My Instagram Photos On a Billboard
The systematic (mis)appropriation of consumer’s social media posts for commercial use

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Alison Chang uploaded a photograph of herself on to a popular photo sharing website called Flickr. Unbeknownst to Alison, Virgin Mobile grabbed her photograph from Flickr and used it in a marketing campaign to advertise its mobile telephone plan. Virgin superimposed the slogans “Dump your pen friend” and “Free text virgin to virgin” over Alison’s photograph. Subsequently, Virgin used the advertisement featuring Alison Chang on bus stops throughout Australia—entirely without notifying and seeking permission from Alison. See Figure 1.

(Figure 1, showing Alison’s Flickr photo and the Virgin Mobile advertisement.)

Until recently, advertisements exclusively featured professional actors and models, celebrities, athletes, and well-recognized public figures promoting and endorsing a product or service. Advertisers soon realized that they can leverage social media and show real people using their products to convince people to purchase their products and enforce their brand identity. Thus, advertisers began to utilize the bandwagon effect for their marketing campaigns by sending the message: your friend is using our product and so should you. This method of advertising infringes upon an individuals’ right of publicity when an advertiser takes their social media content—such as their photograph and name—and uses it in conjunction with the offer or

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sale of a product or service. This action has the effect of placing a consumer in a position where they appear to endorse a product or service. Indeed, this conduct by advertisers is actionable by consumers if the consumer fails to provide their permission.

I. Where does the right of publicity come from?

The Restatement Second of Torts does not define this right as the right of publicity, but calls it a misappropriation of one’s name or likeness. The Restatement of Torts defines it as:

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.²

Although the Restatement defines the tort of misappropriation as a privacy right, this classification differs from state to state. For example, the Illinois legislature considers the right of publicity a property right³ whereas Wisconsin considers it a right of privacy.⁴ Furthermore, the right of publicity has been used as an intellectual property right where celebrities seek protection over their image so that no one else (but they and their family members) can profit from their identity. Nevertheless, the right of publicity does not only protect famous people but it extends to non-celebrities too.

II. Intro To Different State Laws

Many states have codified the common law right of publicity. Different states approach approaches the right of publicity differently.

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² Restatement (Second) of Torts § 652C (defining appropriation of name or likeness).
³ 765 ILCS 1075/1 (the Illinois Right of Publicity Act can be found under the property section of the Illinois Compiled Statutes).
⁴ W.S.A. 895.50 (the Wisconsin Statutes Annotated call this section the “right of privacy”).
The Illinois Right of Publicity Act (“IRPA”) recognizes that individuals have the “right to control and to choose whether and how to use an individual's identity for commercial purposes.” Furthermore, “[a] person may not use an individual's identity for commercial purposes during the individual's lifetime without having obtained previous written consent from the appropriate person.” Thus, in order to establish a claim under the IRPA, a plaintiff must prove an “appropriation of one's name or likeness, without one's consent, for another's commercial benefit.”

The IRPA defines “commercial use” as the “public use or holding out of an individual's identity (i) on or in connection with the offering for sale or sale of a product, merchandise, goods, or services; (ii) for purposes of advertising or promoting products, merchandise, goods, or services; or (iii) for the purpose of fundraising” and “identity” as “any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener, including but not limited to (i) name, (ii) signature, (iii) photograph, (iv) image, (v) likeness, or (vi) voice.”

The California legislature codified the common law right of publicity as and imposes liability on “[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, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent.” A plaintiff must prove all of the following in order to state a right of

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5 765 ILCS 1075/10 (recognizing the right of publicity).
6 765 ILCS 1075/30 (prohibiting the unauthorized use of one identity for commercial use).
8 765 ILCS 1075/5 (defining the term “commercial use” as used in the act).
9 Id. (defining the term “identity” as used in the act).
publicity claim: “(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.”

11 Unlike the IRPA, which requires “written consent”, the California right of publicity statute requires only “consent” that may include oral or implicit consent. The diverging definitions can lead to different results in litigation.

III. What is Happening on Social Media

Companies and brands seek to reinforce their brand identity and ultimately sell more products and increase profits. One way that companies have been trying to accomplish this goal is through social media such as Instagram and Facebook. Some companies seek out their customers and feature them on social media accounts and even on their company website as advertisements for their brands and products—ultimately turning their identity into an advertisement for the company. Mark Zuckerberg, the CEO of Facebook, explained that “[n]othing influences people more than a recommendation from a trusted friend” and that “[a] trusted referral is the Holy Grail of advertising.” Facebook’s COO Sheryl Sandberg further states that “[m]aking your customers your marketers” is “the illusive goal we’ve been searching

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Unfortunately, Facebook’s executive’s ideal has been exploited by advertisers and consumers’ activities have been turned into involuntary endorsements and testimonials for brands and products.

Instagram, Facebook’s subsidiary, is a popular photo-sharing service where users take photos through the mobile application, edit the photos by applying filters, and upload them for their friends to see. Pertinent to this discussion, Instagram users may include important metadata as part of the uploaded photograph. Instagram users may include the location at which they captured the photograph, people who appear in the photo, and a caption to the photo. The captions can include “hashtags” which are words or phrases by which Instagram categorizes content. Users can browse other photos tagged with that hashtag. For example, a user who includes a “#chicago” hashtag to their photo can click on the hashtag and browse all other photos bearing the same hashtag.

Moreover, Instagram allows users to signal other accounts in their photos’ descriptions and comments. When an Instagram user signals another user or account, that account receives a notification and can navigate to the photograph. For example, including “@exampleUser” in a photo or a photo comment will generate a notification for the account with the username “exampleUser.” That user then can then view the photo under which his or her name was included. This feature is often used by Instagram users to bring content to their friends’ attention. This feature is not exclusive to Instagram, but other social networking services like Twitter use this to mention content at other users.

Instagram and Facebook users—especially those with accounts focused on fashion and lifestyle—often indicate what products appear in their photos. Social media users do so by

\[15\text{ Id.}\]
creating hashtags with the brand’s name or product or by tagging a company in a photo. The problem occurs when an Instagram user indicates a brand or company, and that company features that Instagram user’s photo *automatically* by using a hashtag corresponding with a brand or signaling a brand in the photo’s description. Instagram users only *identify* the products that appear in their photographs and did not give consent to the brand to use their photographs.

*Social Networks Offer APIs to Advertisers*

Social networks, like Instagram, offer APIs or Application Program Interfaces which are a set of routines and protocols for interacting with a service. For instance, Instagram’s API allows a software developer to gain access to Instagram’s database of photographs and to extract data from it. In a more practical sense, a software developer can query data from Instagram by the use of an API to retrieve data as defined by the search parameters, such as all photos uploaded by a specific user or the most recent photos uploaded to Instagram with a specific hashtag. On Twitter (as on Instagram) for example, the software developer can search and retrieve all posts from a specific user or search on the entire Twitter social network for keywords and phrases. To gain access to data through an API, a software developer must register with the social network and receives unique API credentials. Typically, access to social media API is free.

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19 *Instagram Developer Documentation*, https://www.instagram.com/developer/authentication/ (last visited Dec. 12, 2016) (requiring developers to authenticate their API requests with a unique “access token”).
Companies have been using social media APIs specifically to use photos taken by their consumers with mentions of their products and feature these photographs in their advertising campaigns. Companies program their websites or mobile applications (for iOS and Android alike) to automatically retrieve photographs from social network accounts, by using the social network’s respective API (e.g., Instagram’s API), by its predetermined parameters. These parameters can range from any mention of the company’s name to specific predetermined hashtags or phrases. Companies who share all Instagram photos with mentions of their business on their websites—without obtaining any consent—can risk lawsuits by entire groups of Instagram users appearing on their site.

To illustrate, a Cook County, Illinois, resident filed a class action lawsuit against Groupon for misappropriating her photographs. Groupon is an e-commerce website that sells discounted coupons for local businesses and restaurants in what it calls “Deals.” As part of the Groupon Deal, Groupon displayed Instagram photographs that were taken and “tagged” at the location associated with the Groupon Deal. Specifically, Christine Dancel alleged that she took a photograph at Philly G’s restaurant and uploaded it to her Instagram account. Subsequently, “Dancel tagged location data to her photograph that indicated she has taken the photograph at ‘Philly G’s’ restaurant.” Groupon then requested her photograph from

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23 Id.
24 Id.
25 Id.
26 Id.
Instagram, and other photographs taken at this restaurant, and displayed them directly on the Deal page. Worst yet, Groupon requested Instagram photos \textit{automatically} and without Dancel’s consent—or the consent of any other person appearing on Groupon Deal pages.\footnote{Id.}

\textit{Third Party Software that Accesses Social Network APIs}

While some companies provide a direct stream of all tagged photographs from social media directly on their website, some companies use third party software to monitor all mentions of their company and to obtain the proper consent. Software like Curalate and Olapic function by obtaining all photographs from Instagram based on pre-determined parameters, such as mentions of a brand name, specific hashtags, or locations, and allow the brand to select and post the pictures that they wish. Furthermore, brands could use this software to overlay information on top of the picture such as the name of the product and a link to the product page.\footnote{Reveal - Shoppable Content for Visual Marketing | Curalate https://www.curalate.com/product/reveal/ (last visited Dec. 12, 2016) ("To drive traffic from images, brands often resort to putting blocks of text links below them. Reveal offers a simpler way for consumers to discover the products, services, or content shown in your images. Just hover to discover").} Most importantly, this software can automatically comment on the Instagram user’s photograph and ask consent to use the photograph for marketing use once the user responds with the appropriate hashtag or phrase.\footnote{Brands can program their software to display photographs that contain multiple hashtags: the hashtag granting consent \textit{and} any brand specific hashtags aimed at the brand.} Only after the software recognizes that the Instagram user responded with the appropriate hashtag, for example, it will post the photograph on its website.

To illustrate, Urban Outfitters uses Curalate’s software.\footnote{This is evident after examining the Urban Outfitter website’s source code that mentions “Curalate.”} When an Instagram user mentions Urban Outfitters in any way on Instagram, Urban Outfitters can view the photograph,
approve it, and add product information, so that it appears on its website. The Instagram user “blessababe” posted a photograph of herself on Instagram holding a jar of facial scrub with the caption “huge shoutout to @sammykeller and @urbanoutfitters beauty for this ethereal shot #uobeauty” and utilized a hashtag. Unfortunately, Urban Outfitters never commented on the Instagram user’s photograph to obtain consent (albeit Urban Outfitters may have reached out to the Instagram user to obtain consent in any other fashion). See Figure 1.

(Figure 1, showing the Instagram user blessababe’s Instagram post.)

Back on Urban Outfitter’s website, the company posted the same photograph from the Instagram user’s profile. Urban Outfitters even added a product photo and a link to the product the

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Instagram user purportedly is holding in her hands: “Fig + Moss Whipped Pink Salt Scrub.” See Figure 2.

(Figure 2)

IV. Commercial Use

The First Amendment permits more regulation of commercial speech than it does of other, non-commercial, speech. The Constitution does not protect every type of speech because “‘not all speech is of equal First Amendment importance,’ certain categories of speech receive a lesser degree of constitutional protection.”32 The First Amendment gives commercial speech

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(especially by commercial entities) less protection than non-commercial speech. While commercial speech receives some limited protections by the First Amendment, it may be subject to more stringent regulations than non-commercial speech.33

As exemplified by the case law below, companies who use consumers’ social media profiles in connection with their products in any ways—even when not directly selling any product or service—are using these photographs for commercial use. After all, companies who make any mention of their product or brand are doing to promote a brand identity. Indeed, marketing and advertising has become so advanced that companies do not have to offer for sale a specific product in an advertisement, instead, companies rely on a technique called “brand advertising” where they attempt to create awareness of the brand and its values among the public.34 Using photographs obtained from social media in conjunction with any branding campaign—and not necessarily offering a product for sale—constitutes commercial use.

In an Illinois right of publicity case, the Seventh Circuit analyzed advertisements with elements of both commercial and non-commercial speech. In Jordan v. Jewel Food Stores, Inc.,35 Jewel created an advertisement congratulating Michael Jordan for the admission to the Basketball Hall of Fame. The advertisement included Jewel-Osco’s logo, slogan, and a photograph of a pair of basketball shoes with Michael Jordan’s jersey number “23.”36 The

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33 See Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989) (“Our jurisprudence has emphasized that commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.” (internal quotations omitted)).
35 Jordan v. Jewel Food Stores, Inc., 743 F.3d 509 (7th Cir. 2014).
36 Id. at 512 (describing Jewel’s advertisement).
district judge found that Jewel’s advertisement congratulating Jordan was not commercial use of Jordan’s identity, explaining that “readers would be at a loss to explain what they have been invited to buy” especially since Jewel is a grocery store and does not sell basketball shoes.  

On appeal, the Seventh Circuit acknowledged that an advertisement need not encourage the sale of a product to be considered commercial:

> We know from common experience that commercial advertising occupies diverse media, draws on a limitless array of imaginative techniques, and is often supported by sophisticated marketing research. It is highly creative, sometimes abstract, and frequently relies on subtle cues. The notion that an advertisement counts as “commercial” only if it makes an appeal to purchase a particular product makes no sense today, and we doubt that it ever did. An advertisement is no less “commercial” because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service. Applying the “core” definition of commercial speech too rigidly ignores this reality. Very often the commercial message is general and implicit rather than specific and explicit.

Indeed, the Seventh Circuit found that Jewel’s advertisements sought to enforce the company’s brand identity because “Jewel's ad has an unmistakable commercial function: enhancing the Jewel–Osco brand in the minds of consumers.”

The Jordan court’s ruling suggests that companies who feature photographs of their clients on social media are enhancing their brand’s identity (even if companies do not directly sell a products their advertisements), and thus their conduct counts as “commercial use.” Moreover, a company who “shares” or reposts a social media user’s photograph on its website or social media account would be engaging in commercial speech the same way. Although a social media page does not necessarily directly sell a company’s product, the purpose of its website and

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37 Id. at 518-519.
38 Id. at 518 (explaining “commercial use” in light of modern marketing techniques).
39 Id. (concluding that Defendant Jewel-Osco’s advertisement served an “unmistakable commercial function”).
social media accounts is to enforce brand identity and eventually lead consumers to make a purchase.

Part of the “commercial use” analysis depends on the proximity of an individual’s identity to the advertisement. Only usage of social media content that has itself been turned into an advertisement satisfies the element of commercial use. Usage of an individual’s identity in content adjacent to an advertisement, however, does not necessarily create commercial use. For example, placing an advertisement adjacent to an individual’s social media post (like an Instagram photo) would probably not qualify as commercial use, whereas, taking that social media post and superimposing a company’s logo would. The distinction is further clarified and supported by case law below.

Placing an advertisement on a person’s profile does not turn the profile into an advertisement. In a class action filed against an attorney directory website, Avvo, plaintiff alleges that Avvo violated the IRPA by using her identity for commercial purposes.\(^{40}\) Avvo allows attorneys to create their profiles to be listed on the website for free, and charges two levels of advertising to its members. The first level is called “Avvo Advertising” and allows Avvo members to list their profiles in “Sponsored Listings” that appear on the profile pages of those members who practice in the same geographic region and/or the same practice area. In other words, Avvo members who pay for “Avvo Advertising” appear on the profile pages of their competitors. For an additional fee, attorneys can purchase “Avvo Pro” that eliminates advertisements on their profile page, including the “Sponsored Listings.”\(^{41}\)


\(^{41}\) Id. (explaining Defendant Avvo’s membership plans).
Defendant Avvo successfully argued that its directory of attorneys is nothing but a “computerized version of the paper ‘yellow pages’ listings” and therefore should receive full First Amendment protection.\textsuperscript{42} Indeed, Defendant points out that Plaintiff’s name (or any other “identity” as defined by the IRPA) does not appear in the advertisement.\textsuperscript{43} And thus the District Court refused to accept Plaintiff’s theory that an advertisement placed on a person’s personal profile is a “commercial use” under the IRPA.\textsuperscript{44}

Indeed, when a company places a consumer’s name inside the advertisement and turns his or her name, image, or photograph into an advertisement, the consumer’s identity is used for a commercial purpose. In \textit{Fraley v. Facebook, Inc.},\textsuperscript{45} Facebook began using its users’ names in paid advertising called “Sponsored Stories.” When a Facebook user used the “like,” “post,” “comment,” and “check-in” feature on Facebook relating to an advertiser, Facebook would create a “Sponsored Story” featuring the Facebook user’s name and likeness.\textsuperscript{46} In this case, the Plaintiff “liked” Rosetta Stone’s Facebook page to receive a free demo of the software. Thereafter, Facebook created a “Sponsored Story” advertisement featuring the Plaintiff’s name and her likeness for Rosetta Stone, publicizing that Plaintiff “likes Rosetta Stone.”\textsuperscript{47} Plaintiff brought a class action against Facebook alleging a violation of California’s right of publicity statute. Facebook argued that a Facebook “like” is akin to expression of a consumer opinion and

\begin{footnotes}
\item[42] \textit{Id.} at 3 (citing \textit{Dex Media West, Inc. v. City of Seattle}, 696 F.3d 952, 962 (9th Cir.2012) (concluding that “publications like yellow pages directories and newspapers receive full First Amendment protection not only because their content is somehow inextricably intertwined, but because, as a threshold matter, they do not constitute commercial speech.”)).
\item[44] \textit{Id.}
\item[45] \textit{Fraley v. Facebook, Inc.}, 830 F. Supp. 2d 785 (N.D. Cal. 2011)
\item[46] \textit{Id.} At 791 (explaining Facebook’s “Sponsored Story” feature).
\item[47] \textit{Id.} (describing Facebook’s use of Plaintiff’s name as an advertisement for Rosetta Stone).
\end{footnotes}
therefore permissible under the “newsworthiness” exception of California’s statute, which tracks First Amendment speech protections.\textsuperscript{48} The Court concluded that even “newsworthy” actions may be subject to liability if “published for a commercial purpose rather than a journalistic purposes.”\textsuperscript{49}

In summary, the “commercial use” element of the right of publicity turns almost any speech by commercial entities designed to promote their brand into commercial speech. Most importantly, the proximity of the consumer’s names, identities, and photographs to the commercial speech determines whether there was “use” of the identity commercially. As long as the consumer’s identity becomes a part of the advertisement, then the company uses the consumer’s identity commercially.

V. Types of Consent

Provided that a company has used an individual’s identity for a commercial use, the individual still has to provide the appropriate consent. Individuals can either provide express written consent or consent implicitly through their conduct. Nevertheless, it is important to keep the scope of the consent in mind. An agreement by a consumer to allow a company to use only one of his or her Instagram photographs, for example, does not extend permission to use multiple photographs from Instagram nor from other social media accounts.

I. Implied Consent

In \textit{Perkins v. LinkedIn Corp.},\textsuperscript{50} plaintiff filed a class action lawsuit against a social network aimed at professional networking, LinkedIn, for sending invitations including the plaintiff’s

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\textsuperscript{48} \textit{Id.} at 804 (explaining Facebook’s argument that a Facebook “like” is an expression of opinion and therefore newsworthy to the Facebook user’s friends).

\textsuperscript{49} \textit{Id.} at 805 (concluding that the California right of publicity statute does not exempt “newsworthy” speech from liability when it has commercial elements).

\textsuperscript{50} \textit{Perkins v. LinkedIn Corp.}, 53 F. Supp. 3d 1190 (N.D. Cal. 2014)
\end{footnotesize}
name to everyone on his email contact list, in violation of California’s common law right of publicity. When a LinkedIn user selected the “Add to Network” option, LinkedIn sent an email to all people from a user’s email contact list featuring the user’s name and the text, “I’d like to add you to my professional network.” If after a week the recipient of the email did not accept the request, LinkedIn would send a reminder email. Again, LinkedIn’s email featured the user’s name as to give the recipient the impression that the user endorsed the LinkedIn social network.51

Plaintiffs further alleged that once LinkedIn initiated the email campaign, it was nearly impossible to stop reminder emails. LinkedIn users could rescind individual email invitations but LinkedIn did not provide users with an option to stop all reminder emails at once.52

The court focused on whether the LinkedIn users gave consent to use their names in the invitation emails and the subsequent reminder emails. As to the invitation emails, the court specifically rejected plaintiffs’ contentions that they never gave their consent because, the court opined, “a reasonable user would have understood that her name would be used in invitations to join LinkedIn that would be sent to her contacts who were not already LinkedIn users.”53 Thus it appears that LinkedIn did not have to specifically ask plaintiffs for consent; instead, consent was implied from the plaintiffs’ conduct. After all, sending an invitation to a user’s contacts has no other purpose than to endorse a service personally, such as LinkedIn in this case. Although the court found that plaintiffs consented to the first invitational email, plaintiffs did not consent to

52 Id. at 1200.
53 Id. at 1215
the consecutive follow up reminder emails. Indeed, the Court found that plaintiffs’ consent to
the first invitation cannot be construed to have consented to subsequent emails featuring their
names: “[s]pecifically, it is entirely plausible that a reasonable user would have thought that by
agreeing to LinkedIn's invitation of the user's contacts to connect, the user authorized LinkedIn
to send only one invitation and that further emails would require further authorizations.”
Therefore, consent that could be implied for a person’s conduct does not extend to subsequent
but related conduct.

This leads to the bigger question: whether an individual has consented to have his or her
photographs used in advertisements when he or she has mentioned a company in his or her social
media post in any way (such as by tagging, using a hashtag, or using the “@” symbol followed
by a company’s name)? The answer is a definite no. In Perkins, the Court examined whether a
reasonable person would understand that sending an invitation would include his or her name in
the email. Here, it is unlikely that a reasonable social media user who uses a hashtag or mentions
a brand would understand that his or her social media post would be used in a marketing
campaign for the company. It would be an absurd outcome if a social media user who merely
announces that he or she uses a product, service, or has visited a location would be considered to
have consented to any and all use of his or her identity for the benefit of the company.

Nevertheless, there may be instances where use of some phrases in a social media post
may be considered implied consent. Today, many companies run marketing campaigns and
solicit their fans to post a photograph on social media with a specific hashtag. To illustrate, in the

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54 Perkins v. LinkedIn Corp., 53 F. Supp. 3d 1190, 1216 (N.D. Cal. 2014) (“Nothing in
LinkedIn's disclosures alerts users to the possibility that their contacts will receive not just one
invitation, but three.”).
55 Id.
summer of 2014, Coca-Cola launched its “Share a Coke” campaign where it replaced labels of their Coca-Cola products with a slogan “Share a Coke” and invited consumers to upload photographs of themselves to social media with the hashtag #ShareaCoke. Coca-Cola invited consumers to share their photographs for a chance to be featured on an interactive billboard. Using this real-world example as a hypothetical, a consumer who was fully aware of Coca-Cola’s marketing campaign and the consequences of using the hashtag could be said to have to have implicitly consented to have his or her image used to promote Coca-Cola (but only in states that do not require written consent such as Illinois).

Had Coca-Cola automatically used every social media user’s photograph on a billboard that has used the #ShareaCoke hashtag on social media, it may run into some trouble as not every person who has used the specific hashtag would have understood that it would be used on a billboard. There is no uniform understanding and intent by ever individual using this hashtag. Some consumers may have seen their friends use the hashtag, while other users understood that their photographs will become an advertisement. It is important to determine what a reasonable person would have understood the consequences of using a branded hashtag. This, unfortunately, places a large burden on consumers to understand every marketing campaign and its outcomes in to avoid having their identities up for grabs by commercial entities. For companies wanting to utilize this sort of marketing campaign, it would be best to solicit express written consent outlining the scope of use of the consumer’s identity before using it in any advertisement, as further explained below.

II. Written Consent

To avoid any legal conundrums relating to obtaining proper consent from social media, companies and brands should rely on principles of proper contract formation to use consumers’ identities for commercial use. This can be achieved in several ways including direct contact with the social media user or by obtaining consent through valid online form agreements.

a. Direct Contact

Intelligent companies who wish to use social media photograph for marketing material should reach out to the prospective user and obtain the proper consent by adhering to principles of contract formation. For example, a company can send an email or a message directly through the social to obtain the proper consent. Contact via mail or telephone, however, may be impractical as most social media users do not display this information publicly. Due to the lack of a uniform federal right of publicity statute and differences between state right of publicity laws, seeking consent through formal communication and a written agreement should become the method of communicating with consumers to use their identity in advertising. This method avoids the risk that wholesale publication of social media photographs poses. Indeed, this method provides an evidentiary purpose of proving an individual’s consent.

b. Terms of Use

Often defendants will argue that the consumer gave consent to the social network to use his or her photographs and that this consent extends to developers who use the social network’s data. Defendants argue that the consumer agreed to the social network’s “Terms of Use” and “Privacy Policy” that include the proper consent disclosure to the social network user. In order to make this argument, the social network’s terms must obtain consent for use by third parties.
Consumers signing up for a social network must accept the terms of use and privacy policy (collectively “terms”). For the terms to bind the social network and the consumer in a contract, the social network must adhere to proper contract formation principles. Online consumers do not sign and mail a contract back to a social network to use is website, for example. Instead, consumers fill out a form with their credentials in order to join the social network. Nevertheless, online contracts are not much different than written contracts, provided that contract formation principles are followed. “While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract. It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree.”

Courts have identified two ways to form a contract online: (i) clickwrap, and (ii) browsewrap agreements. “Contracts formed on the Internet come primarily in two flavors: ‘clickwrap’ (or ‘click-through’) agreements, in which website users are required to click on an ‘I agree’ box after being presented with a list of terms and conditions of use; and ‘browsewrap’ agreements, where a website's terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen.”

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58 See e.g., Facebook - Log In or Sign Up, https://www.facebook.com (showing Facebook’s registration page).
60 Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1175–76 (9th Cir. 2014).
a. Clickwrap Agreements

For clickwrap agreements, “court[s] must determine whether users (i) had reasonable notice of the terms of a clickwrap agreement and (ii) manifested assent to the agreement.”

Indeed, “[a] contract for sale or purchase requires mutual assent to the terms of the contract.”

It is important for a consumer to have knowledge of the terms that he or she is agreeing to. The Seventh Circuit, for example, acknowledge that Internet contracts are not like physical contracts and often contain terms that are not presented at the time of contract formation. A website user must be presented with the terms or have knowledge that the terms exist (constructive notice) in order for the user to be able to agree to the terms. “Where the terms are not displayed but must be brought up by using a hyperlink, courts outside of Illinois have looked for a clear prompt directing the user to read them.” Internet websites, specifically, contain terms on the website such as the website footer or buried deep in user settings and menus. Accordingly, court “cannot presume that a person who clicks on a box that appears on a computer screen has notice of all contents not only of that page but of other content that requires further action (scrolling, following a link, etc.) Indeed, a person using the Internet may not realize that she is agreeing to a contract at all, whereas a reasonable person signing a physical contract will rarely be unaware of that fact.”

63 Sgouros v. TransUnion Corp., 817 F.3d 1029, 1035 (7th Cir. 2016) (explaining other District’s requirement of a constructive notice of binding terms).
64 Sgouros v. TransUnion Corp., 817 F.3d 1029, 1035 (7th Cir. 2016) (acknowledging that individuals who complete an online form do not always have notice of all terms on the website).
Moreover, a user must agree to the terms to be contractually bound to them. “However, courts usually enforce a clickwrap agreement because it requires users to take affirmative action to manifest assent by clicking a button or a checkbox which accompanies a statement instructing users that their click would constitute their assent to the terms at issue.”

b. Browsewrap Agreements

Unlike clickwrap agreements, browse wrap agreements on website “do not require users to “sign a document or click an ‘accept’ or ‘I agree’ button,” so users are considered to give assent “simply by using the website.” This approach creates a whole host of issues pertaining to the notice given to the user. “Courts enforce browsewrap agreements only when there is actual or constructive knowledge of terms. When there is no evidence that users had actual knowledge of terms at issue, ‘the validity of a browsewrap contract hinges on whether a website provided reasonable notice of the terms of the contract’” Therefore courts require that website terms contain “(i) conspicuous hyperlinks or texts of agreements and (ii) an explicit text referencing terms of agreements or instructing users that they are assenting to agreements.” With this approach, a consumer must be put on notice of the terms and a method to agree to the terms by their conduct (i.e. “by clicking ‘continue’ you agree to the Terms of Use and Privacy Policy” and provide hyperlinks to the respective terms).

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66 Id. at 6 (citing Nguyen, 763 F.3d at 1176; Van Tassell, 795 F.Supp.2d at 790).
67 Id. (internal citations omitted).
68 Id. (describing the requirements of a valid browsewrap agreement).
Browsewrap agreements unlike clickwrap agreements treat assent to the terms not by affirmatively acknowledging and accepting the terms, but by the individual’s conduct. This conduct may include the completion of the registration process or by completing a purchase.

III. Other Issues of Consent

a. Scope of Consent

A company is who uses an individual’s identity is permitted to use it within the scope of the company’s and the individual’s agreement. This means that an individual who authorizes the use of his or her identity for commercial use on social media alone, has certainly not agreed to the usage of his or her identity outside of social media. Companies who exceed their authority to use an identity outside of the permissible scope face liability. For instance, a consumer who agrees to a single use of his or her identity cannot be expected to have authorized cups, t-shirts, and billboards bearing their name to advertise a product.

b. Who Can Consent

Unique problems can arise by asking the publisher of a photograph on social media for permission. While a photographer who takes a photo of their subject and places it on social media may grant a license to use his or her photo, he or she certainly is not able to grant permission on behalf of the subject to use his or her identity commercially. Indeed, intellectual property rights of a photographer’s work and the right of publicity of the subject are separate and unique rights belonging to their respective individuals. Nevertheless, a photographer who owns the subject’s right of publicity could give permission to use that individual’s identity, as discussed below.
c. *Transfer of right*

The right of publicity statutes hold that an individual can freely transfer his or her right of publicity. For example, in Illinois individual’s right of publicity “are freely transferable in whole or in part to any person either by written transfer.”\(^{69}\) In practice, this provision allows family members to monetize of the image of a deceased relative. Notably, Frank Sinatra fought to protect his image from exploitation by commercial entities after his death by working to pass the California Right of Publicity statute. As a result “Frank Sinatra created a company for his image to go along with the ones for his movies and his music. And he put Bob Finkelstein and Tina Sinatra in charge.”\(^{70}\) The Frank Sinatra example shows that the right of publicity can be transferred from one individual to another. There may be several reasons for doing so, including conferring a benefit to a family member to monetize an individual’s identity.

Provided that an individual *actually consents* to a *single* use of his or her image from social media, it does not give a company perpetual and unlimited use of ones image as thought he or she transferred his or her right of publicity. Nevertheless, consumers must beware that any agreement made online—through valid browse wrap of click wrap agreements—don’t actually transfer their right of publicity and *only* give consent. The repercussions could mean that a consumer no longer has the right to their image and cannot defend it from exploitation—only the holder of one’s right has that right.

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\(^{69}\) 765 ILCS 1075/15 (describing the right to transfer an individual’s identity under the IRPA).

VI. Conclusion

The right of publicity protects from the unauthorized use of an individual’s identity for commercial purposes without the individual’s consent. Although different states approach this right in different ways, including requiring different types of consent (i.e. written consent), a plaintiff must prove the same three elements to establish liability: 1) the use of one’s identity, 2) for commercial use, and 3) without one’s consent. Companies must beware that its speech is often considered commercial because its end goal is to market and promote its products. Indeed, using an individual’s picture, name, or identity in any way that advances a company’s marketing and promotional of its brand is commercial use. And thus, companies must obtain proper consent to use individuals’ social media content. It is insufficient for a company to assume that an individual has provided consent by mentioning a company name in their social media posts. Companies should obtain the appropriate consent from direct contact with a consumer. Failure to follow these rules can make an advertiser liable to the consumer for violating their right of publicity.