Extending Tort Liability to Creators of Fake Profiles on Social Networking Websites

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EXTENDING TORT LIABILITY TO CREATORS OF FAKE PROFILES ON SOCIAL NETWORKING WEBSITES

Bradley Kay*

Abstract

In today’s world, social media has become ubiquitous. While social media provides opportunities for networking, there are also opportunities for exploitation. Courts and legislatures have provided remedies for some wrongs that can occur on social networking websites. However one area remains neglected- false profiles made for real people.

In present day tort law, using another person’s name or likeness can open the offender to liability for either misappropriation of name or likeness or a violation of right of publicity. This Note argues that these causes of action should be extended to false profiles made on social networking websites. This Note begins by discussing the two causes of action, how they are applied to actions over the Internet, how courts should apply the actions to false profiles, and possible defenses to the causes of action.

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Introduction

In 2009, users of the website Twitter.com were shocked to read what St. Louis Cardinals manager Tony La Russa had to say on his Twitter profile. La Russa made many crude statements to his followers, often insulting his team or players. For instance, one time he said, “Lost 2 out of 3, but we made it out of Chicago without one drunk driving incident or dead pitcher.” As it turns out, La Russa was as surprised about the comments as anybody. Somebody had used La Russa’s identity to create a fake profile and was passing himself off as Tony La Russa. La Russa ultimately settled his suit against Twitter.com, however one wonders what cause of action he would have used against the profile’s creator.

A Social Networking Service (SNS) allows users to be part of an online community with other users. SNSs have been defined as websites that allow users to: “(1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.” Most SNSs also provide their users with a forum for communicating with fellow users. For example, Facebook.com lets a user write messages on another user’s profile, MySpace.com provides weblogs on which its users can write, and Twitter.com lets a user post short messages for others to read. Although there are a number of active SNSs, in this note I will limit the discussion to the three most popular SNSs: Facebook.com (Facebook), MySpace.com (MySpace), and Twitter.com (Twitter).

The connections to other users make these SNSs an open forum on which users can communicate with large numbers of people at once. The ease of communicating with large numbers of people has led to emerging legal issues that were non-existent less than a decade ago. This note will discuss the particular problem that has arisen in recent years of users creating profiles pretending to be other people or entities.

Some profiles are obviously fake such as the Facebook profiles for Planet Earth and the cartoon character Captain Planet. However when a fake SNS profile is purported to be a real...
person it is impossible for other users to determine whether that person actually created the profile.

While creating fake SNS profiles can be innocuous, a maliciously created fake profile can cause personal and economic harm. As a few defendants are finding out, this problem is no longer hypothetical. Multiple cases have been filed in different states over damage done by a person creating a fake SNS profile (in addition to suits against the SNSs to force them to provide user information to be used in a future lawsuit against the user). In Texas, an assistant principal sued two students over a MySpace profile that falsely depicted her as a promiscuous lesbian with a sex problem, listed her phone number and her place of employment, and contained obscene comments, pictures and graphics. In Pennsylvania, four students created a profile for their high school’s principal which claimed that the principal participated in vulgar and illegal activities.

The most extreme case to date is United States v. Drew. This case involved a 49-year-old woman who created a fake SNS profile to bully a 13-year-old girl. Lori Drew created a fake profile on MySpace pretending to be a 13-year-old boy. Drew used the profile to befriend, date and then break up with Megan Meier. Afterwards Drew continued to bully the girl until Megan committed suicide. A California jury found the defendant guilty, but the judge vacated the judgment because the statute she was convicted under was unconstitutionally vague. Although the guilty verdict was vacated for procedural reasons, Drew shows that courts and juries are willing to hold people accountable for actions that take place on SNS websites.

Unfortunately legal remedies for victims of fake profiles are limited because tort law has been slow to adapt to acts committed over the Internet. In Draker, an assistant principal tried to sue two of her students because they created a fake profile with her as the subject. Draker filed multiple amended complaints alleging a variety of claims. It is obvious that she could not find a cause of action that protected her from the type of harm she suffered. Even the Texas Court of Appeals acknowledged the lack of a proper cause of action to redress Draker and affirmed the district court’s grant of summary judgment. In the court’s words, “there is, in fact, no remedy for [her] damages.”

In addition to causing embarrassment, people are also figuring out ways to profit from using programs that hijack other peoples’ profiles. This problem is very common and becoming

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10 Id. at 452.
11 Id.
12 Id.
14 Drew, 259 F.R.D. at 468.
15 271 S.W.3d at 321.
16 Id.
17 Id. at 327 (Stone, J., Concurring).
18 Id.
more prevalent since more people are using SNSs. Twenty-one percent of SNS users claim they have been the targets of malicious programs that hijack their profiles. Additionally, a Russian security firm claims that on some days one in 500 links posted on Twitter contain such malicious programs. Many times having a SNS profile hijacked results in damaged hard drives and embarrassment. The hijacker’s acts on behalf of the SNS user are instantaneously public for the user’s friends and family to see. Security experts say SNSs are prime targets for profile hijackers because people implicitly trust the messages they receive from friends.

Profile hijackers often profit from the referral fees they get for directing people to e-commerce websites using false links. The links the perpetrators place on the profile can be purely spam that leads to websites that pay referral fees for traffic, or they can include viruses that damage or destroy hard drives when clicked.

Many victims of fake profiles do not know what legal remedies are available to address this problem. Although the law is still struggling to catch up to this recent development of fake profiles on SNSs, the courts can rely on the tools that have been a part of the American jurisprudence for many years to provide legal remedy to victims of fake profiles. This note will argue that courts should extend traditional misappropriation of likeness or name and violation of right of publicity causes of action to provide an adequate remedy to the person injured by a fake profile.

Part I of the note discusses the background of the SNSs and current law for misappropriation of likeness or name and right of publicity. Part II of the note discusses how courts should extend the causes of action to the SNS context and what defenses may be available. Part II also discusses the rationale and policy reasons behind extending these causes of action to SNS issues. And, finally, the Conclusion provides summary of the argument that the traditional causes of action could be adapted to redress the victims of fake profiles on SNSs.

I. Background

A. What are SNSs?

A SNS is a social networking website that allows a user to create a profile for himself. The user can then connect his profile to other users’ profiles and see the information on the other users’ profiles. A person can join a SNS by creating a profile that usually consists of general information about the user, a photo of the user, a place to see the user’s friends, and other applications depending on the SNS. Most SNS websites are free to join. SNSs originally started as a way to connect with friends and meet new people with similar interests. The original SNS

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20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.; See Draker*, 271 S.W.3d at 327 (Stone, J., concurring) (stating there is often little to no “civil remedy for the injured targets of these internet communications”).
creators adapted the idea of user profiles from dating websites. Most SNSs feature profiles that its users can create for free.

SNSs are becoming more and more popular every month. At the time of writing this article, the three most popular SNSs are Facebook, which was created in 2004, MySpace, which was created in 2002, and Twitter, which was created in 2006. Facebook attracted over 100 million new users in the first 9 months of 2009, which brings its number of regular users worldwide to over 300 million (roughly the same population as the United States of America). The number of SNSs currently operating on the Internet is enormous (one author has compiled over 350 sites on a single list).

Facebook and MySpace revolve around a profile that the user creates. This profile is created by answering questions include descriptors such as age, location, interests, and an "about me" section. These profiles may also encourage users to upload a profile photo. A user’s profile is then linked to other users by becoming “friends” with the other users. Twitter allows its users to become “microbloggers.” Users utilize the website to let their followers know what they are doing.

While each SNS has a different policy regarding the privacy of a user’s profile, all SNSs have a way to view the profile of another user. With such a large number of users on the most popular SNSs and so many ways for the users to express themselves, it is easy to disseminate information to other people who are viewing the users’ profile.

B. What law should be applied?

In 1977, the American Law Institute published the second edition of its Restatement of Torts. Included in the Restatement (Second) of Torts was § 652A, which distinguished between four categories of invasion of privacy. These four categories were delineated in exactly the same way as in a famous article by Dean William Prosser. The categories are: right of privacy, misappropriation of name or likeness, right of publicity, and publicity that unreasonably places another in a false light. This note will focus on the tort of misappropriation of name or likeness, and the tort of violation of right of publicity.

27 Id.
31 Boyd, supra note 3, at 3.
32 See Twitter About Page, http://twitter.com/#about (defining microblogging as updating followers on what the user is doing in a limited amount of characters) (last visited May 9, 2010).
35 Id. at § 652C.
36 Id. at § 652D.
37 Id. at § 652E.
These two causes of action are similar and easily confused. This is partially because of the similarity in proof required to establish both claims. As the court in Berosini held:

The distinction between these two torts is the interest each seeks to protect. The appropriation tort seeks to protect an individual's personal interest in privacy; the personal injury is measured in terms of the mental anguish that results from the appropriation of an ordinary individual's identity. The right to publicity seeks to protect the property interest that a celebrity has in his or her name.

Therefore, this note will distinguish between the causes of action. Both these causes of action are state law claims and may differ from state to state. I will discuss and use the majority view and mention noteworthy minority views.

C. What is Misappropriation of Name or Likeness?

Misappropriation of Name or Likeness is a cause of action that protects an individual from unauthorized use of his identity. Originally this was not a separate tort but rather was a part of invasion of privacy. Dean Prosser differentiated Misappropriation from other forms of invasion of privacy in his article “Privacy.” The California Court of Appeals adopted Dean Prosser's elements for establishing a misappropriation of name or likeness claim in Eastwood v. Superior Court. These elements are: “(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”

1. Use of Plaintiff's Identity

The defendant cannot use the plaintiff's identity. While this concept is obvious when applied to the plaintiff's name or picture, allusions to the plaintiff may be protected as well. The Minnesota district court has upheld protection for a plaintiff's pseudonym as long as it clearly identifies the plaintiff. Other courts have held that a prima facie case for misappropriation can be established if the name used clearly identifies the wronged person. In Hirsch, the defendant advertised a women’s shaving gel and called it “Crazylegs.” Crazy Legs is the well-known

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39 Kathryn Riley, Misappropriation of Name or Likeness Versus Invasion of Right of Publicity, 12 J. CONTEMP. LEGAL ISSUES 587, 588 (2001).
40 Berosini, 895 P.2d at 1283.
41 Prosser, supra note 45.
42 Id.
44 Id. at 417. See also Prosser, LAW OF TORTS § 117 (4th ed. 1971); Newcombe v. Adolf Coors Co., 157 F.3d 686 (9th Cir. 1998) (applying California law).
45 Faegre & Benson, LLP v. Purday, 367 F. Supp. 2d 1238, 1248 (D. Minn. 2005); see also, McFarland v. Miller, 14 F.3d 912, 922 (3d Cir. 1994) (holding a person cannot appropriate a name if the plaintiff can demonstrate his identification with that name).
47 Id. at 382.
nickname for the plaintiff, former professional football player Elroy Hirsch.\textsuperscript{48} Although the defendant did not use Hirsch’s nickname for a commercial advantage, the Wisconsin Supreme Court held the plaintiff had a property right in his identity and the plaintiff’s identity includes his nickname.\textsuperscript{49}

Protection of a person’s identity is not confined to the person’s name or nickname. An image that identifies a person may also be protected from unauthorized use.\textsuperscript{50} In \textit{Motschenbacher}, the plaintiff was a professional racecar driver.\textsuperscript{51} Every professional driver customized the look of his car to be recognizable his fans.\textsuperscript{52} Motschenbacher’s car stood out among other cars because his racing number was the only one set in an oval instead of a circle.\textsuperscript{53} The defendants made an advertisement using racecars including plaintiff’s car.\textsuperscript{54} The defendants changed some aspects of the plaintiff’s car, but not the color, pinstripes and distinctive oval of the plaintiff’s car.\textsuperscript{55} The 9th Circuit noted that “these markings were not only peculiar to the plaintiff’s cars but they caused some persons to think the car in question was the plaintiff’s and to infer that the person driving the car was the plaintiff.”\textsuperscript{56} These distinctive features were enough to allow the plaintiff to succeed on a claim for misappropriation of likeness.\textsuperscript{57}

Since this cause of action is a state claim, state legislatures can limit what constitutes a plaintiff’s identity. For example, the New York cause of action covers only name, portrait, or picture;\textsuperscript{58} the California action covers only name, voice, signature, photograph, or likeness;\textsuperscript{59} and the Massachusetts action covers only name, portrait, or picture.\textsuperscript{60} However, most courts will permit a misappropriation cause of action if the defendant “pass[es] himself off as the plaintiff or otherwise seek[s] to obtain for himself the values or benefits of the plaintiff’s name or identity.”\textsuperscript{61}

2. Use must be for defendant’s advantage

For a successful claim of misappropriation of name or likeness, the plaintiff must prove the defendant has gained in some way. When the defendant uses the plaintiff’s identity to gain economically it is easy for the court to determine that this element has been satisfied. For example, in \textit{Michaels v. Internet Entertainment Group, Inc.}, the defendant distributed an adult video starring musician Brett Michaels.\textsuperscript{62} The defendant was an Internet website that sold subscriptions to customers.\textsuperscript{63} The subscription service had approximately 100,000 members and

\textsuperscript{48} Id. at 130. \\
\textsuperscript{49} Id. at 822. \\
\textsuperscript{50} Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir. 1974). \\
\textsuperscript{51} Id. at 822. \\
\textsuperscript{52} Id. \\
\textsuperscript{53} Id. \\
\textsuperscript{54} Id. \\
\textsuperscript{55} Id. \\
\textsuperscript{56} Id. at 827. \\
\textsuperscript{57} Id. \\
\textsuperscript{58} N.Y. CIV. RIGHTS LAW § 51 (2009). \\
\textsuperscript{59} CAL. CIV. CODE § 3344(a) (1997). \\
\textsuperscript{60} MASS. GEN. LAWS h. 214, § 3A (2005). \\
\textsuperscript{61} RESTATEMENT (SECOND) OF TORTS § 652C. \\
\textsuperscript{62} 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998). \\
\textsuperscript{63} Id. at 828.
its president estimated that up to one-third of the members would cancel their subscriptions if not for the video containing the plaintiff. The court determined the enticement to continue paying a monthly membership fee was enough to satisfy the advantage element of the cause of action.

Courts will still allow the plaintiff to recover under a misappropriation cause of action even if the defendant uses the plaintiff’s identity for non-commercial benefit. The defendant only has to act for his own benefit even if the benefit sought is not a pecuniary one. In Felsher v. University of Evansville, the defendant was a former professor at the University of Evansville. A few years after his termination, the defendant created websites and email accounts pretending to be the University’s President, Vice President for Academic Affairs, and Dean of the College of Arts and Sciences. The defendant used these websites and email accounts for various purposes; each time he pretended to be the official for whom the account was created. Because of these websites and emails, people thought the university officials were supporting Felscher’s view on certain issues. The court held the use of the plaintiffs’ names and reputations was to the defendant’s advantage because it enabled him to pursue a personal vendetta.

Courts have recognized some limits to the benefit element of the misappropriation cause of action. For instance, a Massachusetts district court held that using the name and picture of a person for the purpose of expressing an opinion about that person is not enough of a benefit to sustain a misappropriation claim. The plaintiff in McMann was a real estate developer. An unknown person created a website with McMann’s picture and the creator’s negative opinion of the plaintiff. The court reasoned that stating an opinion of somebody is not enough of a benefit for the speaker to constitute misappropriation of name or likeness. Thus, although there are a few limits on what is considered a benefit, courts have construed the advantage element for this cause of action broadly.

3. Lack of Consent

For liability in a misappropriation action, the plaintiff must prove that he did not consent to the defendant using the plaintiff’s identity. Even if the plaintiff can establish that a prohibited use has occurred, the court will not allow recovery if it believes the plaintiff consented

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64 Id. at 837.
65 Id. at 838.
66 RESTATEMENT (SECOND) OF TORTS § 652C.
68 Id. at 590.
69 Id. at 591.
70 Id. at 600.
72 Id.
73 McMann, 460 F. Supp. 2d at 270.
74 Id. at 268.
75 See Tollefson v. Price, 430 P.2d 990, 992 (Ore. 1967); Cason v. Baskin, 20 So. 2d 243, 248 (Fla. 1944).
to the use of his identity. This consent can be expressly given by the plaintiff or implied from the plaintiff's actions.

In National Football League, the plaintiff had a contract with several cable television stations giving them permission to telecast football games. The agreement provided that any not-sold-out games would not be shown within a 75-mile-radius of the home club's stadium. The defendants used satellite dishes and other technology to intercept the satellite signals of the not sold-out games, and broadcast them in their restaurants and bars (which were within a 75-mile-radius of the stadium). The court held that the broadcast of the intercepted signal was a prohibited use of the signal. However, because the plaintiffs consented to their likenesses being broadcast by the television stations plaintiffs waived their right to sue for misappropriation even though they did not consent to the defendant's use of their images. Therefore a person's consent to the use of his name or likeness may bar a claim even if a person who did not get express consent uses the name or likeness.

4. Resulting Injury

The final element the plaintiff must establish for a claim of misappropriation of name or likeness is that the defendant's actions resulted in an injury. The plaintiff does not have to allege that a certain amount of injury occurred or make an "estimate in dollars and cents [of] the extent of plaintiff's suffering." In Kunz, the defendant took a picture of the plaintiff without her knowledge to use as an advertisement for defendant's business. The trial court dismissed the plaintiff's complaint principally because the plaintiff failed to prove any actual harm. The Kansas Supreme Court reversed the trial court's dismissal of the complaint because the showing of an injury is possible without the showing of a specific loss.

The California Appeals Court adopted Kunz by holding that any invasion of a legal right is an injury, although without proof of material harm the plaintiff may only be entitled to nominal damages. The court in Fairfield held "special damages need not be charged or proven, and if the proof discloses a wrongful invasion of the right of privacy, substantial damages for mental anguish alone may be recovered." The defendant in Fairfield distributed to potential

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78 624 F. Supp. at 10.
79 Id. at 8.
80 Id. at 9.
81 Id.
82 Id.
83 Id.
84 Kunz v. Allen, 172 P. 532, 532 (Kan. 1918).
85 Id. at 532.
86 Id.
87 Id. at 533.
89 Id. at 199 (quoting Reed v. Real Detective Pub. Co., Inc., 162 P.2d 133, 139 (Ariz. 1945)).
clients a list of satisfied customers of its photocopying equipment.\(^9\) The plaintiff was among the list even though he had already returned the product because he was dissatisfied with it.\(^9\) The court held that any violation should be recoverable even if the injury was mental and subjective.\(^9\) The unauthorized use of a person’s name is an actionable invasion of the plaintiff’s rights even if the injury was slight.\(^9\)

The Washington Supreme Court has held that a plaintiff may use the courts to protect the use of his name.\(^9\) In *Hinkle*, a group of people organized a convention in support of a candidate for the 1924 United States Presidential election and called their political party the “La Follette State Party.”\(^9\) Mr. La Follette was a candidate for the Progressive party and was not affiliated with the defendants’ political party.\(^9\) Mr. La Follette sued to enjoin the use of his name by the defendants’ political party.\(^9\) The Court held that other people have no right to use someone else’s name without their consent.\(^9\) The Court reasoned that a person’s reputation and character are inseparably connected with that person’s name.\(^9\) Therefore when a person’s name is used the court will generally presume an injury resulted from the usage.

While it is necessary to show that harm resulted from the defendant’s action, proving harm in a misappropriation of name action can be easy. Many states hold that as long as the plaintiff can prove an unauthorized use of his name, it is not necessary that “it be alleged or proved that such unauthorized use will damage him.”\(^10\) In situations where a person’s name was misappropriated, the court will generally presume the harm. Thus courts will generally presume harm when a person’s name is misappropriated.

**D. What is the Right of Publicity?**

Simply put, the right of publicity is the inherent right in every person to control the commercial use of his identity.\(^10\) This right is generally treated as a property right that a person has in his identity. Although many corporations have SNS profiles, a corporation generally does not have the same right to protect itself from the unauthorized use of its identity.\(^10\) Thomas McCarthy determined that there are three elements that make up the prima facie case of a

\(^{90}\) *Id.* at 85.
\(^{91}\) *Id.*
\(^{92}\) *Id.* at 197.
\(^{93}\) *Id.*
\(^{94}\) State v. Hinkle, 229 P. 317, 317 (Wash. 1924).
\(^{95}\) *Id.* at 817.
\(^{96}\) *Id.* at 318.
\(^{97}\) *Id.*
\(^{98}\) *Id.* at 319.
\(^{99}\) *Id.*

\(^{100}\) *Id.*; See e.g., Steding v. Battistoni, 208 A.2d 559, 561 (Conn. Cir. Ct. 1964) (Connecticut); James v. Dr. P. Phillips Co., 155 So. 661, 663 (Fla. 1934) (Florida); Ryan v. Holm, 52 N.W.2d 406 (Minn. 1952) (Minnesota); Schlessman v. Schlessman, 361 N.E.2d 1347, 1349 (Ohio App. 6th Dist. 1975) (Ohio); and Hinish v. Meier & Frank Co., 113 P.2d 438, 445 (Or. 1941) (Oregon).


\(^{102}\) See Bear Foot, Inc., v. Chandler, 965 S.W.2d 386, 389 (Mo. Ct. App. 1998). A corporation may have several copyright or trademark causes of action.
violation of someone’s right of publicity. These elements are: a) Validity; b) Infringement; and c) Damage.103

1. Validity

The validity element requires the plaintiff to prove that the defendant used or is using the plaintiff’s identity without permission. According to McCarthy, this element is established when “either [the] plaintiff’s own identity is in issue or that plaintiff is an assignee or exclusive licensee of someone else's right of publicity.”104 Courts have characterized and protected a person’s identity as his property.105

In Presley’s Estate, famous entertainer Elvis Presley’s estate successfully brought a right of publicity action against the defendant.106 Presley worked hard to make sure people identified him by his mannerisms, clothing, symbol, and facial expressions.107 After his death, Presley’s estate continued to make money from licenses and royalties from his songs and endorsements.108 The defendant made money by hiring an Elvis impersonator and developing a show copying an actual Elvis Presley stage show.109 During the copied stage show, the defendant’s performer wore the same type of clothing and hairstyle as Presley and had all of the same mannerisms as Presley.110

The Presley’s Estate court defined the right of publicity as “the right of an individual, especially a public figure or a celebrity, to control the commercial value and exploitation of his name and picture or likeness and to prevent others from unfairly appropriating this value for their commercial benefit.”111 The court said the underlying concept was the right to control the commercial exploitation of one’s name and likeness.112

2. Infringement

To establish this element, the plaintiff must prove that the defendant used the plaintiff’s identity without the plaintiff’s consent.113 The infringement of the right of publicity is an invasion of the plaintiff’s substantial property interest. This infringement can be in the plaintiff’s entire act,114 his likeness, or even his style.115

104 Id. at fn. 1.
106 Id. at 1345.
107 Id.
108 Id. at 1348.
109 Id.
110 Id. at 1348-1349.
111 Id. at 1353.
114 See Zacchini, 433 U.S. at 575-578.
115 Presley’s Estate, 513 F. Supp. at 1353.
Additionally, courts have held that a defendant does not need to know that its use was without the plaintiff's consent to be liable for a violation of the plaintiff's right of publicity. In *Welch v. Christmas*, the court held that knowledge, malice and recklessness were not elements of a violation of someone's right of publicity.

### 3. Damages

The right of publicity protects people from losing the benefit of their work put into creating a marketable image. A person can seek a court order to protect and control the commercial value in his or her name or likeness.

The plaintiff in a violation of right of publicity action does not need to show that the defendant made money from the plaintiff’s name or likeness. In *Henley v. Dillard Dept. Stores*, the plaintiff was a well-known musician named Don Henley. The defendant was a department store that created a line of clothing named after the plaintiff without his consent or knowledge.

The defendant argued that plaintiff’s right of publicity claim must fail because the defendant did not generate sufficient revenue to cover the costs of the advertisements. However, the court determined that the plaintiff only has to prove that defendant received a commercial benefit from use of plaintiff’s name or likeness that he would not have received without the plaintiff’s name or image.

Similar to the misappropriation cause of action, the Illinois Court of Appeals held that courts will presume damages if someone infringes another’s right to control his identity, so claimant does not need to prove actual damages. In *Ainsworth*, the plaintiff agreed to appear in an instructional video. However, the defendants also used clips of the plaintiff in a television commercial, which the plaintiff did not agree to. The court held that even if the plaintiff cannot prove actual damages from the defendant’s use of the plaintiff’s identity, the court would presume damages from an unauthorized use. Since the plaintiff could not prove actual damages, the court awarded only nominal damages. However, since courts will generally presume damages from the unauthorized use of a person’s identity, nominal damages are sufficient to satisfy the damage element.

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117 *Id.* at 1319.
121 *Id.* at 589.
122 *Id.* at 595-96.
123 *Id.* at 597.
125 *Ainsworth*, 693 N.E.2d at 512.
126 *Id.*
127 *Ainsworth*, 693 N.E.2d at 514.
E. How are the Misappropriation and Right of Publicity Claims Distinguished?

The interests these two torts are designed to protect can distinguish the causes of action from one another. The Nevada Supreme Court in Berosini court made a distinction between the two torts by recognizing "the difference between the personal, injured-feelings quality involved in the appropriation, privacy tort and the property, commercial value quality involved in the right of publicity tort." The Berosini court simplified the process of making a distinction between the torts. The Court held that generally celebrities have a claim for right of publicity while private persons only have a claim for misappropriation of name or likeness. The private person's typical injury from an invasion of privacy will be mental anguish and embarrassment because of the unwanted use of his name. A celebrity, on the other hand, is concerned about the commercial loss that is inherent in other people using the celebrated name or identity.

A celebrity is more likely to have a property right in his identity than a private individual, since a private person's identity is not likely to be commercially valuable. The right of publicity is the cause of action that is designed to protect a commercial interest in a person's name or identity. This principle was recognized as far back as 1953. Haelan Laboratories has been recognized as the first case to develop the right of publicity. The judge in Haelan Laboratories held the right of publicity was not a cause of action for bruised feelings, but rather for a deprivation of money that can be received for authorizing advertisements.

A violation of a celebrity's right of publicity is properly viewed as a commercial tort. Courts may hold rigidly to the distinction between the two causes of action. For instance, in Berosini the plaintiff was a public figure and celebrity who sued with a misappropriation claim. However, the plaintiff was interested in recovering the money that was gained through the use of his name. The Court did not allow the plaintiff to recover because he pled misappropriation of likeness and not right of publicity.

F. How has traditional tort law been adapted to torts committed over the Internet?

The Internet has only been in existence for a few decades, but it has already changed the way people interact. Numerous legal problems have evolved because of acts committed over the Internet. In many areas, the common law has been slow to catch up to the new problems that have arisen with advent of the Internet. The first case in which the court ruled that a tort was

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128 Facebook.com, supra notes 5-6.
129 Berosini, 895 P.2d at 1283 (emphasis omitted).
130 Id. at 1284.
131 Id.
132 Id.
133 Id. at 1284.
134 Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 866 (2nd Cir. 1953).
135 Id. at 868.
136 Berosini, 895 P.2d at 1284 (quoting McCarthy, THE RIGHTS OF PUBLICITY AND PRIVACY § 10.02, 10-6).
137 Id.
138 Id.
139 Id. at 1285.
committed using the Internet was in Australia in *University of West Australia in Rindos v. Hardwick*.

Internet torts are considerably different from the “bricks and mortar world of traditional civil litigation in which family law and personal injury tort cases predominate.” A major difference between traditional tort claims and Internet tort claims is the nature of injuries suffered by the plaintiffs. Most cases involving the Internet involve financial loss. Also, ninety-seven percent of Internet torts are intentional torts while traditional torts are predominately negligence.

Scholars have recognized that most torts committed using the Internet are publication or informational torts. This is because a person can use chat rooms, web pages, newsgroups, and other technological innovation to make his voice heard. It was recognized, even before SNSs became mainstream, that these technological innovations created the potential for widespread invasions of privacy.

Although the substance of a tort claim is the same for a traditional tort as it is for an Internet tort, there are differences in the two actions. Among the differences are type of remedy sought (predominately money for traditional tort cases but equitable relief in Internet cases) and types of damage (predominately personal injury in traditional cases but economic loss for Internet torts).

Another difference between traditional causes of action and Internet torts is anonymity. To avoid chilling expression, courts generally promote anonymity for people posting on the Internet. Going back to the Tony La Russa example, the identity of the creator of La Russa’s fake profile was unknown because Twitter refused to release the name of the profile’s creator. This causes plaintiffs additional legal hurdles because the person must first sue the SNS to receive a declaratory judgment that the website is required to provide the name and information of the creator. The plaintiff cannot sue the SNS user without his name and address.

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142 Id. at 93.
143 Id.
144 Id.
145 Id. at 92.
147 Rustad, *supra* note 141.
148 For a complete list of the differences see Rustad, *supra* note 141.
150 See MacMillian, *infra* note 220.
152 Although this problem is outside of the scope of this Note, this additional legal hurdle it is worth noting.
G. What Defenses to the Misappropriation and Right of Publicity Causes of Action Exist?

Defendants in both misappropriation and publicity claims can use defenses to justify their behavior. This section will discuss several common law defenses to the two torts. However, courts need to be able to keep up with the challenges the lightning speed development of the internet poses for common-law adjudicative process. This includes adapting defenses from traditional tort actions to acts committed over the Internet.

1. The First Amendment and Free Speech

The First Amendment to the United States Constitution protects a citizen’s right to free speech. The advent of the Internet has created many new problems in First Amendment jurisprudence because the Internet allows anyone with a computer to “become a town crier with a voice that resonates farther than it could from any soapbox.” The guarantee of free speech has been extended to communication over the Internet.

In Doe v. Cahill the Delaware Supreme Court was asked to limit free speech for people who posted information on a website. The plaintiff, a town councilman, sued four anonymous Internet users for information they posted on a website’s chat room. The Delaware Supreme Court decided that undue limits would chill free speech. The Court did determine that Internet posters do not receive First Amendment protection for defamatory speech.

In a misappropriation or right of publicity cause of action, the defendant can argue that his use of the plaintiff’s identity or name was free speech. In Pooley v. National Hole-In-One Ass’n, the plaintiff was a professional golfer who hit a hole-in-one during a golf tournament. The defendant used a video of the hole-in-one and the plaintiff’s name for a promotion without plaintiff’s consent. When Pooley sued for a violation of his right of publicity, the defendant claimed the use of the video and name was an exercise of freedom of speech. The Arizona district court held that “when the purpose of using a person’s identity is strictly to advertise a product or a service, as it is here, the use is not protected by the First Amendment.”

However the Pooley court did acknowledge that non-commercial use of another’s name or likeness may be protected by the First Amendment. Indeed, courts have held that violation of right to privacy claims (including right of publicity and misappropriation) can be overridden by

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153 Name.Space, Inc. v. Network Solutions, 202 F.3d 573, 584 (2d Cir. 2000).
154 See id.
155 U.S. CONST amend. I.
157 Id. at 870 (holding there here is “no basis for qualifying the level of First Amendment scrutiny that should be applied to [the internet].”).
158 884 A.2d 451, 455 (Del. 2005).
159 Id. at 457.
160 Id. at 456 (citing Chaplinsky v. N.H., 315 U.S. 568 (1942)).
162 Id. at 1109.
163 Id. at 1114.
164 Id. at 1113 (emphasis in original).
165 See id.
constitutional concerns raised by the First Amendment's protection of artistic speech. Courts have been consistently unwilling to recognize the right of publicity cause of action where the plaintiff's name or picture was used in connection with a matter of public interest, be it news or entertainment.

2. Creative Works

Courts and state legislatures generally protect a person's right to use an otherwise protected attribute when used in a creative fashion. In Comedy III Productions, Inc. v. Gary Saderup, Inc., the court looked at whether a product containing a celebrity's likeness is "so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness." The plaintiff in Comedy III Productions was the registered owner of all rights to The Three Stooges and their comedy act. The defendant was an artist who drew images of The Three Stooges using charcoal and then created lithographic and silkscreen prints for T-shirts, which he later sold. The court decided that when the value of the work comes from the skill, creativity, and reputation of the artist (and not from the fame of the celebrity) the use of the protected image is transformative. The First Amendment protects the reproduction of these transformative images.

The relevant test for an affirmative defense using the United States Constitution's First Amendment guarantee of freedom of speech is whether the challenged work has significant transformative elements or whether the work's value is derived elsewhere apart from the celebrity's fame. The defense is designed to protect original works of art and encourage an artist to create something new and creative. Comedy III Productions' transformative defense to a violation of a right of publicity claim should be adapted to the acts committed over the Internet.

3. Social Commentary, Criticism, and Parody

Social commentary, criticism, and parody are all defenses to misappropriation and publicity claims. Parody is likely to be the most commonly used defense for the issue this Note is examining.

Parody is a humorous form of social commentary that has been prevalent in literature and culture since the days of ancient Greece. In Cardtoons, L.C. v. Major League Baseball Players

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167 Id. at 121.
168 See 42 PA. CONS. STAT. § 8316(e)(2) and WASH. REV. CODE § 63.60.070(a).
169 21 P.3d 797, 809 (Cal. 2001).
170 Id. at 393-394.
171 Id. at 394.
172 Id. at 810.
173 Id.
174 Id.
175 Id.
176 Id. at 804.
177 Merriam-Webster dictionary defines parody as "a literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule" and dates the usage of parodies to 1598 A.D., http://www.merriam-webster.com/dictionary/PARODY. (last visited May 9, 2010).
Ass'n, the defendant produced trading cards featuring caricatures of professional baseball players. The cards identified the players by using recognizable caricatures to depict them and using similar names, distinctive team colors and commentary about the players. Each of the 130 cards had a statement claiming the cards were parodies and not connected with Major League Baseball.

In ruling for the defendant, the court in Cardtoons rejected two arguments made by the plaintiff that are relevant to the discussion in the note. The first was that the speech in the cards were entitled to less protection from the First Amendment because the cards did not use serious commentary and the speech did not inform. The court held that it is too hard to draw a line between speech that informs and speech that entertains and also the First Amendment made a distinction. The second argument was that because the defendant failed to use a traditional medium of expression the speech was entitled to less protection from the First Amendment. The court rejected this argument citing many instances where the U.S. Supreme Court upheld the First Amendment’s guarantee of freedom of speech and expression despite the use of nontraditional mediums.

The Cardtoons court held that not allowing an exception to the right of publicity cause of action for parodies would amount to an overprotection of intellectual property rights. This overprotection would lead to a monopoly over the raw materials of creative expression and a decrease in the incentive for creative expression.

The causes of action for misappropriation of name or likeness and violation of right of publicity have been extended to acts committed over the Internet. Courts should also extend these causes of action to fake SNS profiles. These causes of action should protect people from the harm that occurs when a person is a victim of a fake profile.

II. Analysis

SNSs present a new and unique problem for the courts. As Tony La Russa found out, fake SNS profiles can cause real harm to the victims. The victims are often left without any protection or legal recourse. For instance, in Draker the defendants created a fake profile for their school’s vice principal on MySpace. Because Draker was not able to plead a viable cause of action, the trial court granted the defendants’ summary judgment. As the Texas Court of

\begin{thebibliography}{9}
\item[177] 95 F.3d 959, 962 (10th Cir. 1996).
\item[178] Id.
\item[179] Id.
\item[180] Id. at 968-969.
\item[181] Id. at 969 (citing Winters v. N.Y., 333 U.S. 507, 510 (1948)).
\item[182] Id. at 969-970.
\item[184] Cardtoons, 95 F.3d at 975.
\item[185] Id.
\item[186] 271 S.W.3d at 321.
\item[187] Id. at 321 (Stone, J., concurring).
\end{thebibliography}
Appeals recognizes in *Draker*, “[t]he citizens of Texas would be better served by a fair and workable framework in which to present [similar] claims.”188 Two traditional causes of action that should be extended to provide this framework are the torts of misappropriation of name or likeness and violation of right of publicity.

**A. How should a court apply the two causes of action to the problem?**

Courts in America have dealt with whether the SNS can be liable for information posted on the website.189 As can be seen in *Drew*, courts are now starting to hold people who use SNSs responsible for the information they post.190 The question courts must answer is how they should apply traditional tort actions to SNS users. When a SNS user creates a fake profile, the courts should look at the problem in one of three ways depending on the situation.

1. **Clearly Fake Profile**

   The first situation is when a user creates an obviously fake profile. For example, Facebook profiles exist for the Earth and cartoon Captain Planet.191 When this situation occurs, the court should dismiss a claim for misappropriation of likeness or a claim for right of publicity.192 Using McCarthy’s elements of a right of publicity claim193 and the elements of misappropriation laid out in *Eastwood*,194 it is clear that no recognizable injury results from the creation of profiles for these entities.195 Anybody can create a profile for the Earth. Also, there is no recognizable harm since these entities are not real people.

2. **Non-celebrity Profile Subject**

   The second situation occurs when a SNS user creates a fake profile for a non-celebrity. Traditionally non-celebrities have not been allowed to have a viable claim for a violation of right of publicity. Recall that the court in *Haelan Laboratories* distinguished emotional harm from economic harm.196 Therefore, the plaintiff in a right of publicity claim must show that the defendant’s actions have caused a recognizable commercial loss.197 It is possible that a non-celebrity could prove commercial loss caused by the use of his image or identity. However it is not very likely that a non-celebrity will have enough of a protectable property interest in his identity. Therefore, courts should apply the traditional tort of misappropriation of name or likeness when a non-celebrity sues because of a fake profile on a SNS.

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188 *Id.* at 327.
191 Facebook.com, *supra* notes 5-6.
192 Whether a claim for copyright infringement by the cartoon character’s creator would be sustainable is outside the scope of this Note.
195 For a discussion of the elements of misappropriation and publicity claims refer to Part b. 1 and 2 respectively.
196 202 F.2d at 868.
197 *See* Part b. 2.
Courts should use the same elements that the California court put forth in *Eastwood*.198 These elements lend themselves to fake profiles created for non-celebrities. When a SNS user creates a fake profile he uses the plaintiff’s identity. Most SNSs have profiles that include pictures, interests and an “about me” section where the user can write anything about the person for whom the profile was created.199 These applications can be used to post information about the subject of the profile.200

The appropriation of a plaintiff's name or likeness will be to the defendant's advantage. This advantage can be, but does not have to be, commercial.201 The SNS user can benefit in many ways from creating a fake profile. One plausible benefit is any enjoyment the user gets out of pretending to be someone else. Additionally, it is possible for some people to make money on SNSs and this money is usually tied to how many people look at the person’s profile.202 Creating a sensational profile for a well-known person can generate many profile views.203 A profile with many viewers can have links for the viewers to click on which will redirect them to a different website.204 Some companies pay people to increase traffic on their websites.205

The lack of consent to create a fake profile is likely to be an easy element to prove. As a practical matter, a person usually does not give consent for another person to create a fake profile. These fake profiles are commonly used to trick people into thinking that the user was the person for whom the profile is created.206 Therefore it is difficult to think of a reason why a rational person would give another person consent to create a fake SNS profile.

The final element of a misappropriation claim is that the action results in injury. As previously mentioned, being the victim of a fake SNS profile can cause humiliation and emotional injury.207 Sometimes, a more concrete injury can result. For example, the plaintiff in *Draker* had significant damage to her personal and profession reputation due to the comments made on the profile.208 These comments affected her personal and professional life enough so that she decided to sue two of her students.

The elements of a misappropriation claim can and should be applied to situations when fake SNS profiles are created for non-celebrities. The elements from Dean Prosser’s Law of Torts are accepted as the elements of a misappropriation of name or likeness claim.209 The court deciding a misappropriation claim brought by a non-celebrity will have to apply the facts of the specific case to the elements.

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198 149 Cal.App.3d at 417.
199 Boyd, supra note 3.
200 Id.
201 Prosser, supra note 44.
202 See Stone, supra note 19.
203 Id.
204 Id.
205 Id.
206 See generally Felscher v. University of Evansville, 755 N.E.2d 589 (Ind. 2001); supra Part b. 3.
207 See Stone, supra note 20
209 Eastwood v. Superior Court, 149 Cal. App. 3d 409, 417 (1983); Prosser, supra note 44.
3. Celebrity Profile Subject

The final situation occurs when a fake SNS profile is created for a celebrity. This situation is the most likely to occur and the most likely to upset the victim. Celebrities spend time, money, and energy cultivating their public image. That image can be ruined if people think the celebrity is posting inflammatory material on his SNS profile. Luckily, the elements of a right of publicity apply to this situation. The right of publicity cause of action is the most logical cause of action for celebrities since they are likely to be concerned with the commercial viability of their images. This is the exact interest that the right of publicity protects.\footnote{210}

The elements of a right of publicity claim are validity, infringement and damage.\footnote{211} When a SNS user creates a fake profile for a celebrity, validity will be relatively easy to prove. This element is proven by the fact that the profile was created but the celebrity did not create it. Proving this element becomes more difficult when the creator of the SNS profile is anonymous.

The infringement element is also relatively easy to prove. The person for whom the profile is created has to prove that the profile’s creator used the victim’s identity or image in a way that is identifiable to the average person without the plaintiff’s consent.\footnote{212} Since SNS profiles include pictures, personal information and “about me” sections, the celebrity in the profile should be easily identifiable to the average person. In fact, creating an easily recognizable profile is likely the purpose of creating the fake profile.

The most difficult element for a celebrity to establish in a right of publicity claim in this context is the damages. The celebrity is required to prove that the fake profile will harm the celebrity’s marketability.\footnote{213} The court in the SNS context will have to determine whether the profile has hurt the commercial value in the celebrity’s identity.\footnote{214} However, a celebrity cannot sue for a violation of the right of publicity if there was no commercial harm.\footnote{215} It will be straightforward to establish this harm if the damage from the profile causes the person to lose commercial advantages, such as advertising contracts or product endorsement deals.

Damage will be more difficult to establish when the celebrity does not lose a tangible commercial advantage. As discussed above,\footnote{216} economic harm to a right of publicity plaintiff does not need to be quantifiable.\footnote{217} The \textit{Henley} court held that right of publicity plaintiffs do not have to prove a quantifiable economic harm as long as the plaintiffs can prove that the defendant received some economic benefit.\footnote{218} Returning to the Tony La Russa example, viewers thought

\begin{footnotes}
\item[210] McCarthy, \textit{supra} note 103, at § 1:3.
\item[211] \textit{Id.} at § 28:7.
\item[213] Bear Foot, Inc. v. Chandler, 965 S.W.2d 386, 389 (Mo. Ct. App. 1998).
\item[215] Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2nd Cir. 1953) (stating that the right of publicity is for monetary loss not “bruised feelings”).
\item[216] Part b. 4.
\item[218] \textit{Id.}
\end{footnotes}
La Russa was making outrageous comments about players and the team on his profile.\textsuperscript{219} La Russa came under fire for these comments, which upset some people within the Cardinals organization.\textsuperscript{220} La Russa eventually sued Twitter to shut down the account and give him the name of the profile’s creator. La Russa and Twitter settled the matter outside of court.\textsuperscript{221}

There are many ways a creator of a fake SNS profile can benefit economically from other SNS users thinking that a celebrity is the person posting the information on the profile.\textsuperscript{222} Many fake profile creators receive payment from commerce website operators for increasing traffic on their websites.\textsuperscript{223} While it is possible to prove that the fake profile creator was using a program to make money, it will be difficult for a plaintiff to prove damages.

\textbf{B. How will the defenses be applied to creators of fake profiles?}

Like defendants in traditional misappropriation and publicity claims, creators of fake profiles will have certain defenses to liability. While defendants to traditional publicity and misappropriation claims have many defenses at their disposal, the fake SNS profile creators will not be able to avail themselves of all defenses.

The first defense available to creators of fake SNS profiles is the free speech that the First Amendment to the U.S. Constitution protects. The SNS user can conceivably argue that the creation of the profile is an expression of their freedom of speech. The court in \textit{Pooley} acknowledged that non-commercial speech is entitled to First Amendment protection.\textsuperscript{224} Therefore, a person who is not gaining economically from the fake profile he created can argue that the profile is entitled to heightened First Amendment protection.

Defamatory statements are not entitled to First Amendment protection from the courts.\textsuperscript{225} Therefore, if the plaintiff can prove that any statements made on the fake profile were defamatory, the plaintiff’s right of publicity or misappropriation claims may not be barred by the First Amendment.

The second defense available to a creator of a fake SNS profile is the creative works doctrine. This doctrine protects people who use otherwise protected information, images or things to create something new.\textsuperscript{226} The court must consider whether the challenged work has significant transformative elements or whether the work’s value is derived elsewhere than from the original person or creator’s fame.\textsuperscript{227} Both elements of the \textit{Comedy III Productions} test are

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\textsuperscript{220} Douglas MacMillian, La Russa vs. Twitter Tests Web Anonymity, BUSINESS WEEK, June 10, 2009 http://www.businessweek.com/technology/content/jun2009/tc2009069_767898.htm.
\textsuperscript{221} Id.
\textsuperscript{222} See Stone, \textit{supra} note 19.
\textsuperscript{223} Id.
\textsuperscript{224} Pooley v. National Hole-In-One Ass’n, 89 F.Supp.2d 1108, 1114 (D. Ariz. 2000).
\textsuperscript{225} Id.
\textsuperscript{227} Id. at 810.
\end{footnotesize}
relevant in the context of this note. Protected materials or images that are used in connection with a SNS profile will be protected from liability if they are sufficiently transformative. For example, if a fake Facebook account is created for a movie star and the SNS user updates the account with copyrighted images from the star’s movies, the defense will likely not apply. However, if the user edits an image or posts original information a court may find that the editing transformed the image sufficiently enough to qualify it for protection from the creative works doctrine.

A SNS user may be liable for creating a profile that is only valuable because of the subject of the profile. However if the creator adds value to the profile that goes beyond the value created by the subject, the creator may be able to use the creative works defense. This can happen for celebrities and non-celebrities alike. For example, if a user creates a Twitter account pretending to be a subject’s friend and others read the account because they think the friend is updating the account, the creator may be liable. However if the creator makes interesting and humorous insights on the account and people read the updates to read those insights, the SNS user created the value of the account and not the subject. This creates a tension because the user’s insights about the profile’s subject will likely be transformative but those insights may increase the subject’s desire to sue.

Finally, a SNS user can avail himself of the defense of social commentary, criticism and parody. As discussed above, in the context of a fake SNS profile the defense of parody seems the most likely to be used. The Cardtoons court held that an exception to misappropriation and publicity causes of action for parodies is necessary to avoid an overprotection of intellectual property rights. This defense would lead to an incentive for creative expression. Facebook does not have an impersonation or parody policy; the terms of service provide that the user may not “post content or take any action on Facebook that infringes or violates someone else’s rights or otherwise violates the law.” However, some SNSs actually allow parody profiles to be created. For instance, Twitter does not allow profiles that “[do] or [are] intended to mislead, confuse, or deceive others.” Twitter does, however, allow parody accounts that a reasonable person would know is a joke. These policies show that SNS creators contemplated parody profiles and made decisions about whether or not the creator of a fake profile should be punished.

Therefore a SNS user who creates a fake Twitter account can argue that he should escape liability because he is acting within Twitter’s own rules. Although Facebook does not have an

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228 Id.
229 Id.
230 See Cardtoons, 95 F.3d at 969.
231 Id. at 975.
232 Id.
explicit parody defense, a creator of a parody Facebook account should be able to use the parody defense to a misappropriation or publicity claim.

C. Policy reasons behind extending the law

The victim of a fake SNS profile feels real harm. In the United States, when a victim is harmed by the acts of another person the victim has a right to be made whole again. Therefore the courts need to extend causes of action that protect SNS users because, as the Texas Court of Appeals acknowledged, “[t]here appears to be little civil remedy for the injured targets of these Internet communications.”236

In Drew, it could be seen that the creation of fake SNS profiles can lead to harmful results.237 In the 1980’s the United States Congress enacted the Computer Fraud and Abuse Act of 1986, which was used by the court in Drew to hold the defendant liable.238 The Texas State Legislature followed the U.S. Congress’ lead by enacting an online harassment statute.239 This statute makes it a class three felony to “[use] the name or persona of another person to create website or post message on social networking site.”240

However, victims of fake profiles that do not qualify for protection under the Computer Fraud and Abuse Act of 1986 are often left without legal recourse. For instance, the victim in Draker was injured and asked the courts for help in redressing her injuries.241 Left without a suitable cause of action, the plaintiff in Draker was unable to sustain a lawsuit against her attackers.242 The Draker court even acknowledged that the plaintiff’s harm is not unique, but there is no remedy for her damages.243

Extending the misappropriation of likeness and right of publicity causes of action ensures that victims will be able to recover for their injuries. Extending the causes of action to cover SNS users will create liability for acts that are would be redressable if not committed over the Internet. A person should not be afforded less protection just because his injury occurred over the Internet. Protecting SNS users from unwanted use of their names or likenesses requires an extension of the traditional causes of action of misappropriation of name or likeness and violation of right of publicity to acts committed on SNSs.

Conclusion

Since its creation, the Internet has revolutionized many areas of everyday life. It has enabled friends to stay connected with the click of a button. The creation of SNSs has enabled people to convey information with friends and large numbers of other people. While these websites have plenty of beneficial purposes, there are also potential liabilities lurking.

239 TEX. PENAL CODE §33.07 (2009).
240 Id.
241 271 S.W.3d at 318.
242 Id.
243 See id. at 327 (Stone, J., concurring).
Communication can now reach many people with the click of one button, effectively giving every person with a computer access to a soapbox.²⁴⁴

Users of SNSs deserve to have their identities protected in the same way that people deserve such protection in everyday life. However, most jurisdictions do not protect users of SNSs.²⁴⁵

Courts and state legislatures should protect the identities of SNS users. These protections can be in common law form or in the form of a statute.²⁴⁶ Two specific forms of tort protection that should be extended to SNS users are the misappropriation of name or likeness and the right of publicity. Extension of these torts is necessary to protect SNS users from becoming the victim of a hurtful fake SNS profile. The elements of both torts can be adapted to the SNS context. Both causes of action require the defendant to use the plaintiff’s name or likeness without the plaintiff’s permission. In both causes of action, the act must benefit the defendant in some way. And in both causes of action, the plaintiff must have a recognizable harm or injury because of the defendant’s actions.²⁴⁷

When a person is the victim of a fake profile, the profile’s creator uses the plaintiff’s name or likeness as the subject of the profile. The subject of the profile is unlikely to have given consent. The profile creator can benefit from the profile in numerous economic and non-economic ways. Whether it is because of a loss of commercial opportunities or emotional harm, the harm to the victim of the profile is real and often profound.

Simply because the harm occurs using an Internet-based medium does not mean the victim deserves less protection from courts and legislatures. The vice-principal in Draker does not deserve to be shut out from the legal system simply because tort law has failed to evolve to the modern world fast enough.²⁴⁸ Courts and legislatures in the United States should protect SNS users in the same way they protect the victims of misappropriations of name or likeness and right of publicity violations in the traditional context.

²⁴⁶ See TEX. PENAL CODE §33.07, supra n. 239.
²⁴⁷ See Part b. 2 and Part b. 3.
²⁴⁸ 271 S.W.3d at 327 (Stone, J., concurring).