to cultivating their personal brands.²²⁵ So influencers are likely protected in these “prior commercial value” states too.

In those states without statutory right-of-publicity schemes, influencers can turn to their common law right of publicity.²²⁶ Some common law schemes require that the individual’s persona have prior commercial value. For example, Michigan requires individuals show “a pecuniary interest or significant commercial value” in their identity in order to bring a common law right-of-publicity claim.²²⁷ Others don’t. Georgia’s common law right of publicity extends to any individual, whether “a private citizen, entertainer, or . . . a public figure who is not a public official.”²²⁸

So influencers have statutory and common law rights of publicity. But should they?

B. *Should Influencers Have a Right of Publicity?*

Courts and legislators typically set forth two justifications for recognizing a right of publicity: One, individuals have the moral right to control the use of their image or likeness. Two, our society wants to incentivize the creation of valuable names and likenesses; to do that, we must allow individuals to control and commercialize those likenesses. Influencers easily satisfy these traditional justifications and thus, at first glance, deserve the same strong right-of-publicity protections given to traditional celebrities. But a closer look at these traditional justifications should make courts and legislators cautious to so readily broaden the pool of potential right-of-publicity

²²² *Roe v. Amazon.com*, 714 F. App’x 565, 568 (6th Cir. 2017); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46, cmt. d 47 (AM. LAW INST. 1995) (“[T]he identity of even an unknown person may possess commercial value.”).

²²³ *Id.*

²²⁴ 42 PA. CONS. STAT. § 8316(e).

²²⁵ *See supra* Part I.

²²⁶ *See, e.g., supra* note 147.

²²⁷ *Armstrong v. Eagle Rock Entm’t*, 655 F. Supp. 2d 779, 785 (E.D. Mich. 2009).

²²⁸ *Martin Luther King, Jr. Ctr. for Soc. Change v. Am. Heritage Prods.*, 296 S.E.2d 697, 703 (Ga. 1982).

plaintiffs. Social media has drastically changed the nature of fame and celebrity, yet neither scholars nor courts have thoroughly reassessed how these justifications apply in the social media age. This Section does that, ultimately concluding that influencers are entitled to a narrow but strong right of publicity.

1. Influencers and Traditional Justifications for the Right of Publicity

Here, we situate influencers within the traditional justifications for the right of publicity. As the analysis goes, influencers have a moral right to control their hard-earned and deeply personal “brands.” And, assuming that society wants to encourage the creation of these “brands,” we must provide influencers with a powerful tool to police misuse.

a. Moral Rights

Under the moral rights theory, individuals have a moral right to control one’s image or likeness.²²⁹ This basic right branches into two theories: human dignity and Lockean labor rights.

i. Human Dignity

The theory of human dignity provides that individuals are inherently unable to separate their external persona—their name and likeness—from their internal identity.²³⁰ In order to respect their personhood, we must allow them control over the use of their persona.²³¹ Influencers view their personal identities as being inseparably intertwined with their external personas.²³² Influencers often refer to themselves as “brands” or describe their personas as their “child.”²³³ Because an influencer’s brand is so tied up with their

²²⁹ This justification arose from right of publicity’s origins in the right to privacy. Dogan & Lemley, *supra* note 111, at 1180.

²³⁰ See Gervais & Holmes, *supra* note 143, at 194 (“[H]uman identity is a self-evident property right . . .”); Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1343 (2011) (arguing that violating right of publicity “causes disruption to the plaintiff’s sense of identity or autonomy”).

²³¹ See J. Thomas McCarthy, *Public Personas and Private Property: The Commercialization of Human Identity*, 79 TRADEMARK REP. 681, 685 (1989) (“Perhaps nothing is so strongly intuited as the notion that my identity is mine—it is my property, to control as I see fit.”).

²³² Gervais & Holmes, *supra* note 143, at 185 (“[T]he right of publicity exists to protect rights in an individual’s identity . . .”).

²³³ JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 156-60 (2015). Ironically, concerns about bodily autonomy also arise when parents commercialize their actual child’s right of publicity. See Complaint, *Khaled v. Bordenave*, No. 18-5187, 2019 WL 1894321 (S.D.N.Y. 2019) (involving DJ Khaled bringing suit for violation of his eighteen-month-old son’s right of publicity).

internal identity, or so the argument goes, they have a moral right to control their name and likeness.²³⁴

Critics of this theory argue that individuals, by deliberately commercially exploiting their public image, give up any moral right in their image. After all, if they wanted to control their likeness, why would they make it available for all the world to see?²³⁵ But the wide dissemination of these images doesn't destroy the influencer's sense of ownership. As influencer Maren Jensen asserted in response to PopSugar's alleged misappropriation of her images, "Just because this is on a social media platform doesn't mean you're entitled to it. It doesn't mean you can just take it and use it for what you want."²³⁶ After all, the right of publicity includes the right to exploit and the right to exclude—influencers have the right to not commercialize their name or likeness in any particular instance.²³⁷ So even if an individual's persona is public, they still deserve to have control of that image.²³⁸

ii. Lockean Labor Rights

The Lockean labor rights theory posits that individuals are entitled to the product of their hard work and talent.²³⁹ This right focuses on "unjust

²³⁴ This right is amplified in the context of young influencers or marginalized influencers, who particularly need the right to control their image given the oft-exploitative relationship between themselves and established media corporations. See Michael McCann, *NFL Teams Previously Have Settled in Cheerleader Lawsuits. Will Texans' Ex-Cheerleaders Set Different Precedent?*, SPORTS ILLUSTRATED (June 25, 2018), <https://www.si.com/nfl/2018/06/25/houston-texans-cheerleaders-sued-lawsuit-nfl> [<https://perma.cc/LG6N-NQZZ>] (describing a lawsuit filed by cheerleaders against the Houston Texans, a professional football team, alleging "assault, harassment, misappropriation of identity"—specifically, right-of-publicity claims—and "unpaid wages"); Nancy Uddin, *Marginalized Influencers Speak out About the Co-Opting of Their Ethos and Identities*, NYLON (Feb. 25, 2020, 8:00 AM), <https://www.nylon.com/influencer-visibility-marginalized-identities> [<https://perma.cc/2FGC-KGYK>] ("[M]any brands often ask for outrageous deliverables, censor language, and underpay influencers, especially influencers with historically marginalized identities.").

²³⁵ See, e.g., Dogan & Lemley, *supra* note 111, at 1181-82.

²³⁶ George-Parkin, *supra* note 210; see also Jenner Complaint, *supra* note 12, ¶ 7 ("Setting aside the monetary value, however, it is Ms. Jenner's choice whether or not to commercially endorse another party's goods and services. Cutera took that choice away from her when it decided to prominently use her name and likeness in commercial advertising without her permission.").

²³⁷ See *Abdul-Jabbar v. Gen. Motors*, 85 F.3d 407, 415 (9th Cir. 1996) ("[T]he right of publicity protects not only a celebrity's 'sole right to exploit' his identity . . . but also his decision not to use his name or identity for commercial purposes.").

²³⁸ See Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 386 (1999) ("The point is that the use of his image should be his choice, and that his choice is ultimately justified by his humanity.").

²³⁹ See Dogan & Lemley, *supra* note 111, at 1181 ("The celebrity . . . has rights to the fruits of her labor and, at the very least, has the right to prevent others from taking those fruits for their own personal gain.").

enrichment”—an individual who didn’t put the time and effort into developing a persona doesn’t have the right to use that persona.²⁴⁰

In the traditional celebrity context, this justification is fairly weak. As scholars Stacey Dogan and Mark Lemley have argued, it doesn’t make sense to give celebrities the full economic value of their persona because celebrities are almost never “exclusively—or even primarily” responsible for the value of their persona.²⁴¹ The movie star doesn’t become a movie star on her own. Instead, she relies on “writers who craft the celebrity’s dramatic roles, agents who pluck her from obscurity, studios and marketing directors who shape her public image.”²⁴²

In comparison, influencers—especially nano- and microinfluencers—are often exclusively responsible for the commercial value of their names and likenesses. An influencer doesn’t need a writer, or an agent, or a studio, or a marketing director. They don’t even need a stylist or a makeup artist. Instead, many influencers become famous “on their own,” curating their own content and reaching out to companies seeking sponsorships.²⁴³ Influencers, given this time and energy expended, deserve significant ownership over their personas.

b. *Utilitarianism*

Celebrities (and influencers) may cling to a moral rights approach. But courts prefer to justify the right of publicity on utilitarian grounds.²⁴⁴ Here is the general argument: Celebrity personas are valuable. It takes time, money, and effort to develop a persona that is worth commercializing—a persona that can “attract attention and evoke a desired response in a particular consumer market.”²⁴⁵ But a persona or brand is only valuable if it is controlled—it can’t be in use everywhere or by everyone.²⁴⁶ To encourage

²⁴⁰ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (“The rationale for (protecting the right of publicity) is the straightforward one of preventing unjust enrichment by the theft of good will.”).

²⁴¹ Dogan & Lemley, *supra* note 111, at 1181.

²⁴² *Id.* (footnote omitted).

²⁴³ See *supra* notes 55–69 and accompanying text.

²⁴⁴ See *Zacchini*, 433 U.S. at 573 (characterizing the state’s interest in protecting the right of publicity as “focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation”); Johnson, *supra* note 111, at 900 (“[T]he right’s essence was not about hurt feelings—as it was with the right of privacy—but about money”). *But see* Gervais & Holmes, *supra* note 143, at 182 (arguing that “incentivizing the creation of a public persona or notoriety” is not “really the goal of the right of publicity”).

²⁴⁵ *Eastwood v. Superior Court, Cty. of L.A.*, 149 Cal. Rptr. 342, 350 (Ct. App. 1983).

²⁴⁶ *E.g.*, *Kardashian West v. Misguided Ltd.*, No. 19-1258, slip op. at 15 (C.D. Cal. July 2, 2019) (“According to Kardashian, Misguided USA’s unauthorized use of her name and image have been particularly harmful because it damages her credibility and dilutes her brand by making it appear as though she is indiscriminately endorsing Misguided’s products.”); *Complaint ¶ 14, Edmondson v. Velvet Lifestyles, LLC*, No. 15-2442 (S.D. Fla. Dec. 12, 2015) (arguing that unauthorized affiliation

individuals to develop these valuable personas, we must give those individuals the right of publicity to police use of their personas.²⁴⁷

Now, influencer personas are clearly valuable. They're valuable to the influencers themselves. Celeb-influencers can make tens of thousands of dollars per post, and even nano- and microinfluencers can wield their influence over their small but dedicated followings to earn free products and a few hundred dollars a post.²⁴⁸ But they're also valuable to the public. Influencers produce instructive and entertaining content. They help consumers faced with limitless product choices make "good" decisions.²⁴⁹ They are inspirational figures, encouraging their followers to be "better" versions of themselves.²⁵⁰ And they can be public thought leaders, drawing attention to social and political issues.²⁵¹

of models' images with offensive pornographic imagery was "damaging to each model's reputation, marketability and brand"); Ratchford Complaint, *supra* note 37, ¶ 62 ("Each Plaintiff Model must necessarily be vigilant in protecting her 'brand' from harm, taint, or other diminution.").

²⁴⁷ See *Zacchini*, 433 U.S. at 573 ("[T]he State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment"); Dogan & Lemley, *supra* note 111, at 1186 ("A final justification offered for the right of publicity is that the grant of such control is needed to encourage investment in the development of a public persona.").

²⁴⁸ *Supra* notes 76–85 and accompanying text.

²⁴⁹ *Supra* notes 112–18 and accompanying text.

²⁵⁰ *Supra* notes 98–101 and accompanying text.

²⁵¹ Influencers often inadvertently spark conversations about privilege and consumerism. See Kari Paul, "Stop Treating Protests Like Coachella": Influencers Criticized for Capitalizing on Movement, *GUARDIAN* (June 11, 2020, 9:14 AM), <https://www.theguardian.com/media/2020/jun/11/influencers-protests-staged-photos-black-lives-matter> [<https://perma.cc/2LWW-WXMA>] (critiquing influencers for using protests as a "photoshoot"); Lou Stoppard, *Influencers Lose Their Gloss*, *FIN. TIMES* (May 28, 2020), <https://www.ft.com/content/c35caid6-9c3e-11ea-871b-edeb99a20c6e> [<https://perma.cc/RRF2-CBCC>] (criticizing influencers for "flaunt[ing]" wealth and privilege during a global pandemic). But influencers also take a more active role in the public sphere. Influencers frequently call out individuals and brands for racism and discrimination. See Ikran Dahir & Ade Onibada, *Black Influencers Are Calling out Popular Brands for Failing to Address the Deaths of Unarmed Black People at the Hands of the Police*, *BUZZFEED NEWS* (May 29, 2020, 4:37 PM), <https://www.buzzfeednews.com/article/ikrd/black-influencers-are-calling-out-popular-brands-for> [<https://perma.cc/L5KR-Y4LT>]; EJ Dickson, *LGBTQ Influencers Criticize YouTube After Homophobic Videos Are Allowed to Stay*, *ROLLING STONE* (June 5, 2019, 5:54 PM), <https://www.rollingstone.com/culture/culture-features/lgbtq-influencers-steven-crowder-carlos-maza-homophobic-video-youtube-844561/> [<https://perma.cc/AV7G-ME8P>]. Others fight for the environment. *E.g.*, Madison Feller, *Can Instagram Influencers Help Save the Planet?*, *ELLE* (Jan. 23, 2020), <https://www.elle.com/culture/career-politics/a30629637/sustainable-influencers-instagram-climate-crisis/> [<https://perma.cc/4PML-Z8JU>]. Some have even gotten involved in political campaigns. *Weekend Edition Sunday: Social Media Influencers' Role in 2020 Candidate Endorsements*, *NPR* (Feb. 2, 2020), <https://www.npr.org/2020/02/02/801995382/social-media-influencers-role-in-2020-candidate-endorsements> [<https://perma.cc/H57W-CVRE>] (detailing how influencers endorse and canvass for presidential candidates and even engage in political debates with their followers). Ultimately, influencers lead valuable public conversations, often challenging their followers to take action. See John Harrington, *Game of Influence: How New-Wave Political Influencers Became 'Lightning Rods' of Debate*, *PR*

Moreover, “[b]eing an influencer takes hard work.”²⁵² Influencers invest resources into creating their image and into promoting their products.²⁵³ Influencers can pour money into purchasing clothes, makeup, food, production equipment, sometimes even hiring their own employees in order to help produce their content.²⁵⁴ Influencers also monitor their presence online, tracking references or “mentions” by “spend[ing] hours combing social media” or paying for tracking software.²⁵⁵ For “wannabe” influencers, this expended time and energy is all on top of their day jobs.

Absent a right of publicity, companies and individuals are likely to take advantage of influencers’ hard work. PopSugar allegedly misappropriated the images of thousands of influencers.²⁵⁶ And they’re not the only ones, as explored in Section III.B below. So, the utilitarian approach clearly justifies extending the right of publicity to influencers.

2. Right of Publicity in the Instagram Age

Influencers, under moral right or utilitarian theories, deserve a right of publicity. But they don’t deserve a *strong* right.

Courts and legislators have justified expansive right-of-publicity protections on the basis that they were protecting the rights of individuals with “extraordinary ability,” individuals who add immense value to society.²⁵⁷ But the Internet has redefined what it means to be a “celebrity.” Before, celebrities were nationally or internationally recognized movie stars, singers,

WEEK (Jan. 20, 2020), <https://www.prweek.com/article/1671227/game-influence-new-wave-political-influencers-became-lightning-rods-debate> [<https://perma.cc/PY5G-K7Z8>] (“[Influencers] can be lightning rods for debate . . . [W]hether people agree with them or not, they draw attention to a particular issue and can shift the dial on a national conversation or a public debate.”).

²⁵² Lieber, *supra* note 28; *see also* Krupnick, *supra* note 29 (“[G]rowing a following and the accompanying sponsorship deals requires cultivating, protecting, and constantly upkeeping that likability from the show to your feed.”).

²⁵³ *See* Lieber, *supra* note 28 (hypothesizing that it would take about \$250,000 to turn a journalist into an influencer); Jarry Lee, *What Does It Cost to Be Big on Instagram?*, BUZZFEED NEWS (Mar. 3, 2018, 11:37 AM), <https://www.buzzfeednews.com/article/jarrylee/what-does-it-cost-to-be-big-on-instagram> [<https://perma.cc/V3Z2-ZC9G>] (reporting that some microinfluencers spend between \$2000 and \$4000 a month on developing a strong social media presence).

²⁵⁴ *See* Lee, *supra* note 253 (describing the amount of money influencers spend to buy clothing, accessories, travel, equipment, and more).

²⁵⁵ Sonia K. Katyal & Leah Chan Grinvald, *Platform Law and the Brand Enterprise*, 32 BERKELEY TECH. L.J. 1135, 1160 (2017).

²⁵⁶ Complaint ¶ 2, *O’Brien v. Popsugar*, No. 18-cv-329645 (Cal. Super. Ct. July 20, 2018).

²⁵⁷ *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967). *But see* Madow, *supra* note 197, at 160-61 (arguing that the “modern” celebrity, “the person who is known for his well-knownness,” originated in the early twentieth century (internal quotation marks and footnote omitted)); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) (noting that the right of publicity applies “whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof”).

and athletes. Today, “celebrity” has expanded to include stay-at-home moms, home décor experts, and junk food aficionados.²⁵⁸ This expansion has been caused, nearly single-handedly, by the advent of social media. It’s free to create an Instagram account or a YouTube page, and it’s free to upload pictures or videos to attract followers.²⁵⁹ Thanks to social media, “ordinary people” can become famous, overnight or over the course of a few years, without help or interference from the “Hollywood gatekeepers.”²⁶⁰ Traditional celebrities add value; influencers “value visibility in and of itself.”²⁶¹

Courts and legislators may be uncomfortable with this new form of “celebrity.” Stacey Dogan and Mark Lemley may be right that “[s]ociety doesn’t need to encourage more celebrities or more marketing of celebrity image.”²⁶² Still, celebrities, fame, and influencers are a national obsession and a permanent fixture in our cultural ethos.²⁶³

In fact, the Internet has redefined the public’s relationship with celebrity. Prior to the Internet, we took the celebrities we were given by Hollywood, Broadway, or professional sports teams.²⁶⁴ In contrast, influencers are “democratic” celebrities—they became famous because individual social media users were willing to follow them. On social media, “the modern public square,”²⁶⁵ users bargain with influencers, offering them attention in exchange for content. And social media users can take away the fame they have bestowed. One wrong move and an influencer will lose all of their followers and, as a result, any leverage with brands.²⁶⁶ More than ever before, the public participates in the creation of celebrity.²⁶⁷ Thus, the public has an ownership interest in an influencer’s identity that it never had with traditional celebrities.

Social media thus changes the traditional calculus for justifying the right of publicity. Let’s begin with moral rights justification. Influencers are never

²⁵⁸ See *supra* notes 45–54 and accompanying text.

²⁵⁹ See Cook, *supra* note 34, at 467 (explaining that anyone “can enter the social media space for free”).

²⁶⁰ Gamson, *supra* note 123, at 1063, 1067.

²⁶¹ *Id.* at 1063.

²⁶² Dogan & Lemley, *supra* note 111, at 1164.

²⁶³ See SUSAN J. DOUGLAS & ANDREW MCDONNELL, CELEBRITY: A HISTORY OF FAME 1 (2019) (“Celebrity culture has become a central, dominant, and structuring force in American life . . .”).

²⁶⁴ See Gamson, *supra* note 123, at 1062 (“In its most conventional form, celebrity in the United States emerges from, and is managed by, a tightly controlled, well-resourced industry, linked institutions centered mostly in Los Angeles and New York.”); Madow, *supra* note 197, at 140 (arguing, in 1993, that the public is limited to the celebrity “commodities” distributed to them).

²⁶⁵ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017); Heymann, *supra* note 230, at 1423 (describing social media as the largest cohesive “intellectual [and] commercial marketplace[]” ever known).

²⁶⁶ See Lieber, *supra* note 28 (“We’ve seen loyal followers turn on people really fast. Say something racist and you can count on your career being over instantly. I guess it speaks to the power of the platform, in that you can be built up really fast, but you can also lose everything really easily . . .”).

²⁶⁷ See Madow, *supra* note 197, at 141–42 (noting the importance of “popular participation” in the creation of celebrity and public meaning).

“off.” They continuously share their everyday thoughts and actions with followers, such that they often can’t separate their internal and external personas.²⁶⁸ This constant public projection of an influencer’s persona suggests that they have a strong claim to right of publicity’s protections. Yet the constant sharing gives followers a sense of “ownership” over the influencer—they feel entitled to the intimate look into the influencer’s life in exchange for following her. Should courts balance the follower’s sense of “ownership” with the influencer’s? What about unjust enrichment? An influencer wouldn’t be an influencer without followers.²⁶⁹ Is it unjust enrichment for a follower to appropriate an influencer’s persona when the follower helped create and validate that persona?²⁷⁰

Now, for the utilitarian justifications. Influencers don’t need right-of-publicity protections to be incentivized to become influencers—the free goods and increased social capital are incentives enough.²⁷¹ And influencers can police most misappropriations of their persona without a right of publicity. For one, influencers can report misappropriators to social media platforms. Social media platforms don’t allow “content intended to impersonate a person.”²⁷² And every social media platform has a way for users to report infringing content.²⁷³ Influencers can also use “public shaming” to deter and punish copycats.²⁷⁴ This surprisingly effective technique involves a social media user “calling out” another user or company for bad behavior and

²⁶⁸ *Supra* notes 231–33 and accompanying text.

²⁶⁹ See Gevinson, *supra* note 73 (“Together, we have helped Instagram become its own multibillion-dollar economy: the influencer industry, where people become brands and where brands reach people through other people . . .”); cf. Heymann, *supra* note 230, at 1349 (describing “reputation as a social phenomenon, as something that is created and altered by the judgments of others rather than something that exists inherently or develops organically as a result of efforts by the reputation holder”).

²⁷⁰ Cf. Heymann, *supra* note 230, at 1376 (noting that “a more complete theory of reputation would take into account not only the importance of reputation for the reputation holder but also the interests of communities in forming and using the reputations of others”).

²⁷¹ See Madow, *supra* note 197, at 227 (“More than wealth, power, or descent, fame is now the chief fount of prestige and status in American society.”).

²⁷² E.g., *Policy on Impersonation*, GOOGLE: SUPPORT, <https://support.google.com/youtube/answer/2801947> [<https://perma.cc/J87B-QFJD>] (last visited Nov. 7, 2019).

²⁷³ See *Reporting Copyright Infringements*, INSTAGRAM: HELP, <https://help.instagram.com/454951664593304> [<https://perma.cc/Q632-GEZU>] (last visited Nov. 7, 2019) (explaining how to report copyright infringement on Instagram); *Report Violations*, TWITTER: HELP, <https://help.twitter.com/en/rules-and-policies/twitter-report-violation> [<https://perma.cc/5S5U-Z2PU>] (last visited Nov. 7, 2019) (describing how users can report “impersonation”); *Submit a Copyright Takedown Notice*, GOOGLE: SUPPORT, <https://support.google.com/youtube/answer/2807622?hl=en> [<https://perma.cc/VE5C-KU5U>] (last visited Nov. 7, 2019) (explaining how to submit a copyright infringement complaint on YouTube).

²⁷⁴ See Rachel Rodgers, *The Instagram Accounts Calling out Fashion’s Copy Cats*, SLEEK (May 17, 2017), <https://www.sleek-mag.com/article/instagram-fashion-copy-cats/> [<https://perma.cc/P2MZ-5P5W>] (describing Instagram accounts dedicated to exposing copycats).

encouraging their followers to do the same.²⁷⁵ Shaming can lead many individuals and companies to retract the offending materials and issue public apologies.²⁷⁶ Public shaming won't always be enough. Some appropriators are immune to shame or wield significantly more social capital than the shaming influencer and thus won't be harmed by the shame.²⁷⁷ In those cases, the influencers need a legal remedy to reclaim their name and likeness. That is where the right of publicity comes in.

The Internet may have undermined many of the justifications for the right of publicity. But it hasn't destroyed them.²⁷⁸ At the end of the day, influencers—despite self-help tools and public contributions to the economic value of their persona—deserve a legal tool to police egregious misappropriations of their image or likeness. But, as illustrated in the next subsection, that tool should not be as broad or blunt as current right-of-publicity doctrine. Instead, in order to protect the public's interest in the “new” celebrity, courts and legislators must carefully examine and reshape the doctrine.

²⁷⁵ See Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CALIF. L. REV. 1455, 1458 (2019) (“Most frequently, [artists] use shaming, principally through social media or a similar platform to call out perceived misappropriations.”).

²⁷⁶ See, e.g., Alex Lubben, *The Guys From Fuck Jerry Are Using Stolen Memes and Pics to Shill Their “LOL” Tequila*, VICE NEWS (Feb. 14, 2019, 11:13 AM), https://news.vice.com/en_us/article/nex3zm/the-guys-from-fuck-jerry-are-using-stolen-memes-and-pics-to-shill-their-lol-tequila [<https://perma.cc/MJY3-NUX2>] (describing how pressure from a news story led an Instagram account to take down unauthorized endorsements out of fear of “some kind of backlash”). Notably, this shaming relies almost exclusively on the willingness of the individual or company being shamed to take down offending posts, as social media platforms themselves are, in practice, often unhelpful in assisting with claims of misappropriation or infringement. See, e.g., First Amended Complaint ¶¶ 27-28, 30-38, *Oreto v. Facebook*, No. 18-2328 (E.D. Pa. June 7, 2018) (describing repeated unsuccessful requests to Facebook and Instagram to remove infringing content).

²⁷⁷ For an example of failed public shaming, see *supra* Section III.C for a discussion of the feud and lawsuit between Mars Argo and Poppy, two YouTube influencers. Argo accused Poppy of misappropriating her persona. Complaint ¶ 13, *Sheets v. Mixter*, No. 18-3204 (C.D. Cal. Apr. 17, 2018) [hereinafter *Poppy Complaint*]. Despite media attention and criticism from Argo's many fans, Poppy continued to produce (allegedly) infringing content. *Poppy Complaint* ¶ 77, 101-03, 105-10.

²⁷⁸ Cf. Madow, *supra* note 197, at 133-34 (striving to “reopen the question of whether the right of publicity should exist at all” despite “overwhelming[] consensus within the American legal community that the right of publicity is a good thing”).

C. How Do We Assess Influencer Right-of-Publicity Suits?

Facebook was founded in 2004.²⁷⁹ Instagram was founded in 2010.²⁸⁰ Influencers followed shortly thereafter.²⁸¹ In the decade since, influencers have filed just a few right-of-publicity lawsuits.²⁸² Some of these lawsuits are “easy” cases, involving exact misappropriations of their name or image. Others, involving misappropriations that simply “evoke” an influencer’s persona, are much more challenging. This Section takes a close look at both types of cases, analyzing actual cases and hypotheticals drawn therefrom to explore the murky boundaries of the doctrine.

Ultimately, this Section concludes that current right-of-publicity doctrine, with its leeway for nonexact takings, is unprepared for the challenges presented by influencer right-of-publicity suits. These challenges in assessing nonexact takings, combined with the weakened justifications for an influencer’s right of publicity discussed in the previous Section, demonstrates that influencers should be entitled only to protection of exact takings of their name and likeness.²⁸³

1. Exact Takings

Influencers have sought to police “exact takings” of their persona—exact replicas of their names, images, voice, or signature, for example. Let’s take two recent cases as examples. In one, influencer Nina Batra sued PopSugar, a popular fashion website, alleging that the website had copied “thousands of

²⁷⁹ Nicholas Carlson, *At Last—The Full Story of How Facebook Was Founded*, BUS. INSIDER (Mar. 5, 2010, 4:10 AM), <https://www.businessinsider.com/how-facebook-was-founded-2010-3> [<https://perma.cc/AS2G-KBVL>].

²⁸⁰ Abram Brown, *Kevin Systrom in His Own Words: How Instagram Was Founded and Became the World’s Favorite Social Media App*, FORBES (Sept. 25, 2018, 12:43 PM), <https://www.forbes.com/sites/abrambrown/2018/09/25/kevin-systrom-in-his-own-words-how-instagram-was-founded-and-became-the-worlds-favorite-social-media-app/#6de2coe142bf> [<https://perma.cc/FG7J-VBDE>].

²⁸¹ Social media influencers began to grow in prominence beginning in 2009 and 2010. Brittany Rawlings, *Fashion Bloggers, Celebrities, and Other Influencers’ Endorsements and FTC Guidelines*, ENT. & SPORTS LAW. (May 30, 2018), https://www.americanbar.org/content/dam/aba/publications/entertainment_sports_lawyer/rawlings-ftc-endorsement-guidelines-and-fashion-influencers-final.pdf [<https://perma.cc/C9KQ-LAAF>]; see also *The History of Influencer Marketing: How It Has Evolved Over the Years*, GRIN (Sept. 10, 2019), <https://www.grin.co/blog/the-history-of-influencer-marketing-how-it-has-evolved-over-the-years> [<https://perma.cc/BYQ5-2LS3>] (dating the rise of social media influencers to 2010 but tracing influencing back as far as the Queen and the Pope).

²⁸² Nearly all of these cases have settled prior to any substantive decisions. See, e.g., Kerry Folan, *Kim Kardashian Has Settled That Old Navy “Fauxdashian” Lawsuit with a Disappointing Lack of Drama*, RACKED (Aug. 30, 2012, 10:30 AM), <https://www.racked.com/2012/8/30/7712573/kim-kardashian-has-settled-her-old-navy-lawsuit> [<https://perma.cc/XQ77-U5QE>] (describing the settlement in the suit between Kim Kardashian-West and lookalike Melissa Molinaro who appeared in an Old Navy commercial).

²⁸³ Likewise, celebrities should only be entitled to police exact takings. But support for such a claim is beyond the scope of this Comment.

influencers' Instagram images," removed the links that Batra and others, including nano- and microinfluencers, had included in the caption of those images, and then shared the images on its website to attract online shoppers.²⁸⁴ Batra alleged that PopSugar, in copying those photos, misappropriated not only her likeness within the photograph but also "the nonphotographic elements of her likeness and identity."²⁸⁵ The district court found that Batra's allegations were sufficient to survive PopSugar's motion to dismiss.²⁸⁶ Batra and PopSugar settled the suit in June 2019.²⁸⁷ Maren Jensen, another influencer discussed in Part III, filed a similar suit, alleging that PopSugar had stolen hundreds of photographs of her.²⁸⁸

In another case, microinfluencer Kelleth Steinbech, also known as Kelly Culburth, "went viral" during the 2019 Oscars when she photobombed dozens of celebrities while holding a tray of Fiji water bottles.²⁸⁹ Social media exploded, with individuals lauding her bright blue dress, coy smile, and apparently uncanny ability to find the lens of a camera.²⁹⁰ Overnight, Culburth's Instagram account jumped from 50,000 followers to over 200,000.²⁹¹ Fiji decided to capitalize on Culburth's "newfound" fame, setting up cut-outs of Culburth near Fiji Water displays in stores around Los Angeles.²⁹² Culburth subsequently sued, arguing that Fiji had violated her right of publicity by setting up those cut-outs of her exact likeness.²⁹³ Fiji countersued Culburth for

²⁸⁴ *Batra v. PopSugar*, No. 18-3752, 2019 WL 482492, at *1 (N.D. Cal. Feb. 7, 2019).

²⁸⁵ *Id.* at *4.

²⁸⁶ *See id.* (finding that the influencers' right-of-publicity claims were not clearly preempted by copyright laws).

²⁸⁷ Nayak, *supra* note 13.

²⁸⁸ George-Parkin, *supra* note 210.

²⁸⁹ Lianne Kolirin, *And the Golden Globe for Most Obvious PR Stunt Goes to Fiji Water Girl*, CNN (Jan. 8, 2019, 5:38 AM), <https://www.cnn.com/2019/01/07/entertainment/fiji-water-golden-globe-scli-intl/index.html> [<https://perma.cc/A9JB-93WD>]; Daisy Murray, *The Fiji Water Girl's Identity Has Been Revealed and She Was an Influencer Before She Was a Meme*, ELLE (Sept. 1, 2019), <https://www.elle.com/uk/life-and-culture/a25830079/fiji-water-girl-identity-kelleth-cuthbert/> [<https://perma.cc/88UN-BG79>].

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² Tracy Brown, *'Fiji Water Girl' Sues Company for Using Her Likeness in Cardboard Cutout Campaign*, L.A. TIMES (Feb. 1, 2019, 6:00 PM), <https://www.latimes.com/entertainment/la-et-fiji-water-girl-lawsuit-20190201-story.html> [<https://perma.cc/74YS-747G>].

²⁹³ Complaint ¶¶ 34-42, *Steinbach v. The Wonderful Co., LLC*, No. 19ST-cv-03256 (Cal. Super. Ct. Jan. 31, 2019).

breach of contract, claiming that Culburch had given Fiji the right to use her name and likeness.²⁹⁴ The case is currently still ongoing.²⁹⁵

Almost all state statutes cover these exact takings, as do state common law rights. In both of these cases, it's easy for influencers to prove that their name and likeness were appropriated. Batra simply needed to point to the copied photographs, while Culburch can cite the many cut-outs of her. Moreover, these exact takings map closely onto the core justifications for an influencer's right of publicity. It seems most unfair—most likely to infringe on an influencer's moral rights and to discourage creation of valuable personas and brands—to allow exact replications of their name and likeness. So, influencers should be entitled to bring right of publicity suits to police exact takings.

2. Nonexact Takings

But influencers should not be allowed to police nonexact takings of their personas. Remember, a nonexact taking is any misappropriation beyond an exact replication of the influencer's likeness, including use of the influencer's general persona or distinctive attributes.²⁹⁶ Influencers have already brought these suits for nonexact takings. Let's look at two examples. In 2011, Kim Kardashian-West sued Old Navy for airing a commercial containing a Kardashian-West “lookalike.”²⁹⁷ The commercial features actress Melissa Molinaro singing and dancing as she went about her day “getting a mani pedi and then a root canal, having her jeans ripped off by a dog only to reveal a denim miniskirt, and dancing on a conveyor belt in a supermarket.”²⁹⁸ Kardashian-West, in her right of publicity claim, accused Old Navy of attempting to capitalize on her popularity by appropriating physical

²⁹⁴ See Defendant and Cross-Complainant Fiji Water Company LLC's Cross-Complaint Against Plaintiff and Cross-Defendant Kelly Steinbach ¶¶ 41-58, *Steinbach*, No. 19ST-cv-03256 (Cal. Super. Ct. Jan. 31, 2019). Fiji has accused Culburch of having “bitten the hand that feeds her by suing the very company that is entirely responsible for providing her the opportunity and the means to capitalize on her fleeting 15 minutes of internet fame.” *Id.* at ¶ 2.

²⁹⁵ See Notice Re: Continuance of Hearing and Order, *Steinbach*, No. 19ST-cv-03256 (Cal. Super. Ct. Mar. 20, 2020) (showing the case as pending as of March 2020).

²⁹⁶ See *supra* subsection II.A.2.

²⁹⁷ Tiffany Yannetta, *Kim Kardashian Is Suing Old Navy for \$20M over an Ad Campaign*, RACKED (July 20, 2011, 3:28 PM), <https://www.racked.com/2011/7/20/7757343/kim-kardashian-is-suing-old-navy-for-20-million-over-a-fauxdashian> [<https://perma.cc/KPL7-VUY9>]. Kardashian-West herself may balk at being called a “mere” influencer. See *Kardashian West v. Misguided Ltd.*, No. 19-1258, slip op. at 1 (C.D. Cal. July 2, 2019) (identifying Kardashian-West as a “television celebrity, model and spokesperson . . . [and] celebrity endorser” with significant “popularity and reach on social media”). But, like it or not, Kardashian-West “really trailblazed the idea of being an influencer.” Laurie Brookins, *Yes, Kim Kardashian West Is Worthy of a CFDA Influencer Award*, *Fashion Insiders Say*, HOLLYWOOD REP. (June 5, 2018, 1:12 PM), <https://www.hollywoodreporter.com/news/yes-kim-kardashian-west-is-worthy-a-cfda-influencer-award-fashion-insiders-say-1117403> [<https://perma.cc/N2EF-MBM2>].

²⁹⁸ Yannetta, *supra* note 297.

attributes and “a storyline associated with” Kardashian-West to “evoke [her] likeness, identity and persona.”²⁹⁹ The case settled before the court provided any substantive rulings on the merits of Kardashian’s claims.³⁰⁰

In another case, Mars Argo, a famous YouTube influencer, sued her ex-boyfriend Titanic Sinclair and YouTube star Poppy, whose real name is Moriah Pereira, for violation of Argo’s right of publicity.³⁰¹ Argo and Sinclair had previously been partners on their YouTube channel, which featured pop music and satirical content; after a public split, Sinclair brought in Pereira to serve as his new partner.³⁰² In her lawsuit, Argo accused Sinclair and Pereira of turning Pereira, via her alter-ego Poppy, into an “Argo knockoff.”³⁰³ Specifically, Argo asserted that the two “copied Mars Argo’s identity, likeness, expression of ideas, sound, style, and aesthetic” and “dyed [Pereira’s] hair a specific platinum blonde and, in character as Poppy, started to alter her voice to be a pitch higher to mimic Mars Argo’s distinctive speaking voice.”³⁰⁴ This, according to Argo, violated her right of publicity.³⁰⁵ Again, the lawsuit settled before the court decided any substantive motions.³⁰⁶

These cases raise two questions. One, what constitutes a protected persona or attribute? Two, how do we assess misappropriation of that persona or attribute? Neither answer, it turns out, is satisfying.

a. *Defining Protected Attributes and Personas*

Tyler Steinkamp is an wildly popular influencer and online video game streamer.³⁰⁷ Steinkamp, under the moniker Tyler1, acts with such characteristic aggression and offensive language that he has been

²⁹⁹ Complaint ¶ 29, *Kardashian v. The Gap Inc.*, No. 11-5960 (C.D. Cal. July 20, 2011).

³⁰⁰ Folan, *supra* note 282.

³⁰¹ Julia Alexander, *Poppy’s Legal-Battle Woes Are Years in the Making (Update)*, POLYGON (Sept. 17, 2018, 1:04 PM), <https://www.polygon.com/2018/5/16/17346050/poppy-lawsuit-mars-argo-titanic-sinclair-youtube-explained> [<https://perma.cc/CL7Q-W9UC>]. Another legal commentator has described the suit between Argo and Sinclair as “the most quintessential digital age-influencer era legal battle . . . ever.” Mars Argo v. Titanic Sinclair *Is the Quintessential YouTube Influencer-Era Legal Battle*, FASHION L. (Apr. 19, 2018), <https://www.thefashionlaw.com/home/mars-argo-v-titanic-sinclair-is-the-most-influencer-era-legal-battle-ever> [<https://perma.cc/7QNS-ZBWV>].

³⁰² Alexander, *supra* note 301.

³⁰³ Poppy Complaint, *supra* note 277, ¶ 10.

³⁰⁴ *Id.* ¶¶ 11, 13.

³⁰⁵ *Id.* ¶¶ 135-40.

³⁰⁶ Louise Matsakis, *Did YouTube Phenomenon Poppy Steal Her Style from Another Star?*, WIRED (May 9, 2018, 12:00 PM), <https://www.wired.com/story/poppy-mars-argo-copyright/> [<https://perma.cc/57YP-A749>].

³⁰⁷ See Daniel Friedman, *The Difficulty in Banning the ‘Most Toxic League of Legends Player in North America,’* POLYGON (Jan. 8, 2018, 4:50 PM), <https://www.polygon.com/2017/1/10/14179366/league-of-legends-riot-ban-tyler1> [<https://perma.cc/L6R3-FBBQ>] (describing Steinkamp as a “Twitch streamer, YouTube content creator and League of Legends player” with over 450,000 YouTube subscribers, as well as his own website and merchandise).

characterized as the “most toxic League of Legends player in North America.”³⁰⁸ His followers on Twitch, a video game streaming site, enjoy his “colorful, creative insults.”³⁰⁹ Many of them have purchased his dietary supplement or tank tops featuring his signature catchphrases.³¹⁰

What do we do when faced with influencers, like Tyler Steinkamp, who may want to protect their personas and attributes? Let’s start with one hypothetical situation for *personas*. Tyler Steinkamp comes across another streamer who has donned Steinkamp’s signature tank tops and billed themselves as “the most toxic player” in a different video game. Steinkamp sues, alleging that he has a distinctive persona that has been misappropriated. But does Steinkamp have a protectable persona? The Ninth Circuit, in *White*, faced a similar situation.³¹¹ There, the Ninth Circuit sustained Vanna White’s claim that Samsung’s robot, “dressed in a wig, gown, and jewelry,” appropriated her persona.³¹² In doing so, the Ninth Circuit implicitly found that White’s persona of a blonde woman in a ball gown standing on the Wheel of Fortune game show set is distinctive and thus protectable— “[s]he is the only one” called to mind by that depiction.³¹³ Steinkamp’s claim would likely be no different. Steinkamp “is the only one” called to mind by tank tops, constant yelling, and video game streams; so Steinkamp has a protectable persona.³¹⁴

Let’s look at another hypothetical for *attributes*. After Kelly Culburth’s viral moment with Fiji Water, an entrepreneurial influencer posts a photo of herself coyly smiling into the camera in a bright blue dress. Culburth brings a right-of-publicity suit, alleging misappropriation of a single protected attribute—her (admittedly) distinctive blue dress. Will Culberth lose? Let’s look at some relevant precedents. The Sixth Circuit sustained Johnny Carson’s right of publicity suit where a portable toilet company appropriated one element of Carson’s identity—a catchphrase, “Here’s Johnny,” that members of the “public tend[ed] to associate with” the plaintiff.³¹⁵ The Ninth

³⁰⁸ *Id.* Riot Games, which produces League of Legends, called Tyler 1 a “genuine jerk” before temporarily banning him from the stream. Steven Asarch, *Is Tyler1 Reformed? ‘League of Legends’ Streamer Persists with Controversial Behavior*, NEWSWEEK (Apr. 8, 2019, 5:23 PM), <https://www.newsweek.com/tyler1-reformed-reddit-league-legends-twitch-youtube-stream-1389954> [<https://perma.cc/J5MY-E4FK>].

³⁰⁹ Tyler Erzberger, *Tyler1’s Road to League of Legends Redemption*, ESPN (Oct. 1, 2018), http://www.espn.com/esports/story/_/id/24855025/league-legends-world-championship-tyler1-road-league-legends-redemption [<https://perma.cc/VT34-KL4V>]

³¹⁰ *Id.*

³¹¹ *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992).

³¹² *Id.*

³¹³ *Id.* at 1399.

³¹⁴ See THOMAS MCCARTHY & ROGER E. SCHECHTER, *THE RIGHT OF PUBLICITY AND PRIVACY* § 4:46 (2d ed. 2020) (defining a protected persona as “those various indicia by which the relevant group of people can identify plaintiff”).

³¹⁵ *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835-37 (6th Cir. 1983).

Circuit allowed a racecar driver's suit against a defendant who merely used a picture of the driver's "distinctive" racecar—the car's decorations were part of the driver's identity because they "caused *some* persons to think the car in question" belonged to the driver.³¹⁶ In sum, anything (or combination of things) that leads *some* people to think of the influencer when they see it constitutes a protectable attribute or persona.³¹⁷ Culburth made quite the splash with her blue dress. Certainly, some members of the public, seeing a copycat blue dress, could think of Culburth at the Oscars. So perhaps Culburth's dress is a distinctive attribute.

Clearly, courts define protected attributes and personas generously—Steinkamp and Culburth may have personas or attributes protectable under *current* right of publicity doctrine. That's a problem. But almost no influencers have unique personas or attributes. Instead, many, many influencers look exactly alike.³¹⁸ Some are copycats. For example, Kim Kardashian-West lookalikes are rampant on Instagram.³¹⁹ Others look and act similar simply because of social media's version of "natural selection."³²⁰ On Instagram, marketers describe it as the "influencer" look—"well-lit pictures, stylish clothing, pristine makeup, an enviable body."³²¹ On TikTok and gaming platforms, e-girls and e-boys reign, replete with "thick eyeliner and dyed hair" and "beanies" and "belt chains."³²² Influencers don't just look alike; many produce near identical content. Food bloggers all post carefully plated photos of their food. Fashion bloggers all post photos of their outfits. Video game

³¹⁶ *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974).

³¹⁷ MCCARTHY & SCHECHTER, *supra* note 314, § 4:46. (defining protected attributes as those that "suffice to identify plaintiff," like "a unique vocal style, body movement, costume, makeup, or distinguishing setting").

³¹⁸ To be fair, this same criticism could be lodged against celebrities. But whereas it is atypical to have two celebrities be lookalikes, it is common to have a handful of influencers who may be indistinguishable from each other, such as the Kim Kardashian-West lookalikes discussed in the Introduction.

³¹⁹ Christian Gollayan, *Meet the Kim Kardashian Clones Taking Over Instagram*, N.Y. POST (Mar. 9, 2018, 7:21 PM), <https://nypost.com/2018/03/09/meet-the-kim-kardashian-clones-taking-over-instagram/> [<https://perma.cc/7WA5-WXM3>]. Some of these influencers just naturally look like Kardashian-West. But others undergo extensive plastic surgery to look more like Kardashian-West. Strugatz, *supra* note 6. Either way, these lookalikes often follow her every move, cutting their hair when she cuts her hair and purchasing her go-to products. *Id.*

³²⁰ See Krupnick, *supra* note 29 ("One glance at the [influencers'] accounts and the generic aesthetic washes over you like a wave of chilled frosé.")

³²¹ *Id.*; see also Julia Brucculieri, *Instagram Influencers Are All Starting to Look the Same. Here's Why.*, HUFFINGTON POST (Mar. 9, 2018, 5:46 AM), https://www.huffpost.com/entry/instagram-influencers-beauty_n_5aa13616e4b002df2c6163bc [<https://perma.cc/F3Q2-3TZC>] ("Social media influencers these days are starting to look like beauty clones.")

³²² Paige Leskin, *Everything You Need to Know About E-Girls and E-Boys, Teen Gamers Who Have Emerged as the Antithesis of Instagram Influencers*, BUS. INSIDER (Mar. 9, 2020, 10:29 AM), <https://www.businessinsider.com/e-girls-definition-tiktok-e-boys-anti-influencer-teen-gamers-2019-9> [<https://perma.cc/HR24-SEMP>].

streamers all provide witty running commentary during a livestream. As the theory goes, certain looks and content appeal to the target audience more than others. Influencers imitate those looks and content in an attempt to gain followers, other influencers follow their lead, and so the cycle continues.³²³

In doing so, influencers contribute to and pull from the influencer “public domain”—attributes and personas that are common to particular categories of influencers. These “public domain” elements are stock features required for every influencer to be successful. Instagram stars share the same poses and backgrounds.³²⁴ Game streamers post videos with all-caps titles and thumbnails featuring a scene from the game and a close-up of the streamers face.³²⁵ YouTubers stream unboxing videos and rants about their day.³²⁶ Influencers, of course, have original ideas. But once the photo or video or blog post is shared on social media, that idea is no longer original: it is almost instantaneously replicated and improved upon, by celeb-influencers, by nanoinfluencers, by followers.³²⁷ With each post, this influencer “public domain” grows and evolves, creating a vibrant, necessary marketplace of ideas.

³²³ See Nora Oravecz, *Stop Copying Mega Influencers and Build a Personal Brand DNA that Is All You*, HUFFINGTON POST (Aug. 16, 2017, 5:26 AM), https://www.huffpost.com/entry/stop-copying-mega-influencers-and-build-a-personal_b_598cobb4e4b030foe267ca1f [https://perma.cc/X52R-ZMAR] (“[S]o many influencers are influenced by each other.”). Here’s how the mimicry process goes: One influencer comes up with an original idea—a new photo backdrop, a new video format, a new recipe. That new content generates significant attention on social media. That attention inspires other influencers, who quickly copy the idea in the hopes of getting lots of attention on their own posts. It works—they get more likes, more followers. Other influencers see this, and they decide to mimic the copycats. And so it goes. See Mike Murphy, *You Are Not Original or Creative on Instagram*, QUARTZ (Aug. 8, 2018), <https://qz.com/quartz/1349585/you-are-not-original-or-creative-on-instagram/> [https://perma.cc/7ST6-7GBX] (“What gets likes gets created, and viewers will like what is familiar.”). This copying isn’t condemned; it’s expected, even encouraged. See Maeve Touhey, *How to Curate an Influencer-Style Instagram*, COLLEGE CANDY (June 4, 2020), <https://collegecandy.com/2020/06/04/curate-an-influencer-style-instagram/> [https://perma.cc/8R5C-63YC] (encouraging aspiring influencers to “[l]ook into what other influencers are doing and take inspiration from them”).

³²⁴ See Insta Repeat (@insta_repeat), INSTAGRAM, https://www.instagram.com/insta_repeat/ [https://perma.cc/GA4C-CKR9] (last visited June 13, 2020) (compiling collages of near-identical posts from travel influencers).

³²⁵ For a preview of these stock elements in action, see *Gaming*, YOUTUBE, <https://www.youtube.com/gaming/> [https://perma.cc/S2Q3-W2HT] (last visited June 13, 2020).

³²⁶ See Heather Kelly, *The Bizarre, Lucrative World of ‘Unboxing’ Videos*, CNN (Feb. 13, 2014, 10:49 AM), <https://www.cnn.com/2014/02/13/tech/web/youtube-unboxing-videos/index.html> [https://perma.cc/VKG7-MNUD] (explaining the popularity of “unboxing videos,” where influencers open new products on camera); Ian Sherr, *Meet the Angry Gaming YouTubers Who Turn Outrage into Views*, CNET (June 6, 2019, 4:26 PM), <https://www.cnet.com/news/meet-the-angry-gaming-youtubers-who-turn-outrage-into-views/> [https://perma.cc/HJT7-DBM6] (“How to make a successful video on [YouTube]: Step 1: Find something to be angry about. Go to online forums, track what’s hot on Twitter and figure out the outrage of the day. Step 2: Rant into a camera for 10 minutes. Step 3: Profit.”).

³²⁷ See Murphy, *supra* note 323 (“[T]here’s an incredible amount of value in emulation both when someone is learning and continuing their craft. Improving upon and building upon what has been done . . . is an important part [of] the evolution of art.”).

These “public domain” elements should not be protected by the right of publicity. No one influencer, by filing a lawsuit, should be able to monopolize these common elements to the exclusion of existing or aspiring influencers.³²⁸ Yet, a court faced with a right-of-publicity lawsuit would likely find that the plaintiff influencer does have protected personas and attributes. It wouldn’t matter to most courts that many influencers sport platinum blonde hair and speak in a high-pitched voice. That, under current doctrine, goes to misappropriation or damages, not the existence of a protected persona or attribute.³²⁹ As long as the attribute or persona is identifiable, it is protectable.³³⁰ As explained above, that’s a problem. Influencers constantly build off of each other. One food blogger posts a new dish; all her competitors do too. A beauty influencer develops original looks of his own and borrows some from others. Thousands of nanoinfluencers copy the same pose for photographs. In the rapidly evolving social media marketplace, an idea is novel for mere seconds before being stolen and morphed into a dozen different variations. This vibrant social-media marketplace, which enables the influencer personas we so value, is threatened if we allow influencers to claim these public domain elements as a protected persona or attribute.

b. *Assessing Misappropriation*

So nearly anything can be a protected persona or attribute. But how do we assess if that persona or attribute has been misappropriated?

Let’s return to Mars Argo’s suit against Poppy. Assume that Mars Argo’s persona—her platinum blonde hair, high-pitched voice, and “doll-like” aesthetic—is protectable.³³¹ Poppy does look and act like Argo.³³² Argo’s fans noticed, allegedly referring to Poppy as a “complete copycat,” and one potential music manager actually mistook Poppy for Argo.³³³ Industry insiders also noticed the similarity between the two characters.³³⁴ But Poppy

³²⁸ Cf. *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983) (Kennedy, J., dissenting) (“Protection under the right of publicity creates a common law monopoly that removes items, words and acts from the public domain.”).

³²⁹ See, e.g., *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992) (“[C]ommon law right of publicity reaches means of appropriation other than name or likeness, but . . . the specific means of appropriation are relevant only for determining whether the defendant has in fact appropriated the plaintiff’s identity.”); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 137 (Wis. 1979) (“[T]here were others who were known by the same name. This, however, does not vitiate the existence of a cause of action. It may, however, if sufficient proof were adduced, affect the quantum of damages should the jury impose liability or it might preclude liability altogether.”).

³³⁰ See *supra* notes 314, 317 (defining protectable personas and attributes).

³³¹ Poppy Complaint, *supra* note 277, ¶ 51-52.

³³² *Id.* ¶ 77.

³³³ *Id.* ¶¶ 48, 77, 95-98.

³³⁴ *Id.* ¶¶ 105-09.

clearly is not an exact replica of Argo. Whereas Argo sports short hair, Poppy wears her hair long.³³⁵ Poppy's outfits are similar, but never exact replicas.³³⁶ Assuming the case hadn't settled, would Mars Argo have succeeded in her right-of-publicity claim?

Let's start with the law in California, where Argo filed suit. The Ninth Circuit's test, set out in *Motschenbacher*, is that misappropriation occurs where the plaintiff is identifiable to *some* persons from the defendant's appropriation.³³⁷ In *White v. Samsung*, Samsung's ad featured a robot wearing a ballgown and wig and standing next to a letter board on the set of a game show.³³⁸ The court admitted that "many other women" don similar looks.³³⁹ But the court refused to analyze the ad's individual elements—the robot, the letter board, the game show—separately; instead, the court noted that the ad, as a whole, left "little doubt about the celebrity the ad is meant to depict."³⁴⁰ Argo can likely satisfy the Ninth Circuit's test. Argo's fans and industry insiders repeatedly noted that Poppy's persona, taken as a whole, conjures Argo's persona. As in *White*, it likely wouldn't matter to the Ninth Circuit that other influencers don similar looks—a platinum blonde, "doll-like" aesthetic. Instead, Poppy's work would leave "little doubt" that she mimicked Argo.

But even if she was heavily inspired by Argo, Poppy added her own creative expression to her persona. That might not matter in California.³⁴¹ But it would in Ohio. In *ETW*, a sports artist created a three-panel painting of golfer Tiger Woods.³⁴² Woods sued, alleging a violation of his right of publicity under Ohio common law.³⁴³ To assess Wood's claim, the Sixth

³³⁵ See *id.* ¶ 11, 80-81 (describing Poppy's hair and depicting side-by-side pictures of Argo and Poppy).

³³⁶ *Id.* ¶¶ 80-91.

³³⁷ *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 826-27 (9th Cir. 1974); see also *Negri v. Schering Corp.*, 333 F. Supp. 101, 103-04 (S.D.N.Y. 1971) ("[T]he question is whether the figure is recognizable, not the number of people who recognized it."); *Cohen v. Herbal Concepts, Inc.*, 472 N.E.2d 307, 309 (N.Y. 1984) ("[T]here can be no appropriation of plaintiff's identity . . . if he or she is not recognizable from the picture."); *MCCARTHY & SCHECHTER*, *supra* note 314, § 3:10 ("[P]laintiff need prove no more than that he or she is reasonably identifiable in defendant's use to more than a de minimis number of persons."). At this point, you may be a bit confused. "Isn't this test quite similar to the test for protectable elements?" Yes, it is. And that is part of the problem with current right-of-publicity doctrine: courts have failed to establish distinctive, concrete rules for how to (1) identify protected personas and (2) assess misappropriation of those personas.

³³⁸ *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992).

³³⁹ *Id.* at 1399.

³⁴⁰ *Id.*

³⁴¹ Poppy could assert transformative use as an affirmative defense. See *supra* notes 190-93 and accompanying text. But it's unclear if (1) Poppy's work is primarily Poppy's own expression "other than the likeness of" Argo or (2) the "marketability and economic value" of Poppy's work is due to Poppy's creative expression and not Argo's fame. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1274 (9th Cir. 2013). For further discussion of California's complicated transformative use defense, see *id.* at 1273-77.

³⁴² *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 918 (6th Cir. 2003).

³⁴³ *Id.* at 919.

Circuit adopted a balancing test, weighing the “substantiality” of the use of plaintiff’s likeness against any added “significant creative component.”³⁴⁴ The defendant artist did not simply portray a lifelike replica of Woods; instead, the painting featured Woods in three different stages of a golf swing, with a row of other famous golfers watching Woods.³⁴⁵ This added creativity, according to the Sixth Circuit, meant that the portrait of Woods was not a misappropriation of his right of publicity.³⁴⁶ That’s good news for Poppy. Arguably, Poppy added her own “twist” on Argo’s persona. As just one example, Argo, in one YouTube video, sat eating a lollypop in a built-in bathtub with pink tile.³⁴⁷ Poppy later released a photograph that featured her in a clawfoot tub, sans lollypop and in an entirely different pose, with a pink wall behind her.³⁴⁸ These changes add up to change the overall look and aesthetic of the work—the “significant creative component” of Poppy’s photograph is likely to outweigh any similarity to Argo’s video.

Mars Argo’s suit against Poppy is an easier case. Argo was a well-known influencer with a distinctive persona. Poppy likely modified her physical appearance to imitate Argo,³⁴⁹ and she repeatedly referenced Argo in her work.³⁵⁰ On top of all that, Poppy was in partnership with Titanic Sinclair, Argo’s allegedly abusive ex-boyfriend and bandmate. It’s just seems *fair* to find that Poppy misappropriated Argo’s right of publicity.

But we need legal doctrines that address both the easy *and* the hard cases. Let’s look back to Kim Kardashian-West’s suit against Old Navy. Assume that Kim Kardashian’s persona is protectable. Melissa Molinaro, the actress in Old Navy’s ad, does look remarkably like Kardashian-West.³⁵¹ Assuming the case hadn’t settled, would Kardashian-West have succeeded in her right-of-publicity claim? The doctrinal analysis for Kardashian-West wouldn’t be any different than it would be for Mars Argo. The Ninth Circuit’s test would be satisfied. Molinaro is readily identifiable as Kardashian-West from the video; Molinaro’s character was jokingly called a “Fauxdashian.”³⁵² The Sixth Circuit’s test is a bit trickier, but Old Navy could argue that its unrealistic depiction of Kardashian-West “having her jeans ripped off by a dog only to reveal a denim miniskirt, and dancing on a conveyor belt in a supermarket” is “a significant creative component” of its own.³⁵³

³⁴⁴ *Id.* at 938.

³⁴⁵ *Id.* at 918.

³⁴⁶ *Id.* at 937.

³⁴⁷ Poppy Complaint, *supra* note 277, ¶ 91.

³⁴⁸ *Id.*

³⁴⁹ *Id.* ¶ 51.

³⁵⁰ *Id.* ¶ 99.

³⁵¹ Yannetta, *supra* note 297.

³⁵² *Id.*

³⁵³ *Id.*

Molinaro could argue that she did not copy Kardashian's persona but instead appropriated "public domain" elements. Many influencers have long hair, pouty lips, perfect tans, and a sporty style; those features, alone or in combination, are clearly in the "influencer public domain." No court has explicitly acknowledged such a defense. The Ninth Circuit hinted at it when it acknowledged that "many other women" dress like Vanna White.³⁵⁴ And Judge Kennedy's dissent in *Carson* raised a similar concern, balking at the majority's choice to allow Carson to claim a right of publicity in his catchphrase "Here's Johnny" and so remove a common phrase from the public domain.³⁵⁵ Perhaps such a defense should be recognized. There may only be one Mars Argo or Tyler Steinkamp, but there are tens of thousands of micro- and nanoinfluencers who look shockingly similar. These influencers pull from and contribute to a rich public domain; often, an influencer must partake in these public domain elements in order to gain followers and sponsorships. So, influencers shouldn't be punished if their particular combination of public domain elements veers close to another's influencer's persona.³⁵⁶

Molinaro could also argue that she has "prior user rights." Molinaro can't help that she looks like Kardashian-West; should she be prevented from capitalizing on her likeness simply because she looks a lot like a pre-existing influencer? In both trademark and patent law, courts allow prior users to continue to use trademarks or now-patented information.³⁵⁷ Perhaps right of publicity could adopt a similar defense. Many influencers trade on relatability, not cultivated, theatric personas like Tyler Steinkamp or Mars Argo. Should courts really enjoin a nanoinfluencer from sharing photos of herself simply because she shares a remarkably similar persona to Chiara Ferragni or Tavi Gevinson?

Finally, let's address one more wrinkle in assessing misappropriation. Think of the Kim Kardashian-West lookalikes from the Introduction. Many of these lookalikes are "influencers in their own right," boasting up to one

³⁵⁴ *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992).

³⁵⁵ *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983) (Kennedy, J., dissenting).

³⁵⁶ *Cf. Lohan v. Take-Two Interactive Software, Inc.*, 97 N.E.3d 389, 395 (N.Y. 2018) (refusing to grant right-of-publicity protections to "indistinct . . . representations of the style, look, and persona of a modern, beach-going young woman").

³⁵⁷ See David H. Hollander, Jr., *The First Inventor Defense: A Limited Prior User Right Finds Its Way into U.S. Patent Law*, 30 *AIPLA Q.J.* 37, 39 (2002) ("Many of the world's most important patent systems," including the United States', "allow a prior user of an invention that is subsequently patented by another to continue to use that invention, subject to certain qualifications and limitations."); David S. Welkowitz, *The Problem of Concurrent Use of Trademarks: An Old/New Proposal*, 28 *U. RICHMOND L. REV.* 315, 315-16 (1994) (explaining that, for nearly a century, courts have allowed new "junior" users and old "senior" users of a trademark to coexist).

million followers on social media.³⁵⁸ Two of the most famous “clones” are Jelena Peric³⁵⁹ and Kamilla Osman.³⁶⁰ The two look remarkably similar to Kardashian-West—in fact, they are famous (and attract advertisers) in part “because they look like” Kardashian-West.³⁶¹ But Peric and Osman also look remarkably like each other. Imagine a hypothetical lawsuit in which Osman sues Peric for a violation of her right of publicity. Peric defends on the basis that she is appropriating Kim Kardashian’s persona, not Osman’s—she’s pulling from a “prior common source.” In copyright law, the “prior common source” doctrine holds that a work isn’t infringing, despite notable similarities, if both works pulled from a prior common source.³⁶² This doctrine is particularly important in “crowded fields,”³⁶³ and influencing is a particularly crowded field.

Of course, courts can just continue to use the same tests they’ve sporadically used for decades. But, as illustrated above, none of these tests consider the nuances inherent to influencers—the influencer “public domain,” an individual’s moral right to market their persona, the prevalence of purposeful lookalikes. That’s a problem. One or two bad precedents can chill valuable and necessary public speech, destroying the vibrant influencer community.³⁶⁴

D. *How Do We Update the Right of Publicity for the Influencer Age?*

Clearly, there is a misfit between the right of publicity’s current scope, justifications, and beneficiaries. This misfit isn’t new; the right of publicity has always been a problematic right.³⁶⁵ But the doctrine’s problems have often been brushed under the rug. Only celebrities brought right of publicity cases. There are a finite number of celebrities with claims worth bringing, and so relatively few cases. But the rise of social media and influencers have

³⁵⁸ Strugatz, *supra* note 6.

³⁵⁹ Jelena Peric (@j_make_up), INSTAGRAM, https://www.instagram.com/j_make_up [<https://perma.cc/837S-6FBJ>] (last visited Nov. 7, 2019).

³⁶⁰ Kamilla Osman (@kamiosman), INSTAGRAM, <https://www.instagram.com/kamiosman> [<https://perma.cc/42L9-GFZ4>] (last visited Nov. 7, 2019).

³⁶¹ Strugatz, *supra* note 6; *see also* Renee Jacques, *There’s Another Kim Kardashian Look-Alike, and She’s the Best One Yet*, ALLURE (May 27, 2016), <https://www.allure.com/story/jelena-peric-kim-kardashian-lookalike> [<https://perma.cc/6RA2-68K4>] (noting how influencers’ “uncanny resemblance” to Kardashian-West can make them “overnight Instagram sensation[s]”).

³⁶² *See* Dorsey v. Old Sur. Life Ins. Co., 98 F.2d 872, 873 (10th Cir. 1938) (“One work does not violate the copyright in another simply because there is a similarity between the two if the similarity results from the fact that both works deal with the same subject or have the same common source.”).

³⁶³ Design Basics, LLC v. Lexington Homes, Inc., 858 F.3d 1093, 1100 (7th Cir. 2017).

³⁶⁴ *See* Carson v. Here’s Johnny Portable Toilets, Inc., 698 F.2d 831, 840 (6th Cir. 1983) (Kennedy, J., dissenting) (arguing that improper extension and application of the right of publicity leaves “the public . . . to act at their peril,” resulting in “a chilling effect on commercial innovation and opportunity”).

³⁶⁵ *See supra* notes 130–34 and accompanying text (criticizing the right of publicity).

amplified this misfit. There are over 100,000 influencers,³⁶⁶ and those influencers will want to enforce their rights of publicity.³⁶⁷ And 100,000 influencers equals 100,000 individuals with commercially valuable names and likenesses. For some influencers, that commercial value equals millions of dollars each year. But even for less lucrative influencers, it is still easy to quantify economic harm due to misappropriation of their image. Courts could soon be faced with armies of nano- and microinfluencers armed with injunctions and statutory damages provisions.³⁶⁸

But we don't need an avalanche of potential lawsuits to take this opportunity to rethink the right of publicity. So, where do we start? First, we must assess who gets right-of-publicity protections. Currently, most states' right of publicity applies to all persons, famous or not. Courts and legislators could decide that only "traditional" celebrities get right of publicity protections. Or they could limit the right of publicity to only celebrities and celeb-influencers, as those individuals are the ones most likely to need to police use of their image.

Second, we must determine which types of misappropriations we prohibit. What personas and attributes will we protect? How will we know when those attributes or personas have been misappropriated? The goal is to craft a doctrine that "neither overprotects nor underprotects" the right.³⁶⁹ We can redefine what constitutes protectable attributes or personas. We can adopt more nuanced doctrines to better assess misappropriation. Or, more radically, we could limit the right of publicity to exact takings, providing individuals with a remedy in cases of blatant misappropriation. This is the route I recommend—provide the right of publicity to any and all, but limit that right to exact takings. Courts can't accurately police nonexact takings, especially in the realm of influencers, without significantly hampering free speech and creative expression. We should adopt a bright-line rule that influencers can

³⁶⁶ 2019 BENCHMARK REPORT, *supra* note 8, at 6.

³⁶⁷ Influencers are much more likely to resort to extralegal methods, such as public shaming or even asking nicely, to police misappropriation. *See* Nayak, *supra* note 13 ("Intellectual-property attorneys representing influencers said they've had to rethink how aggressively to go after infringers, and rely more on friendly warnings or cease-and-desist letters instead of rushing off to court."). But influencers will still utilize lawsuits as a backstop for appropriation.

³⁶⁸ Right of publicity plaintiffs can seek actual damages, statutory damages, or both. For example, California provides that right of publicity plaintiffs can recover either actual damages (i.e., "the fair market value of the right to use plaintiff's name or likeness in the manner in which it was used") or \$750 in statutory damages for each unauthorized use. CAL. CIV. CODE § 3344(a) (West 2020); *see also, e.g.*, Clark v. Am. Online Inc., No. 98-5650, 2000 WL 33535712, at *8 (C.D. Cal. Nov. 30, 2000). For macro- and celeb-influencers, actual damages can be sizable—a California state court found that actual damages for violation of Kim Kardashian's right of publicity could range from \$300,000 to \$500,000 a post. *Kardashian West v. Misguided Ltd.*, No. 19-1258, slip op. at 13 (C.D. Cal. July 2, 2019).

³⁶⁹ Gervais & Holmes, *supra* note 143, at 183.

only bring right-of-publicity claims for appropriation of their name and likeness. Such a bright-line rule would provide individuals with a remedy in cases of blatant misappropriation—i.e., exact takings. But it would also strike a balance between any individual’s moral right to control their identity and the public’s ownership interest in influencer identities. It also minimizes intrusions into free speech, ensuring that we can have a vibrant community of micro- and nanoinfluencers to entertain and inform the masses.

CONCLUSION

Children used to want to be movie stars, athletes, or astronauts when they grow up—now, 86% of them want to be influencers.³⁷⁰ Influencers are “the new celebrity”—“the new status symbol of humanity.”³⁷¹ We created influencers; we created a society in which “every moment of our consumption, every moment of our waking day, can be an advertising message.”³⁷² Now, influencers are asking for legal protections. They deserve those protections, but the public also deserves access to those personas. Not only has “[s]ocial media . . . exacerbated society’s obsession with celebrity,”³⁷³ it has given the public an ownership interest in celebrity personas.

The right of publicity isn’t ready for influencers. The right’s current doctrinal framework overprotects, threatening the influencer public domain and the thriving community of influencers that inspire each other. It’s time to update that framework. The right of publicity has always been a problematic right, but it doesn’t have to be. This Comment joins recent scholarship calling on legislators and courts to rethink the scope and justification of the right³⁷⁴: for the influencer age, an influencer’s right of publicity.

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³⁷⁰ Sarah Min, *86% of Young Americans Want to Become a Social Media Influencer*, CBS NEWS (Nov. 8, 2019, 4:49 PM), <https://www.cbsnews.com/news/social-media-influencers-86-of-young-americans-want-to-become-one/> [<https://perma.cc/7RFE-L4FE>].

³⁷¹ *The New Celebrity*, *supra* note 96.

³⁷² *Id.*

³⁷³ Strugatz, *supra* note 6.

³⁷⁴ See, e.g., ROTHMAN, *supra* note 206, at 139 (urging courts to “revisit why states have adopted a right of publicity, and engage in more searching analyses of the legitimacy of these justifications”).