

## COMMENT

# #Liability: Avoiding the Lanham Act and the Right of Publicity on Social Media

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### INTRODUCTION

Suppose your company wants to engage young people through social media, building your brand among thousands of potential customers in an effective and relatively inexpensive manner. You learn that a photographer has snapped a picture of a popular celebrity leaving your store, shopping bags with your logo in hand. Excited by this opportunity to improve your brand, your company posts the photograph on social media. Three days later, you have a lawsuit on your hands.

If this sounds far-fetched, think again. Lawsuits have proliferated in recent years as celebrities have claimed violations of their statutory and common-law rights when companies post pictures on social media. Plaintiffs ranging from Katherine Heigl to Humphrey Bogart's estate have filed lawsuits against companies after the companies posted the celebrities' pictures on social media.<sup>1</sup> However, none of these suits has come to judgment, instead settling privately before trial,<sup>2</sup> which provides little guidance to potential defendants, plaintiffs, and judges.

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<sup>1</sup> See generally Complaint, *Heigl v Duane Reade, Inc.*, Civil Action No 14-2502 (SDNY filed Apr 9, 2014) (available on Westlaw at 2014 WL 1383558) ("*Heigl* Complaint"); Complaint, *Bogart LLC v Burberry Group, PLC*, Civil Action No 12-04491 (CD Cal filed May 31, 2012) (available on Westlaw at 2012 WL 2911856). For another example of a suit that included use of social media, see Ben Child, *Sandra Bullock Settles Lawsuit with Watchmaker over Use of Her Name* (The Guardian, May 21, 2014), archived at <http://perma.cc/W4XZ-QMDU>.

<sup>2</sup> See Nate Raymond, *Katherine Heigl, Duane Reade End Lawsuit over Actress' Photo* (Reuters, Aug 27, 2014), archived at <http://perma.cc/432K-HVEQ>; Bill Donahue, *Burberry Makes Peace in Humphrey Bogart Image Battle* (Law360, Aug 1, 2012), archived at <http://perma.cc/VK44-49TG>.

Social media is an increasingly common and effective tool for companies to reach consumers. Most companies use social media—83 percent of Fortune 500 companies have corporate Twitter accounts and 80 percent use Facebook.<sup>3</sup> In 2015, companies were projected to spend over \$23.6 billion worldwide on social media advertising.<sup>4</sup> More importantly, this investment can generate immense returns. A recent study found that *each Facebook post* made by large companies generated, on average, over 24,000 “likes”<sup>5</sup> from consumers and 350 positive, consumer-written comments.<sup>6</sup> Another study found that the presence of Facebook “likes” can increase sales by almost 13 percent for online retailers.<sup>7</sup> User comments and posts are also valuable. For example, each time a Ticketmaster user posts that she is considering attending an event, Ticketmaster receives an average of \$5.30 in direct sales from that post.<sup>8</sup>

Even a single post can have a massive impact, especially if it involves a celebrity. Samsung signed baseball player David Ortiz as an “MLB social media insider” (a form of endorsement deal) the day before Ortiz visited the White House to celebrate his team’s World Series win.<sup>9</sup> While at the celebration, Ortiz took a “selfie”<sup>10</sup> of himself with President Barack Obama and posted it to his Twitter account.<sup>11</sup> Shortly thereafter, Samsung started using the picture as a “promoted post”<sup>12</sup> on Twitter, while

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<sup>3</sup> Nora Ganim Barnes and Ava M. Lescault, *The 2014 Fortune 500 and Social Media: LinkedIn Dominates as Use of Newer Tools Explodes* (University of Massachusetts Dartmouth, 2015), archived at <http://perma.cc/LYR5-FNPT>.

<sup>4</sup> *Social Network Ad Spending to Hit \$23.68 Billion Worldwide in 2015* (eMarket-er, Apr 15, 2015), archived at <http://perma.cc/W6Y4-WDRT>.

<sup>5</sup> Facebook allows a user to “[c]lick[ ] Like below a post on Facebook . . . to let people know that [she] enjoy[s] it without leaving a comment.” *Like* (Facebook), archived at <http://perma.cc/E8YU-9XB7>.

<sup>6</sup> Thomas Aichner and Frank Jacob, *Measuring the Degree of Corporate Social Media Use*, 57 *Intl J Mkt Rsrch* 257, 267 (2015).

<sup>7</sup> *Facebook Recommendations Could Be Worth Millions of Euros* (Johannes Gutenberg Universität Mainz, June 3, 2013), archived at <http://perma.cc/D8UN-3EVD>.

<sup>8</sup> Danny Sullivan, *By the Numbers: How Facebook Says Likes & Social Plugins Help Websites* (Search Engine Land, May 22, 2011), archived at <http://perma.cc/YMW9-4KR2>.

<sup>9</sup> Mark Bergen, *Samsung Swings for Another Selfie Home Run* (Advertising Age, Apr 2, 2014), archived at <http://perma.cc/PE34-WSMD>.

<sup>10</sup> A “selfie” is a “photograph that one has taken of oneself, typically one taken with a smartphone or webcam and shared via social media.” *Selfie* (Oxford Dictionaries), archived at <http://perma.cc/RX2D-6ZNY>.

<sup>11</sup> Bergen, *Samsung Swings for Another Selfie Home Run* (cited in note 9).

<sup>12</sup> A “promoted post” is one in which the author pays Twitter to show the post to more people than would normally see it. Chuck Frey, *How to Do Paid Promotion on Twitter the Right Way* (Content Marketing Institute, Apr 28, 2015), archived at <http://perma.cc/M4MW-DSU9>.

another Samsung corporate account shared the photo and told fans it was taken with a Galaxy Note 3, a type of Samsung phone.<sup>13</sup> As of October 19, 2015, the original photo had been “retweeted” 40,417 times and “favorited” 46,721 times.<sup>14</sup> When Samsung orchestrated a similar stunt with comedian Ellen DeGeneres at the 2014 Oscars, involving a photo with actors Meryl Streep, Bradley Cooper, and Jennifer Lawrence, the tweet became known as the “tweet heard ‘round the world,”<sup>15</sup> with nearly three million accounts retweeting the photograph (and millions more viewing it) within the first day.<sup>16</sup> This form of marketing works; after the DeGeneres photo was posted, Samsung was mentioned about nine hundred times per minute on social media.<sup>17</sup>

Given this staggering potential, it is no surprise that companies are using social media despite the high risk of litigation and the lack of any judicial opinions to guide their use. This Comment provides guidance to companies wishing to take advantage of the benefits of social media without incurring liability. Although the few cases filed in court have settled, leaving companies with undisclosed bills<sup>18</sup> and legal uncertainty about social media, a few simple behaviors on the part of companies could protect them from liability. This Comment is organized as follows: Part I provides background on the basics of social media. It describes common social media platforms, illustrates the corporate profit-boosting opportunities presented by social media, and explains why celebrity lawsuits represent a significant problem for companies. Part I also details Heigl’s lawsuit against Duane Reade over posts using her photograph. Part II gives an overview of two key claims—the federal Lanham Act<sup>19</sup> and the state law right of publicity—and discusses First Amendment defenses that can be applied to these claims. Part

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<sup>13</sup> Bergen, *Samsung Swings for Another Selfie Home Run* (cited in note 9).

<sup>14</sup> David Ortiz, *What an Honor!* (Twitter, Apr 1, 2014), archived at <http://perma.cc/Q5RC-PCKL>.

<sup>15</sup> See, for example, Wayne Pacelle, *The Tweet Heard ‘Round the World* (Huffington Post, May 4, 2014), archived at <http://perma.cc/2C2Y-P6A3>.

<sup>16</sup> Suzanne Vranica, *Behind the Preplanned Oscar Selfie: Samsung’s Ad Strategy* (Wall St J, Mar 3, 2014), archived at <http://perma.cc/X9SM-MKAZ>; Michael Fleischman, *The Reach and Impact of Oscars 2014 Tweets* (Twitter, Mar 5, 2014), archived at <http://perma.cc/96BE-5KXK>.

<sup>17</sup> Vranica, *Behind the Preplanned Oscar Selfie* (cited in note 16).

<sup>18</sup> In the *Heigl* case, for example, Duane Reade agreed to make an undisclosed donation to Heigl’s animal-welfare foundation. Raymond, *Katherine Heigl, Duane Reade End Lawsuit* (cited in note 2).

<sup>19</sup> Pub L No 79-489, 60 Stat 427 (1946), codified as amended at 15 USC § 1051 et seq.

III then details specific aspects of these claims (nickname protection and the definition of advertising) and defenses (the public interest) that are most relevant to social media. Finally, Part IV discusses how the structure of social media provides opportunities for companies to post photographs without violating the Lanham Act or the right of publicity. Specifically, Part IV first explains how avoiding the use of certain usernames and linking devices can prevent liability. It further discusses how another feature of social media—sharing—can be used to bolster a First Amendment public-interest defense for shared images. If handled correctly, social media posts of celebrity photographs can be an effective means of engaging fans without generating liability.

### I. SOCIAL MEDIA BACKGROUND

A basic understanding of social media and its uses is integral to understanding its potential and its pitfalls. The first social media website was launched in 1997 and attracted millions of users.<sup>20</sup> Social media websites allowing people to connect with friends, make new professional connections, and locate potential romantic partners popped up in the next several years.<sup>21</sup> Although social media was available beginning in the late 1990s, lawsuits involving social media websites did not begin until the mid-2000s.<sup>22</sup> In recent years, privacy claims have begun to proliferate.<sup>23</sup> However, Lanham Act and right of publicity cases are still in their infancy when it comes to social media.

Before this Comment dives into that law, this Part explains how social media works. Part I.A provides a primer on social media, including common platforms, terminology, and structures. Part I.B explains the differences between conventional media and social media and why it is important for companies to

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<sup>20</sup> See danah m. boyd and Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J Computer-Mediated Commun 210, 211–14 (2007) (defining social network sites “as web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system”).

<sup>21</sup> See *id.*

<sup>22</sup> One of the earliest social media lawsuits was over the ownership of the software code used to create social media websites. See generally *Google, Inc v Affinity Engines, Inc*, 2005 WL 2007888 (ND Cal). Another early case was a 2007 antitrust lawsuit against MySpace. See generally *LiveUniverse, Inc v MySpace, Inc*, 2007 WL 6865852 (CD Cal).

<sup>23</sup> See, for example, *In re Facebook Privacy Litigation*, 791 F Supp 2d 705, 708 (ND Cal 2011) (involving a suit against Facebook for alleged violations of the Electronic Communications Privacy Act and breach of contract, among other claims).

maintain a social media presence. Part I.C explains the significance of celebrity social media suits and how company behaviors are affected by the surrounding legal uncertainty. Finally, Part I.D gives an example of a recent social media case: movie star Heigl's suit against drugstore Duane Reade.

#### A. Social Media

“Social media is a broad term incorporating blogs, wikis, Internet communities and online discussions” including websites like Facebook, YouTube, Instagram, and Twitter.<sup>24</sup> In the context of this Comment, “social media” refers to websites on which people (“users”) make accounts and then connect their accounts to others’ accounts. The act of connection is called “following,” and a user who connects to another user’s account is called a “follower.”<sup>25</sup> Users can also create posts, which may include text, pictures, videos, or some combination thereof. These posts are labeled differently from website to website—on Facebook they are “statuses”<sup>26</sup> while on Twitter they are “tweets”<sup>27</sup>—but they are all essentially the same thing. Other users can comment on these posts to reply to the original user and can share<sup>28</sup> the post with their followers. Each user has a home page or “feed” on which she sees recent posts from the users she follows, as well as a profile page on which other users can see the content she has posted or shared.<sup>29</sup> Companies and celebrities can also create accounts (which users can follow) and can use these accounts to make posts.<sup>30</sup> Corporate accounts are popular; approximately 70

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<sup>24</sup> Bob Franklin, et al, *Key Concepts in Public Relations* 200 (Sage 2009).

<sup>25</sup> The exact language varies by site—for example, on Facebook, following is called “friending,” while on Twitter it is simply called “following.” See Francis McCarthy, *The 7 Rules of Facebook Friending* (Thought Catalog, July 24, 2013), archived at <http://perma.cc/5G3K-VKSL>; *The Twitter Glossary* (Twitter), archived at <http://perma.cc/MZ3X-47Y2>. “Following” and “followers” are used throughout this Comment because they are the most descriptive and least platform-specific terms.

<sup>26</sup> *Social Media Terminology* (Two Degrees Marketing), archived at <http://perma.cc/SB4B-C9FT>.

<sup>27</sup> *Id.*

<sup>28</sup> Sharing also has a variety of names depending on the platform, such as “retweeting” on Twitter. *The Twitter Glossary* (cited in note 25).

<sup>29</sup> See *Social Media Terminology* (cited in note 26).

<sup>30</sup> Many corporate and celebrity accounts are managed by paid staff. See Caysey Welton, *Social Media: An Occupation on the Rise (Infographic)* (PRNews, Oct 3, 2013), archived at <http://perma.cc/EQ2U-67J4>. The fact that celebrity accounts are managed by third-party agents has not troubled courts, which tend to view the heavily managed nature of a celebrity’s identity and statements to still be attributed to the celebrity as a person. Just as the actions of a corporate social media staffer are attributed to the company as an

percent of active Facebook users in North America follow at least one business.<sup>31</sup>

Once a person has followed another account, she will see the followed account's recent posts on her home page.<sup>32</sup> Because the home page is a compilation of recent posts by everyone a user follows, the odds of seeing any single post are relatively small. Facebook posts by a given company are typically seen by about 16 percent of that company's followers.<sup>33</sup> To increase the number of people who see a given post, companies can pay the social media site to make the post a "promoted post" (on Facebook) or a "promoted tweet" (on Twitter).<sup>34</sup> Companies can even target a given post to specific users or specific demographics (such as women in their twenties or men in Oklahoma).<sup>35</sup> These posts can convince more people to follow the company's account or can persuade them to buy a specific product.<sup>36</sup> These paid posts advertise not only the product mentioned in the post but also the company's social media account itself, encouraging users to follow the account.<sup>37</sup> This advertising is quite cost-effective. Each post can cost as little as \$1 per new follower and lead to large increases in business.<sup>38</sup> For example, the Aria, a Las Vegas hotel, chose to post a deal on Facebook and paid to promote it.<sup>39</sup> Over 177,000 people clicked on the link and over 600 people booked reservations—representing a 485 percent return on Aria's investment, according to Facebook.<sup>40</sup> An Arizona bicycle company that ran a similar deal saw its sales increase by \$500,000.<sup>41</sup>

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entity, the actions of a celebrity's social media manager are attributed to the celebrity as if she wrote them herself. See Amy Kaufman, *For Hollywood's Social Media Managers, Tweeting Is a Living* (LA Times, Nov 15, 2013), archived at <http://perma.cc/T7YL-R3EJ>.

<sup>31</sup> Lauren Drell, *Can Promoted Posts Help Your Business?* (Mashable, July 8, 2013), archived at <http://perma.cc/A8YY-KKQT>.

<sup>32</sup> There are ways to hide or change which accounts a user sees on her home page (also called a "feed"), but they are not relevant here since the default is that the accounts are seen. See, for example, *Controlling What You See in News Feed* (Facebook), archived at <http://perma.cc/QTH7-J5RU>.

<sup>33</sup> Drell, *Can Promoted Posts Help Your Business?* (cited in note 31).

<sup>34</sup> See id.; Frey, *How to Do Paid Promotion on Twitter* (cited in note 12).

<sup>35</sup> See Drell, *Can Promoted Posts Help Your Business?* (cited in note 31).

<sup>36</sup> See id.

<sup>37</sup> See id.

<sup>38</sup> Sujan Patel, *12 Things You Need to Know about Social Advertising* (Small Business Trends, Oct 23, 2014), archived at <http://perma.cc/6KXU-246G>.

<sup>39</sup> *Case Study: Aria Resort and Casino* (Facebook), archived at <http://perma.cc/E2UP-WNY4>.

<sup>40</sup> Id.

<sup>41</sup> *State Bicycle Co* (Facebook), archived at <http://perma.cc/9GVG-B7PF>.

Users can employ several tools to increase the visibility of their posts without paying the social media site. For example, a user can “tag” another user by typing the “@” symbol followed by the person’s or company’s username.<sup>42</sup> The post will then appear on the profile pages of both the tagger and the tagged user, as well as on their followers’ feeds.<sup>43</sup>

Another way to increase viewership of a post is through a form of indexing using hashtags. A “hashtag” is a word or phrase (without spaces) preceded by the “#” symbol.<sup>44</sup> Clicking a hashtag will bring up other posts by users who have used the same hashtag.<sup>45</sup> For example, clicking on “#Ferguson” brings up posts related to the 2014 shooting of Michael Brown in Ferguson, Missouri, while “#snowday” brings up posts about school closings due to snow.<sup>46</sup> Many companies and celebrities have their own hashtags that they use to promote their brands, services, or upcoming products: for example, Samsung used the hashtag “#TheNextBigThing” to promote its Galaxy smartphone.<sup>47</sup>

Corporate social media functions somewhat differently than traditional advertising. Social media accounts can certainly aim to sell specific products—for example, a March 14, 2014, Twitter post by Duane Reade read “Crunch, crunch Munch! It’s National Potato Chip Day! Enjoy!” and was followed by a link to an advertisement

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<sup>42</sup> See Marissa Mele, *Using Facebook’s Updated Tagging Feature to Increase Your Brand’s Exposure* (MoreVisibility, Mar 3, 2014), archived at <http://perma.cc/7CPF-QFLF>.

<sup>43</sup> To some extent, this is dependent on the privacy settings of the tagger and the tagged user, but tagging almost always leads to an increase in visibility. See Sam Blum, *Facebook’s New Promoted-Post Feature Sparks Privacy Concerns* (The Guardian, Feb 15, 2013), archived at <http://perma.cc/YW56-AVPL>; *Facebook Brand Pages Increase Visibility with Page Tagging* (Starmark), archived at <http://perma.cc/AA57-JSK4>.

<sup>44</sup> *The Twitter Glossary* (cited in note 25).

<sup>45</sup> See *id.*

<sup>46</sup> See *#Ferguson* (Twitter), archived at <http://perma.cc/H3Z6-GP6G>; *#snowday* (Twitter), archived at <http://perma.cc/LVN3-R4ZM>.

<sup>47</sup> Tim Nudd, *Samsung Unveils Super Bowl Ad, as LeBron James Joins Seth Rogen and Paul Rudd* (Adweek, Feb 3, 2014), archived at <http://perma.cc/3HDH-GDLK>. Many celebrities have distinctive hashtags: actor Charlie Sheen used “#tigerbloodintern” for a sponsored internship campaign, and actress Christina Ricci inspired “#Riccing” for pictures of individuals trying to fit themselves into small spaces, while “#Eastwooding” refers to talking to an empty chair as actor Clint Eastwood did during the 2012 Republican National Convention. Jo Piazza, *How Much Can a Celebrity Make for Tweeting?* (Vulture, Jan 28, 2012), archived at <http://perma.cc/JC83-AEYJ>; Dana Schuster, *5 of the Best Celebrity-Inspired Hashtags* (NY Post, Jan 27, 2014), archived at <http://perma.cc/4KCE-8NXX>. Companies get in on the act too. T-Mobile once attempted to use Verizon’s marketing slogan (“#NeverSettle”) against it (turning it into “#NeverSettleforVerizon”), although the advertising campaign was withdrawn after backlash from users. See Christopher Heine, *T-Mobile Appears to Pull Twitter Ad after Backlash: #NeverSettleForVerizon Reaps Negative Tweets* (Adweek, May 14, 2015), archived at <http://perma.cc/XJV3-L6R4>.

for its store brand of potato chips.<sup>48</sup> However, companies often use social media to engage in building brand loyalty.<sup>49</sup> Brand loyalty is “the tendency of consumers to continue buying a particular brand instead of trying a different one,” meaning that a customer with high brand loyalty will consume a company’s product even when its competitors offer similar products.<sup>50</sup> Similar to loyalty-building corporate holiday cards, corporate social media accounts are as likely to offer a “happy holidays” message or a heartwarming story about an employee as they are to offer a discount on Christmas decorations.<sup>51</sup>

For celebrities, social media creates opportunities for both formal and informal advertisements. Formal advertisements involve a celebrity who is paid directly for her advertisement: for example, Kim Kardashian was paid \$10,000 for making a Twitter post about retailer ShoeDazzle.com.<sup>52</sup> In fact, an entire company, Ad.ly, has sprung up to pay celebrities for giving advertisement writers access to their Twitter accounts, typically earning celebrities between \$2,500 and \$8,000 per post.<sup>53</sup> In some cases, the levels can reach even higher. Actor Charlie Sheen was paid “about \$50,000 per tweet” for one Ad.ly campaign for Internships.com, which ultimately generated 82,148 internship applications and 1,000,000 visits to the website.<sup>54</sup> Informal advertising may be unintentional and take the form of using or posting about a product. For example, a dress worn by Lindsay Lohan sold out internationally within days after photos of her wearing it appeared on social media.<sup>55</sup>

Despite the prevalence of formal and informal advertising, social media advertising is not highly regulated. At least one author has called for more regulation of celebrity social media advertising

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<sup>48</sup> Duane Reade (Twitter, Mar 14, 2014), archived at <http://perma.cc/5WFP-CUGU>.

<sup>49</sup> See Michel Laroche, Mohammad Reza Habibi, and Marie-Odile Richard, *To Be or Not to Be in Social Media: How Brand Loyalty Is Affected by Social Media?*, 33 *Intl J Info Mgmt* 76, 81 (2013) (“To the extent that a brand community based on social media acts to provide benefits . . . it cements the customers’ relationships with the brand, the product, the company and other customers. These enhanced relationships result in enhanced brand loyalty.”).

<sup>50</sup> *Brand Loyalty* (Collins English Dictionary), archived at <http://perma.cc/YK6K-LJYT>.

<sup>51</sup> See Aleksandra Sagan, *Tips for a Successful Social Media Holiday Campaign* (Hootsuite), archived at <http://perma.cc/T9F3-U3HE>.

<sup>52</sup> Piazza, *How Much Can a Celebrity Make for Tweeting?* (cited in note 47).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Liz Kelly, *Lindsay Lohan’s White Dress Sells Out Online* (Wash Post, Feb 11, 2011), archived at <http://perma.cc/D3SY-XGLK>.

to prevent customers from being confused by informal advertising.<sup>56</sup> Leah Feinman explains that disclosures are not currently required “when a reasonable consumer would presume that the [celebrity] was being compensated” for her endorsement.<sup>57</sup> Feinman advocates for disclosures accompanying each sponsored message.<sup>58</sup> In addition to a lack of disclosures in messages that celebrities are paid to produce, celebrities are often not forthcoming about whether they have a relationship with a brand or whether a given tweet was a part of that relationship. For example, Ortiz acknowledged that he was a “social media insider” for Samsung, but he insisted that the selfie he took with President Obama was genuinely personal, even though it was later used in Samsung’s advertising.<sup>59</sup> These ambiguous relationships between celebrities and companies may cause legal problems if the person in the photo is later surprised to find herself at the center of an advertising campaign that she did not approve.<sup>60</sup>

#### B. Differences between Social Media and Conventional Media

Before addressing the structural features of social media that will impact the viability of Lanham Act and right of publicity claims, it should be made clear that social media represents a new phenomenon in several ways. Social media has more users, is more interactive, and costs less than conventional media. These attributes are discussed more below, as they demonstrate why companies should make an effort to use social media despite potential liability.

The first difference between social media and conventional media is the sheer size of the platform: at the end of 2013, Facebook had 1.23 *billion* active monthly users.<sup>61</sup> By comparison, the largest American consumer magazine in the second half of 2013 was *AARP The Magazine* with roughly 22.3 million

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<sup>56</sup> See Leah W. Feinman, Note, *Celebrity Endorsements in Non-traditional Advertising: How the FTC Regulations Fail to Keep Up with the Kardashians*, 22 Fordham Intel Prop Media & Enter L J 97, 140–41, 143 (2011).

<sup>57</sup> Id at 124.

<sup>58</sup> Id at 138.

<sup>59</sup> See Jim Baumbach, *White House Not Sold on David Ortiz’s Selfie with Obama* (Newsday, Apr 12, 2014), archived at <http://perma.cc/7ZM2-NEZT> (discussing the White House’s reaction to Ortiz’s relationship with Samsung and noting that Ortiz “insist[s] the presidential selfie wasn’t a planned stunt”).

<sup>60</sup> Consider, for example, the White House’s poor reaction to Ortiz’s selfie. Id.

<sup>61</sup> Ami Sedghi, *Facebook: 10 Years of Social Networking, in Numbers* (The Guardian, Feb 4, 2014), archived at <http://perma.cc/MK2M-4H5P>.

subscribers, and the largest American nonpaid magazine had only 12.4 million recipients.<sup>62</sup> Thus, advertising on Facebook targets an audience almost one hundred times larger than advertising in the most popular magazines. Even an advertisement aired on every public nightly news channel (ABC, CBS, and NBC) during the evening news broadcast would reach an average of only 22.1 million viewers.<sup>63</sup> By contrast, two of the leading brands on Facebook (Coca-Cola and YouTube) had over eighty-one million followers each in October 2015, allowing these brands to reach millions of people without spending a penny on distribution.<sup>64</sup> Because the audience for every post is significantly larger than for a print or television advertisement, companies are rightfully excited about the potential of social media.

Furthermore, unlike conventional media, social media is interactive and responsive. This interactivity allows fans to expand the audience of a company's post and create a deeper relationship with the company. Fans can and do respond directly to celebrities and companies. Celebrities and companies can respond back, creating a dialogue. Taylor Swift and Ariana Grande are known for endearing themselves to fans by responding to individual fan messages on social media from time to time, while Lady Gaga has attributed her success to her social media fans.<sup>65</sup> Companies have also directly engaged with their consumers through social media. In 2015, Spotify won a Webby Award (used to reward the best websites and use of Internet technology) for its SpotifyCares Twitter account, which handles customer-service issues over social media.<sup>66</sup> A customer having an issue with Spotify's service can send a tweet to @SpotifyCares and receive technical support in real time.

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<sup>62</sup> Neal Lulofs, *Top 25 U.S. Consumer Magazines for December 2013* (Alliance for Audited Media, Feb 6, 2014), archived at <http://perma.cc/TJS9-JA3M>.

<sup>63</sup> Emily Guskin, Mark Jurkowitz, and Amy Mitchell, *Network: By the Numbers* (Pew Research Center, 2013), archived at <http://perma.cc/DZ6L-QXGX> (discussing the viewership statistics for the year 2012).

<sup>64</sup> *Product Brands with the Most Facebook Fans as of October 2014 (in Millions)* (Statista), archived at <http://perma.cc/X3PY-38GR>.

<sup>65</sup> See Alexis Rhiannon, *9 Celebrities Who Might Just Interact with You on Social Media, Even Though You're a Normal* (Bustle, May 25, 2015), archived at <http://perma.cc/L3UL-78GX>; Lucy Bennett, *Fan/Celebrity Interactions and Social Media: Connectivity and Engagement in Lady Gaga Fandom*, in Linda Duits, Koos Zwaan, and Stijn Reijnders, eds., *The Ashgate Research Companion to Fan Cultures* 109, 111 (Ashgate 2014).

<sup>66</sup> See *Spotify Social Media Customer Support* (The Webby Awards, 2015), archived at <http://perma.cc/Y9FC-37MD>.

Fans can also increase the reach of corporate speech by sharing a company's post. In an earlier era, a fan might show her friend a magazine advertisement or talk about a television advertisement. Today, in a few keystrokes, a fan can send the advertisement to hundreds of her friends, who may well watch it and distribute it to their friends, and so on. *Paranormal Activity*, a 2009 horror film, became one of the most profitable films of all time after the \$15,000 budget film distributed a trailer online that was widely shared on social media.<sup>67</sup> The film generated over \$100 million in revenue.<sup>68</sup>

A final difference is that companies can enter the social media space for free. While companies may pay for posts to be promoted to other users or spend money on creating graphics and videos,<sup>69</sup> the account itself and the act of posting are both free.<sup>70</sup> The costs of creating a single social media post—in terms of staff time, production costs, and distribution—are dramatically lower than the costs of developing a print or television advertisement, allowing a company to substantially increase its advertising activity to a level that would be impossible in conventional media.<sup>71</sup>

This reduced cost, combined with quick release time, may be why social media gaffes are a regular feature of daily news. In fact, ill-advised social media posts are so common that professional organizations now offer advice on how to properly apologize for them.<sup>72</sup>

The size, interactivity, and low cost of social media are compelling reasons for companies to become involved with these platforms. However, if companies use certain features of social media, they may find themselves on the wrong side of costly

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<sup>67</sup> Craig Carter, *15 Viral Marketing Examples over the Past 5 Years* (Ignite Social Media, Sept 18, 2013), archived at <http://perma.cc/9GEQ-2MCX>. See also Amy Raphael, *How Paranormal Activity Became a Frightening Success* (The Guardian, Nov 20, 2009), archived at <http://perma.cc/7C6M-SWUX>.

<sup>68</sup> Marisa Porter, *Paranormal Activity: Viral Marketing Used to Generate 100 Million Dollars* (Sentient Decision Science, Jan 14, 2010), archived at <http://perma.cc/6D2S-8CKK>.

<sup>69</sup> See text accompanying notes 33–35.

<sup>70</sup> Most social media websites generate the bulk of their revenue through paid advertising. Data licensing (that is, selling information about users and public posts) is another revenue source. See Pia Gadkari, *How Does Twitter Make Money?* (BBC, Nov 7, 2013), archived at <http://perma.cc/GXA7-6QDG>.

<sup>71</sup> See Shea Bennett, *Marketing 101 – Social Media vs Traditional Media [INFOGRAPHIC]* (Social Times, July 13, 2012), archived at <http://perma.cc/FP5Y-R4GC>.

<sup>72</sup> See, for example, Chris Syme, *How to Nail the Social Media Apology* (CASE, Aug 22, 2013), archived at <http://perma.cc/SX79-H3LX>.

lawsuits filed by celebrities rather than simply enjoying the great value and large audience that social media can provide.

### C. Significance of Celebrity Lawsuits

When social media and celebrities combine, it can be a potent combination for companies, drastically increasing sales and brand loyalty. However, legal uncertainty may have a chilling effect, causing companies to not take full advantage of these opportunities.<sup>73</sup> This Comment counteracts the chilling effect that suits like Heigl's have had on companies' use of social media by providing guidance on how to stay within the boundaries of the law.

As discussed above, seeing a product used by a celebrity on social media can massively increase the product's sales. When fashion retailer Lord & Taylor paid fifty fashion bloggers to post photos of themselves wearing a specific dress on Instagram (a photo-sharing social media site), the dress sold out within days.<sup>74</sup> The effect with celebrities is even stronger. British Duchess of Cambridge Kate Middleton's fashion choices have such a strong impact on clothing sales that the British media refers to it as the "Kate effect."<sup>75</sup>

Despite the clear benefits of highlighting celebrities, companies generally do not fill their social media accounts with images of stars using their products. Although a few brands have made a point to showcase celebrities' use of their products,<sup>76</sup> most do not. Even when a fashion blog like *Tom + Lorenzo* points out a celebrity wearing a brand's clothes, most companies do not share this with their fans.<sup>77</sup>

It was not always like this. For example, many restaurants have long posted photographs of celebrities on their walls proudly

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<sup>73</sup> Consider Brian Heidelberger, *Can Brands Use Celebrities in Social Media without Permission?* (Advertising Age, Jan 30, 2013), archived at <http://perma.cc/N3MU-BWEX> (discussing the various risk levels associated with companies' use of celebrities on social media).

<sup>74</sup> See Lauren Tuck, *50 Bloggers Wear the Same Dress, Sells Out within Days* (Yahoo Style, Apr 2, 2015), archived at <http://perma.cc/789G-98GU>.

<sup>75</sup> Lauren Milligan, *The Kate Effect* (Vogue, July 22, 2011), archived at <http://perma.cc/NHA8-8NTM>.

<sup>76</sup> One example is designer Louis Vuitton's August 20, 2015, Facebook post featuring a picture of actress Lupita Nyong'o. Louis Vuitton, *Lupita Nyong'o Wearing Louis Vuitton* (Facebook), archived at <http://perma.cc/8M5U-E5P8>.

<sup>77</sup> For example, when actress Reese Witherspoon was spotted wearing a J. Crew skirt, J. Crew said nothing, missing out on a great opportunity to connect with fans. See *Reese Witherspoon in Draper James and J. Crew in Santa Monica* (Tom + Lorenzo, Aug 19, 2015), archived at <http://perma.cc/KN8N-G2EL>.

proclaiming that celebrities like Arnold Palmer and James Brown ate there.<sup>78</sup> Newspapers and Internet sites still report the restaurants at which celebrities dine,<sup>79</sup> but it is rare to see a picture of a celebrity dining on a restaurant's social media page.

One of the reasons why companies are not taking advantage of these opportunities to build their brands is likely that they fear celebrity suits.<sup>80</sup> None of these suits has gone to trial, which creates legal uncertainty as to whether posting photographs is in fact tortious. Without a clear framework with which to determine whether they will be held liable, it makes sense for risk-averse (and cost-averse) companies to avoid litigation costs by settling their individual cases and avoiding similar behavior in the future.

The continued lack of case law has likely caused companies to shy away from lawful social media activity. Scholars have long recognized that legal uncertainty causes "overcomplying," in which defendants err on the side of caution more than is socially optimal.<sup>81</sup> Both companies and social media users benefit when companies post celebrity photos on social media—the companies' sales increase and social media users are better able to emulate their celebrity idols.

This Comment reduces this uncertainty, and therefore reduces overcompliance, by providing a guide to the legal framework and specific behaviors that companies can use to reduce their risk of liability. As both uncertainty and risk of liability decrease, companies should increase their social media activity to a more socially optimal level. Once the legal lines are clear, companies will be able to share valuable information with consumers.

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<sup>78</sup> See, for example, Meg Mirshak, *Restaurants Line Walls with Celebrity Photos* (The Augusta Chronicle, July 16, 2011), archived at <http://perma.cc/X9CR-W7XA>.

<sup>79</sup> See, for example, Lesley Abravanel, *Celebrities Spotted around Town at Hot Spots* (Miami Herald, Feb 17, 2014), archived at <http://perma.cc/R3GM-59FB>.

<sup>80</sup> See Melissa Maleske, *6 IP Dilemmas That Can Trip Up GCs* (Law360, June 22, 2015), archived at <http://perma.cc/D6BG-4P3J> (discussing litigation problems and risks from an intellectual property standpoint, including the risk of companies' social media posts referencing celebrities or other brands).

<sup>81</sup> John E. Calfee and Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 Va L Rev 965, 966 (1984). See also Bruce Chapman, *Corporate Tort Liability and the Problem of Overcompliance*, 69 S Cal L Rev 1679, 1683 (1996) ("[O]vercompliance occurs when the defendant takes more than the socially cost-justified level of precautions.").

#### D. An Example: The *Heigl* Complaint

Parts III and IV use the facts of an actual complaint, filed by Heigl against drugstore Duane Reade, to illustrate the key legal differences between social media and conventional media. The facts are as follows: Heigl is an actress and celebrity who has granted permission for selected uses of her name and picture to a foundation that she created.<sup>82</sup> She maintains an official Twitter account (“@KatieHeigl”), which had over 754,000 followers as of the date she filed her complaint.<sup>83</sup> In March 2014, drugstore Duane Reade posted a photograph of Heigl leaving a Duane Reade store on Twitter with the caption “Love a quick #DuaneReade run? Even @KatieHeigl can’t resist shopping #NYC’s favorite drugstore.”<sup>84</sup> The photograph was also posted on Duane Reade’s Facebook page with a revised caption: “Don’t you just love a quick #DuaneReade run? Even Katherine Heigl can’t resist shopping at #NYC’s most convenient drugstore!”<sup>85</sup> Heigl allegedly did not consent to the use of her image, which was originally taken by a paparazzi photographer and posted on the celebrity news site Just Jared in a story about Heigl changing talent agencies.<sup>86</sup> It does not appear from the complaint that Duane Reade purchased the rights to the image from the photographer.<sup>87</sup>

At the time, Duane Reade had over 2,000,000 followers on Twitter<sup>88</sup> (as of August 2015, its official Facebook page had just over 100,000 followers).<sup>89</sup> Duane Reade stated that its online social media campaign was meant to “drive awareness, engagement, and increase sales at all retail stores using digital marketing strategies.”<sup>90</sup> Heigl alleged that the company’s social media posts “predominantly promote commercial advertisements for a wide range of its products and services,”<sup>91</sup> although a quick glance at the company’s current usage suggests a balance of feel-good

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<sup>82</sup> *Heigl* Complaint at \*3–4 (cited in note 1).

<sup>83</sup> *Id.* at \*4.

<sup>84</sup> *Id.* at \*7 (emphasis omitted).

<sup>85</sup> *Id.* (emphasis omitted). It is not clear whether Heigl’s official Facebook account was tagged in the Facebook post, and the post has since been removed.

<sup>86</sup> *Heigl* Complaint at \*7–8 (cited in note 1).

<sup>87</sup> *Id.* at \*8.

<sup>88</sup> *Id.* at \*5.

<sup>89</sup> *Duane Reade* (Facebook), archived at <http://perma.cc/3A6E-RM8B>.

<sup>90</sup> *Heigl* Complaint at \*5–6 (cited in note 1).

<sup>91</sup> *Id.* at \*6.

posts with no mention of specific goods or services<sup>92</sup> and posts that clearly encourage the buying of goods or services.<sup>93</sup>

Heigl's case is interesting for several reasons. In addition to being one of the first test cases for Lanham Act and right of publicity claims on social media, Duane Reade tagged Heigl by her Twitter username rather than using her real name. Furthermore, Duane Reade used content created by a paparazzi photographer rather than content generated in-house. As discussed below, these features (the username, the act of tagging, and the sharing of someone else's content) may also influence the legal analysis in novel ways. Part IV elaborates on these devices. But first, Part II provides background on the Lanham Act and the right of publicity (both of which were used in the *Heigl* complaint) as well as the possible First Amendment defense that Duane Reade could have raised.

## II. LEGAL BACKGROUND: THE LANHAM ACT, THE RIGHT OF PUBLICITY, AND THE FIRST AMENDMENT

This Comment covers two distinct causes of action that may be brought against companies that post unauthorized pictures of celebrities on social media—the Lanham Act and the right of publicity. These claims are commonly alleged together<sup>94</sup> and courts often treat the claims as closely related.<sup>95</sup> Generally speaking, Lanham Act claims cover consumer confusion over whether an individual has endorsed a product, while right of publicity claims cover the economic loss associated with lost opportunities or goodwill. Since a false endorsement could lead to a celebrity losing sponsorship opportunities or the goodwill of her fans, it makes sense that these claims are often brought together. Part II.A describes § 43(a) of the Lanham Act, which covers

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<sup>92</sup> For example, a September 28, 2015, Facebook post from Duane Reade read “Happy National Good Neighbor Day! Tell those people who pop on your list of wifi networks how much they mean to you.” Duane Reade, *Happy National Good Neighbor Day!* (Facebook, Sept 28, 2015), archived at <http://perma.cc/BR9S-EKPG>.

<sup>93</sup> For example, a January 17, 2016, Facebook post read: “Still finding your 2016 organizational groove? Take 25% off a custom photo calendar.” Duane Reade, *Still Finding Your 2016 Organizational Groove?* (Facebook, Jan 17, 2016), archived at <http://perma.cc/YUD3-3ESD>.

<sup>94</sup> See, for example, *Heigl* Complaint at \*2 (cited in note 1). See also *Rogers v Grimaldi*, 875 F2d 994, 996 (2d Cir 1989).

<sup>95</sup> See, for example, *ETW Corp v Jireh Publishing, Inc*, 332 F3d 915, 924 (6th Cir 2003), citing Bruce P. Keller, *The Right of Publicity: Past, Present, and Future*, 1207 PLI Corp L & Prac Handbook, 159, 170 (Oct 2000) (“In fact, one legal scholar has said that a Lanham Act false endorsement claim is the federal equivalent of the right of publicity.”).

false endorsement claims based on the use of “marks” (such as a celebrity’s name) that create consumer confusion. Part II.B gives an overview of the right of publicity, including its focus on the use of a person’s name or photograph in an advertisement. Part II.C explains the First Amendment public-interest (or “newsworthiness”) defense, which can be used to defeat Lanham Act and right of publicity liability if the post provides information to the public on a matter of public interest.

#### A. The Lanham Act

The Lanham Act covers uses of marks, such as a person’s name, that could lead consumers to make a false association between a product and a person without her consent. Section 43(a) of the Lanham Act provides:

Any person who . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof . . . which[] is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable.<sup>96</sup>

Unlike right of publicity claims, Lanham Act claims cannot be made on the basis of a picture alone since photographs are not included in the statute’s list (“word, term, name, symbol, or device”).<sup>97</sup> The infringer must identify the person by name or mark; a nickname or other name that identifies only the celebrity may be sufficient.<sup>98</sup>

Each circuit has developed its own test for determining whether the Lanham Act has been violated by a given act. The Ninth Circuit’s test is typical.<sup>99</sup> It considers:

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<sup>96</sup> 15 USC § 1125(a)(1).

<sup>97</sup> See *ETW Corp.*, 332 F3d at 922 (holding that the likeness of Tiger Woods is not a trademark that is protected by the Lanham Act); *Pirone v MacMillan, Inc.*, 894 F2d 579, 583 (2d Cir 1990) (finding that there is no trademark over photographs of Babe Ruth).

<sup>98</sup> For example, in a right of publicity claim, Muhammad Ali was able to claim that a cartoon labeled “The Greatest” clearly identified him. *Ali v Playgirl, Inc.*, 447 F Supp 723, 727 (SDNY 1978).

<sup>99</sup> The Sixth Circuit has adopted a test that is almost identical to the Ninth Circuit’s. See *Abercrombie & Fitch Stores, Inc v American Eagle Outfitters, Inc.*, 280 F3d 619, 646 (6th Cir 2002). Although the Seventh and Third Circuits use largely similar tests, the Seventh Circuit omits the likely expansion of product lines and the degree of care that is likely to be exercised by the purchaser. See *Henri’s Food Products Co v Kraft, Inc.*, 717 F2d 352, 354 (7th Cir 1983). In contrast, the Third Circuit adds “the extent to

1. strength of the mark;
2. proximity of the goods;
3. similarity of the marks;
4. evidence of actual confusion;
5. marketing channels used;
6. type of goods and the degree of care likely to be exercised by the purchaser;
7. defendant's intent in selecting the mark; and
8. likelihood of expansion of the product lines.<sup>100</sup>

The “mark” in the celebrity context typically refers to the celebrity's identity or persona, and the “strength” refers to the celebrity's fame, especially among consumers of that specific product.<sup>101</sup> New modes of advertising may impact the “marketing channels used” factor.

By the language of the Lanham Act itself, causing “confusion” about a person's “sponsorship or approval” of a product is a violation of the Act.<sup>102</sup> For cases of sponsorship or endorsement confusion (as opposed to confusion about the identity or origin of a product), the courts of appeals consider context-specific factors (such as the strength of the mark and evidence of actual confusion) to determine the likelihood of confusion. The goods-focused factors (such as proximity and similarity) may not play a role in the celebrity-image cases, because the plaintiff alleges confusion about the endorsement rather than a deception of fact about the good.<sup>103</sup>

Courts have already begun customizing these factors to the specifics of social media. For example, tweets have been used in at least one case as evidence of actual confusion between two social media tools with similar names, suggesting that the confusion of social media fans is a valid form of consumer confusion.<sup>104</sup> This use of Twitter posts is important because it highlights that

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which the targets of the parties' sales efforts are the same.” *A&H Sportswear, Inc v Victoria's Secret Stores, Inc*, 237 F3d 198, 211 (3d Cir 2000).

<sup>100</sup> *AMF Inc v Sleekcraft Boats*, 599 F2d 341, 348–49 (9th Cir 1979).

<sup>101</sup> See Naeha Prakash, *Stars in Their Eyes: The Dominance of the Celebrity Brand and Intellectual Property Norms Protection through Fan Goodwill*, 35 *Hastings Commun & Enter L J* 247, 259–60 (2013).

<sup>102</sup> 15 USC § 1125(a).

<sup>103</sup> See, for example, *Volkswagenwerk Aktiengesellschaft v Church*, 411 F2d 350, 350–52 (9th Cir 1969) (upholding the district court's determination that there was not sufficient confusion to constitute a violation of the Lanham Act when “Volkswagen” was paired with the word “independent” in an advertisement).

<sup>104</sup> See *Boathouse Group, Inc v TigerLogic Corp*, 777 F Supp 2d 243, 253 (D Mass 2011).

the definition of “consumer” will be read broadly to include fans on social media as well as people who actually purchase the wrong product. As courts continue to encounter Lanham Act claims involving social media, they will have to reconsider the applicability of prior decisions and other legal constructions. This opens up new legal frontiers, but it also increases short-term uncertainty while courts settle on how to address social media. When misleading fans online (even if they do not purchase anything) is a Lanham Act risk, companies must be even more careful to comply with the Act.

### B. The Right of Publicity

The right of publicity is the right of a person “to control the commercial use of his or her identity.”<sup>105</sup> It is a state law claim that is recognized by common law or statute in thirty-one states, and only two states have held that no such right exists under the common law.<sup>106</sup> The right of publicity claim is a tool that “provides an economic incentive for [an individual] to make the investment required to produce a performance of interest”<sup>107</sup> and “prevent[s] unjust enrichment by the theft of good will.”<sup>108</sup> The right is intended to remedy economic harms that are associated with the loss of sponsorship opportunities or the loss of goodwill, both of which reduce the “business value” of the celebrity’s identity.<sup>109</sup>

Because the right of publicity is a state law claim, states have developed separate statutes and jurisprudence with different legal elements. California’s language is typical: “Any 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” commits the tort.<sup>110</sup> For example, in one textbook

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<sup>105</sup> J. Thomas McCarthy, 5 *McCarthy on Trademarks and Unfair Competition* § 28:1 at 28-3 (Thomson Reuters 4th ed 2014).

<sup>106</sup> *Id.* at 28-47.

<sup>107</sup> *Zacchini v Scripps-Howard Broadcasting Co.*, 433 US 562, 576 (1977).

<sup>108</sup> *Id.*

<sup>109</sup> McCarthy, 5 *McCarthy on Trademarks* at 28-8 to -9 (cited in note 105) (explaining that the right to publicity “is a commercial and business right”).

<sup>110</sup> Cal Civ Code § 3344(a). This Comment emphasizes the statute and the court cases coming from California because a large share of right of publicity jurisprudence emerges from that state. As of January 2016, a Westlaw search for “right of publicity” found that of the 246 state-level cases mentioning the right of publicity, 92 came from California. The next highest was New York with 46 cases. At the federal level, of the 961 cases that

right of publicity case, a model had agreed to have his photo used on the front of bricks of coffee sold in Canada, only to discover that the image had been used on instant-coffee packaging all around the world.<sup>111</sup> Because the company had used his photograph without his consent, the model was awarded actual damages and a portion of the profits from the instant-coffee sales,<sup>112</sup> subject to a determination of whether the statute of limitations had run.

The statutory emphasis on inclusion in an advertisement (or another communication that has the “purpose[ ] of advertising or selling, or soliciting purchases”<sup>113</sup>) has led to a fragmented jurisprudence when new forms of advertising are introduced. How to define an “advertisement” that can deprive a celebrity of value continues to be debated in right of publicity cases. This inquiry is sometimes confused with whether the supposed “advertisement” is commercial or noncommercial speech,<sup>114</sup> because both the definition of an “advertisement” and the commercial/noncommercial speech distinction originally centered on whether the speech did no more than propose a transaction.<sup>115</sup> For example, a message simply proposing a

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mention the right of publicity, 331 came from within the Ninth Circuit while courts within the Second Circuit (the next highest) had referred to the right in 141 cases.

<sup>111</sup> See *Christoff v Nestlé USA, Inc.*, 213 P3d 132, 134–35 (Cal 2009).

<sup>112</sup> See *id.* at 136. One reason that celebrities are typically the plaintiffs in right of publicity cases is that they can prove damages (lost business value) more easily than noncelebrity plaintiffs, although statutory damages are sometimes available to encourage noncelebrity plaintiffs to bring lawsuits. See Brian D. Wassom, *Uncertainty Squared: The Right of Publicity and Social Media*, 63 *Syracuse L Rev* 227, 242–44 (2013) (providing an overview of states that use statutory damages as an alternative to actual damages). For an example of a noncelebrity right of publicity case, see Third Amended Class Action Complaint, *Perkins v LinkedIn Corp.*, Civil Action No 13-04303, \*60–62 (ND Cal filed Dec 15, 2014) (available on Westlaw at 2014 WL 7691849).

<sup>113</sup> Cal Civ Code § 3344(a).

<sup>114</sup> An advertisement can be commercial or noncommercial speech, and commercial speech need not be a conventional advertisement. See *Bolger v Youngs Drug Products Corp.*, 463 US 60, 66 (1983) (“The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech.”). Furthermore, in *Bolger*, one of the pamphlets was strictly health information without any discussion of Youngs’s products, but it was still found to be commercial speech. *Id.* at 62 n 4, 67–68. The Court considered it important that the pamphlets were conceded to be advertisements, referenced specific products (in some mailings), and had a commercial motivation for the mailings. *Id.* at 66–67. See also *Kasky v Nike, Inc.*, 45 P3d 243, 248, 254, 259 (Cal 2002) (applying *Bolger*’s three-factor test—concerning “advertising format, product references, and commercial motivation”—and finding that press releases and letters released by Nike regarding how well it paid its workers constituted commercial speech even though such statements were not standard “advertisements”).

<sup>115</sup> See *Bolger*, 463 US at 66.

transaction might read “Come buy the new edition of *The University of Chicago Law Review*, only \$75 at the bookstore!” However, a message that simply reads “Congratulations to *The University of Chicago Law Review* on a great year!” does not propose a transaction and does not fall within the traditional definition of “advertising” or “commercial speech.” As companies have become more creative and stopped simply proposing transactions, courts have struggled to determine what constitutes an “advertisement” within the meaning of the right of publicity.

Courts have begun adapting legal tests to the variety of ways that companies advertise. The Seventh Circuit has found that a “congratulatory message” to Michael Jordan featuring a retailer’s name and slogan was an advertisement, even though it promoted “brand awareness or loyalty” rather than urging fans to buy a specific product.<sup>116</sup> Similarly, the Third Circuit has found that a half-hour-long film about a video game was an advertisement, even though a documentary film is an uncommon form for an advertisement.<sup>117</sup> When the National Football League created promotional videos, a district court found the videos could qualify as advertisements and allowed former players to sue under the right of publicity.<sup>118</sup>

These cases demonstrate that courts are already beginning to think flexibly about the definition of “advertisement,” pushing beyond its conventional definition. As this expansion continues, companies must increase their awareness of right of publicity law, since previously legal conduct may now cause liability. For

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<sup>116</sup> *Jordan v Jewel Food Stores, Inc.*, 743 F3d 509, 518 (7th Cir 2014).

<sup>117</sup> *Facenda v N.F.L. Films, Inc.*, 542 F3d 1007, 1017 (3d Cir 2008).

<sup>118</sup> *Dryer v National Football League*, 689 F Supp 2d 1113, 1120 (D Minn 2010). When athletes can bring right of publicity claims (for instance, for the use of their names, faces, or statistics in video games) is a fast-moving area of litigation that is outside the scope of this Comment. See generally, for example, Kendall K. Johnson, *Enforceable Fair and Square: The Right of Publicity, Unconscionability, and NCAA Student-Athlete Contracts*, 19 Sports L J 1 (2012) (concluding that the use of a college athlete’s likeness without compensation is not unconscionable, such that his right of publicity suit should fail); Mary Catherine Moore, Note, *There Is No “I” in NCAA: Why College Sports Video Games Do Not Violate College Athletes’ Right of Publicity Such to Entitle Them to Compensation for Use of Their Likenesses*, 18 J Intel Prop L 269 (2010) (arguing that college athletes need not be compensated for the use of their likenesses because of free speech protections). But see generally, for example, Jennifer Hinds, Comment, *The One-Sided Games of the NCAA: How In Re NCAA Student-Athlete Levels the Playing Field*, 35 Loyola LA Enter L Rev 95 (2014) (insisting that NCAA contracts waiving student athletes’ rights to compensation are procedurally unconscionable); Pamela Edwards, *What’s the Score?: Does the Right of Publicity Protect Professional Sports Leagues?*, 62 Albany L Rev 579 (1998) (arguing that sports leagues have a protectable identity under the right to publicity).

celebrities whose images are posted on social media, these new definitions may allow them to create right of publicity claims that would not have existed even ten years ago.

### C. First Amendment Defense

Both Lanham Act and right of publicity claims can be defeated if the defendant can show that its usage was protected by the First Amendment. While courts tend to begin the First Amendment inquiry by asking whether the speech is commercial or noncommercial,<sup>119</sup> First Amendment protection can turn not only on this distinction but also on whether the speech is found to be in the public interest.<sup>120</sup> Some courts protect public-interest speech by effectively removing it from the category of commercial speech (even if it otherwise meets the definition),<sup>121</sup> while others acknowledge the action as commercial speech and then proceed with the public-interest inquiry.<sup>122</sup> Regardless of how the court doctrinally places the analysis of the public-interest defense, the effect is the same: if speech is found to be in the public interest, it is protected by the First Amendment.

The public-interest defense is essentially a right to inform the public, although what information and distribution methods are included is sometimes disputed. The public-interest defense is based on the premise that “no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.”<sup>123</sup> Although some courts adhere to a firm distinction between

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<sup>119</sup> See, for example, *Bolger*, 463 US at 65–66 (noting that the court “must first determine the proper classification of the [expression]” because the scope of First Amendment protections “depends on whether the activity . . . constitutes commercial or non-commercial speech”).

<sup>120</sup> For example, in a suit involving allegations of unfair competition and false advertising under state law, the California Supreme Court noted that courts applying the modern commercial speech doctrine can find that “truthful and nonmisleading speech about commercial matters of public importance is entitled to constitutional protection.” *Kasky*, 45 P3d at 260.

<sup>121</sup> See, for example, *Rogers*, 695 F Supp at 121 (noting that the state law right of publicity did not apply to matters of public interest, even though the conduct was “carried on for a profit”).

<sup>122</sup> See, for example, *Yeager v Cingular Wireless LLC*, 673 F Supp 2d 1089, 1097–98 (ED Cal 2009) (concluding that “the Publication [was] properly categorized as commercial speech” before continuing on to its public-interest analysis).

<sup>123</sup> *Hilton v Cards*, 599 F3d 894, 912 (9th Cir 2010), citing *Montana v San Jose Mercury News, Inc.*, 40 Cal Rptr 2d 639, 640 (Cal App 1995). See also *Smith v NBC Universal*, 524 F Supp 2d 315, 325 (SDNY 2007) (“[T]he First Amendment protects the publication of facts that are both truthful and newsworthy.”).

advertising and “legitimate news item[s]” printed in newspapers,<sup>124</sup> other courts are more flexible and have found that newsworthy information is not “automatically privileged” and that factors such as the form of transmission (for example, a newspaper, television show, or documentary) can be taken into account.<sup>125</sup>

In cases involving both print and video depictions of celebrities, courts have also considered the subject of the speech. Famous people are sometimes seen as more likely to generate newsworthy information because “[p]ublic interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities.”<sup>126</sup> However, these same courts refuse to allow the use of a celebrity to qualify for a public-interest defense if the use is “tenuous” and the celebrity’s inclusion is a mere “illustrative use” that “does not contribute significantly to a matter of the public interest.”<sup>127</sup> To avoid the potential tautology of allowing the use of a celebrity to be considered in the public interest when the “public interest” is the celebrity’s life, courts have been disinclined to consider “promot[ing] an unrelated product” to constitute a “matter of public interest.”<sup>128</sup> Similarly, courts typically distinguish between public-interest matters and those that are “advertisement[s] in disguise” or those in which the celebrity “has no real relationship to the article.”<sup>129</sup>

For example, the Eleventh Circuit recently engaged in “fact-sensitive balancing” to figure out whether publishing a professional wrestler’s nude photos after her murder fell within the public-interest exception to the right of publicity.<sup>130</sup> The court used “the relationship between the published photographs and

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<sup>124</sup> *Nichols v Moore*, 334 F Supp 2d 944, 955 (ED Mich 2004).

<sup>125</sup> *Abdul-Jabbar v General Motors Corp*, 85 F3d 407, 416 (9th Cir 1996). The California Supreme Court has proposed nonexclusive “guidelines” for whether a report is newsworthy, which include “the depth of the intrusion into the plaintiff’s private affairs, the extent to which the plaintiff voluntarily pushed himself into a position of public notoriety, the exact nature of the state’s interest in preventing the disclosure, and whether the information is a matter of public record,” as well as “any continued public interest in the event” and “the circumstances prevailing at the time of publication.” *Forsher v Bugliosi*, 608 P2d 716, 727 (Cal 1980).

<sup>126</sup> *Hilton*, 599 F3d at 912, citing *Dora v Frontline Video, Inc*, 18 Cal Rptr 2d 790, 792 (Cal App 1993).

<sup>127</sup> *Downing v Abercrombie & Fitch*, 265 F3d 994, 1002 (9th Cir 2001).

<sup>128</sup> *Yeager*, 673 F Supp 2d at 1099.

<sup>129</sup> *Creel v Crown Publishers, Inc*, 496 NYS2d 219, 220 (NY App 1985), citing *Dallesandro v Henry Holt and Co*, 166 NYS2d 805, 806 (NY App 1957).

<sup>130</sup> *Toffoloni v LFP Publishing Group, LLC*, 572 F3d 1201, 1204, 1208 (11th Cir 2009). Because the wrestler was deceased, the right of publicity was exercised by her estate.

the corresponding article, as well as the relationship between the published photographs and the incident of public concern—[the] murder”—to determine whether the photographs were in the public interest.<sup>131</sup> The court found that the images did not provide information to the public and were not sufficiently related to the article or to the woman’s death, and therefore that the public-interest defense did not apply.<sup>132</sup>

In contrast, a California appellate court upheld a lower court’s dismissal based on the public-interest defense in *Montana v San Jose Mercury News, Inc.*<sup>133</sup> In *Montana*, San Francisco 49ers quarterback Joe Montana sued the *San Jose Mercury News* for printing posters that included a photograph of him playing in the Super Bowl, alleging a violation of his right of publicity because the newspaper did not compensate him for the use of the photograph.<sup>134</sup> The court found that selling the posters, replicas of the newspaper’s front pages when the 49ers won the Super Bowl, was protected by the public-interest defense because Montana was “a major player in contemporaneous newsworthy sports events.”<sup>135</sup> Even though the newspaper sold the posters for profit, it found that the newspaper “had a right to republish its front page sports stories to show the quality of its work product.”<sup>136</sup> This case demonstrates several of the factors that are commonly used in public-interest-defense cases. First, there was an actual newsworthy event of public interest: the Super Bowl. Second, there was a relationship between the words and the pictures used, because Montana was a large part of the Super Bowl win. Finally, the connection to the celebrity was not tenuous window dressing, because the high-quality reporting on the Super Bowl was not unrelated to the newspaper’s product.<sup>137</sup>

The gist of the public-interest defense is that a publisher should be able to give the public the information it needs, as long as its need is not purely voyeuristic. Courts will not protect speech that serves no purpose “beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger.”<sup>138</sup> However, the line between peeping and proper is complicated

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<sup>131</sup> *Id.* at 1208–09.

<sup>132</sup> *Id.* at 1212.

<sup>133</sup> 40 Cal Rptr 2d 639, 640 (Cal App 1995).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 641.

<sup>136</sup> *Id.* at 642.

<sup>137</sup> *Montana*, 40 Cal Rptr 2d at 640–43.

<sup>138</sup> *Haynes v Alfred A. Knopf, Inc.*, 8 F3d 1222, 1232 (7th Cir 1993).

with celebrities. The public wants as much information about celebrities as it can get, and celebrities are arguably always newsworthy. On the other hand, courts do not want to “indirectly expose everyone’s private life to public view” by finding a person’s life to be an open book once she has done anything newsworthy.<sup>139</sup> To this end, courts apply special scrutiny to speech involving celebrities, testing the relationship between the celebrity and the subject of the speech. Although the test is not identical in every court, it is often phrased in terms of whether there is a relationship and whether this relationship is “tenuous.”<sup>140</sup> However, it is not clear how courts will map these factors onto social media. For example, should a court analyze a company’s entire page or just one post? How can a court determine whether a post is about a newsworthy event, especially when posts are so short? How should courts think about newsworthiness itself in the age of selfies that are shared by thousands of people? These ambiguities leave companies able to vigorously assert their First Amendment rights under the public-interest defense if they are sued over a social media post, as is discussed below.

### III. OLD LAW IS NEW AGAIN: NICKNAMES, ADVERTISING, AND PUBLIC CONTROVERSIES

Social media’s features are fundamentally different in structure and scope than those of conventional media. These structural features will require plaintiffs and judges to stretch existing law in new ways, and businesses can exploit these structural differences to creatively promote themselves while staying within the bounds of the law. This Part zeroes in on the specific facets of Lanham Act, right of publicity, and First Amendment law that affect companies who want to take advantage of these unique features of social media. Part III.A discusses the law of nicknames under the Lanham Act, which likely applies to usernames. Part III.B describes a new view of advertising that may change the calculus of right of publicity claims, especially with regard to linking. Finally, Part III.C explains the First Amendment public-interest defense as it relates to public controversies and so-called window dressing, which is relevant to sharing content on social media.

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<sup>139</sup> *Virgil v Time, Inc.*, 527 F2d 1122, 1131 (9th Cir 1975).

<sup>140</sup> See, for example, *Downing*, 265 F3d at 1002.

### A. Nickname Protection under the Lanham Act

The Lanham Act applies to all uses of a name or other mark, including on social media. Usernames present unique difficulties in applying the Lanham Act, which is built around conventional media, to social media. The Lanham Act's language confines the Act to the unlicensed use of names or words, which has sometimes been read to include nicknames. This Section explores the Lanham Act's restrictions and the relationship between Lanham Act claims and nicknames.

Companies who post celebrity photographs can breathe an initial sigh of relief: the Lanham Act does not cover the use of photographs alone. The Act's language limits itself to the use of "any word, term, name, symbol, or device, or any combination thereof,"<sup>141</sup> and courts in several circuits have found that a person's picture alone is not a sufficient "symbol."<sup>142</sup> For example, in *ETW Corp v Jireh Publishing, Inc.*,<sup>143</sup> Tiger Woods's licensing agent sued an art publisher after the publisher printed a painting that contained three images of Woods.<sup>144</sup> The court decided that to allow a Lanham Act claim for the use of Woods's image without his name would "constitute Woods himself as a walking, talking trademark" and would fail to meet the goals of the Lanham Act because the paintings would not cause consumer confusion.<sup>145</sup> Because the painting did not contain Woods's name or an affiliated slogan, Woods could not sue under the Lanham Act. However, stage names and nicknames have been protected, which raises questions as to whether social media usernames will qualify for protection.

Stage names have been protected by courts as if they were legal names. For example, in one case a magazine published a nude sketch of Muhammad Ali, which was labeled "The Greatest" rather than using Ali's name.<sup>146</sup> The court found that although Ali's name was not used, he referred to himself as "The Greatest" and others referred to him by this stage name, so the moniker

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<sup>141</sup> 15 USC § 1125(a)(1).

<sup>142</sup> See, for example, *ETW Corp v Jireh Publishing, Inc.*, 332 F3d 915, 922 (6th Cir 2003) (holding that the likeness of Tiger Woods was not a trademark protected by Lanham Act); *Pirone v MacMillan, Inc.*, 894 F2d 579, 583 (2d Cir 1990) (holding that the likeness of Babe Ruth was not protected).

<sup>143</sup> 332 F3d 915 (6th Cir 2003).

<sup>144</sup> *Id.* at 918.

<sup>145</sup> *Id.* at 922.

<sup>146</sup> *Ali v Playgirl, Inc.*, 447 F Supp 723, 725, 727 (SDNY 1978).

was a “name” that triggered the Lanham Act.<sup>147</sup> In a similar state law claim of trade name infringement, the Wisconsin Supreme Court found that the use of the nickname “Crazylegs” was sufficiently identifying to interfere with a former star football player’s ability to use his name.<sup>148</sup>

Furthermore, even corporate or brand nicknames have been afforded trademark protection (including Lanham Act protection) through a process of public recognition, although it can take “years or even generations” before a nickname is legally recognized.<sup>149</sup> For example, it took Coca-Cola twenty-six years of public use for the company to trademark the nickname “Coke” for its signature drink.<sup>150</sup> These nicknames become protected through a theory known as the public-use doctrine.

The public-use doctrine is traditionally applied to abbreviations coined by the public that have become so widespread that they identify a product as well as its trademarked name. In fact, the Federal Circuit has suggested that the public-use doctrine applies to “abbreviations and nicknames of trademarks or names used *only* by the public,” while nicknames generated by a company do not qualify for protection.<sup>151</sup> A nickname adopted by a trademark holder as its own might not qualify for protection. Similarly, some courts take seriously the idea that only shortened nicknames can qualify. For example, the Fourth Circuit rejected a company’s effort to enforce trademark rights in the term “LEFT CENTER RIGHT” based on its previous use of the abbreviation “LCR,” reasoning that the doctrine was applicable only when the public chose to use a shortened version of a mark.<sup>152</sup>

However, social media usernames do not fall cleanly into either of these categories and it is not clear how courts will treat them. They are not stage names, used by celebrities as if they were their legal names. Nor are they publicly generated nicknames used

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<sup>147</sup> Id at 727–29.

<sup>148</sup> *Hirsch v S.C. Johnson & Son, Inc*, 280 NW2d 129, 131 (Wis 1979).

<sup>149</sup> Llewellyn Joseph Gibbons, *Crowdsourcing a Trademark: What the Public Giveth, the Courts May Taketh Away*, 35 *Hastings Commun & Enter L J* 35, 36–37 (2012).

<sup>150</sup> Id.

<sup>151</sup> *National Cable Television Association, Inc v American Cinema Editors, Inc*, 937 F2d 1572, 1577 (Fed Cir 1991). See also *George & Co v Imagination Entertainment Ltd*, 575 F3d 383, 403 (4th Cir 2009), quoting J. Thomas McCarthy, 3 *McCarthy on Trademarks and Unfair Competition* § 7:18 (Thomson Reuters 1994) (“The Public Use doctrine was developed because ‘Americans are prone to abbreviate recognized trademarks and to use nicknames.’”).

<sup>152</sup> *George & Co*, 575 F3d at 403–04 (“[T]he doctrine is applied when the public abbreviates or nicknames a term, not the other way around.”).

as shorthand by the public to identify a celebrity. Including a celebrity's username with the photograph has many benefits for the company—it increases the prominence of the post in users' feeds and it may add the picture to the celebrity's page.<sup>153</sup> More banally, it could help to identify the celebrity if the picture is blurry or the celebrity's face is partially concealed. Whether a username is a sufficient hook to invoke the Lanham Act has never been addressed by courts, but, as discussed in Part IV.A, social media usernames will likely create Lanham Act claims.

#### B. Right of Publicity: Advertising as Theft of Goodwill

Social media introduces a potential wrinkle into a would-be plaintiff's right of publicity suit as well: Is a Facebook or Twitter post an advertisement? Although posts may not appear to be advertisements under traditional tests, new views of advertising that emphasize the theft of goodwill may turn social media posts into close calls. Recall that for a right of publicity claim to succeed, the photograph must have been used as an advertisement.<sup>154</sup> The issue of what constitutes advertising rarely arises in right of publicity cases because most of the uses “[do] no more than propose a commercial transaction.”<sup>155</sup> In such cases there is no question that “the defendant used an aspect of the celebrity's identity *entirely and directly for the purpose of selling a product*.”<sup>156</sup> In this framework, a post like the Heigl tweet<sup>157</sup> would not fall within the statute's scope, because it is not “entirely and directly”<sup>158</sup> for the purpose of selling a specific product; rather than explicitly asking the viewer to buy anything, it instead seeks to foster indirect loyalty and respect for Duane Reade's brand. However, courts have begun to take a different view of advertising that could increase the reach of right of publicity statutes. This Section explains the new view of advertising, defined as a publication that increases loyalty or goodwill rather than simply proposing a transaction. As explained in Part IV.B,

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<sup>153</sup> See Part I.B.

<sup>154</sup> Cal Civ Code § 3344(a) (“Any person who knowingly uses another's . . . photograph . . . for purposes of advertising or selling, or soliciting purchases . . . without such person's prior consent . . . shall be liable.”). Other right of publicity statutes offer somewhat broader language, such as “for commercial purposes” or “for the purposes of trade” in Illinois and New York, respectively. 765 ILCS 1075/30; NY Civ Rts Law §§ 50–51.

<sup>155</sup> *Hoffman v Capital Cities/ABC, Inc*, 255 F3d 1180, 1185 (9th Cir 2001).

<sup>156</sup> *Id* (emphasis added).

<sup>157</sup> See *Duane Reade* (cited in note 48).

<sup>158</sup> *Hoffman*, 255 F3d at 1185.

this new view of advertising could render linking tools off-limits for companies who want to avoid liability for right of publicity violations.

Courts have begun to move away from the traditional definition of advertising to a holistic one that focuses on the theft of goodwill. The most instructive case for the new view of advertising is *Jordan v Jewel Food Stores, Inc.*<sup>159</sup> In *Jordan*, the Seventh Circuit found that a full-page picture of a pair of basketball shoes bearing Michael Jordan's number with congratulatory text<sup>160</sup> upon his induction into the Basketball Hall of Fame was an advertisement.<sup>161</sup> The court found that "[m]odern commercial advertising is enormously varied in form and style" and "relies on subtle cues," so a message can still be commercial advertising when "it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service."<sup>162</sup> The court determined that the message was a loyalty-generating advertisement because it was "plainly aimed at fostering goodwill for the Jewel brand" based on the inclusion of Jewel's brand name in the visual and the use of Jewel's slogan "just around the corner."<sup>163</sup>

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<sup>159</sup> 743 F3d 509 (7th Cir 2014).

<sup>160</sup> For the exact text of the advertisement, see *id.* at 512:

A Shoe In! After six NBA championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan's elevation in the Basketball Hall of Fame was never in doubt! Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was "just around the corner" for so many years.

<sup>161</sup> *Id.* Note that this case was decided in the context of whether the speech was protected under the First Amendment (the lower court had found that the advertisement was noncommercial speech and was therefore protected). *Id.* at 513. This makes sense, given that the Illinois statute requires only "commercial purposes" for a right of publicity claim, while other statutes explicitly require advertising. See note 154. It is worth noting two things at this point: first, speech found to be an advertisement will almost always meet the requirements of a statutory or common-law right of publicity claim; second, speech found to be an advertisement is less likely to receive First Amendment protection. See *Bolger v Youngs Drug Products Corp.*, 463 US 60, 65 (1983) ("[T]he degree of protection afforded by the First Amendment depends on whether the activity . . . constitutes commercial or noncommercial speech."). Therefore, many of the decisions cited conduct the inquiry into whether a piece is advertising to determine both First Amendment protection as well as whether the right of publicity has been violated. This Comment does not address the commercial/noncommercial speech distinction, but it is worth remembering that finding a post to be an advertisement greatly weakens the speech's First Amendment protection as well, making the advertising designation doubly important.

<sup>162</sup> *Jordan*, 743 F3d at 518.

<sup>163</sup> *Id.*

Avoiding the visual use of slogans or brand names—both of which were factors identified in *Jordan*—may allow companies to increase loyalty without a court finding that a post was an advertisement. The Heigl post did not use Duane Reade’s slogans, and Duane Reade’s name was included in the text but not inserted into the visual.<sup>164</sup> Even under the *Jordan* regime, the lack of Duane Reade’s name and slogans in the visual would seem to weigh against considering the post as an advertisement.<sup>165</sup> The more attenuated the signatures of a brand are from a post, the less likely the post is to be viewed as an advertisement (and therefore as subject to the right of publicity statute).

However, the Heigl post did “promote[] brand awareness [and] loyalty” by taking advantage of fans’ respect and affection for Heigl, as did the picture in *Jordan*.<sup>166</sup> Although rarely used in modern right of publicity cases, this rhetoric echoes back to the Supreme Court’s description of the right of publicity in 1977. There, the Court stated that the right of publicity is meant to “prevent[] unjust enrichment by the theft of good will” that a celebrity has worked to develop.<sup>167</sup> This concept of theft of loyalty or goodwill cuts to the heart of Duane Reade’s reasons for posting the Heigl photograph: Heigl’s fans may become more loyal to Duane Reade because of the post. The more that a company appears to be reaching out to Heigl’s fans, the more the company seems to be unjustly enriching itself by appropriating some of Heigl’s fan-base loyalty for itself. This follows for almost any posting of a celebrity’s image.<sup>168</sup> Companies that post photos of celebrities are making a plea to fans: “Like us because you like and trust this celebrity.” This transfer of goodwill from one entity to another is exactly what the right of publicity seeks to prevent.

The theft-of-goodwill doctrine might seem to swallow the rule and turn every statement by a company’s social media account or spokesperson into an advertisement. However, there are important limitations. Most importantly, the advertisement needs to be stealing goodwill from someone else. A picture of a

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<sup>164</sup> See Stephanie Clifford, *Everywhere You Go, a Duane Reade Ad* (NY Times, July 8, 2009), archived at <http://perma.cc/6WWF-86UM>.

<sup>165</sup> See *Butler v Target Corp.*, 323 F Supp 2d 1052, 1057 (CD Cal 2004) (dismissing a right of publicity claim by a band against a retailer for using the band’s song and imitations thereof in commercials, but allowing a right of publicity claim for the allegation that lyrics from the song were used as slogans in print advertisements).

<sup>166</sup> *Jordan*, 743 F3d at 518.

<sup>167</sup> *Zacchini v Scripps-Howard Broadcasting Co.*, 433 US 562, 576 (1977).

<sup>168</sup> But see text accompanying note 170.

tree with the phrase “Happy Fall!” cannot be an advertisement, because a company cannot steal goodwill from a tree. The Seventh Circuit has made this point as well, differentiating a message congratulating a local community group from a message congratulating Jordan.<sup>169</sup> A community group is unlikely to have the reputation or fan base necessary to have goodwill stolen from it. Even some uses of a celebrity may not constitute the theft of goodwill, if the uses are not meant to reach out to that celebrity’s fans. For example, retailer Abercrombie & Fitch once issued a press release asking *Jersey Shore* star Michael Sorrentino to stop wearing its products.<sup>170</sup> Abercrombie & Fitch easily defeated Sorrentino’s right of publicity suit because it was clearly not trying to promote itself to Sorrentino’s fan base.<sup>171</sup> In fact, it was trying to disassociate itself from the star. A post is advertising only if it is trying to attract fans and use the goodwill that those fans have toward the celebrity. Linking and hashtags, two tools that are used to reach out to fans and potentially steal goodwill from celebrities on social media, are discussed in Part IV.B.

### C. First Amendment Public-Interest Defense and Window Dressing

Companies may be able to claim a First Amendment public-interest defense if they are accused of violating a celebrity’s rights under the Lanham Act or her right of publicity through social media posts. Speech, whether or not it is commercial, is protected if the publication is a “matter[ ] in the public interest.”<sup>172</sup> Although the Supreme Court has never formally recognized this defense against right of publicity or Lanham Act claims, it has been a part of these claims among the lower courts and in the literature, including in seminal works like Professor Melville Nimmer’s *The Right of Publicity*.<sup>173</sup> A company is more likely to succeed on this defense if it is able to connect the photograph to a wider public controversy<sup>174</sup> by sharing it from a

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<sup>169</sup> See *Jordan*, 743 F3d at 518.

<sup>170</sup> See *MPS Entertainment, LLC v Abercrombie & Fitch Stores, Inc.*, 2013 WL 3288039, \*2–3 (SD Fla).

<sup>171</sup> See *id.* at \*13–14.

<sup>172</sup> *Hilton v Cards*, 599 F3d 894, 912 (9th Cir 2010). See also *Dora v Frontline Video, Inc.*, 18 Cal Rptr 2d 790, 792 (Cal App 1993).

<sup>173</sup> Melville B. Nimmer, *The Right of Publicity*, 19 L & Contemp Probs 203, 212 n 60 (1954).

<sup>174</sup> See, for example, *Hilton*, 599 F3d at 908 (noting that an “ongoing public controversy” can serve as the basis of a First Amendment public-interest defense).

third-party source instead of by posting original content.<sup>175</sup> This Section first provides background on the use of social media as a news source, which may be necessary to persuade courts that social media can be an information source similar to a newspaper. Second, this Section explores the legal distinction between bona fide interest in a celebrity's activities and mere "window dressing" uses. The use of sharing to enhance a public-interest defense is discussed in Part IV.C.

Some courts will not entertain a public-interest defense if they have previously found that particular speech was an advertisement.<sup>176</sup> However, other courts have been willing to take a more holistic approach.<sup>177</sup> These latter courts may be receptive to expanding First Amendment rights on social media.

First, these courts must recognize that social media represents a significant source of public information for many Americans. In 2014, 71 percent of Internet-using adults (and 58 percent of the general population) used Facebook.<sup>178</sup> Over 40 percent of American adults now get news through Facebook, according to a 2014 Pew Research Center study, while 10 percent of adults receive news through Twitter.<sup>179</sup> And this behavior is on the rise at a rate of about 10 percent *per year*: a 2013 version of the study reported 30 percent of American adults reading news on Facebook,<sup>180</sup> and a 2012 report found that only 9 percent of adults said they often used Facebook or Twitter for news.<sup>181</sup> In 2014, Facebook was a bigger source for political news than CNN

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<sup>175</sup> An example of generating original content would be paying an employee to stand outside Duane Reade's stores to photograph celebrities and then using the resulting photographs.

<sup>176</sup> See, for example, *Nichols v Moore*, 334 F Supp 2d 944, 955 (ED Mich 2004) ("Only the use of an individual's identity in advertising infringes on the persona.").

<sup>177</sup> See, for example, *Abdul-Jabbar v General Motors Corp*, 85 F3d 407, 416 (9th Cir 1996). California has proposed nonexclusive "guidelines" for whether a report is newsworthy, which include "the depth of the intrusion into the plaintiff's private affairs, the extent to which the plaintiff voluntarily pushed himself into a position of public notoriety, the exact nature of the state's interest in preventing the disclosure, and whether the information is a matter of public record," as well as "any continued public interest in the event" and "the circumstances prevailing at the time of publication." *Forsher v Bugliosi*, 608 P2d 716, 727 (Cal 1980).

<sup>178</sup> Maeve Duggan, et al, *Social Media Update 2014* (Pew Research Center, Jan 9, 2015), archived at <http://perma.cc/2S7W-DM39>.

<sup>179</sup> Michael Barthel, et al, *News Use on Facebook and Twitter Is on the Rise* (Pew Research Center, July 14, 2015), archived at <http://perma.cc/4V8H-NKR8>.

<sup>180</sup> Monica Anderson and Andrea Caumont, *How Social Media Is Reshaping News* (Pew Research Center, Sept 24, 2014), archived at <http://perma.cc/W87M-Q2WZ>.

<sup>181</sup> Amy Mitchell, Tom Rosenstiel, and Leah Christian, *What Facebook and Twitter Mean for News* (Pew Research Center, 2012), archived at <http://perma.cc/EY7D-UHFJ>.

or Fox; only local television provided more people with news.<sup>182</sup> Perhaps even more importantly, of users who regularly consume news on Facebook, 73 percent read entertainment news and 65 percent read stories about “people [and] events in [their] communit[ies],” compared to 31 percent who read about business.<sup>183</sup> These data indicate that celebrity-related posts are among the information the public wants most.

This cycle feeds on itself on social media: those who are interested in celebrity news are likely to post it, driving their friends to read this kind of news. Facebook refers more traffic to news sites through links than any other source does, including Google.<sup>184</sup> One concern may be that entertainment-news websites are not “real” news. Studies have found that entertainment news is more likely to come from specialized publications than most other types of news, and it is among the types of news that are most common on social media.<sup>185</sup> Furthermore, entertainment news has long been recognized as news by influential research organizations like Pew, even though it is more likely to come from a specialized outlet. Moreover, courts have a long history of applying the same First Amendment defense to celebrity-related news as they do to conventional news: the public-interest defense.

Courts have long struggled with the interaction between celebrities and the public-interest defense, creating an opportunity for companies to use the public-interest defense if they are sued for celebrity-related posts. For example, California courts have stated that “[p]ublic interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities,” meaning that the day-to-day lives of celebrities can be considered newsworthy.<sup>186</sup> However, California courts have also distinguished stories that are actually about the daily lives of celebrities (the above quotation comes from a case involving a documentary film about surfers that used archival footage of the plaintiff, a famous surfer<sup>187</sup>) from cases in which

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<sup>182</sup> Todd Wasserman, *Facebook Is a Bigger Source for Political News Than CNN, Fox* (Mashable, Oct 21, 2014), archived at <http://perma.cc/Q4VS-HYDK>.

<sup>183</sup> Anderson and Caumont, *How Social Media Is Reshaping News* (cited in note 180).

<sup>184</sup> Mathew Ingram, *Facebook Has Taken Over from Google as a Traffic Source for News* (Fortune, Aug 18, 2015), archived at <http://perma.cc/Z9TE-A7KJ>.

<sup>185</sup> See, for example, *The Personal News Cycle* \*3 (The Media Insight Project, Mar 2014), archived at <http://perma.cc/6TVM-UXLG>.

<sup>186</sup> *Dora*, 18 Cal Rptr 2d at 792.

<sup>187</sup> *Id* at 791.

“the context of the communication and the nature of the information conveyed” suggest that the use of the celebrity is “illustrative” or mere “window-dressing,” with only a “tenuous” connection to the real subject.<sup>188</sup> Courts tend to reject the defense in cases in which “the names of the individuals were linked to products that bore no relationship to those individuals or their activities, and conveyed no message other than information about the unrelated products.”<sup>189</sup>

Posts like Duane Reade’s have an initial advantage in this definition because there is a relationship between the product and the celebrity’s activity—namely, the photograph suggests that the celebrity used the product. A court disinclined to allow a company to use a picture of an unrelated professional surfer in a beach-themed catalogue may see the use of a picture of the surfer wearing *that company’s clothing* differently. The celebrity is no longer window dressing because her relationship to the brand, rather than just her celebrity status, is what the company seeks to convey to the public.

Whether courts are more inclined to view a celebrity-related post as manifesting a bona fide attention in the celebrity’s activities or providing famous window dressing may depend on the unit of analysis. Assuming the posting of the photograph is a one-time incident,<sup>190</sup> the natural unit of measurement seems to be by the post. However, a few cases have suggested that the social media account or home page may merit consideration as a whole. For example, when the Virginia Supreme Court determined whether an attorney’s blog posts constituted attorney advertising or protected speech, the court considered the blog and its posts as constituting “an advertisement” (singular), even though some of the posts were political commentary and were not about cases that the attorney had won (although most were).<sup>191</sup> A similar intuition may explain why the *Heigl* complaint, which focused on one post, still alleged that Duane Reade’s posts “predominantly promote commercial advertisements for a wide range of its products and services” and provided examples of other posts.<sup>192</sup> Since the other parts of the analysis, such as whether

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<sup>188</sup> *Yeager v Cingular Wireless LLC*, 673 F Supp 2d 1089, 1099 (ED Cal 2009).

<sup>189</sup> *Aldrin v Topps Co*, 2011 WL 4500013, \*3 (CD Cal).

<sup>190</sup> A post does not have to be a one-time incident. For example, a designer might post a series of photographs of one celebrity wearing its designs without the celebrity’s consent.

<sup>191</sup> *Hunter v Virginia State Bar*, 744 SE2d 611, 617 (Va 2013).

<sup>192</sup> *Heigl* Complaint at \*6 (cited in note 1).

the post was a qualifying advertisement, were conducted at the post level, a compelling argument could be made that the post is the relevant unit of analysis. A post-level unit of analysis makes it less likely that the celebrity will be seen as window dressing. After all, the celebrity is the focus of *that* post even if she is not the focus of the entire page. Social media cases are new, so companies should not yet count on either frame of reference—although framing responses at the post level may help to focus a court on the specific post.

Regardless of the frame of reference, in some sense the public-interest defense will necessarily be a fact-specific test: it may be newsworthy if Heigl, whose foundation is dedicated to helping animals,<sup>193</sup> wears a fur coat, while it might be less newsworthy if she visits Starbucks. The fur coat may reveal some new information about her or educate the public. The post would be more likely to be in the public interest if it came in a package dedicated to a broader topic—for instance, if it were displayed in a series of posts about the hypocrisy of animal rights advocates. The picture used by Duane Reade originated in a post on an entertainment-news website about Heigl's recent change of talent agency.<sup>194</sup> Tellingly, Heigl did not sue the news website for the use of the photo. Heigl likely understood that her change of talent agency was a newsworthy story, important to fans and industry executives. Using a photograph of a celebrity when writing a genuinely newsworthy story is a classic protected public-interest use, because it provides a valuable addition to the story rather than mere window dressing for an unrelated story. Emphasizing this sort of connection to a legitimate news story through sharing is discussed more in Part IV.C.

#### IV. CORPORATE SOCIAL MEDIA SUGGESTIONS: AVOID USERNAMES AND LINKING, INCREASE SHARING

This Part provides three examples of social media features—usernames, linking, and sharing—that could sway a court's analysis of Lanham Act and right of publicity claims. Part IV.A describes how using social media usernames is likely to trigger Lanham Act liability even if a celebrity's name is not used. Part IV.B explains how linking through hashtags and tagging may constitute a theft of goodwill under the *Jordan* paradigm,

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<sup>193</sup> See *About* (Jason Debus Heigl Foundation), archived at <http://perma.cc/8T2A-77XP>.

<sup>194</sup> *Heigl* Complaint at \*8 (cited in note 1).

leading to right of publicity claims. Part IV.C discusses how sharing can be used to bolster a public-interest defense by demonstrating that a celebrity is part of a public controversy and not mere window dressing.

#### A. Usernames Are a Lanham Act Land Mine

The lack of protection for photographs under the Lanham Act presents an interesting opportunity for businesses that want to publicize a celebrity using their products: as long as they do not use the celebrity's name, companies can avoid liability. For example, Duane Reade could likely have avoided Lanham Act liability if it had not identified Heigl and had instead chosen a clever caption like "Guess who we saw today?" For an easily recognized celebrity like Heigl, using a sly caption is unlikely to reduce the impact of the post on viewers. The lack of protection for photographs represents a unique opportunity for companies, since other aspects of a celebrity, such as an announcer's distinctive voice, can potentially generate liability.<sup>195</sup> Although a distinctive voice can be a mark, photographs have been singled out as an area to which the Lanham Act does not apply.<sup>196</sup>

However, usernames may throw a wrench into this social media utopia if companies use them. No court has yet faced the issue of whether usernames qualify as names that trigger the Lanham Act, but it is only a matter of time. For example, the Duane Reade tweet named Heigl without using her proper name, under which she does business. Instead, it used her Twitter username, "KatieHeigl."<sup>197</sup> Lanham Act claims must include the use of a "word, term, name, symbol, or device, or any combination thereof."<sup>198</sup> Intuitively, most readers would say that "KatieHeigl" is, in some sense, a variant of Heigl's name—it would be odd if a company could avoid liability for using Tom Hanks in an advertisement by calling him "Tommy Hanks."<sup>199</sup> Despite not falling cleanly into any of the categories listed in the Lanham Act,

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<sup>195</sup> See, for example, *Facenda v N.F.L. Films, Inc.*, 542 F3d 1007, 1014 (3d Cir 2008) ("[C]ourts broadly interpret the terms 'name, symbol, or device' in § 43(a)(1) to include other indicia of identity, such as a person's voice.").

<sup>196</sup> See text accompanying note 142.

<sup>197</sup> *Heigl* Complaint at \*7 (cited in note 1).

<sup>198</sup> 15 USC § 1125(a)(1).

<sup>199</sup> Variants that are likely to cause confusion with a mark are subject to the Lanham Act. See *Kappa Sigma Fraternity v Kappa Sigma Gamma Fraternity*, 654 F Supp 1095, 1096, 1103 (D NH 1987) (issuing an injunction because the defendant used "a chameleonic variant of [the] plaintiffs' federally registered fraternal trademarks").

celebrities' social media usernames will also likely trigger liability for the reasons discussed below.

A Twitter username can be convincingly analogized to a stage name. Like Muhammad Ali calling himself "The Greatest," Heigl chose to adopt the moniker "KatieHeigl" on Twitter and can be easily identified by her username. Heigl's followers likely assume that all content coming from the "KatieHeigl" account is a message from Heigl herself. In fact, celebrities and scholars have begun to identify "brandjacking" and "Twitterjacking"—the impersonation of a brand or celebrity on social media—as serious problems.<sup>200</sup> For example, St. Louis Cardinals manager Tony La Russa sued Twitter when a user made a fake account in his name and posted inflammatory tweets.<sup>201</sup> He later voluntarily dismissed the suit after the fake Twitter account was shut down.<sup>202</sup> The La Russa case demonstrates that usernames can function identically to a person's name: actions attributed to that username are immediately imputed to the (real or purported) owner.

One could argue that a social media username need not be a person's name—Heigl could just as easily have taken the username "Katie27" or "kh2007" or some random combination of words and letters. A court could hold that a person's username does not qualify for Lanham Act protection, especially if it does not resemble her real name. After all, it would be hard to say that a username identifies the source of a good if no one but the user's closest friends know who "kh2007" is.<sup>203</sup> A username that

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<sup>200</sup> See, for example, Lisa P. Ramsey, *Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders*, 58 Buff L Rev 851, 854–55 (2010) (discussing "how current federal trademark infringement and free speech law appl[y] to alleged brandjacking on social networks"). Lawsuits over fake Twitter accounts or accounts that have been hacked have started to proliferate but typically settle.

<sup>201</sup> See Complaint for Trademark Infringement, False Designation of Origin, Trademark Dilution, Cybersquatting, Misappropriation of Name, and Misappropriation of Likeness, *La Russa v Twitter, Inc.*, Case No 09-488101, \*2–3 (Cal Super filed May 6, 2009).

<sup>202</sup> See Notice of Dismissal of Complaint with Prejudice, *La Russa v Twitter, Inc.*, Civil Action No 09-2503, \*1 (ND Cal filed June 26, 2009).

<sup>203</sup> A different analysis might hold true for a user who was famous only in association with her username such that it became a symbol for her brand similar to a stage name (for example, this may be true of certain Internet comedians who do not use their real names). For example, when looking at whether "Here's Johnny" toilets violated the rights of John Carson, who used the phrase "Here's Johnny" on his show, the Sixth Circuit wrote:

It is not fatal to appellant's claim that appellee did not use his "name." Indeed, there would have been no violation of his right of publicity even if appellee had

lacks recognition would not validate the Lanham Act's purpose of preventing consumer confusion about a product or endorsement. However, celebrities are unlikely to create usernames that obscure their identities. The value of social media for celebrities is the ability to be easily found and followed so that they can mobilize their fan bases at the touch of a button. Furthermore, companies are less likely to link to obscure usernames, since they would trigger the desired connection with the celebrity for fewer people. Thus, only recognizable celebrity usernames like "KatieHeigl" are likely to become involved in Lanham Act suits.

Even if a court viewed a username as unlike a stage name, it could still find a username protected under the public-use doctrine. Usernames are typically abbreviated forms of celebrity names, which the public can use to interact with the celebrity on social media (for instance, by tweeting a message to that username).<sup>204</sup> Although more vulnerable to challenges than the stage name theory, granting celebrities rights in their usernames would validate the underlying goals of the public-use doctrine.

The best challenge to applying the public-use doctrine is that it is intended to be invoked only when a nickname has been in public use for a long period of time.<sup>205</sup> Social media websites constantly rise and fall, and celebrities must create new accounts each time a new platform gains popularity. For instance, the once-popular social networking site MySpace went from "exponential growth" in 2005 to being surpassed by Facebook in 2008.<sup>206</sup>

When new platforms become popular, celebrities must make new accounts (potentially with new usernames), which may make it difficult for their usernames to gain widespread public recognition. Some celebrities find that when they try to join a

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used his name, such as "J. William Carson Portable Toilet" or the "John William Carson Portable Toilet" or the "J.W. Carson Portable Toilet." The reason is that, though literally using appellant's "name," the appellee would not have appropriated Carson's identity as a celebrity. Here there was an appropriation of Carson's identity without using his "name."

*Carson v Here's Johnny Portable Toilets, Inc.*, 698 F2d 831, 837 (6th Cir 1983).

<sup>204</sup> Celebrity usernames are often shortened versions of their real names. In addition to Heigl's "KatieHeigl," consider Justin Timberlake's "jtimberlake," President Obama's "POTUS," rapper will.i.am's "iamwill," actress Emma Watson's "EmWatson," and singer Christina Aguilera's "xtina."

<sup>205</sup> Consider Coke's twenty-six-year saga. See text accompanying notes 149–50.

<sup>206</sup> Nicholas Jackson and Alexis C. Madrigal, *The Rise and Fall of MySpace* (The Atlantic, Jan 12, 2011), archived at <http://perma.cc/9TLF-UM5R>.

new platform, someone has already created an account in their name.<sup>207</sup> This practice is sometimes called “username squatting,” due to its similarity to cybersquatting<sup>208</sup> for domain names.<sup>209</sup> Theoretically, username squatting could cause celebrities to change usernames whenever they join a new site. In some sense, this is a chicken-and-egg problem: If celebrities do not have trademark protection for their usernames, they cannot prevent cybersquatting and must frequently change usernames. Frequently changing usernames may prevent celebrities from building up the necessary recognition of their usernames to achieve trademark protection. However, if a celebrity had a recognized mark in a username, she could prevent pranksters from username squatting. In the latter world, in which usernames are protected by the public-use doctrine, a celebrity could sue the squatter as a trademark infringer. Although this may seem like an intractable problem, the answer may be provided by social media itself, since terms coined on social media spread much faster than conventional nicknames.

Social media may be changing what it means for a nickname to be widely used by the public. At least one scholar has argued that “[n]ew forms of social media will increase the rate at which consumers accept a new publically coined designation to represent existing marks”—that is, that social media makes the public more likely to quickly accept a nickname for a product or person.<sup>210</sup> For example, the rate at which the *Oxford English Dictionary* has added new words has dramatically increased in recent years, perhaps due to social media.<sup>211</sup> Social media allows words and phrases to quickly spread through the population,

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<sup>207</sup> This is sometimes the explanation for celebrities including “real” or “official” in their usernames. For example, One Direction band member Liam Payne uses “Real\_Liam\_Payne,” while fellow bandmate Niall Horan uses “NiallOfficial.” See Carolyn Gregoire, *Funniest One Direction Tweets: 20 Weird, Poetic and Generally Awesome One-Liners from the #1D Boys* (Huffington Post, May 1, 2012), archived at <http://perma.cc/2JKU-3BYJ>.

<sup>208</sup> Cybersquatting occurs when a person buys a website name that is related to a business or person in the hopes that the business or person will want to make a website in the future and will pay the cybersquatter a large amount of money to use the website name. See *DaimlerChrysler v The Net Inc*, 388 F3d 201, 204 (6th Cir 2004).

<sup>209</sup> See generally Zorik Pesochinsky, Note, *Almost Famous: Preventing Username-Squatting on Social Networking Websites*, 28 *Cardozo Arts & Enter L J* 223 (2010) (proposing a solution to the issue of username squatting by shifting the focus to the right of publicity).

<sup>210</sup> Gibbons, 35 *Hastings Commn & Enter L J* at 40 (cited in note 149).

<sup>211</sup> See *id.* at 41 (noting that the rate of addition has increased from roughly one thousand words per year to approximately four thousand words per year and attributing that growth, at least partly, to “the growth of social media” and increasing Internet use).

dramatically cutting down the time it takes for a nickname to gain widespread usage—this is why viral videos can receive millions of hits in a matter of days.<sup>212</sup> Although the time frame may differ from older public-use-doctrine cases, social media usernames may have the same popular recognition as older nicknames. A technologically savvy court may well choose to “update” public-use doctrine to reflect this level of usage and approve a Lanham Act claim based on a social media username.

Given this legal uncertainty, a company’s best option to avoid a Lanham Act claim is to not use a celebrity’s name or username in its social media posts. Coy references or asking fans to identify the celebrity by commenting on the post will be unlikely to fall within the statutory framework, while references to a celebrity’s username will likely be seen as similar to the use of a popular nickname or stage name. Even posting a photo without these references will still enable customers to learn the most valuable piece of information: that the celebrity has used the company’s product. Even if only some viewers can identify the celebrity, the fans who can recognize a celebrity on sight are those for whom the post is most important.

B. Use of Linking Increases a Post’s Audience but Also Increases the Likelihood of a Right of Publicity Claim

Many common social media tools increase the audience of a post by reaching out to followers of a celebrity or topic, including tagging and hashtags. However, these tools may be considered a theft of goodwill, pushing a post into the world of advertising that is covered by the right of publicity. Consider first the use of tags—using the “@” symbol followed by a person’s username.<sup>213</sup> By using a tag, a company connects the post to another account, such as Heigl’s account. This has several consequences, depending on Heigl’s account settings. The post may become visible to anyone who visits her page and may also show up in other sections of her account. The post may also show up on the home page of her followers. Causing a post from Duane Reade’s account to be shown on Heigl’s page takes advantage of the work Heigl has done to acquire a large number of followers.

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<sup>212</sup> See Megan O’Neill, *What Makes a Video “Viral”?* (SocialTimes, May 9, 2011), archived at <http://perma.cc/7W9F-ZN7C>.

<sup>213</sup> For a more in-depth discussion of the mechanics involved in this Section, see Part I.A.

This type of outreach exploits the goodwill of fans who have followed a celebrity's page in a much more tangible way than traditional advertisements. Consider the traditional advertisement in *Downing v Abercrombie & Fitch*,<sup>214</sup> in which Abercrombie used an unapproved photograph of George Downing, a famous surfer, in its surfing-themed catalogue.<sup>215</sup> The catalogue was sent only to Abercrombie-catalogue subscribers, who received the catalogue every quarter.<sup>216</sup> In contrast, because of tagging, the Heigl tweet could be seen by Duane Reade's followers and Heigl's followers. An analogous situation would be if the advertiser in *Downing* had sent the offending catalogue not just to its mailing list but also to Downing's fan club (even if those people had never asked to be sold clothes by the company).

The potential impact of just one tag creates a high-risk, high-reward situation for companies that want their posts viewed. Even if Heigl quickly removed the photo from her own page, social media sites may increase the visibility of the post (for example, by bringing it to the top of a user's home page) if the user follows both the poster (Duane Reade) and the tagged person (Heigl). This represents a huge gain to Duane Reade. The average post by a business is seen by only 16 percent of its followers.<sup>217</sup> This suggests that about 320,000 of Duane Reade's 2,000,000 Facebook followers would see a typical post.<sup>218</sup> However, if it is also seen by 16 percent of Heigl's 750,000 Facebook followers (at a rate that would likely be greater because the post would be placed higher than the average post for fans who liked both brands), another 120,000 people would see the post,<sup>219</sup> increasing the visibility of the post by 37 percent without Duane Reade spending a dime. Although some fans will surely cherish this newfound glimmer of information about Heigl's shopping habits, showing this information takes away Heigl's opportunity to profess her true preferences (perhaps she usually shops at CVS) and allows Duane Reade into a community it could never have entered without the photograph as its ticket.

Similarly, the use of hashtags (such as the use of "#NYC" in the Heigl post) promotes the post to new viewers, further

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<sup>214</sup> 265 F3d 994 (9th Cir 2001).

<sup>215</sup> Id at 999–1000.

<sup>216</sup> Id at 999.

<sup>217</sup> Drell, *Can Promoted Posts Help Your Business?* (cited in note 31).

<sup>218</sup> See text accompanying note 89.

<sup>219</sup> See text accompanying note 83.

increasing its audience. A person clicking on “#NYC” might normally see information about the city, upcoming events, or even photos of the skyline—but probably would not see a photograph of a movie star leaving a drugstore. Furthermore, there are a variety of hashtags that are associated with specific celebrities. For example, the phrase “#tigerbloodintern” was specifically created by Charlie Sheen for an advertising campaign for Internships.com,<sup>220</sup> while Taylor Swift promoted her recent concerts with the phrase “#The1989WorldTour.”<sup>221</sup> The use of a hashtag that would be expected to return results that are related to a specific celebrity (say, if the photo had been of Taylor Swift and the post had included the phrase “#The1989WorldTour”) undoubtedly takes advantage of the celebrity’s goodwill—fans are searching the phrase to connect with the celebrity and instead finding a self-promoting post from a company.

Echoes of this issue of pushing into unexpected spaces can be seen in the tests for nominative fair use, which require only as much reference to the celebrity’s mark as is “reasonably necessary to identify [a] product.”<sup>222</sup> When courts apply such a test, they are seeking to limit the company’s ability to draw on a celebrity’s goodwill for its own benefit—and a court will almost never find it necessary to use hashtags for the purpose of forcing viewers who follow neither the company nor the celebrity to see the post.

Finally, use of a celebrity-picture post as a paid “promoted” or “sponsored” post (as Samsung did with Ortiz’s selfie with Obama) would almost certainly qualify as an advertisement. (In contrast, the advertising space used in *Jordan* was given to Jewel for free.)<sup>223</sup> The audience selected when buying promoted status could easily be used by a celebrity as evidence of theft of goodwill. For example, if Duane Reade’s fan base is primarily over the age of forty, but Duane Reade chooses to promote the Heigl post to women in their twenties and thirties who like romantic comedies, it seems clear that Duane Reade is intentionally reaching out to Heigl fans.

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<sup>220</sup> Piazza, *How Much Can a Celebrity Make for Tweeting?* (cited in note 47).

<sup>221</sup> Taylor Swift, *CHICAGO, IL Show Added to #The1989WorldTour!* (Facebook, Nov 14, 2014), archived at <http://perma.cc/XY5B-DUU6>.

<sup>222</sup> *New Kids on the Block v News America Publishing, Inc.*, 971 F2d 302, 308 (9th Cir 1992).

<sup>223</sup> *Jordan*, 743 F3d at 511.

In sum, although traditional right of publicity cases require that an advertisement explicitly propose a transaction, cases like *Jordan* have instead focused on whether the post exploits a celebrity's accumulated goodwill with her fans.<sup>224</sup> Using linking devices like tags and hashtags reaches out to people who would not otherwise see the post based on such viewers' loyalty to a celebrity or their interest in a topic. The link takes advantage of the work that celebrities have put in to grow large follower lists and increase the popularity of their related hashtags. In a post-*Jordan* world, this outreach may push a linked post into the category of right of publicity liability-generating advertisements, rather than nonadvertisements that do not propose transactions.

### C. Sharing Bolsters the Public-Interest Defense

A recent article by Professor Daniel Gervais and attorney Martin Holmes predicted that “[o]nline uses [of individuals’ names and likenesses] and use of celebrities in posts in social media are likely to escalate attempts to use the right [of publicity] to bar or restrict online speech.”<sup>225</sup> However, companies can aggressively use the First Amendment to protect themselves against right of publicity and Lanham Act claims and to prevent the restriction of online speech. This Section discusses how sharing (rather than creating) photographs can bolster a First Amendment public-interest defense by connecting these photographs to a wider public controversy and thus helping them to avoid being seen as mere window dressing.<sup>226</sup>

Even if a post is not clearly newsworthy on its own merits, it may still meet the requirements of the public-interest defense if the company uses the structure of social media to link it to a wider controversy. For example, one commentator has suggested that hashtags might be used to gauge whether a tweet implicated a public controversy (by seeing whether other users were talking about the subject at the same time or whether they were engaged in a conversation with one another).<sup>227</sup> Sharing creates an even stronger link between the controversy and the post than

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<sup>224</sup> *Id.* at 519.

<sup>225</sup> Daniel Gervais and Martin L. Holmes, *Fame, Property, and Identity: The Scope and Purpose of the Right of Publicity*, 25 *Fordham Intel Prop Media & Enter L J* 181, 183 (2014).

<sup>226</sup> See Part III.C.

<sup>227</sup> See Patrick H. Hunt, Comment, *Tortious Tweets: A Practical Guide to Applying Traditional Defamation Law to Twibel Claims*, 73 *La L Rev* 559, 591–93 (2013).

hashtags do, because sharing more easily demonstrates that the specific post was relevant to the controversy.

One way to demonstrate a public controversy is to use a link from another source (such as the photographer's website) rather than uploading the image directly. Using a link, especially to a news or paparazzi site, allows an otherwise very short message to situate itself in a broader conversation. For example, a California appellate court found that footage of a famous surfer was protected by the public-interest defense when the footage was part of one of several segments about surfers in the documentary.<sup>228</sup> In contrast, a California district court found that references to a famous test pilot and his accomplishments (which were "wholly unrelated" to the defendant's broader message) in a short press release were not entitled to the public-interest defense.<sup>229</sup> One of the decisive differences between the two cases was that the first was clearly situated in a broader public conversation, while the second was not. Sharing a link from another source not only places the post in context but also may help demonstrate that the information began in a news story, helping to debunk the misconception among older generations that social media is not news media.<sup>230</sup>

Beyond the analogy, using a link helps to demonstrate that the matter is of interest to more people than merely the two primary parties (the celebrity and the company). One commonly used test to determine whether a public controversy exists is whether the dispute affects some portion of the population beyond the parties.<sup>231</sup> If a third party originally posted the image, and especially if it is a publication of some prominence, a company can make a clear-cut case that people beyond the parties were affected by the news. If they were not, the third party would not have originally posted the content.

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<sup>228</sup> *Dora v Frontline Video, Inc*, 18 Cal Rptr 2d 790, 792–94 (Cal App 1993).

<sup>229</sup> *Yeager v Cingular Wireless LLC*, 673 F Supp 2d 1089, 1098–99 (ED Cal 2009).

<sup>230</sup> See, for example, *Abdul-Jabbar v General Motors Corp*, 85 F3d 407, 416 (9th Cir 1996) ("[N]o prior consent is required for use of a 'name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign.'"). Social media news consumers are "considerably younger" than other adult Facebook users: the average Facebook news consumer is only thirty-nine years old. Drew DeSilver, *Facebook Is a News Source for Many, but Only Incidentally* (Pew Research Center, Feb 4, 2014), archived at <http://perma.cc/2Q58-VUZD>.

<sup>231</sup> See, for example, *Waldbaum v Fairchild Publications, Inc*, 627 F2d 1287, 1296 (DC Cir 1980) (noting that a "public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way").

A savvy company could take this argument a step further if it set up its celebrity-picture posts to simply be “shares” of earlier posts, as Samsung did with Ortiz’s selfie with Obama. If a picture has already received hundreds or thousands of shares (as many pictures of celebrities do), the company’s sharing is more clearly a matter of public interest, and the addition of new information (for example, the fact that it was taken with a company’s product or outside its store) might be relevant to the public buzz on the issue.<sup>232</sup> It also allows a company to set up a useful contrast—the original poster of the photograph has arguably also taken advantage of the celebrity’s goodwill or caused consumer confusion. This is especially true when the original poster is a news or celebrity-gossip entity rather than a judgment-proof individual fan. The original poster provides a likely target for the celebrity’s lawsuit, while the company can portray itself as simply one among many users who sent the photograph to its followers.

Speakers have long used the presence of other speech or interest in a topic to claim that their speech deserves First Amendment protection. For example, in *McQuoid v Springfield Newspapers, Inc.*,<sup>233</sup> a newspaper published an article about a project promoter based on another newspaper’s prior article.<sup>234</sup> The court found that the promoter had to meet a higher standard in his defamation claim because his conduct had been discussed in “over 100 published articles, government regulatory and investigative scrutiny, [and] politicians’ speeches” and was “the subject of the citizens’ daily comment.”<sup>235</sup> The evidence of prior publications and citizen interest increased the First Amendment protection that was available to the defendant. Duane Reade could make a similar argument if it showed that, like Springfield Newspapers, it had simply been republishing another’s story that had already generated public comment and

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<sup>232</sup> See Matthew Lafferman, Comment, *Do Facebook and Twitter Make You a Public Figure? How to Apply the Gertz Public Figure Doctrine to Social Media*, 29 Santa Clara Computer & High Tech L J 199, 231–32 (2012) (noting that under traditional public controversy tests, many social media posts qualify as public controversies).

<sup>233</sup> 502 F Supp 1050 (WD Mo 1980).

<sup>234</sup> *Id.* at 1052–53.

<sup>235</sup> *Id.* at 1059. See also *Wynberg v National Enquirer, Inc.*, 564 F Supp 924, 928–29 (CD Cal 1982) (“[I]t is undisputed that at least 17 news articles reported Plaintiff’s assorted criminal convictions, newspapers covering local, national, and international news fronts.”); *Rebozo v Washington Post Co.*, 637 F2d 375, 379 (5th Cir 1981) (“[D]uring the six months prior to October 25, 1973, the date of the *Washington Post* article, *The New York Times* published 48 articles mentioning Rebozo, while *The Miami Herald* published 76.”).

interest. Just as courts often take into account the number of other publications that carry a story, courts in social media cases could look to how many other users have liked or shared a post.

Similar tests, which look to how widespread the discussion of an incident is, have been developed in the context of California's anti-SLAPP<sup>236</sup> statute.<sup>237</sup> One prominent test defines actions as being "public issues" when they are: "(1) statements concern[ing] a person or entity in the public eye; (2) conduct that could directly affect a large number of people beyond the direct participants; (3) or a topic of widespread, public interest."<sup>238</sup> Posts about celebrities clearly meet the first prong, since they are about celebrities rather than ordinary citizens. The Ninth Circuit has virtually equated the third prong, widespread public interest, with "widespread public recognition" of the subject.<sup>239</sup> Even if a court resisted the idea that celebrity status could be equated with both the first and third factors, sharing a post that has already been widely liked or shared could be used as evidence that interest was widespread. Evidence that a topic was already famous or widely known is an existing litigation strategy in these kinds of cases. For example, one California district court reasoned that there had been widespread public interest in a movie because it had been commercially successful (*My Big Fat Greek Wedding*, in that case).<sup>240</sup>

By sharing an existing picture or post, a company can make a more compelling case that it is functionally equivalent to a public-interest news provider for the purposes of that post. Companies that are not traditionally thought of as news providers, such as the film company that made the surfing documentary *Legends of Malibu*, have successfully claimed the public-interest defense.<sup>241</sup> Linking to content that was previously posted by another source will help prove that there is sufficient bona fide interest in the celebrity's day-to-day activities to warrant First Amendment

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<sup>236</sup> "SLAPP" stands for "Strategic Lawsuit Against Public Participation." Anti-SLAPP statutes seek to deter litigation that "interfer[es] with the defendants' past or future exercise of constitutionally protected rights," especially the First Amendment right to free speech. Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 *Loyola LA L Rev* 801, 802–03 (2000).

<sup>237</sup> Cal Civ Proc Code § 425.16.

<sup>238</sup> *Hilton v Cards*, 599 F3d 894, 906 (9th Cir 2010) (quotation marks omitted), quoting *Rivero v American Federation of State, County and Municipal Employees, AFL-CIO*, 130 Cal Rptr 2d 81, 89 (Cal App 2003).

<sup>239</sup> *Hilton*, 599 F3d at 907 n 8.

<sup>240</sup> *Kronmyer v Internet Movie Data Base, Inc*, 59 Cal Rptr 3d 48, 54 (Cal App 2007).

<sup>241</sup> See *Dora*, 18 Cal Rptr 2d at 791, 793–94.

protection.<sup>242</sup> Referencing the source of a photograph may also provide a celebrity with another outlet for her ire, such as the photographer or celebrity-gossip site. By being one among hundreds or thousands of accounts that shared a photograph, a company can demonstrate that there is significant public interest in the photograph and that it is simply further informing a public that is interested in this hot topic.

#### CONCLUSION

The Heigl case and others like it have all settled before a district court could even conduct a trial. This may suggest to companies that their options are to either avoid posting celebrity photographs on social media or face liability. However, smart use of social media can allow companies to engage consumers on social media without fear of liability. By avoiding usernames and linking devices like hashtags, companies can avoid liability under the Lanham Act and right of publicity regimes. Furthermore, companies may be able to take advantage of a First Amendment public-interest defense if they share photographs rather than generate them on their own. Social media is a valuable tool with a broad reach, and companies can make careful use of it in line with the law.

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<sup>242</sup> See *id.* at 792.