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From the Golden Gate to London: Bridging the Gap Between Data Privacy and the Right of Publicity

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FROM THE GOLDEN GATE TO LONDON: BRIDGING THE GAP BETWEEN DATA PRIVACY AND THE RIGHT OF PUBLICITY

INTRODUCTION

In this digital age, communicating and gathering information through posts, shares, and likes on social media is the norm.[1] Brands increasingly use social media to advertise products and services because, now more than ever, consumers rely on social media for product recommendations.[2] Moreover, public visibility and sponsorships are no longer exclusively for major celebrities as brands realize "the power of normal people to promote their products."[3] With easy access to the Internet and technologies, anyone can create content and amass a following from their own home.[4]

Consider this scenario: you are passionate about skin care and have an Instagram account, a social media platform where users share photos and videos, with several thousand followers that you interact with. You regularly post photos of yourself to show updates on your skin and give honest opinions about the products you try, developing a reputation as an approachable and relatable expert in skincare. Now imagine a follower has discovered that a British brand has taken one of your photos

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1. *See* Peter Suciu, *More Americans are Getting Their News from Social Media*, FORBES (Oct. 11, 2019, 10:35 AM), https://www.forbes.com/sites/petersuciu/2019/10/11/more-americans-are-getting-their-news-from-social-media/#99dd9c13e179 (reporting that fifty-five percent of US adults consume the news from social media).

2. Maryam Mohsin, *10 Social Media Statistics You Need to Know in 2020 [Infographic]*, OBERLO (Aug. 6, 2020), https://www.oberlo.com/blog/social-media-marketing-statistics ("49% of consumers claim that they depend on influencer recommendations on social media to inform their purchasing decision.").

3. Caroline Forsey, *How to Get Sponsored on Instagram (Even if You Currently Have 0 Followers)*, HUBSPOT (Nov. 12, 2020, 5:02 PM, updated Nov. 17, 2020), https://blog.hubspot.com/marketing/how-to-get-sponsored-instagram.

4. Ellen S. Bass, Comment, *A Right in Search of a Coherent Rationale – Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights*, 42 U. S.F. L. REV. 799, 800 (2008) ("Today, widespread access to broadband technologies and explosive growth of the Internet has inaugurated the age of do-it-yourself marketing where anyone can be a star.").

and posted it with a link to its products on its own Instagram account, implying that your skin looks great because you used their advertised products. You feel that your privacy has been violated for the unauthorized use of your image, but you also feel that you should be compensated by the brand for benefiting from the use of your identity as a skincare aficionado to market its products.

Several states in the United States (US) protect an individual's right of publicity, defined as the right for a person "to control and profit from the commercial use of [their] name, likeness, and persona."[5] If you are a California resident and bring an action against the British brand for infringing on your right of publicity, you will not have a recoverable claim because the United Kingdom (UK) does not recognize a right of publicity.[6] Instead, you must sue under a different cause of action, such as breach of confidence.[7] This requires some navigating because the photo the British brand used was one you publicly posted, allowing for shares and re-posting,[8] and the relief under different causes of action might not be comparable to that of a right of publicity claim in California.[9] The lack of global harmonization for the right of publicity leaves many individuals without a

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5. *Right of Publicity*, FINDLAW (last updated May 26, 2016), https://corporate.findlaw.com/litigation-disputes/right-of-publicity.html.

6. Matthew Savare, *Publicity Rights*, INTELL. PROP. MAG. (Mar. 2013), https://www.lowenstein.com/media/4712/publicity-rights.pdf ("England does not recognise the right of publicity or any distinct right designed to protect an individual's name, image or likeness from unauthorised use. Accordingly, individuals have had to rely on a patchwork of doctrines… in attempt to protect their personality from commercial misappropriation.").

7. *See* Sarah Wright & Louise Bloom, *Image Rights: The Pitfalls of Celebrity Endorsement*, THOMSON REUTERS PRAC. L. (Sept. 26, 2012), https://uk.practicallaw.thomsonreuters.com/8-521-4902?transitionType=Default&contextData=(sc.Default)&firstPage=true.

8. *Privacy*, BRETT WILSON LLP, https://www.brettwilson.co.uk/services/defamation-privacy-online-harassment/misuse-of-private-information/ (last visited Feb. 19, 2021) (to bring a privacy claim, the information at issue must be of such that the "claimant is said to have a 'realistic expectation of privacy.'" It could be argued that there is no realistic expectation of privacy when a person posts a photo on a social media platform that is publicly accessible.).

9. *See California Right of Publicity Law*, DIGIT. MEDIA L. PROJECT (Jan. 22, 2021), https://www.dmlp.org/legal-guide/california-right-publicity-law (explaining that a claimant in California can recover actual damages, profits from the use, and even punitive damages).

remedy or cause of action for the unauthorized use of their name, image, and likeness.[10]

This Note compares the different approaches applied to the right of publicity by the US and the UK. Part I will begin with an overview and brief history of the development of the right of publicity. It will also discuss the increasing use of social media and the need to protect non-celebrities' right of publicity.[11] Part II will review the US's approach to the right of publicity, which is governed by state law, and examine a sample of the varying degrees of protection offered by different states, including California's distinctive approach. Part III will discuss how the UK handles right of publicity issues. Since the UK does not recognize a right of publicity, this section will explore some alternative claims an individual can bring to seek a remedy for the misappropriation of their name, image, and likeness.[12] Part IV will compare the US and the UK approaches, with a specific focus on the similar approaches towards data privacy in California and the UK. Part V proposes that incorporating the right of publicity into recent data protection regulations would protect the unauthorized commercial use of a person's identity online. Currently, there is no international right of publicity that allows individuals to control the commercial use of their name, image, and likeness.[13] With the ease and expansion of an individual's ability to monetize their online content, identity, and personality across the globe via social media, legal protection should also expand by standardizing an international right

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10. *See generally,* Alec Schulman, *Image Rights, Personality Rights and the Right of Publicity in the US and the EU*, JAYARAM L. (July 26, 2019), https://www.jayaramlaw.com/blog/2019/07/image-rights-personality-rights-and-the-right-of-publicity-in-the-us-and-the-eu/ (comparing the right of publicity in the US, UK, France, Spain, and Germany).

11. Daryl Steiger, *Everyone's a Celebrity: The Role of the Right of Publicity in a World Increasingly Dominated by Social Media*, NYIPLA, Oct./Nov. 2016, at 5 ("[A]s a result of the advancement in technology and the rise in social media, the term 'celebrity' has shifted and private citizens or 'non-celebrities' have become more visible and identifiable. Therefore, the right [of publicity] is currently more salient for a broader population of individuals, and courts should respond accordingly.").

12. *See* Wright & Bloom, *supra* note 7.

13. Eliana Torres, *The Celebrity Behind the Brand International Protection of the Right of Publicity*, 6 PACE INTELL. PROP., SPORTS & ENT. L.F. 116, 122 (2016) ("There is no unifying body of international law on the right of publicity… Every jurisdiction treats the right of publicity differently.").

of publicity that extends protection to non-celebrities online.[14] This international right of publicity should be incorporated into new data protection regulations that have a global reach and offer private individuals the ability to protect themselves against the misappropriation of their persona on the Internet.

I. BACKGROUND

To provide some background for this Note, this part will briefly discuss how the right of publicity developed in the US and around the world, and then explore the rise in social media usage.

A. Overview of the Right of Publicity

The right of publicity is "an intellectual property right that protects against the misappropriation of a person's name, likeness, or other indicia of personal identity—such as nickname, pseudonym, voice, signature, likeness, or photograph—for commercial benefit."[15] It originated out of the right to privacy; however, it has gradually developed into its own distinct right.[16] Privacy is an internationally recognized natural human right that protects individuals from "arbitrary interference with his privacy, family, home or correspondence . . ." and protects against "attacks upon his honor and reputation."[17] It has its roots in the fundamental idea of personal autonomy and that an individual has the "right to be left alone."[18]

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14. Steiger, *supra* note 11, at 6 ("Historically, the right of publicity has served almost solely to protect celebrities; however, as social media continues to allow non-celebrities to have more public personas, the protection afforded by this right must expand as well.").

15. *Right of Publicity*, INT'L TRADEMARK ASS'N, https://www.inta.org/topics/right-of-publicity/ (last visited Nov. 17, 2020).

16. Alain J. Lapter, *How the Other Half Lives (Revisited): Twenty Years Since* Midler v. Ford *A Global Perspective on the Right of Publicity*, 15 TEX. INTELL. PROP. L.J. 239, 245 (2007) ("Most scholars posit that the right of publicity doctrine emerged from the tort for invasion of privacy.").

17. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess, Supp No 13, U.N. Doc. A/810, art. 12 (1948); OER SERVICES, https://courses.lumenlearning.com/suny-hccc-worldhistory2/chapter/natural-rights/ (last visited Nov. 17, 2020) (natural rights do not depend "on the laws, customs, or beliefs of any particular culture or government," and are thus, "universal and inalienable.").

18. Kateryna Moskalenko, *The Right of Publicity in the USA, the EU, and Ukraine* 1 INT'L COMP. JURIS. 113, 114 (2015).

1. History of the Right of Publicity in the US

In 1890, Samuel Warren and Louis Brandeis published an article, "The Right to Privacy," in the *Harvard Law Review* that described the "simplest case for a right to privacy as the right of one who has remained a private individual to prevent his public portraiture[;]" that is, to prevent exposing private individuals from unwanted publicity.[19] The right to privacy "was primarily about the right to control 'publicity'—when and how one's image and name could be used by others in public," but over time the fiction that "privacy law did not adequately protect public figures who sought to commercialize their identities . . ." caused the need for the creation of a distinct right—the right of publicity.[20] The first major case to recognize the right of publicity was in New York, 1953, with *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[21] There, Haelan Labs, a gum manufacturer that contracted with baseball players to use their names and images on trading cards, sought to prevent a competing gum manufacturer, Topps, from contracting with the same players by claiming the players had assigned their publicity rights exclusively to Haelan.[22] The US Court of Appeals for the Second Circuit found the right of publicity completely separate from the personal right to privacy, recognizing it as an economically valuable, assignable property interest.[23] The court shifted the focus from an emotional harm to an economic harm, paving a path separate from the right to privacy for the right of publicity to take.[24] In the US, the right of publicity is state-based, so the decision in *Haelan* is not binding

19. JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 20 (2018).

20. *Id.* at 11, 4.

21. Lapter, *supra* note 16, at 242 ("… the right of publicity was first coined fifty years ago by Judge Jerome Frank in the seminal case of *Haelan Laboratories v. Topps Chewing Cum*, stating that 'a man has a right in the publicity value of his [likeness].'").

22. *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867 (2d Cir. 1953).

23. *See id.* at 868.

24. *Id.* ("For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.").

across the nation.[25] In fact, currently only twenty-four states provide a statutory right of publicity.[26] Protection differs widely, with some jurisdictions extending protection to a person's voice,[27] or a person's catchphrase,[28] and some even extend protection post-mortem.[29]

2. History of Right of Publicity Globally

Around the world, the right of publicity varies greatly.[30] Korea, a civil law country, notably did not recognize a distinct right of publicity in 1992 when a district court dismissed a post-mortem right of publicity claim for actor James Dean after his image was digitally manipulated to appear in a car commercial without authorization by his estate.[31] Since then, Korea has developed its right of publicity into one of the most expansive in scope and liberal in protection in the world.[32]

Other countries rely on different legal doctrines like defamation, breach of contract, and breach of confidence to address the unauthorized use of one's name, image, and likeness.[33] The UK

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25. *See Statutes & Interactive Map,* RIGHT OF PUBLICITY, https://rightofpublicity.com/statutes (last visited Feb. 21, 2021). The Second Circuit in *Haelan Labs* chose to interpret New York's privacy statute as recognizing an alienable right of publicity enforceable by third parties, giving plaintiffs a legal right to enforce against defendants. *See Haelan Labs. Inc.*, 202 F.2d at 868.

26. *See* RIGHT OF PUBLICITY, *supra* note 25.

27. *See* Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

28. *See* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983) (late night host, Johnny Carson, had a "protected pecuniary interest in the commercial exploitation of his identity," which was violated when his catchphrase, "Here's Johnny," was used without permission—even when his name or picture had not been used.).

29. *See* Martin Luther King, Jr.*, Center for Social Changes, Inc. v. American Heritage Products, Inc.* 694 F.2d 674, 680 (11th Cir. 1983).

30. *See* Savare*, supra* note 6.

31. *See* Hyung Doo Nam, *The Emergence of Hollywood Ghosts on Korean TVs: The Right of Publicity from the Global Market Perspective* 19 PAC. RIM L. & POL'Y J. ASS'N 487, 488 (2010).

32. *See id.* at 489. (explaining that the right of publicity is assignable, subject to inheritance, and descendible for fifty years after death).

33. *See* Savare, *supra* note 6. Brazil does not formally recognize a right of publicity, but Article 5 of the 1988 Brazilian Constitution says, "privacy, private life, honor, and the image of all people are inviolable" and protects against not only moral, emotional, and reputational harms, but also injuries to the economic loss associated with the unauthorized use of one's image. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5, § X (Braz.).

refuses to create a separate right of publicity, asserting that these harms can be protected through existing claims.[34] For instance, film actors Michael Douglas and Catherine Zeta-Jones sought an injunction in the UK against *Hello! Magazine* to restrain it from publishing unauthorized photographs taken at their wedding and sought monetary damages for breach of confidence, including an invasion of privacy and damage to their commercial interests.[35] French jurisprudence takes a dual view on image rights and differentiates the "right *to* one's image," meaning an individual has an exclusive right to use their image and can prevent third parties from such usage, from the "right *on* one's image," which allows the person to commercially exploit their image.[36] France's perspective on image rights has evolved from a strictly moral rights view to encompass "both a negative, subjective right to prohibit fixation and reproduction of one's image, as well as a positive, economic right to commercially exploit one's image."[37]

A theoretical justification for the right of publicity is the Lockean labor theory.[38] The Lockean labor theory is a theory of natural law that believes property ownership comes from an individual's effort in working the resources.[39] When used to justify the right of publicity, it assumes that "celebrities do purposefully exert effort to create a public persona."[40] Similarly, the average social media user exerts effort into curating, filtering, and editing how they present their online identities.[41]

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34. *See* Moskalenko, *supra* note 18, at 115.

35. *See* Douglas v. Hello Ltd. [2005] EWCA (Civ) 595 [34] (Eng.).

36. Moskalenko, *supra* note 18, at 116.

37. Lapter, *supra* note 16, at 286.

38. *Lockean Labor Theory Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/l/lockean-labor-theory/ (last visited Nov. 17, 2020) ("The Lockean labor theory is the justification of private property that is based on the natural right of one's ownership of one's own labor, and the right to nature's common property to the extent that one's labor can utilize it.")

39. *Id.*

40. Bass, *supra* note 4, at 802; *see also* White v. Samsung Elec. Am., Inc., 971 F.2d 1395, 1399 (9th Cir. 1992) ("Considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit.").

41. Daniel Nemet-Nejat, Note, *Hey That's My Persona!: Exploring the Right of Publicity for Blogs and Online Social Networks*, 33 COLUM. J.L. & ARTS 113, 119 (2009) (social media profiles are "personal billboards representing one's managed, researched and well-crafted identity.").

B. Social Media Use and the Value of Personalities

Social media usage is very much a part of everyday life and is steadily becoming even larger as access to the Internet and technologies becomes more readily available.[42] In 2020, approximately 3.6 billion people used social media, and by 2025, this figure is projected to reach 4.41 billion people worldwide.[43] As of January 2021, there are an estimated 2.7 billion Facebook, 2.2 billion YouTube, and 1.2 billion Instagram users.[44] Social media platforms like these have become a prominent source of news, information, and consumer recommendations because of their ability to foster communication and interaction beyond established borders.[45] Some people choose to freely express their unfiltered opinions, being recognized as relatable and authentic, while others take a more curated and aspirational approach to the content they share.[46] Regardless of how one interacts with social media, it is important to understand that social media profiles are "personal billboards representing one's managed, researched and well-crafted identity."[47] These online identities have "economic value and can be easily misappropriated . . ." because of the labor put into constructing them and the value they present to followers.[48]

As individuals developed their online identities, brands noticed the power their personalities have in marketing.[49] "Influ-

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42. J. Clement, *Number of Global Social Network Users 2017-2025*, STATISTA (July 15, 2020), https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/ (social network usage is "anticipated to grow as lesser developed digital markets catch up with other regions when it comes to infrastructure development and the availability of cheap mobile devices. In fact, most of social media's global growth is driven by the increasing usage of mobile devices.").

43. *See id.*

44. *See Global Social Media Stats*, DATAREPORTAL, https://datareportal.com/social-media-users (last visited Feb. 12, 2021).

45. *See* Mohsin, *supra* note 2.

46. *See* Jenni Hill, *Are We Witnessing the Death of the Curated Instagram Feed?*, THE DRUM (Apr. 25, 2019, 11:59 AM), https://www.thedrum.com/opinion/2019/04/25/are-we-witnessing-the-death-the-curated-instagram-feed-0.

47. Nemet-Nejat, *supra* note 41, at 119.

48. *Id.* at 124

49. *See* Bass, *supra* note 4, at 800 ("While the associative value of human identity as a means of attracting attention to consumer products is as pervasive as ever, in the future it is likely that everyone and anyone, as much as

encer marketing," a type of social media marketing similar to celebrity endorsements that involves collaborations between brands and content-creators,[50] has become a popular tool as an estimated forty-nine percent of consumers rely on recommendations made on social media when making purchases.[51] More recently, brands have shifted focus towards "micro-influencers"—individuals with "between a few hundred to a few thousand . . ." followers that "have good communication with their followers . . ." because of the smaller audience.[52] With better engagement than those with large audiences, micro-influencers are considered to be genuine and trustworthy, making them a cost-effective way for brands to reach consumers who willingly take their advice.[53] Micro-influencers are by no means considered celebrities, yet their online personas clearly have economic value to brands and to followers.[54] If a brand uses a micro-influencer's image to market its products without authorization, the micro-influencer, a non-celebrity, may not be able to seek adequate relief in some jurisdictions.[55] This issue is exacerbated when considering the growing number of micro-influencers and the inconsistencies among the laws and available relief for violations of the right of publicity in foreign nations.[56]

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celebrities, will command advertisers' interest on a scale previously unattainable.").

50. *See What is Influencer Marketing: An in Depth Look at Marketing's Next Big Thing*, INFLUENCER MKTG. HUB (Oct. 15, 2020, last updated March 22, 2021), https://influencermarketinghub.com/what-is-influencer-marketing/.

51. *See* Mohsin, *supra* note 2.

52. Shane Barker, *3 of the Best Benefits of Working with Micro-Influencers*, SHANE BARKER (Oct. 20, 2020), https://shanebarker.com/blog/benefits-working-with-micro-influencers/.

53. *See id*.

54. Kimberly Buffington & Carolyn S. Toto, *Social Media Brings the Right of Publicity to the Masses*, PILLSBURY INTERNET & SOC. MEDIA L. BLOG (Oct. 7, 2015), https://www.internetandtechnologylaw.com/social-media-brings-the-right-of-publicity-to-the-masses/#page=1 ("[S]ocial media has imbued in everyday persons 'commercial value' in their unique identities.").

55. Steiger, *supra* note 11, at 7 ("Leaving non-celebrities only with a right of privacy claim no longer provides an adequate remedy if the person is not distressed by the use of their identity but instead believes they should have been compensated.").

56. Hayley Duquette, Note, *Digital Fame: Amending the Right of Publicity to Combat Advances in Face-Swapping Technology*, 20 J. HIGH TECH. L. 82, 113–14 (2020) ("It is now entirely possible for a third party to create a fake

II. THE US APPROACH TO RIGHT OF PUBLICITY

As stated above, the right of publicity is a state-based right in the US.[57] States offer various levels of protection; for example, Indiana has arguably one of the most generous interpretations, recognizing the right as a property interest, thus extending protection beyond one's name and image to include gestures and mannerisms.[58] Meanwhile, Louisiana has a very restricted scope, only recognizing the right of publicity in deceased soldiers.[59] With a fragmented state approach, the US is also divided on whether to extend publicity right protection to foreigners.[60] This section will explore the contrasting protections offered in the US by looking at New York and California as examples, as these states take distinctive approaches from each other and have the most developed right of publicity laws.[61]

A. New York

Although New York was the first state to recognize the independent right of publicity in *Haelan Labs*,[62] it has not expanded the right as liberally as some other states.[63] New York es-

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simulation of a particular influencer promoting the third party's product without the influencer's knowledge or participation. In this scenario, the third party benefits from the fact that they didn't have to pay the influencer for their endorsement although they got to benefit from associating their product with the influencer and thus increasing the product's appeal to consumers. This activity is an obvious violation of the right of publicity. Ultimately, the growing number of influencers increases opportunity for such violations.").

57. *See* RIGHT OF PUBLICITY, *supra* note 25.

58. IND. CODE § 32-36-1-0.2 (1994); *see also Indiana*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (July 19, 2019), https://www.rightofpublicityroadmap.com/law/indiana.

59. LA. STAT. ANN. § 14:102.21 (2011); *see also Louisiana*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (Aug. 16, 2019), https://www.rightofpublicityroadmap.com/law/louisiana.

60. *See* Torres, *supra* note 13, at 125.

61. *See* Kelli L. Sager, *Summary of Right of Publicity Issues*, DAVIS WRIGHT TREMAINE LLP (2012), https://law.ku.edu/sites/law.ku.edu/files/docs/media_law/Summary_of_Right_of_Publicity_Issues.pdf.

62. *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867 (2d Cir. 1953).

63. *See* Nemet-Nejat, *supra* note 41, at 117 ("New York courts have never moved beyond the enumerated traits in the statute, confining the right of publicity to a narrow, more literal interpretation")

tablishes the right of publicity within its privacy statute and prohibits "a person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person."[64] A foreigner may bring a claim in New York as long as the infringing activity takes place within the state.[65] Since New York's right of publicity stems from privacy rights rather than property rights, it may be unassignable.[66] New York does, however, allow any individual to bring a claim and does not require that the identity holder be a celebrity or have a commercially valuable identity to seek relief for the misappropriation of their identity.[67]

New York's approach has been criticized as enabling defendants to exploit a person's identity because "many unauthorized appropriations of identity are deemed lawful under the statute."[68] New York Civil Law sections 50 and 51 contain an exhaustive, limited list of protectable traits.[69] New York takes this narrow view of protection for the right of privacy and publicity in order to avoid conflicting with First Amendment rights.[70] Sections 50 and 51 are interpreted as encompassing only commercial uses and does not cover expressive works of "humor, comedy, music, art, fiction, and satire," nor does it apply to factual and newsworthy uses.[71] For example, in 1990, rap trio The Fat Boys sued Miller Brewing Company for a violation of their rights of privacy and publicity for creating and airing a

64. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2020).

65. *Id.*; *see also* Donovan Rodriques, *New York Right of Privacy Has Its Limits*, RODRIQUES LAW (Aug. 21, 2018), https://rodriqueslaw.com/blog/new-york-right-privacy-has-its-limits/.

66. *See* Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 192 (2012).

67. Stephano v. News Grp. Publ'ns, 64 N.Y.2d 174, 182–83 (1984) (Section 51 protects those who have "never sought publicity" and applies to "any use of a person's picture or portrait for advertising or trade purposes whenever the defendant has not obtained the person's written consent to do so.").

68. Steiger, *supra* note 11, at 7.

69. *See id.*

70. Ann-Margret v. High Soc'y Magazine, Inc., 498 F. Supp. 401, 404 (S.D.N.Y. 1980) (Section 51 of the New York Civil Rights Law "has been narrowly construed by courts… so as 'to avoid conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest' guaranteed by the First Amendment.").

71. Rodriques, *supra* note 65; *see also* N.Y. CIV. RIGHTS LAW § 50 (McKinney 2020).

commercial that featured "look-alikes" and "sound-alikes" of the group.[72] The Southern District of New York held that sections 50 and 51 cannot be applied "to prohibit the portrayal of an individual's personality or style of performance," and refused to extend protection against "look-alikes" and "sound-alikes."[73]

More recently, however, New York has begun expanding the application of its statute to adapt to advances in technology.[74] In 2018, the Court of Appeals of New York recognized that an avatar,[75] a "graphical representation of a person," may "constitute a 'portrait' within the meaning of the [statute]."[76] In this case, actress and singer Lindsay Lohan brought an action against the developers of the popular video game *Grand Theft Auto V* for allegedly creating a "look-alike" of her in the game without her consent.[77] While the court agreed that avatars are included within the scope of the statute, it nevertheless dismissed Lohan's claim concluding that she was not recognizable from the generic avatar of a young woman, which was "nothing more than cultural comment."[78] Although New York is slow to adapt its law to keep up with technology and narrowly construes the right of publicity to plainly avoid conflicting with the freedom of expression;[79] a micro-influencer can still protect

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72. *See* Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826, 828 (S.D.N.Y. 1990).

73. *Id.* at 836; *see also* Geller v. Fallon McElligott Advert., No. 90 CIV. 2839 (VLB), 1991 WL 640574, at *1 (S.D.N.Y. July 22, 1991) (the court explained, "[A]n individual can be known by his face, social security number, name, voice, movement, style, and accomplishments," but "only an individual's name and face are protected under the statute.").

74. Lohan v. Take-Two Interactive Software, Inc., 97 N.E.3d 389, 394 (N.Y. 2018) (the court here recognized that Section 51 was enacted before digital technology was invented and applied the theory of statutory construction, that "general terms encompass future developments and technological advancements," to accept a broader reading of the term "portrait.").

75. *See* Sarah Cavill, *Avatars Becoming Ubiquitous in Digital Marketing Strategies*, DIGIT. MEDIA SOL. (Sept. 3, 2020), https://insights.digitalmediasolutions.com/articles/avatars-popularity-digital-advertising (explaining that there is a rise in the popularity of avatars, notably within marketing campaigns).

76. *Lohan*, 97 N.E.3d at 395.

77. *See id.* at 392.

78. *Id.* at 395.

79. New York has recently added a provision to its privacy statute that provides relief against the deceptive use of digital replicas. *See* Judith B.

their identity if the infringing use occurs within the state, if the public can clearly recognize their image from the use, and if the use cannot be deemed expressive but rather purely for purposes of advertising.[80]

B. California

California provides the right of publicity in California Civil Code section 3344, providing a civil claim for the unauthorized use of one's "name, voice, signature, photograph, or likeness" on products or merchandise, or for the purposes of advertising or promotion.[81] Further, unlike New York, California recognizes the common law tort of appropriation.[82] In 1988, Bette Midler, a famous singer and actress, brought an action against Ford Motor Company for producing a commercial, which Midler previously declined to participate in, that featured a different singer imitating Midler's voice and singing one of her popular songs.[83] Though neither Midler's name, image, nor actual voice were used in the commercial, the Ninth Circuit turned to California's common law tort of appropriation and held that defendants deliberately imitated Midler's voice to sell a product without authorization, violating her right of publicity.[84] Note that in New York, "sound-alikes" were found not to be protectible,[85] yet in California, the courts came to the opposite conclu-

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Bass, *New York's New Right of Publicity Law: Protecting Performers and Producers*, NYSBA (Mar. 17, 2021), https://nysba.org/new-yorks-new-right-of-publicity-law-protecting-performers-and-producers/.

80. Geller v. Fallon McElligott Advert., No. 90 CIV. 2839 (VLB), 1991 WL 640574, at *2 (S.D.N.Y. July 22, 1991) (the court dismissed the right of publicity claim, concluding that there were "enough physical differences between the plaintiff's face and the face of the individual in the commercial for the court to determine that most persons who could identify the plaintiff would not think that the commercial actually featured him.").

81. CAL. CIV. CODE § 3344 (West 2020).

82. *See Appropriation*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/appropriation (last visited Feb. 21, 2021) (common law tort of appropriation is "when a defendant uses a plaintiff's name, likeness, or image without his or her permission for commercial purposes.").

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

84. *Id.* at 463 ("To impersonate her voice is to pirate her identity.").

85. *See* Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826, 838 (S.D.N.Y. 1990).

sion, underscoring the lack of harmonization in the application of the right of publicity.[86]

A distinctive feature of California's right of publicity, making it one of the most expansive interpretations, is its extension of protection for seventy years after an identity holder's death so long as the identity holder was domiciled in the state at the time of death.[87] The Ninth Circuit held in *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC* that section 3344.1 was amended "to provide that the California statutory right of publicity is deemed . . . a property right, freely transferable and descendible; and, in the absence of an express testamentary transfer, could pass through the residual clause in the will of the deceased personality."[88] Here, Marilyn Monroe's estate claimed to inherit her post-mortem right of publicity and sued Milton Green Archives for violating this right by advertising and selling photographs of Monroe without permission.[89] The court, however, denied the Monroe estate's claim because it had previously established that Monroe was domiciled in New York at her death, meaning New York's right of publicity law, which at the time did not recognize a post-mortem right, governed.[90] This decision again highlights the contrasting outcomes claimants face when attempting to protect their right of publicity in different states. This decision also impacts foreigners seeking to protect post-mortem rights because an individual who is not domiciled in California at the time of death cannot benefit from its expansive law and is limited to the laws of their home nation, which may not recognize this cause of action.[91]

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86. *See* Paul Czarnota, *The Right of Publicity in New York and California: A Critical Analysis*, 19 JEFFREY S. MOORAD SPORTS L.J. 481 (2012) (describing the lack of harmonization between New York and California right of publicity laws).

87. CAL. CIV. CODE § 3344 (West 2020); *see also California*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (Aug. 16, 2019), https://www.rightofpublicityroadmap.com/law/california. On December 1, 2020, New York's Governor Andrew Cuomo signed a bill that provides a post-mortem right of publicity for forty years after a deceased personality's death. *See* Bass, *supra* note 79.

88. Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 992 (9th Cir. 2012).

89. *See id*. at 991–92.

90. *See id.* at 998.

91. *See* Cairns v. Franklin Mint Co., 292 F.3d 1139, 1146 (9th Cir. 2002) (in determining whether to extend the right of publicity to foreigners, the court here said they cannot enforce a post-mortem right of publicity for the

While New York has been criticized for remaining relatively conservative in expanding publicity rights, California has been accused of overstepping "the necessary limits of the doctrine by continually expanding its parameters to include attributes of identity that only indirectly evoked the persona of the individual in the minds of consumers."[92] This was primarily in response to the Ninth Circuit's decision in *White v. Samsung Electronics America, Inc.*, where the court held that Samsung misappropriated *Wheel of Fortune* hostess Vanna White's likeness when it aired an advertisement depicting a robot posed next to a game board wearing a wig and gown.[93] The court explained that flexibility in interpreting the right of publicity was necessary to properly protect people from unauthorized commercial uses of one's identity.[94]

Although California's interpretation of the right of publicity is considered expansive, it does potentially require an individual to have a "commercially valuable" identity in order to bring a claim, suggesting that protection may not extend to non-celebrities.[95] Social media, however, is beginning to obscure the difference between celebrity and consumer, so California courts have begun broadening the protection to include non-celebrities.[96] In a class action lawsuit against Facebook, plaintiffs alleged that Facebook's "Sponsored Stories" misappropriated users' identities by publicizing a Facebook interaction, interpreted as a commercial endorsement, without permission or compensation.[97] Sponsored Stories were a form of paid adver-

late Princess Diana because she died a domiciliary of Great Britain, and the UK does not recognize the post-mortem right of publicity).

92. Bass, *supra* note 4, at 807–08.

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

94. *Id.* at 1398 (it is impossible to treat the right of publicity "as guarding only against a laundry list of specific means of appropriating identity. A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth.").

95. *See* ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, *supra* note 87; *see also* CAL. CIV. CODE § 3344 (West 2020).

96. *See* Steiger, *supra* note 11, at 6; *see also* Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 808 (N.D. Cal. 2011) ("In a society dominated by reality television shows, YouTube, Twitter, and online social networking sites, the distinction between a 'celebrity' and a 'non-celebrity' seems to be an increasingly arbitrary one.").

97. *Fraley*, 830 F. Supp. 2d at 790.

tisement that appears on a Facebook user's page and consists of a Facebook friend's "name, profile picture, and an assertion that the person 'likes' the advertiser."[98] Although users could adjust the privacy settings to restrict the use of their name and profile picture in commercial content, users could not opt out of participating in Sponsored Stories.[99] The court recognized the economic value that Facebook users' recommendations hold,[100] and concluded that the plaintiffs, ordinary people, had commercially valuable identities since, "in essence, Plaintiffs are celebrities—to their friends."[101] This decision aligns with the growing trend of brands using micro-influencers to promote products, as Facebook CEO Mark Zuckerberg even agreed that "nothing influences people more than a recommendation from a trusted friend . . ." and went so far as to call a trusted referral the "Holy Grail of advertising."[102] Since followers view micro-influencers as trusted internet friends,[103] a micro-influencer's recommendations hold significant economic value, which subsequently deems their identities as trustworthy experts in their chosen field as commercially valuable and entitled to protection.

III. THE UK APPROACH TO RIGHT OF PUBLICITY

From as early as 1869, UK law has not offered protection to a person's name.[104] The UK does not recognize the right of publicity, but instead takes a piecemeal approach and relies on other legal theories such as passing off, trademark infringement, and data protection.[105] This was showcased in 2015 when global

98. *Id.*

99. *See id.* at 792

100. *Id.* at 800 (Facebook CEO and COO stated that "friend endorsements are two to three times more valuable than generic advertisements sold to Facebook advertisers.").

101. *Id.* at 808.

102. *Id.*

103. *See* Forsey, *supra* note 3 ("With the right strategy, [a micro-influencer's] audience will begin to see [them] as one of their real friends.").

104. Du Boulay v. Du Boulay [1896] 2 LRPC 430. In Du Boulay v. Du Boulay, the court rejected the argument of a slave-owning family who sued to prevent the illegitimate son of the master and a slave from adopting the family name, holding that they "do not recognize the absolute right of a person to a particular name… whatever the cause of annoyance it may be." *Id.*

105. *See* Wright & Bloom, *supra* note 7. Passing off is a tort that protects the goodwill of a merchant from misrepresentation and is more expansive

popstar Rihanna sued Topshop, a UK clothing company, for selling t-shirts bearing her image on them.[106] The court held that, under UK law, there was no "'image right' or 'character right' which allows a celebrity to control the use of their name or image . . ." and that a celebrity would have to "rely upon some other cause of action."[107] Rihanna was ultimately successful under a passing off claim, but had she been unsuccessful, she would not have had any other cause of action to stop the unauthorized use of her image on the t-shirts in the UK.[108] Note that some of these separate legal doctrines have requirements that limit who can bring a claim.[109] For example, passing off requires the person to have a commercially valuable identity and an unauthorized use of it amounting to false endorsement of a product.[110] Likewise, bringing a trademark infringement claim requires the individual to hold a valid trademark in their name or image, which must be able to indicate the source of specific trade goods.[111]

A. Passing off

The tort of passing off protects against unjust enrichment and consumer confusion stemming from acts of intentional deception.[112] Passing off only protects a person's name and image if they can prove that their name and image has "a sufficient

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than trademark protection; trademark infringement is when someone else uses a mark that is similar to the registered mark without permission, in commerce, and is likely to cause consumer confusion; data protection is a method of the safeguarding personal data against unauthorized uses. *Id.*

106. *See* Schulman, *supra* note 10.

107. Robyn Rihanna Fenty v. Arcadia Group Brands Ltd. [2015] EWCA (Civ) 3 [3] (Eng.).

108. *See* Torres, *supra* note 13, at 132.

109. *See* Paul Jordan & Sean Ibbetson, *Getting the Deal Through, Right of Publicity 2020, United Kingdom*, BLOOMBERG (Mar. 26, 2019), https://www.bloomberglaw.com/document/25224839720.

110. Wright & Bloom, *supra* note 7; *see also* Lapter, *supra* note 16, at 283 (pop group ABBA could not enjoin a merchandiser from selling products with the band's image on them because the band and merchandiser were not operating within a common field of activity, therefore, it is unlikely that consumers would be confused and believe that ABBA endorses the products).

111. *See* Jordan & Ibbetson, *supra* note 109 (in the *Fenty* case, Rihanna could not seek relief under trademark infringement because she did not hold a valid trademark in her name or image to enforce).

112. *See* Lapter, *supra* note 16, at 281.

amount of trading goodwill."[113] An individual must also show that their name and image was used without consent and amounts to a misrepresentation of their endorsement of a product or service such that it negatively affects their goodwill and reputation.[114] In Rihanna's case, the court concluded that through promotions, merchandising, and sponsorship deals, she had acquired sufficient goodwill in relation to fashion and that her image on the t-shirts was "likely to mislead potential customers . . ." into believing that she was associated with the product, therefore amounting to a false endorsement of the product and a deceptive use of her goodwill.[115] In 2002, celebrity racecar driver Eddie Irvine brought a claim against TalkSport radio station for using his image in advertising material without consent or compensation.[116] The court held that TalkSport exploited Irvine's goodwill and gave a false impression that he endorsed them, which, for a celebrity with multiple sponsorships and brand endorsement deals, harmed his reputation and entitled him to recover damages.[117] An average social media user, even a micro-influencer, may have difficulty raising a passing off claim if they are unable to prove the requisite level of goodwill in the trade that their name or image is being misappropriated in.[118] Even if sufficient goodwill is acquired, courts may not view the unauthorized use of their name and image by a brand as being a deceptive misrepresentation.[119]

An adjacent avenue to bringing a passing off claim is submitting a complaint with the Advertising Standards Authority

113. Jordan & Ibbetson, *supra* note 109.

114. *See* Wright & Bloom, *supra* note 7.

115. Robyn Rihanna Fenty v. Arcadia Group Brands Ltd. [2015] EWCA (Civ) 3 [13] (Eng.).

116. *See* Edmund Irvine Tidswell Ltd. v. TalkSport Ltd. [2002] EWHC (Ch) 367 [15] (Eng.).

117. *See id.* at [16].

118. Colin Sawdy & Chika Ochonogor, *The Famous, the Unknown and the Deceased*, WORLD TRADEMARK REV. (Oct./Nov. 2012), ("[P]assing off does not protect the name or image of the average person, unless it is used in trade and has acquired goodwill, and it can be shown that the defendant's act constituted a misrepresentation, which caused the person loss.").

119. Wright & Bloom, *supra* note 7 ("Where companies use images of celebrities for branding purposes without permission, there are no definitive rules as to what will amount to a misrepresentation. The court's assessment will depend on the individual facts of the case and, in particular, the context in which the celebrity's name or image has been used.").

(ASA), a "self-regulatory body that regulates the content of advertisements, sales promotions and direct marketing in the U.K." by investigating complaints made about the advertisements and deciding whether they comply with the standard Advertising Codes.[120] The Advertising Codes apply to broadcast and the Internet, including social media sites.[121] It requires advertisers to obtain permission from a celebrity before including their identity in an advertisement or "implying personal approval for the marketed goods," otherwise it would be considered a false endorsement under passing off.[122] A micro-influencer who is unable to bring a passing off claim can file a complaint to the ASA to prevent an advertiser from using their name and image, but a formal investigation following the complaint may take time and the only remedy is for the advertiser to change the advertisement or take it down, as monetary damages will not be awarded.[123]

B. Trademark Infringement

Celebrities can register their name or image as trademarks in order to raise a trademark infringement claim when their name or image is misappropriated.[124] It can be difficult to enforce a trademark in a name since the name must be capable of indicating the commercial source of the item bearing the trademark to consumers.[125] Another challenge is that the more

120. *Protect Your Business from Scams*, NIBUSINESSINFO.CO.UK, https://www.nibusinessinfo.co.uk/content/reporting-misleading-advertising (last visited Feb 21, 2021).

121. *See About the ASA and CAP*, ADVERT. STANDARDS AUTH., https://www.asa.org.uk/about-asa-and-cap/about-regulation/about-the-asa-and-cap.html (last visited Nov. 17, 2020).

122. Wright & Bloom, *supra* note 7.

123. *See* ADVERT. STANDARDS AUTH., *supra* note 121; *see also Sanctions*, ADVERT. STANDARDS AUTH., https://www.asa.org.uk/codes-and-rulings/sanctions.html (last visited Mar. 7, 2021).

124. Lapter, *supra* note 16, at 280 ("Under the Trade Marks Act of 1994, names theoretically receive protection so long as they achieve the requisite level of distinctiveness. Distinctiveness is attained when the name is: (1) invented, (2) not descriptive of the product's characteristics, (3) the applicant's signature, or (4) unique."); *see also* Wright & Bloom, *supra* note 7 (David Beckham registered his name as a trademark throughout the European Union for certain goods to protect his name from unauthorized uses).

125. Wright & Bloom, *supra* note 7 ("[T]he mark DAVID BECKHAM as applied to a poster may simply describe the image depicted on that poster, rather than indicate the commercial source from which it originates.").

famous a celebrity is, the more likely their name can pass into common usage and become descriptive, barring them from trademark protection.[126] For example, in 1997, the High Court of Justice concluded the name "Elvis Presley" could not be registered as a valid trademark because it was too commonly known to the public and thus failed to meet the distinctiveness threshold that trademarks require.[127] A micro-influencer will likely not be barred from enforcing a trademark in their name since, by definition, they are not as commonly known as traditional celebrities are, so the risk of their mark being descriptive is low.[128] Still, it can be cost prohibitive for a micro-influencer to register for a trademark because trademark protection only allows the owner to enforce against unauthorized uses in the specific category in which the mark is registered, requiring them to register in multiple categories to cast a wider net of protection.[129]

C. Privacy

Privacy rights can protect a person from unauthorized publishing of personal information about them, including images, if the person has a "reasonable expectation of privacy" regarding the information.[130] In the UK, the right to privacy stems from Article 8 of the European Convention on Human Rights (ECHR), which regards privacy as a natural right, protects a person's reputation, and provides the "right to respect for his private and family life."[131] Article 8 must also be balanced against Article 10 of the ECHR, which affords freedom of ex-

126. *See* Hayley Stallard, *The Right of Publicity in the United Kingdom*, 18 LOY. L.A. ENT. L. REV. 565, 569 (1998).

127. *See* Elvis Presley Enterprises v. Sid Shaw Elvisly Yours [1997] EWHC (Ch).

128. *See* Barker, *supra* note 52 (discussing how micro-influencers are not well-known to millions of followers).

129. *See* Josh Gerben, *How Much Does it Cost to Register a Trademark in the U.K.?,* GERBEN L. https://www.gerbenlaw.com/blog/how-much-does-it-cost-to-register-a-trademark-in-the-u-k/ (last visited Jan. 8, 2021) (explaining that UK trademark application fee is £200).

130. Jordan & Ibbetson, *supra* note 109.

131. *Article 8 ECHR – Right to Private Life, Family Life, Correspondence and Home*, HEMBACH LEGAL, https://human-rights-law.eu/echr/article-8-echr-right-to-private-life-family-life-correspondence-and-home/ (last visited Feb. 22, 2021).

pression.[132] Under Article 8, photographs are given a greater degree of protection if they are taken in *private* situations since this is likely an intrusion on private life.[133] This, then, provides little recourse for a micro-influencer or an average social media user who voluntarily posts their photo *publicly* online.[134] If an individual is able to successfully bring a privacy claim, an injunction may be the only useful remedy as damages tend to be low.[135] Though the UK is no longer a member of the EU, it has agreed to continue to comply with the ECHR domestically.[136]

D. Data Protection

Data protection, a more modern aspect of privacy law, can be used by celebrities and non-celebrities to prevent the processing of their personal data.[137] The UK's Data Protection Act 1998 regulates how all public and private organizations process personal data,[138] which includes a person's image.[139] An unauthorized use of a person's image may amount to an unlawful processing of personal data unless there is a legitimate purpose for the use, such as public interest or newsworthiness.[140]

In 2016, the European Union (EU) enacted the General Data Protection Regulation (GDPR), widely viewed as the most com-

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132. *See* Jordan & Ibbetson, *supra* note 109.

133. *See* Wright & Bloom, *supra* note 7.

134. Mark Sableman, *Do You Have Privacy Rights on Social Media?*, THOMPSON COBURN LLP (July 12, 2016), https://www.thompsoncoburn.com/insights/blogs/internet-law-twists-turns/post/2016-07-12/do-you-have-privacy-rights-on-social-media- ("[M]ost courts have concluded that once something is voluntarily posted on Facebook, it no longer carries a reasonable expectation of privacy.").

135. *See* Jordan & Ibbetson, *supra* note 109.

136. 2021 O.J. (L 149) 10, 692.

137. *See* Jordan & Ibbetson, *supra* note 109.

138. Dale Walker, *What is the Data Protection Act 1998?*, ITPRO (June 20, 2019), https://www.itpro.co.uk/data-protection/28085/what-is-the-data-protection-act-1998 ("[P]ersonal data is defined as information related to an individual that can be used either in isolation or in tandem with other data sources to reveal that individual's identity."); Data Protection Act 1998, c. 29 (Eng.), https://www.legislation.gov.uk/ukpga/1998/29/contents.

139. José Manuel Martinez & Juan Manuel Mecinas, *Old Wine in a New Bottle?*, 8 J. INFO. POL'Y 362, 365 (2018) ("[O]n the Internet, likeness is an image and it is also data… [P]rotecting an image is a problem of data, with the possibility of eliminating the image on the Internet with specific economic consequences.").

140. *See* Wright & Bloom, *supra* note 7.

prehensive global regulation for the collection and use of personal data.[141] The UK's Data Protection Act 1998 was amended in 2018 to adapt to the modernization of new technologies and supplement the GDPR by adopting it into domestic UK law.[142] Since the UK is no longer a member of the EU, the GDPR will not regulate domestically.[143] In order to maintain a sufficient level of data protection under the EU's standard, a UK-version of the GDPR (UK-GDPR), which embodies the substance and scope of the GDPR, was passed to take its place and work in tandem with the Data Protection Act 2018.[144]

The GDPR broadly defines personal data as "any information relating to an identified or identifiable natural person."[145] The GDPR protects "data subjects," which are "any natural individuals who have data processed inside the EU by companies offering services and/or products to the Union," meaning a tourist visiting an EU country who has their data processed there is protected under the GDPR.[146] The GDPR also provides for a unique right, the "right to be forgotten," which allows EU citizens to request the deletion of their private data.[147] The right to be forgotten is controversial for its potential conflict with the

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141. *See The EU General Data Protection Regulation*, HUM. RTS. WATCH (June 6, 2018, 5:00 AM), https://www.hrw.org/news/2018/06/06/eu-general-data-protection-regulation# (stating that the GDPR is effective as of May 25, 2018 for all EU Member States).

142. *See Data Protection Act 2018 – 2021 Update*, COOKIEBOT (Apr. 21, 2021), https://www.cookiebot.com/en/data-protection-act-2018/.

143. *See Brexit and Data Protection in the UK*, IT GOVERNANCE, https://www.itgovernance.co.uk/eu-gdpr-uk-dpa-2018-uk-gdpr (last visited May 22, 2021).

144. *Data Protection Act 2018 – 2021 Update*, *supra* note 142 ("The EU Withdrawal Agreement that took effect on Exit Day specifies that the UK 'shall ensure a level of protection of personal data essentially equivalent to that under Union law.'" Article 45 of the GDPR requires non-EU members to have an "adequate level" of data protection to guarantee the free flow of information with the EU.).

145. Directive 2016/679, of the European Parliament and the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119), art. 4(1).

146. *CCPA vs GDPR – Compliance with Cookiebot*, COOKIEBOT (Nov. 30, 2020), https://www.cookiebot.com/en/ccpa-vs-gdpr/.

147. *See* Ben Wolford, *Everything You Need to Know About the "Right to be Forgotten"*, GDPR.EU, https://gdpr.eu/right-to-be-forgotten/.

freedom of speech and expression,[148] but is an attempt to provide rights that guard against the unwanted publication of personal data on the Internet, including a person's name and image.[149] In 2014, the Court of Justice of the European Union held that Google must comply with certain requests from individuals to remove links to websites that result from searching their name.[150] This decision has been criticized as allowing individuals, potentially those of public interest, to suppress truthful information that is merely unflattering.[151] Other countries, however, have begun to follow the EU's lead and implement similar right to be forgotten regulations.[152] There is a clear overlap between the right of publicity and the right to be forgotten, namely that they both give individuals control over the use of their name and image online and potentially clash with the freedom of expression.[153]

Although the GDPR only regulates EU member states, its effects extend globally since it applies to any company or organization that services anyone in the EU, regardless of where the

148. *See* Magdalena Jozwiak, *Balancing the Rights to Data Protection and Freedom of Expression and Information in the EU*, 23 MAASTRICHT J. EUR. & COMP. L. 404, 424 (2016).

149. *See* Martinez & Mecinas, *supra* note 139, at 363.

150. Case C-131/12, Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González, 2014 E.C.R. I-317, [94] (If requested, information that is lawfully published by third parties, but that is "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine" must be erased.).

151. *See The EU General Data Protection Regulation*, *supra* note 141; *see also* Leo Kelion, *Google Wins Landmark Right to be Forgotten case*, BBC (Sept. 24, 2019), https://www.bbc.com/news/technology-49808208 ("Google had argued that the obligation could be abused by authoritarian governments trying to cover up human rights abuses were it to be applied outside of Europe.").

152. Danielle Bernstein, *Why the "Right to be Forgotten" Won't Make it to the United States,* MICH. TECH. L. REV. BLOG (Feb. 14, 2020), http://mttlr.org/2020/02/why-the-right-to-be-forgotten-wont-make-it-to-the-united-states/ ("Despite censorship concerns, erasure has begun to gain support outside of the European Union; Argentina is the most recent country to implement similar regulations.").

153. Martinez & Mecinas, *supra* note 139, at 369 ("It is clear that the right of publicity and the right to be forgotten may have a similar object. The decision in the *Costeja* case protected a person's name, and the right of publicity protects the commercial benefits of using a name/likeness.").

company physically operates.[154] The GDPR allows for a private right of action against companies that have infringed on an individual's privacy for noncompliance with the regulation, which means a person can sue a company that provides services to the EU for an unauthorized use of their personal data.[155] A micro-influencer could therefore potentially bring an action against a brand subject to the GDPR that unlawfully uses their personal data and collect monetary compensation for either material damages, like economic or financial losses, or non-material damages, like emotional distress.[156]

IV. A COMPARATIVE ANALYSIS

This section compares the right of publicity of New York, California, and the UK. It also examines the similarities of the GDPR and California's data protection regulation.

A. Key Similarities and Differences in the Right of Publicity

The US and UK take significantly different approaches in navigating the right of publicity, yet there are still some similarities. The UK chooses not to recognize the right of publicity as an independent right, instead relying on intellectual property rights, unfair competition, and privacy considerations to provide relief.[157] In the US, California views the right of publicity as a transferrable intellectual property right even though it stemmed from the right to privacy, emphasizing an individual's economic right to control their persona.[158] Like California, un-

154. *See The EU General Data Protection Regulation*, *supra* note 141; *see also CCPA vs GDPR – Compliance with Cookiebot*, *supra* note 146.

155. *See* Richard Slawson, *Article 3(2): The Hole in the GDPR Wall*, SLAWSON & SLAWSON (Aug. 12, 2019), https://slawsonandslawson.com/article-32-the-hole-in-the-gdpr-wall/.

156. *See Data Protection and Online Privacy*, EUROPA.EU (Sept. 3, 2020), https://europa.eu/youreurope/citizens/consumers/internet-telecoms/data-protection-online-privacy/index_en.htm; *see also* Stephan Appt, *H&M Served €35m GDPR Fine over Employee Record-Keeping*, PINSENT MASONS (Oct. 2, 2020, 2:08 PM), https://www.pinsentmasons.com/out-law/news/hm-served-35m-gdpr-fine-over-employee-record-keeping (retailer H&M was recently fined €35 million for non-compliance with the GDPR).

157. *See* Wright & Bloom, *supra* note 7.

158. *See* Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 992 (9th Cir. 2012) ("[t]he California statutory right of publicity is deemed… a property right, freely transferable and descendible"); s*ee also* Nemet-Nejat, *supra* note 41, at 115–116 (Right of publicity in the US devel-

der the UK's trademark and passing off laws, protection can survive death as long as the trademark remains registered and sufficient goodwill can be demonstrated since intellectual property rights are alienable.[159] The UK's trademark and passing off laws are similar to the US's Lanham Act,[160] however, British courts are less likely than American courts to protect a celebrity's name or likeness because British courts often do not see names as distinctive nor find that a likelihood of confusion would arise from misuse of a name or likeness.[161]

Similar to the UK, New York holds more strictly to privacy right theories, viewing the right of publicity as unassignable and inalienable.[162] Under privacy law, post-mortem right of publicity is generally not recognized since privacy rights are personal rights that cease upon death.[163] On December 1, 2020, however, New York's Governor Andrew Cuomo signed a bill that extends the right of publicity in its privacy statute to deceased persons.[164] This means the right of publicity will now be assignable and alienable post-mortem, so long as the deceased person is domiciled in New York and has commercial value in their personality at the time of death.[165] While this extension broadens New York's right of publicity, the law contains many

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oped out of the right of privacy, a dignitary interest, but after the decision in *Halean Labs*, it evolved into an economic interest where damages could be awarded to protect "the commercial value of a person's identity").

159. *See* Jordan & Ibbetson, *supra* note 109.

160. *Lanham Act*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/lanham_act (last visited Nov. 17, 2020) (Lanham Act protects federally registered trademarks in the US against infringing marks that cause dilution or consumer confusion. Registered marks must be distinct and used in commerce to qualify for protection).

161. Lapter, *supra* note 16, at 281 ("It is clear that the English courts will not protect a celebrity's name or likeness to the extent US courts would under section 43(a) of the Lanham Act because, in the English courts' view, likelihood of confusion will not ensue. In addition, since the names themselves are not distinctive, unjust enrichment is not a viable argument.").

162. *See* Rothman, *supra* note 66, at 192 (stating that New York's right of publicity is encompassed within its statutory right of privacy).

163. *See* Jordan & Ibbetson, *supra* note 109.

164. *See* Sandra A. Crawshaw-Sparks, Brendan J. O'Rourke & Jennifer L. Jones, *New York Passes Law Recognizing Post-Mortem Right of Publicity and Creating Private Right of Action for Sexually Explicit Deepfakes*, NAT'L L. REV. (Dec. 14, 2020), https://www.natlawreview.com/article/new-york-passes-law-recognizing-post-mortem-right-publicity-and-creating-private.

165. *See id.*

limitations to this extension, remaining more conservative compared to California's approach.[166]Still, the new law also reacts to modern technological advancements by guarding against digital replicas of personalities in sexual content, taking a step closer to California's broad view of the right of publicity.[167] In the US, more so than in the UK, protection of a person's name, image, and likeness is trending towards extending to non-celebrities in specific circumstances, especially as the Internet and social media cements itself into common use.[168] Nevertheless, both the US and the UK grapple with the conflict that the freedom of speech and expression poses when determining the scope of protection for publicity rights and attempts to reconcile the two by restricting misappropriation of a person's name, image, and likeness to purely commercial uses.[169]

B. General Data Protection Regulation and California Consumer Privacy Act

More recently, an important commonality developed between the UK and the US through data protection regulations. In 2018, California passed the California Consumer Privacy Act (CCPA), effective as of January 1, 2020, which mirrors the GDPR's and, by extension, the UK-GDRP's, broad protection of personal data.[170] It allows Californians to opt out of businesses

166. *See id.* New York's new law only extends post-mortem protection for forty years and it does not apply retroactively. *Id.* The deceased personality's post-mortem right must be registered with the Secretary of State for the successor in interest or licensee to pursue a claim. *Id.*

167. *See id.*

168. *Using the Name or Likeness of Another*, DIGIT. MEDIA L. PROJECT (Jan. 22, 2021), https://www.dmlp.org/legal-guide/using-name-or-likeness-another ("The growing trend, however, is to permit both celebrities and non-celebrities to sue for both misappropriation and violation of the right of publicity."); *see also* Shannon Montgomery, *Right of Publicity and the Social Media Influencer*, MONTGOMERY LAW PLLC (Jan. 26, 2018), https://montgomerypllc.com/right-publicity-social-media-influencer/ ("As social media grows, and influencers become more integral to the way brands market their products and services- the right of publicity will become more important.").

169. Moskalenko, *supra* note 18, at 115 ("The United Kingdom has traditionally offered wide protection to free speech, resulting in the refusal to develop a specific legal framework or tort for protection of the right of publicity.").

170. *See* Jennifer Huddleston & Ian Adams, *Potential Constitutional Conflicts in State and Local Data Privacy Regulations*, REG. TRANSPARENCY

selling their data to third parties and to request that businesses disclose or delete data they previously collected.[171] The CCPA and GDPR both reach extraterritorially since businesses that serve California and the EU respectively must comply with the regulations, regardless of where the business is physically located.[172] The CCPA, however, protects only California residents, while the GDPR protects anyone who is in the EU when their data is collected or processed, even if only for a transitory period.[173] The GDPR's position is based on prior consent, meaning the data subjects protected by the GDPR have a default control over their privacy and companies must ask for permission before processing data, where the CCPA's approach is an opt out option, meaning Californians have the ability to look back and choose to take control over their data after it has been collected.[174]

The CCPA has been criticized as being too stringent, potentially infringing the right to freedom of speech by restricting the flow of information.[175] It is interesting that California provides wide protection for a person's identity, favoring personal autonomy and control over First Amendment rights;[176] however, critics in the US are wary of the scope of the CCPA and the power it gives individuals over their data.[177] Meanwhile, the UK, which currently offers far less protection for a person's identity, prioritizes the necessity of remaining in compliance with the EU's GDPR and adopts similarly expansive protec-

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PROJECT (Dec. 2, 2019), https://regproject.org/paper/potential-constitutional-conflicts-in-state-and-local-data-privacy-regulations#row_1; *see also CCPA vs GDPR – Compliance with Cookiebot*, *supra* note 146 ("Some have called the CCPA 'the California GDPR'…").

171. *See CCPA vs GDPR – Compliance with Cookiebot*, *supra* note 146.

172. *See id*.

173. *See id*.

174. *Id.* ("The GDPR is focused on creating a 'privacy by default' legal framework for the entire EU, whereas the CCPA is about creating transparency in California's huge data economy and rights to its consumers. Where the GDPR creates a door for the EU user to lock prior to any data processing, the CCPA creates a window for the Californian consumer to open, in order to find out what of their date has already been obtained by a business or sold to a third party.").

175. *See* Huddleston & Adams, *supra* note 170.

176. *See* Bass, *supra* note 4, at 810 (discussing how the decision in *White v. Samsung Electronics America, Inc.* expanded the right of publicity doctrine so wide that it potentially encroaches on First Amendment protections).

177. *See* Huddleston & Adams, *supra* note 170.

tions under the UK-GDPR.[178] This may be because the CCPA is recognized as a "shift from the American approach to data governance—largely permissionless innovation with a post hoc regulatory response to concrete harms—to a European-style approach with the precautionary principle at its center."[179] Critics of the CCPA are concerned about the right to deletion, the counterpart to the GDPR's right to be forgotten, as a violation of the First Amendment, restricting access to information and encouraging censorship.[180] Others respond that data privacy is not the suppression of the freedom of speech and information, but rather the ability to control how one chooses to share speech and information.[181] Regardless, there is a growing movement towards more expansive data protections as states and nations adopt their own regulations.[182]

On November 3rd, 2020, California voters enacted the California Privacy Rights Act (CPRA), which supplements the CCPA and provides Californians with significantly more control over their personal information.[183] The CPRA moves even

178. *See New UK-GDPR Law after Brexit – Compliance with Cookiebot*, COOKIEBOT (Apr. 21, 2021), https://www.cookiebot.com/en/uk-gdpr/ ("After Brexit, the UK is now categorized as a 'third country' by the EU under the GDPR," which means personal data can only be transferred in compliance with the GDPR's cross-border provisions.).

179. *See* Huddleston & Adams, *supra* note 170.

180. *Id.* ("As the Center for International Media Assistance points out, a right to be forgotten not only potentially endangers and limits the ability to gather useful public information, it could also be used to increase government censorship of both media sources and individuals.").

181. Alessandro Acquisti, Curtis Taylor & Liad Wagman., *The Economics of Privacy* 52 J. ECON. LITERATURE 1, 4 (2016) ("Privacy is not the opposite of sharing – rather, is control over sharing.").

182. Huddleston & Adams, *supra* note 170 ("Other states, including Nevada and Maine, have likewise passed consumer data privacy laws, and more still are considering such legislation"); *see also* Adam Satariano, *G.D.P.R., a New Privacy Law, Makes Europe World's Leading Tech Watchdog*, N.Y. TIMES (May 24, 2018), https://www.nytimes.com/2018/05/24/technology/europe-gdpr-privacy.html ("Brazil, Japan and South Korea are set to follow Europe's lead, with some having already passed similar data protection laws. European officials are encouraging copycats by tying data protection to some trade deals . . . ").

183. *See* Edward S. Chang, Jennifer C. Everett, Daniel J. McLoon, Mauricio F. Paez, Jeff Rabkin, Lisa M. Ropple & John A. Vogt, *California Voters Adopt the California Privacy Rights Act*, JONES DAY (Nov. 2020), https://www.jonesday.com/en/insights/2020/11/california-voters-approve-cpra (announcing that the CPRA will go into effect on January 1, 2023).

closer to the GDPR in its broadening of consumer privacy rights and obligations on businesses.[184] It also, however, includes exceptions for information that a business could reasonably believe is made publicly available, and information made accessible by a person who has not restricted their information to a specific audience.[185] These exceptions could carve out a safety zone for brands that use an image posted on an unrestricted social media page, and micro-influencers typically have public social media pages in order to grow their audience.[186]

V. PROPOSAL FOR A GLOBAL STANDARD

With advancements in technology and a growing reliance on the Internet, there is an increasing need to protect a person's right of publicity, yet no global standard exists regulating how countries should do so.[187] Social media influencers are particularly vulnerable to right of publicity violations when brands create a false impression of their endorsement of products and services, benefitting from the influencer's reputation without obtaining their consent or compensating them financially.[188] With a lack of an international standard, micro-influencers may be forced into contorting their publicity violation claim into different causes of action depending on where the unauthorized use occurred and where they bring their suit, which could require higher thresholds to meet and provide inadequate relief.[189]

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184. *See* Michael Bahar, Mary Jane Wilson-Bilik & Alexander F.L. Sand, *California's New Privacy Law, the CPRA, was Approved: Now What?*, EVERSHEDS SUTHERLAND (Nov. 9, 2020), https://us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts/236928/Californias-new-privacy-law-the-CPRA-was-approved-Now-what.

185. *See* Chang, Everett, McLoon, Paez, Rabkin, Ropple & Vogt, *supra* note 183.

186. *See id.*

187. Duquette, *supra* note 56, at 85 ("The recent increase in right of publicity disputes historically parallels technology's profound impact on society. With social media platforms enabling global exposure of one's identity, it has become faster and easier for a person to acquire commercial value in their name and likeness which consequently leaves them at risk for having their identity misappropriated.").

188. *See id.* at 115.

189. Emily Grant, Note, *The Right of Publicity: Recovering Stolen Identities under International Law*, 7 SAN DIEGO INT'L L.J. 559, 566 (2006) (Countries that do not recognize the right of publicity force litigants to "fit the proverbial square peg into a round hole when it comes to enforcing [publicity] rights.").

In order to develop an effective standard for the right of publicity, States should adopt both the US's economic justifications of the commercial value of an identity and the dignitary reasonings based on natural right theories of personal autonomy and protection of reputation.[190] Remember, however, that the right of publicity stemmed from the right to privacy, but it was never intended to be interpreted as the opposite of privacy.[191] Privacy law was meant to be expansive enough to cover an individual's public life and grow with the changing attitude of a society that now commonly shares and posts personal information on the Internet as a means of communication.[192] Data protection regulations attempt to bridge this gap by imposing restrictions on companies that misuse personal data collected from the Internet and by providing individuals with some control over their personal information.[193] Implementing the right of publicity into data protection regulations like the GDPR and the CCPA will help protect social media users and micro-influencers against advertisers from misappropriating their name, image, and likeness for commercial purposes online, and give them the opportunity to recover financial compensation.[194] There is understandably a lack of protection for unauthorized uses without an Internet nexus, but as advertising practices increasingly occur online, data protection regulations can afford security for a significant portion of potential infringements.[195]

Since the GDPR and CCPA reach extraterritorially, and because the Internet is by nature global, these regulations can

190. *See id.* at 562.

191. ROTHMAN, *supra* note 19, at 4 ("[C]ourts and commentators today frequently refer to the right of "publicity" as the "reverse side of the coin of privacy," as though they are opposites, … But the history of these two rights is far more intertwined than widely believed.").

192. *See id.*

193. *See* Chang, Everett, McLoon, Paez, Rabkin, Ropple & Vogt, *supra* note 183.

194. *CCPA vs GDPR – Compliance with Cookiebot*, *supra* note 146 ("The GDPR can be enforced through monetary penalties issued by the national data protection authorities in the EU member states… The CCPA can be enforced by the Attorney General of California through monetary penalties, though these are much smaller than the ones issued for non-compliance with the GDPR.").

195. Lapter, *supra* note 16, at 278 ("[T]he pervasiveness of advertising, now on a global scale, increases the need to consider the availability of such protection in foreign lands.").

affect companies around the world.[196] Businesses can choose to group their actions to comply only with the GDPR within the EU and CCPA within California, but many larger, multinational companies, like Microsoft, Apple, and Twitter, have extended some of the regulations' requirements worldwide.[197] Both the GDPR and the CCPA contain a version of the right to be forgotten, which is very similar to the ultimate goal of the right of publicity for micro-influencers on the Internet, namely, to control how their identity is used commercially online.[198] It seems logical to include the right of publicity for the Internet sphere into data protection regulations so that micro-influencers and average social media users can prevent the misappropriation of their identities for commercial purposes online by requesting deletion of the infringing use or monetary compensation for it.

A Pew Research study shows that most American adults are in favor of more data protection regulations with seventy-four percent agreeing that it is "important to be able to 'keep things about themselves from being searchable online.'"[199] There is a noticeable trend globally for greater data protection regulations and California is just one example of this.[200] Other nations should follow California's lead by taking an approach that is responsive to the needs of the public, specifically the need for enhanced data privacy, as demonstrated by the enactment of the CPRA by a fifty-six to forty-four percent margin, which ex-

196. *See* Martinez & Mecinas, *supra* note 139, at 369–70 (Information that is unavailable for Internet users in Europe, but available in other parts of the world does not eliminate the information, only creates an obstacle for Europeans for the right to information. To effectively protect a victim, extraterritorial implementation of data protection must be considered).

197. *See The EU General Data Protection Regulation*, *supra* note 141.

198. *See* Marc P. Misthal, *Risk of Violating Right of Publicity is Increasing*, GOTTLIEB, RACKMAN & REISMAN, P.C. (May 2016), https://grr.com/publications/risk-violating-right-publicity-increasing/.

199. Brooke Auxier, *Most Americans Support Right to Have Some Personal Info Removed from Online Searches*, PEW RES. CTR. (Jan. 27, 2020), https://www.pewresearch.org/fact-tank/2020/01/27/most-americans-support-right-to-have-some-personal-info-removed-from-online-searches/.

200. Bahar, Wilson-Bilik & Sand, *supra* note 184 ("The CPRA is yet another example of the rapidly evolving privacy landscape. But underlying the volatility is a clear trend towards enhanced privacy obligations on companies, which will almost certainly continue apace, both in the United States and across the globe.").

pands control over one's privacy.[201] Starting with its liberal interpretation of the right of publicity, California's nimble and adaptable style of understanding public sentiment is best suited for a world that is constantly evolving.[202] Within two years, California updated the CCPA by enacting the broader CPRA.[203] Since California's data protection regulations continue to be amended, it is a reasonable area to incorporate right of publicity protections for micro-influencers online. For countries like the UK that are reluctant to create a separate right of publicity, incorporating a right for people to control the online commercial use of their name, image, and likeness into data protection regulations as an extension of data privacy could be a viable option that allows countries to provide these protections without committing to recognizing a separate right of publicity.

CONCLUSION

As more people choose to participate in social media, build a personal brand, and monetize their activity on the Internet, the risk of misappropriation of one's identity online rises.[204] On the Internet, a person's name, image, and likeness is personal data that should be protected.[205] The global nature of the Internet makes it difficult to navigate in a fragmentary fashion.[206] In-

201. *See id.*

202. *See generally* Czarnota, *supra* note 86, at 498–502 (Between the Ninth Circuit Court of Appeal's 1974 decision in *Motschenbacher v. R.J. Reynolds Tobacco Co.* to *White v. Samsung Electronic*s, California has greatly expanded its protection of the right of publicity, holding that "*how* one's identity was misappropriated is not as important as *whether* it had been misappropriated.").

203. *See* Magdalena Olkiewicz-Borkowska & Justyna Regan, *Recent Developments in Data Privacy Laws Impacting U.S. Companies*, MILLER CANFIELD (Nov. 18, 2020), https://www.millercanfield.com/resources-Data-Privacy-Laws-Impacting-US-Companies.html.

204. Montgomery, *supra* note 168 ("With the explosion of the social media influencer onto the scene, the legal landscape surrounding the right of publicity is changing and will continue to do so. There has been a push for a uniform approach to handling these cases, but for now, they are predominately controlled state to state.").

205. Martinez & Mecinas, *supra* note 139, at 378 ("The right of publicity is considered as a personal right in some legal systems and a commercial right in others. In its interaction with the right to be forgotten, it is crucial to consider that on the web a likeness/name is data.").

206. Huddleston & Adams, *supra* note 170 ("The internet's uniquely global nature inherently cannot be dealt with in a fractured manner.").

cluding a right that protects against the misappropriation of one's name, image, and likeness commercially online as a part of the privacy protection afforded in the GDPR and CCPA would be a step towards ensuring that micro-influencers have control over their personal data online. The extraterritorial reach of the GDPR and CCPA may have the effect of encouraging businesses to comply with the regulations in all markets, or of influencing other countries to follow suit and provide similar protections, creating an international standard for the protection of an individual's commercial identity online. Returning to the hypothetical posed in the introduction, as a skin care micro-influencer and California resident, if the CCPA provided a means to recoup monetary compensation for unauthorized commercial uses of personal data, such as your name and image, you would be able to bring a claim against the British brand and recover payment for the unauthorized use of your photo as endorsement since, as a company reaching California residents, they would be required to comply with the CCPA.[207] This would enable one to control how their personal data is used online regardless of whether the UK recognizes the right of publicity. It is therefore desirable to incorporate rights similar to the right of publicity into data protection regulations like the CCPA and GDPR to offer control over the commercial use of personal information to social media users.

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207. *CCPA vs GDPR – Compliance with Cookiebot*, *supra* note 146 ("The CCPA applies to companies that fit under the definition of a business…, regardless of whether the company is itself located in California.").

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