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## IN THE FACE OF DANGER: FACIAL RECOGNITION AND THE LIMITS OF PRIVACY LAW

When with close friends, people seldom present the same face they show to the rest of the world. But what if even the unguarded — and perhaps indiscreet — moments between friends were captured in pictures and instantly available across the world in digital form? And what if a computer in some distant room could identify the faces in each picture to create a searchable database — a fully indexed catalog of life, captured in still frames? That technology is here.

The effect of this technology, which creates an automatic, searchable pictorial documentary of one's life, is multiplied by a dramatic change in how young people use photos stored on the Internet as a defining part of their everyday lives. The sales of digital cameras have exploded in recent years,<sup>1</sup> with new camera phones alone generating an additional twenty-nine billion images in 2004.<sup>2</sup> Billions of photos, however, would be of little concern if they were simply stored in shoeboxes. Before the Internet, “[p]rivate individuals did not possess or have access to instruments for widely disseminating information”;<sup>3</sup> today, people can share news, messages, and photos instantaneously.<sup>4</sup> Indeed, armed with nothing more than cameras and Internet connections, young Americans have become foot soldiers in a cultural revolution, eagerly capturing everything from parties to study groups and leaving a digital documentary of life in their wake.<sup>5</sup> As one of these standard-bearers proclaimed: “To me, or to a lot of people, it’s like, why go to a party if you’re not going to get your picture taken?”<sup>6</sup> Rising to make this revolution technologically possible are sites such as

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<sup>1</sup> Industry analysts predicted that in 2006, manufacturers would sell over eighty-nine million digital cameras worldwide. Press Release, InfoTrends, *Maturing Digital Camera Market Expected to Show Growth in New Worldwide Regions* (Mar. 20, 2006), available at <http://www.capv.com/public/Content/Press/2006/03.20.2006.b.html>. Of those, over thirty million were sold in the United States alone. Reuters, *U.S. Digital Camera Sales May Hit New Record*, FOXNEWS.COM, Dec. 22, 2006, <http://www.foxnews.com/story/0,2933,238294,00.html>. Even more explosive have been the sales of camera phones, which are on track to become the “fastest-growing consumer technology device ever.” Jefferson Graham, *Camera Phones Rival DVD Players as Fastest Growing*, USA TODAY, Nov. 18, 2003, at 1B.

<sup>2</sup> Press Release, InfoTrends, *Worldwide Camera Phone Sales to Reach Nearly 150 Million in 2004, Capturing 29 Billion Digital Images* (Mar. 11, 2004), available at <http://www.infotrends-rgi.com/home/Press/itPress/2004/3.11.04.html>.

<sup>3</sup> Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887, 889 (2006).

<sup>4</sup> See *id.* at 891 (describing the Internet as a means to “a worldwide gossip mall”).

<sup>5</sup> See Emily Nussbaum, *Say Everything*, N.Y. MAG., Feb. 12, 2007, at 24, 102, available at <http://nymag.com/news/features/27341> (“My generation is going to have all this history; we can document anything so easily.” (quoting Caitlin Oppermann)).

<sup>6</sup> *Id.* at 29 (quoting Xiyin Tang) (internal quotation marks omitted).

Flickr and Shutterfly, created to help anyone with a camera share her pictures over the Internet.<sup>7</sup> The demand has been staggering; Flickr alone now catalogues over 325 million digital photos.<sup>8</sup>

Although the world now has access to an ever-expanding collection of images, finding specific photos has not been easy. There are an estimated 11.5 billion indexed websites,<sup>9</sup> and although web searches can help find text in that morass, programs like Google's image search have been unable to do more than guess at the content of images based on nearby text — such programs cannot identify what is actually in the image.<sup>10</sup> Thus, in the Internet's nascent stage, most moments captured for digital eternity were safely lost in silicon and fiber haystacks. Photo-sharing websites began to lift this veil of anonymity. Once photos are uploaded to Flickr, the uploader has the ability to make the photos public and to add "tags" to them — words that allow searchers to find photos uploaded to Flickr.<sup>11</sup> Thanks to Flickr, the uploader can tag photos with anyone's name, and once a photo has been tagged, only the uploader can remove the tag.<sup>12</sup> Although this system allows photos, otherwise lost, to become globally accessible, it also has an important limiting factor: Flickr requires human intervention. Uploaders cannot tag a photo unless they can personally identify its subjects. As long as the photographer is also the uploader, it is likely that anyone who is tagged would know whom to ask if he wanted to be "untagged" and restored to his prior, more anonymous state.

New facial recognition systems, however, are making it possible for computers to tag photos with names even if the uploader and the subject are complete strangers. One of these facial recognition search engines is Polar Rose;<sup>13</sup> it searches the entire Web for photos, matches faces in the photo with previously tagged photos, tags the new photo, and makes its database completely searchable.<sup>14</sup> Polar Rose's only

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<sup>7</sup> See About Flickr, <http://flickr.com/about> (last visited Apr. 7, 2007).

<sup>8</sup> E-mail from Sheila Tran, Media Relations Contact, Yahoo! Search and Social Media, to the Harvard Law Review (Jan. 25, 2007, 00:09:28 EST) (on file with the Harvard Law School Library).

<sup>9</sup> Antonio Gulli & Alessio Signorini, *The Indexable Web Is More Than 11.5 Billion Pages* (May 10, 2005) (unpublished manuscript), available at <http://www.cs.uiowa.edu/~asignori/web-size/size-indexable-web.pdf>.

<sup>10</sup> For example, Google's image search predicts the content of the picture by looking at the text on the page, the photo's caption, and other data. See Google Image Search: Help, [http://www.google.com/help/faq\\_images.html#how](http://www.google.com/help/faq_images.html#how) (last visited Apr. 7, 2007).

<sup>11</sup> See Flickr: Learn More, [http://flickr.com/learn\\_more\\_3.gne](http://flickr.com/learn_more_3.gne) (last visited Apr. 7, 2007) (noting that the uploader can choose to allow viewers to add tags as well).

<sup>12</sup> E-mail from Sheila Tran, *supra* note 8.

<sup>13</sup> <http://www.polarrose.com> (last visited Apr. 7, 2007).

<sup>14</sup> See Tom Simonite, *Face-Hunting Software Will Scour Web for Targets*, NEWSSCIENTIST.COM, Dec. 19, 2006, <http://www.newscientisttech.com/article/dn10828-facehunting-software-will-scour-web-for-targets.html>. Polar Rose works by extracting three-dimensional data from pictures of faces, which allows computerized matching with other faces in its database. See *id.* The

limitation comes from its gracious promise not to search for photos on the hard drives of users who install the company's software.<sup>15</sup> Riya is a similar service,<sup>16</sup> but it searches only photos uploaded to Riya and allows the uploader to make them private.<sup>17</sup> Thus, photos from every corner of the Internet — from every moment of life — once lost, are now ready to be found, and all with minimal human intervention.<sup>18</sup>

This Note argues that privacy law, in its current form, is of no help to those unwillingly tagged. This conclusion should come as no surprise; as our networked world has expanded what is *possible*, the law has been slow to catch up and determine what is *permissible*.<sup>19</sup> For several reasons, existing privacy law is simply ill-suited for this new invasion. First, traditional tort law does not recognize invasions of privacy that occur in public, such as the taking of a photo in any public location.<sup>20</sup> Second, the few "public invasions" that do constitute torts involve celebrities or other individuals who have commercial interests in their likenesses.<sup>21</sup> Third, courts have severely limited privacy protections in order to ensure that privacy claims do not limit the free flow of ideas.<sup>22</sup>

This Note proposes that Congress require facial recognition search engines to provide an opt-out regime that allows users to remove their names from these search engines' databases. Congress is in the best

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program supplements this information with user-supplied data. See Polar Rose, <http://www.polarrose.com> (last visited Apr. 7, 2007). In order for Polar Rose to make a match between an unknown face and a name, there must be at least one photo on the Internet that was tagged by someone who knows the subject.

<sup>15</sup> Posting of Nikolaj Nyholm to Polar Rose Blog, <http://blog.polarrose.com/2006/12/on-privacy-and-polar-rose> (Dec. 20, 2006) (promising not to index "private photos").

<sup>16</sup> See About Riya, <http://www.riya.com/about> (last visited Apr. 7, 2007).

<sup>17</sup> See Jennifer Granick, *Face It: Privacy Is Endangered*, WIRED NEWS, Dec. 7, 2005, <http://www.wired.com/news/technology/0,69771-0.html>.

<sup>18</sup> Using the Internet to wreak havoc on someone's life used to require affirmative steps and malicious intent. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997) (man received death threats after an anonymous user of AOL posted messages that claimed he was mocking the Oklahoma City bombing); *People v. Kochanowski*, 719 N.Y.S.2d 461, 462 (App. Term 2000) (woman received harassing phone calls after her ex-lover created a website that included her work and home phone numbers and suggestive photographs). Now similar results can arise when an innocent and unaware uploader posts a picture of people he does not even know.

<sup>19</sup> See Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 80 (2003); Jo Napolitano, *Hold It Right There, and Drop That Camera*, N.Y. TIMES, Dec. 11, 2003, at G1 ("[T]echnology has developed at the speed of light and American law is 'stuck in the Stone Ages.'" (quoting Barry Steinhardt, Dir., ACLU Tech. and Liberty Program).

<sup>20</sup> See *infra* section II.A, pp. 1876–77.

<sup>21</sup> See *infra* pp. 1879–80; see also Rustad & Koenig, *supra* note 19, at 139 (noting that the limited tort protections available for "cyberwrongs" are "structured to accommodate the economic interests of AOL, CompuServe, Walt Disney, and Hollywood," not individuals).

<sup>22</sup> See *infra* pp. 1885–87.

position to address this threat, and it can do so in a way that is consonant with the policies of existing privacy law.

### I. FACING THE FACTS: IDENTIFYING THE THREAT

When recent legal scholarship has considered modern threats to privacy, it has focused largely on the “destruction of ‘practical obscurity’”<sup>23</sup> by both businesses and governments. In other words, many scholars have been preoccupied with the collection of personal information in large, easily abused databases that threaten to create detailed portraits of individuals.<sup>24</sup> Others have fretted over the emergence of a corporate/government panopticon.<sup>25</sup> Although these are important areas of concern, they all suggest that the modern battle for privacy will be fought with pebbles and a slingshot against the mighty corporate or governmental aggressor.

To focus on governments or businesses ignores that the Internet harnesses power, creativity, and knowledge at the edges of the network. What is celebrated about the Internet is the power it gives individuals to shape media and culture.<sup>26</sup> Indeed, even *Time* magazine saw fit to name us “Person of the Year” because of the breadth of user-created content on the Internet.<sup>27</sup> Since a strength of the Internet is its democratic, peer-to-peer nature, it is only logical that dangers would also emerge from that power. However, with the exception of Professor Jonathan Zittrain,<sup>28</sup> legal scholars have missed the greatest threat to modern privacy: ourselves.

<sup>23</sup> Elbert Lin, *Prioritizing Privacy: A Constitutional Response to the Internet*, 17 BERKELEY TECH. L.J. 1085, 1100 (2002) (quoting Matthew D. Bunker et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 583 (1993)).

<sup>24</sup> See, e.g., Vera Bergelson, *It's Personal but Is It Mine? Toward Property Rights in Personal Information*, 37 U.C. DAVIS L. REV. 379, 384 (2003) (focusing “only on the relationship between individuals and commercial enterprises”); Susan E. Gindin, *Lost and Found in Cyberspace: Informational Privacy in the Age of the Internet*, 34 SAN DIEGO L. REV. 1153, 1156 (1997) (confining focus to large commercial and government databases).

<sup>25</sup> See, e.g., JEFFREY ROSEN, *THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE* 7–8 (2004) (expressing concern about government surveillance); JEFFREY ROSEN, *THE UNWANTED GAZE* 163–168 (2001) (describing how direct marketers and retailers threaten anonymity in cyberspace); DANIEL J. SOLOVE, *THE DIGITAL PERSON* 2–7, 13–26 (2004) (describing the invasiveness of “digital dossiers” — the collection of information held in commercial databases, public records, and government files).

<sup>26</sup> See YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 273–78, 285–300 (2006); see also *id.* at 293 (“My claim is that the emergence of a substantial nonmarket alternative path for cultural conversation increases the degrees of freedom available to individuals and groups to engage in cultural production and exchange, and that doing so increases the transparency of culture to its inhabitants.”).

<sup>27</sup> Lev Grossman, *Time Person of the Year: You*, TIME, Dec. 25, 2006, at 38.

<sup>28</sup> See JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET — AND HOW TO STOP IT* (forthcoming 2007) (manuscript at ch. 9, on file with the Harvard Law School Library).

Polar Rose, Riya, and inevitable future facial recognition search engines expand what used to be considered primarily a problem of foolishness and youth. Prior to these new technologies, it was widely acknowledged that young adults often placed rather embarrassing photos onto highly popular social networking websites such as Facebook and MySpace, sometimes with disastrous results.<sup>29</sup> Facebook profiles have already had political ramifications; one caused a minor scandal in the 2006 U.S. Senate election of Bob Corker when the press discovered photos of the conservative Republican's daughter kissing another woman at a party.<sup>30</sup> But this danger was likely one of choice rather than circumstance: as on Flickr, photos on Facebook are uploaded and tagged by the user and/or his friends.<sup>31</sup>

Users control their own profiles on social networking sites, so although readers may sympathize with those harmed by their own profiles, far more concerning, and the focus of this Note, are those instances in which people are exposed by others. Now, with the same ease by which the press found images of Senator Corker's daughter, anyone armed with only a name will be able to find photos of specific individuals. Images flood the Web because it is so easy and cheap to publish photos, but it is the ability to sift through this sea of data that threatens to erase the boundary people so carefully construct between their public and private lives. Most dangerously, it tears down that wall not because an individual or a friend willingly placed a photo online, but because someone from anywhere in the world did so.

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<sup>29</sup> See, e.g., H.J. Cummins, *Students' Facebook Faces Adult Invasion*, STAR TRIB. (Minneapolis-St. Paul), Mar. 30, 2006, at A1 (acknowledging employers' increasing use of Facebook for pre-hiring investigations); Alan Finder, *When a Risky Online Persona Undermines a Chance for a Job*, N.Y. TIMES, June 11, 2006, at A1 (discussing an employer who did not hire a candidate because of references to drugs, sex, and violence on his Facebook profile); Martha Irvine, *Bloggers Spill Souls for Everyone To Read*, CHARLOTTE OBSERVER, July 9, 2005, at 20A ("I would bet that in the 2016 election, somebody's Facebook entry will come back to bite them." (quoting Professor Steve Jones, Head, Dep't of Commc'ns, Univ. of Ill. at Chi.) (internal quotation marks omitted)).

<sup>30</sup> See Wendi C. Thomas, *Corker's Having It Both Ways*, COM. APPEAL (Memphis), Oct. 29, 2006, at B1, available at [http://www.commercialappeal.com/mca/local\\_columnists/article/0,2845,MCA\\_25341\\_5247612,00.html](http://www.commercialappeal.com/mca/local_columnists/article/0,2845,MCA_25341_5247612,00.html); Wonkette, *More Facebook Fun*, <http://wonkette.com/politics/kids/more-facebook-fun-bob-corkers-daughter-experiments-with-mary-cheneyism-180720.php> (June 14, 2006). The popular political website Wonkette has devoted an entire page to tracking the Facebook entries of politicians and their children, Wonkette, Facebook, <http://wonkette.com/politics/facebook> (last visited Apr. 7, 2007), and has even featured President Bush's daughter Barbara, Wonkette, *Facebush Update: Barbara's Profile Revealed*, <http://wonkette.com/politics/barbarabush/facebush-update-barbaras-profile-revealed-229111.php> (Jan. 16, 2007).

<sup>31</sup> See Facebook: Customer Support, <http://www.facebook.com/help.php#cat15> (follow "There's a photo of me on Facebook that I want taken down" hyperlink) (last visited Apr. 7, 2007) (stating that a user can "untag" a photo that includes her name but cannot remove the photo from the system unless it violates the terms of service).

Although these technologies are too new to have had any real-world consequences, their potential is readily apparent. Take one salient example: Catherine Bosley, a news anchor from Ohio, had suffered from several life-threatening ailments. After she underwent several surgeries and finally learned that she was going to live, she took a vacation with her husband to Florida. There, surrounded by strangers and possessed by the desire to do something exhilarating to celebrate her newfound life, she entered a “wet T-shirt” contest. As she described it, “[w]e thought it’d be our moment with a bunch of strangers.”<sup>32</sup> A year later, pictures and video from the contest were on the Internet and she was fired from her job. The station’s rationale was simple: “Catherine is a seasoned veteran who consciously chose to engage in behavior that she knew was inconsistent with the responsibilities of her chosen profession.”<sup>33</sup>

Although Catherine Bosley received attention because of her public career, the lesson of the story is applicable to anyone: when employers or others have easy access to our most personal information, they may not like what they see.<sup>34</sup> Thanks to facial recognition search engines, what happened to Bosley is likely to happen to others with greater frequency. The various facets of people’s lives, once kept at a distance, will collapse into one, and it will become apparent “how quickly a brief lapse in judgment can permanently destroy someone’s reputation.”<sup>35</sup>

## II. FACING THE CONSEQUENCES: THE INAPPLICABILITY OF TORT LAW

Does the law provide any succor for those whose quiet anonymity among the masses is laid to waste by the power of a search box? Unfortunately, current privacy doctrines are simply too antiquated to handle this unique problem. Modern privacy scholarship began in 1890, when Samuel Warren and Louis Brandeis argued for the “right to be let alone.”<sup>36</sup> In 1960, Dean William Prosser expanded on Warren

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<sup>32</sup> Connie Schultz, *Bare Facts Don't Tell Whole Story*, PLAIN DEALER (Cleveland), Jan. 29, 2004, at F1, LEXIS, News Library, Clevpd File.

<sup>33</sup> *Id.* (internal quotation marks omitted) (quoting Gary Coursen, News Dir., WKBN). The station apparently found out about the pictures through the intervention of a malicious interloper. *Id.*

<sup>34</sup> *Cf.* Irvine, *supra* note 29 (discussing how some employers have fired employees for their personal blog postings).

<sup>35</sup> Jim Barr Coleman, Note, *Digital Photography and the Internet, Rethinking Privacy Law*, 13 J. INTELL. PROP. L. 205, 207 (2005).

<sup>36</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890). Several scholarly articles provide more depth on the development of privacy scholarship and case law. *See, e.g.*, Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213 (1999);

and Brandeis's work, arguing for four separate privacy tort claims.<sup>37</sup> Dean Prosser's article was extremely influential, and today over half of the states have adopted those torts through either statute or common law.<sup>38</sup>

These torts, however, are inapplicable to the situation of facial search engines. Dean Prosser's first three torts — intrusion upon seclusion, false light, and public disclosure — apply to only those acts that take place outside of public view, thus excluding protection for pictures taken in public. His fourth tort, misappropriation, along with the related action of the right of publicity, usually requires a well-known, commercially valuable name, thereby limiting its use to celebrities. Thus, without changes, these legal claims would not help individuals arrest the use of their images on these new search engines.

#### A. *The Three Private Privacy Torts*

The first three of Dean Prosser's torts are intrusion upon seclusion, public disclosure, and false light. The tort of intrusion upon seclusion represents the most traditional conception of privacy. The tort is defined as an intrusion into "a private place or matter as to which a plaintiff would have a reasonable expectation of privacy."<sup>39</sup> Unlike intrusion, for which defendants can be liable even if they never tell a soul what they discovered, the tort of public disclosure punishes those who reveal private information "that would be objectionable to a reasonable person of ordinary sensibilities."<sup>40</sup> The tort of false light makes liable defendants who falsely claim the plaintiff made certain statements or actions.<sup>41</sup>

As may already be apparent, these three torts are inapplicable to those whose photos are taken in public spaces and then uploaded to the Internet. The very fact that an image is snapped at a party, a res-

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Coleman, *supra* note 35, at 209–14; Alan Kato Ku, Comment, *Talk Is Cheap, but a Picture Is Worth a Thousand Words: Privacy Rights in the Era of Camera Phone Technology*, 45 SANTA CLARA L. REV. 679, 681–86 (2005); Aimee Jodoi Lum, Comment, *Don't Smile, Your Image Has Just Been Recorded on a Camera-Phone: The Need for Privacy in the Public Sphere*, 27 U. HAW. L. REV. 377, 380–84 (2005).

<sup>37</sup> See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389–407 (1960).

<sup>38</sup> See Andrew Jay McClurg, *Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 998–99 (1995).

<sup>39</sup> Joseph Siprut, *Privacy Through Anonymity: An Economic Argument for Expanding the Right of Privacy in Public Places*, 33 PEPP. L. REV. 311, 317 (2006); see also RESTATEMENT (SECOND) OF TORTS § 652B (1977).

<sup>40</sup> Siprut, *supra* note 39, at 319; see also RESTATEMENT (SECOND) OF TORTS § 652D.

<sup>41</sup> Siprut, *supra* note 39, at 317–18. False light is broader than slander or libel, protecting the plaintiff's reputation even if the defendant did not actually defame the plaintiff. See RESTATEMENT (SECOND) OF TORTS § 652E cmt. b; Prosser, *supra* note 37, at 400.

restaurant, a park, or a bar dooms the claim.<sup>42</sup> As one judge observed about intrusion, the tort simply did “not apply to matters which occur in a public place or a place otherwise open to the public eye.”<sup>43</sup> For example, when a man going through a highly emotional divorce sued a newspaper for publishing a picture of him with his children in the courtroom, the court denied his claim and stated:

[T]he undeniable fact is that he had made public the most intimate and indeed scandalous occurrences of his domestic life and had them spread on the public records of a court of his choosing, and, in so doing, he departed from his “quiet and peaceful life free from the prying curiosity and unmitigated gossip which accompanies fame, notoriety and scandal” and in a sense became a quasi-public figure in the community and particularly in his own strata of society.<sup>44</sup>

These views are not unique; almost all courts have staunchly held that a plaintiff cannot sustain a privacy claim when the captured behavior occurred in a public space.<sup>45</sup> Ostensibly, this bright-line rule makes sense: if events occur in a place that anyone can observe, how can it be tortious to take and publish a picture of what anyone had the right to see?<sup>46</sup> It thus appears that if those captured by facial recognition search engines are to obtain any relief, they must find it elsewhere.

### B. *The Public Privacy Torts*

The fourth kind of privacy tort — misappropriation or the right of publicity — holds more promise for those whose images are identified, tagged, and rendered searchable via the Internet. The general idea behind these claims — stopping use of the plaintiff’s image when damaging to her reputation or persona — seems to address precisely the concerns raised by the new image search engines. Unfortunately,

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<sup>42</sup> See Phillip E. Hassman, Annotation, *Taking Unauthorized Photographs as Invasion of Privacy*, 86 A.L.R.3d 374, 375 (1978) (“Where the picture is taken on the public streets, or in a public place such as a courtroom or a sporting event, the courts have refused to consider the taking as an invasion of privacy.”).

<sup>43</sup> *Fogel v. Forbes, Inc.*, 500 F. Supp. 1081, 1087 (E.D. Pa. 1980); see also *Forster v. Manchester*, 189 A.2d 147, 150 (Pa. 1963).

<sup>44</sup> *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957, 961 (D. Minn. 1948) (quoting the plaintiff’s complaint).

<sup>45</sup> See *Coleman*, *supra* note 35, at 212. Courts hold to this rule even to the detriment of victims of voyeurism. See *Lum*, *supra* note 36, at 405.

<sup>46</sup> See *Lugosi v. Universal Pictures*, 603 P.2d 425, 444 (Cal. 1979) (Bird, C.J., dissenting) (“[I]f information about a person is already in the public domain, there can be no claim for an invasion of privacy; to that extent, the right of privacy has been waived.”); see also *Bergelson*, *supra* note 24, at 407 (observing that the tort of intrusion protects “only ‘secret’ information, i.e., the information that either has never been communicated to anyone . . . or is highly personal in its character”). It should be noted that photography in public can lead to a sustainable claim if the photography is so invasive that it becomes harassment. See, e.g., *Galella v. Onassis*, 487 F.2d 986, 995 (2d Cir. 1973).

both torts are focused on commercial exploitation<sup>47</sup> and are thus largely inapplicable to the average person plucked from the anonymous masses.

These essentially identical public privacy torts of right of publicity and misappropriation are as deficient as the other privacy torts when it comes to protecting one's own image. Professor J. Thomas McCarthy's treatise on the right of publicity summarizes the action as follows: to succeed, the plaintiff must show that the "[d]efendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant's use" and that the "[d]efendant's use is likely to cause damage to the commercial value of that persona."<sup>48</sup> Similarly, although New York's misappropriation statute does not require commercial damage, it does require that the likeness be used for "for advertising purposes or for the purposes of trade."<sup>49</sup> The broadest form of the tort is found in the Restatement (Second) of Torts, which requires that the defendant put the likeness to her "own use or benefit."<sup>50</sup> Many jurisdictions have adopted this broad form of the tort.<sup>51</sup>

The similarity between these torts has courts so thoroughly muddled in their treatment of the two that this Note treats them as one, largely undifferentiated, set of actions. The right of publicity emerged before Dean Prosser popularized misappropriation, when the Second Circuit, applying New York law in a diversity action, first mentioned a right of publicity that exists "in addition to and independent of th[e] right of privacy."<sup>52</sup> From that point forward, despite some efforts to offer rationales that differentiate these torts,<sup>53</sup> courts have obscured

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<sup>47</sup> Professor Melville Nimmer, responding to courts' attempts to compensate public figures, *see Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868-69 (2d Cir. 1953), developed guidelines for the right of publicity. *See* Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204 (1954); *see also* Thomas Phillip Boggess V, *Cause of Action for an Infringement of the Right of Publicity*, in 31 CAUSES OF ACTION 2d 121, 138-39 (Clark Kimball & Mark Pickering eds., 2006). A few years later, Dean Prosser developed the tort of misappropriation, *see* Prosser, *supra* note 37, at 401-07, which was also entirely focused on commodification. *See* Kahn, *supra* note 36, at 224-25.

<sup>48</sup> 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 3:2 (2d ed. 2006) (footnotes omitted).

<sup>49</sup> N.Y. CIV. RIGHTS LAW § 51 (McKinney Supp. 2007).

<sup>50</sup> RESTATEMENT (SECOND) OF TORTS § 652C (1977).

<sup>51</sup> *See, e.g., Moore v. Big Picture Co.*, 828 F.2d 270, 275 (5th Cir. 1987) ("[A] plaintiff must show that his or her personal identity has been appropriated by the defendant for some advantage, usually of a commercial nature, to the defendant." (quoting *Nat'l Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533, 540 (W.D. Tex. 1980)) (internal quotation mark omitted)).

<sup>52</sup> *Haelan Labs.*, 202 F.2d at 868.

<sup>53</sup> *See* Kahn, *supra* note 36, at 213 ("Publicity rights implicate monetary interests. In contrast, privacy rights protect and vindicate less tangible personal interests in dignity and integrity of the self." (footnote omitted)).

the boundary between privacy and publicity.<sup>54</sup> For example, in 1979, the California Supreme Court described commercial protection of the right of publicity as “the heart of the law of privacy.”<sup>55</sup> In 1999, a federal district court in Texas suggested the two claims were identical except for their names.<sup>56</sup> In 2001, a California appellate court claimed that the right of publicity grew from Dean Prosser’s misappropriation tort.<sup>57</sup> These cases are only some of the many examples of doctrinal disorder.<sup>58</sup> In fact, courts have observed the confusion in other courts, remarking that “numerous cases blend the concepts together.”<sup>59</sup> Indeed, the entire area is so muddled that even scholars have lumped the two together, with one prominent privacy expert declaring that misappropriation “evolved” into the right of publicity.<sup>60</sup>

Although the two actions are not identical, they share the idea that the defendant utilizes the plaintiff’s likeness for his own benefit. The gain does not materialize from thin air; the defendant trades on or exploits the value inherent in the plaintiff’s name or image.<sup>61</sup> This gain can occur only when the name is a brand, not just an identity.<sup>62</sup> Accordingly, these torts have been likened to intellectual property law in that they create incentives for developing brands while protecting the value that is created.<sup>63</sup>

If a successful claim requires an identity that is commercially valuable, then average people whose images enter searchable databases

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<sup>54</sup> See *id.* at 264 (“The problem is that the courts’ considerations of privacy-based identity harms are usually entangled with and largely subsumed by their analyses of the property-based rights of publicity . . .”).

<sup>55</sup> *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979).

<sup>56</sup> See *Henley v. Dillard Dep’t Stores*, 46 F. Supp. 2d 587, 590 (N.D. Tex. 1999) (“The tort of misappropriation of one’s name or likeness is generally referred to as the ‘Right of Publicity’ . . .”).

<sup>57</sup> See *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 313 (Ct. App. 2001).

<sup>58</sup> See, e.g., *Brown v. Ames*, 201 F.3d 654, 657 (5th Cir. 2000) (stating that Texas’s tort of misappropriation “is best understood as a species of the right of publicity or of privacy”); *Stephano v. News Group Publ’ns, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984) (explaining that in New York’s misappropriation statute the “‘right of publicity’ is encompassed . . . as an aspect of the right of privacy”).

<sup>59</sup> *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978).

<sup>60</sup> *McClurg*, *supra* note 38, at 1002–03 (“The tort of appropriation has evolved into a property-based claim unrelated to the protection of personal privacy. It is used primarily as a tool for helping celebrities protect the commercial value of their ‘right of publicity.’” (footnote omitted)).

<sup>61</sup> See *Lugosi v. Universal Pictures*, 603 P.2d 425, 438 (Cal. 1979) (“An unauthorized commercial appropriation of one’s identity converts the potential economic value in that identity to another’s advantage.”).

<sup>62</sup> See *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538, 1542 (11th Cir. 1983) (discussing how the plaintiff’s name has a “secondary meaning” that acts as his brand).

<sup>63</sup> See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (“[T]he State’s interest in permitting a ‘right of publicity’ is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment.”).

will not be saved by misappropriation or the right of publicity.<sup>64</sup> Unfortunately for such people, the only ones who can invoke these torts are those whose names and faces are well recognized, and who therefore have commercial value that could be exploited<sup>65</sup> — in short, celebrities.<sup>66</sup> Granted, the torts are not expressly limited to those who have achieved fame, but celebrities tend to be the only ones with any commercial value attached to their names.<sup>67</sup> Those individuals unwillingly tagged are tagged not because they are famous, but only because the engine wants the most comprehensive database possible.

Uses of likenesses that are not advertisements are often protected as newsworthy or otherwise important to the public interest.<sup>68</sup> For instance, the provision of images and statistics on baseball players,<sup>69</sup> a

<sup>64</sup> Professor Andrew McClurg observes the irony that “celebrities have less privacy than non-celebrities, [but] they enjoy somewhat greater legal protection for privacy.” McClurg, *supra* note 3, at 895.

<sup>65</sup> See *Lugosi*, 603 P.2d at 431 (“The so-called right of publicity means in essence that the reaction of the public to name and likeness, which may be fortuitous . . . or planned, endows the name and likeness of the person involved with commercially exploitable opportunities.”).

<sup>66</sup> See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1098 (9th Cir. 1992) (“The . . . tort is a species of violation of the ‘right of publicity,’ the right of a person whose identity has commercial value — most often a celebrity — to control the commercial use of that identity.”); *Henley v. Dillard Dep’t Stores*, 46 F. Supp. 2d 587, 590 (N.D. Tex. 1999) (“The right of publicity is designed to protect the commercial interests of celebrities . . . .”); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728–29 (S.D.N.Y. 1978) (noting that the right of publicity “recognizes the commercial value of the picture or representation of a prominent person or performer” and that “[a]ccordingly, this right of publicity is usually asserted only if the plaintiff ‘has achieved in some degree a celebrated status’” (quoting *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 847 (S.D.N.Y. 1975))).

<sup>67</sup> See McClurg, *supra* note 3, at 895 (“While [misappropriation and right of publicity] claims are not technically reserved for celebrities, as a practical matter, they are used almost exclusively by celebrities.”). Reflecting the torts’ historical connection to advertising, see George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443, 454–61 (1991), the commercial use a plaintiff must allege is usually advertising — something inapplicable to facial recognition search engines. See, e.g., *Waits*, 978 F.2d at 1100, 1112 (holding that the use of a soundalike in a radio commercial for snack foods violated Tom Waits’s right of publicity); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463–64 (9th Cir. 1988) (holding the use of a Bette Midler voice soundalike in a car commercial violated her right of publicity); *Henley*, 46 F. Supp. 2d at 594 (finding that singer Don Henley’s name was used “to attract the attention of customers”); *Ali*, 447 F. Supp. at 727 (holding that the use of a lookalike in a nude photospread was “for the ‘purpose[s] of trade’” (quoting N.Y. CIV. RIGHTS LAW § 51 (McKinney Supp. 2007))).

<sup>68</sup> Newsworthy and commercial uses are often defined as binary options. See, e.g., *Creel v. Crown Publishers, Inc.*, 496 N.Y.S.2d 219, 220 (App. Div. 1985) (“It is well-settled that [a] picture illustrating an article on a matter of public interest is not [commercial misappropriation] . . . unless it has no real relationship to the article . . . .” (first alteration and first omission in original) (quoting *Dallesandro v. Henry Holt & Co.*, 166 N.Y.S.2d 805, 806 (App. Div. 1957))); *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144, 146 (Sup. Ct. 1973) (holding that the use of Howard Hughes’s name on a board game was “not legitimate to the public interest” and therefore commercial); see also *infra* section IV.A, pp. 1885–89. Some advertisements, however, may be protected if the photo’s use is only “incidental.” See *Booth v. Curtis Publ’g Co.*, 223 N.Y.S.2d 737, 742–44 (App. Div. 1962) (holding that it is acceptable for a publication to use a previously published picture in an advertisement that demonstrates the quality of the publication).

<sup>69</sup> *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 314–15 (Ct. App. 2001).

magazine cover relating to the lead story,<sup>70</sup> caricatures on parody baseball cards,<sup>71</sup> and even a nude photo on the cover of a nude beach guide<sup>72</sup> were all held to be protected. In cases typical of misappropriation or right of publicity claims, the issue is simply control of the image: “[T]he plaintiff does not complain about the fact of exposure to the public, but rather about its timing or manner.”<sup>73</sup> While celebrities may welcome publicity as long as they benefit from it, those whose faces appear in search engines would often rather not appear at all.

### III. FACING UP: HELPING INDIVIDUALS PROTECT THEIR IMAGES

When the lives of ordinary citizens are suddenly searchable, moments of naiveté or indiscretion become lasting reminders open to the entire world. This phenomenon creates the risk that individuals will be judged solely on the basis of their moments of weakness, thus erasing a lifetime of good.<sup>74</sup> Whereas falsities, despite the pain they cause, can be disproved, the truth can be far more destructive.<sup>75</sup> When that truth is captured in a photograph, it is all the more harmful, allowing for a level of scrutiny unavailable to a mere passerby.<sup>76</sup> Even though many photos may be taken in public spaces, it seems wrong when moments with friends, possibly from years ago, become inescapable parts of our public lives. This permanent instantiation of private moments seems wrong because it destroys the good will established in people’s identities.<sup>77</sup> Living an active and full life should not require the surrender of all aspirations to be better than our worst moments.<sup>78</sup>

#### A. Reforming Tort Law

If tort law in its current form is of no avail to those unwillingly tagged, one option is to reform the law. Given that only photographs

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<sup>70</sup> *Murray v. N.Y. Magazine Co.*, 267 N.E.2d 256, 258 (N.Y. 1971).

<sup>71</sup> *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 970–73 (10th Cir. 1996).

<sup>72</sup> *Creel*, 496 N.Y.S.2d at 220.

<sup>73</sup> *Zacchini v. Scripps-Howard Broad Co.*, 433 U.S. 562, 582 (1977).

<sup>74</sup> See *ROSEN, THE UNWANTED GAZE*, *supra* note 25, at 9 (“[W]hen intimate information is removed from its original context and revealed to strangers, we are vulnerable to being misjudged on the basis of our most embarrassing, and therefore most memorable, tastes and preferences.”).

<sup>75</sup> See McClurg, *supra* note 3, at 906.

<sup>76</sup> See McClurg, *supra* note 38, at 1041–44.

<sup>77</sup> Cf. *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144, 146 (Sup. Ct. 1973).

<sup>78</sup> Cf. *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (“Perhaps the basic and underlying theory is that a person has the right to enjoy the fruits of his own industry free from unjustified interference.”); Coleman, *supra* note 35, at 225 (“Most reasonable people would agree that we sacrifice some of our privacy when we walk out our front doors, but this does not mean that we necessarily forgo or want to forgo all solitude, secrecy, and anonymity.”).

taken in private currently have protection in tort, one tempting solution is for either courts or legislatures to expand “privacy” into public places. In 1995, Professor Andrew McClurg proposed “public privacy” — allowing privacy torts for behavior in areas that courts have typically labeled “public.”<sup>79</sup> Unfortunately, he needed to limit the plan severely to avoid running afoul of the First Amendment, because the more speech that is actionable as a violation of privacy, the more the tort claims resemble impermissible restrictions on speech. To avoid restricting too much speech, his proposal set a high bar for qualifying for privacy protection: his rule protects only “those subjected to highly offensive public intrusions of a serious nature.”<sup>80</sup> A photo taken in a restaurant or bar, even if disagreeable to the subject of the photo, is unlikely to meet that demanding standard. Expanding what counts as private therefore may not be the best approach for dealing with this unique problem.

As an alternative, courts could liberalize their interpretations of misappropriation and right of publicity in order to have the claims apply to facial recognition search systems. For a court to make that step would not be such a revolutionary leap because it would be consistent with some of the underlying theories that courts already recognize in these torts. Despite the courts’ general emphasis on the torts’ economic nature, they have noticed an important emotional aspect. For example, the Ninth Circuit has repeatedly emphasized that “it is quite possible that the appropriation of the identity of a celebrity may induce humiliation, embarrassment, and mental distress” and that freedom from those harms should be considered part of the right of publicity.<sup>81</sup>

These cases suggest that some courts understand that people can be deeply wounded when their images are shown in ways that they did not expect or want — particularly when they have avoided using their faces as a brand.<sup>82</sup> Under this reading there is a part of these torts that is *universally* applicable; there is no rational reason to believe emotional harms affect only the famous while the nonfamous who find

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<sup>79</sup> See McClurg, *supra* note 38.

<sup>80</sup> *Id.* at 995.

<sup>81</sup> *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1103 (9th Cir. 1992) (quoting *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 n.11 (9th Cir. 1974)) (internal quotation marks omitted); see also *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 881 (S.D.N.Y. 1973) (“If the jury decides in plaintiff Grant’s favor he will *of course* be entitled to recover for any lacerations to his feelings that he may be able to establish.” (emphasis added)); *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004, 1012 (App. Div. 1981) (recognizing that the same harm can cause both property and emotional damages).

<sup>82</sup> See, e.g., *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 283 (S.D.N.Y. 1977) (noting that courts are more likely to consider emotional impact “when an individual has elected not to engage in personal commercialization”).

their faces suddenly receiving unwanted attention on the Internet have no feelings on the matter. Unfortunately, it is actually *harder* for the nonfamous to convince courts of their emotional pains in privacy actions.<sup>83</sup> Of course, not every court has recognized an emotional side to misappropriation and the right of publicity,<sup>84</sup> but its acceptance in certain quarters shows that some judges understand the damage that the involuntary display of one's image can cause.<sup>85</sup>

Similarly, courts could adopt a more expansive definition of commercialization that would encompass use of photos in search engines. Unfortunately for noncelebrities, courts have proven extremely reluctant to enforce regular privacy torts,<sup>86</sup> let alone those in cyberspace.<sup>87</sup> Even if courts were more open to enforcing and reforming these actions, change would be a slow, state-by-state process that would leave a confusing patchwork of different policies.<sup>88</sup> There is certainly something to be said for the benefits of experimentation, but in the absence of uniform rules, information that could be very damaging will find the path of least resistance. While tort law reforms might work, they are less than ideal.

### B. Developing Contract Rules

Several scholars leave privacy law aside and argue that contract relationships should be developed to provide protection for photos. One proposal vests ownership of a photograph with the subject so that the

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<sup>83</sup> See McClurg, *supra* note 38, at 1006–07; see also *Forster v. Manchester*, 189 A.2d 147, 150–51 (Pa. 1963) (protecting public surveillance of the plaintiff even though the shock of discovering people filming and following her caused extreme emotional distress).

<sup>84</sup> See, e.g., *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 973, 976 (10th Cir. 1996) (noting “various noneconomic interests” in the right of publicity, including “averting emotional harm,” but ultimately concluding that “publicity rights . . . are meant to protect against the loss of financial gain, not mental anguish”); see also RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (1977) (noting that misappropriation is ultimately a property right even though “the protection of [the plaintiff’s] personal feelings against mental distress is an important factor leading to a recognition of the rule”).

<sup>85</sup> It has also been important to courts that defendants did not need the plaintiff’s specific image, as would be the case with the facial recognition engines. See, e.g., *Grant*, 367 F. Supp. at 883 (“[T]he Court can take judicial notice that there is no shortage of celebrities who — for an appropriate fee — are only too happy to lend their faces . . .”).

<sup>86</sup> See McClurg, *supra* note 38, at 999; McClurg, *supra* note 3, at 887–88; Sipur, *supra* note 39, at 316.

<sup>87</sup> See Rustad & Koenig, *supra* note 19, at 122.

<sup>88</sup> Cf. Brad Smith, Gen. Counsel, Microsoft Corp., Address to the Congressional Internet Caucus: Protecting Consumers and the Marketplace: The Need for Federal Privacy Legislation (Nov. 3, 2005), available at <http://download.microsoft.com/download/c/2/9/c2935f83-1a10-4e4a-a137-c1db829637f5/PrivacyLegislationCallWP.doc> (describing the current system as “compliance chaos” for corporations).

photographer will have to bargain for its use.<sup>89</sup> Others have proposed recognizing contracts — implied<sup>90</sup> or explicit<sup>91</sup> — to govern the use of personal information. However, these proposals for improving privacy protections are all inadequate because they rely upon a relationship that extends beyond that of just a single transaction between a photographer and the target of his lens.<sup>92</sup> Because facial recognition technology works even if the person tagged is simply in the background, a solution cannot assume that the photographer knows the subjects of her photos. It would also be difficult to establish a contractual relationship between any particular user of the photo and the subject because, as with any digital medium, later users may be far downstream,<sup>93</sup> any contract regime that limitlessly connects distant users to the subject would leave all photos potentially tainted and would thus chill productive uses.

### C. A New Proposal: Congressional Intervention

It appears that tort and contract approaches are inadequate. This Note proposes a rather simple alternative: Congress should require that companies offering indexed searching of photos provide an opt-out system. The exact contours of such a plan — whether the list of blocked names is centralized or not, for instance — are not currently important; what matters is that individuals have a simple and clear mechanism for removing their names from these databases.

Federal action is particularly appropriate here. The Internet crosses state borders, and thus one state alone cannot create a comprehensive solution.<sup>94</sup> National legislation would avoid the delay of a piecemeal, state-driven approach as well as the doctrinal mess that can emerge when states apply a patchwork of standards.<sup>95</sup> The federal government has done this before: the National Do Not Call Registry allows citizens to opt out of receiving telemarketing calls<sup>96</sup> in the same

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<sup>89</sup> See Siprut, *supra* note 39, at 323–24; see also Bergelson, *supra* note 24, at 383 (“[I]n order to protect privacy, individuals must secure control over their personal information by becoming its real owners.”).

<sup>90</sup> See McClurg, *supra* note 3, at 908–37.

<sup>91</sup> See Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right To Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1057–62 (2000).

<sup>92</sup> Prior to the invention of Riya and Polar Rose, a photographer was unlikely to associate a name with a face unless he had at least enough contact with the subject to ask for a name.

<sup>93</sup> See Coleman, *supra* note 35, at 223.

<sup>94</sup> Cf. Joseph J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, 16 BERKELEY TECH. L.J. 1165, 1239 (2001) (“There is no federal right of publicity and no likelihood of enactment of such legislation in the near term. Thus, the existence and terms of such a right are a matter of state law.” (citation omitted)).

<sup>95</sup> Cf. *supra* pp. 1878–79.

<sup>96</sup> See Do-Not-Call Implementation Act, Pub. L. No. 108–10, 117 Stat. 557 (2003); 16 C.F.R. § 310.4(b)(1)(iii)(B) (2006); 47 C.F.R. § 64.1200(c)(2) (2006); FED. TRADE COMM’N, Q&A: THE

way that this proposal would allow a user to opt out of commercial searching of her image.

Government regulation may be preferable to tort litigation in this circumstance. The tort system, particularly when used to regulate Internet services, can be an inefficient and ineffective way to achieve policy goals.<sup>97</sup> Aside from the cost and effort of filing a suit, private litigation may not even change the behavior of search engines. With a simple opt-out system, citizens can secure their privacy without hiring attorneys or clogging the judicial system.

#### IV. FACIAL CHALLENGES: OBJECTIONS TO A CONGRESSIONAL MANDATE

This Note argues that Congress is best situated to help people protect the use of their own images. There are, however, several significant objections to any legislative intervention: concern for the First Amendment, a desire for full information, faith in the market, and anxiety about government interference with emerging technology. However, each of these objections is unavailing.

##### A. *The Impact on Free Speech*

Courts, although generally protective of free speech, recognize the necessity of a balance “between the protection of an individual’s right to control the use of his likeness and the constitutional guarantee of free dissemination of ideas, images, and newsworthy matter.”<sup>98</sup> As Professor Eugene Volokh explains, the concern is that if individuals can exercise control over an increasingly large sphere of information about themselves, then they can begin to use privacy torts to restrict speech.<sup>99</sup> Professor Volokh contends that “[c]alling a speech restriction a ‘property right’ . . . doesn’t make it any less a speech restriction, and it doesn’t make it constitutionally permissible.”<sup>100</sup> Courts have sympathized with these concerns and have carefully circumscribed the privacy torts in order to maintain the free exchange of facts and news.<sup>101</sup>

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NATIONAL DO NOT CALL REGISTRY (2005), <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt107.pdf> (providing information about the registry).

<sup>97</sup> See Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653, 660–64 (2003).

<sup>98</sup> Titan Sports, Inc. v. Comics World Corp., 870 F.2d 85, 88 (2d Cir. 1989).

<sup>99</sup> See Volokh, *supra* note 91, at 1076–80. Professor Volokh is also concerned that courts may use their role as arbiters of privacy rights to exert control over what people say. See *id.* at 1089–90.

<sup>100</sup> *Id.* at 1063.

<sup>101</sup> See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 567 (1977) (noting that the Restatement (Second) of Torts “was understood to make room for reasonable press appropriations by limiting the reach of the right of privacy rather than by creating a privileged invasion”); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 138–39 (2d Cir. 1984); *Murray v. N.Y. Magazine Co.*, 267 N.E.2d 256, 258 (N.Y. 1971); *Creel v. Crown Publishers, Inc.*, 496 N.Y.S.2d 219, 220 (App. Div.

Courts have long protected images connected to current events and other matters of “public interest”<sup>102</sup> and now protect “much of what the media do in the reproduction of likenesses or sounds.”<sup>103</sup> In fact, even if the image is included for the sole purpose of selling more newspapers and magazines, the image will be protected as long as it is connected to something in the public interest.<sup>104</sup>

The First Amendment has shielded a diverse array of activities. There have been obvious examples, such as allowing a picture associated with a news story about a local performer,<sup>105</sup> a photo of a boxer next to commentary on the dangers of boxing,<sup>106</sup> and a photo of a man in Irish garb associated with a cover story on St. Patrick’s Day.<sup>107</sup> The true reach of the First Amendment, however, is best appreciated in examples in which “public interest” is more tenuous: nude photos associated with an article on a well-known starlet,<sup>108</sup> posters featuring a comedian who pretended to run for President,<sup>109</sup> and images of Howard Stern’s buttocks displayed by an online service provider to promote its

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1985); *Oma v. Hillman Periodicals, Inc.*, 118 N.Y.S.2d 720, 724–25 (App. Div. 1953); *Stern v. Delphi Internet Servs. Corp.*, 626 N.Y.S.2d 694, 700 (Sup. Ct. 1995); *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 507 (Sup. Ct. 1968); *Lahiri v. Daily Mirror, Inc.*, 295 N.Y.S. 382, 388 (Sup. Ct. 1937); *see also* Volokh, *supra* note 91, at 1069.

<sup>102</sup> *See, e.g., Paulsen*, 299 N.Y.S.2d at 506 (declaring that “activities involving the dissemination of news or information concerning matters of public interest . . . are privileged and do not fall within” the ambit of New York’s misappropriation statute); *Lahiri*, 295 N.Y.S. at 388 (“[W]ith respect to newspapers, recovery under the statute has for the most part been denied for the unauthorized publication in a single issue of photographs used in connection with the dissemination of current news and matters of information and general interest.”).

<sup>103</sup> *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988).

<sup>104</sup> *See Lee v. Penthouse Int’l, Ltd.*, No. CV96-7069SVW (JGX), 1997 WL 33384309, at \*3–4 (C.D. Cal. Mar. 19, 1997) (concluding that nude images were protected because they were newsworthy even though “*Penthouse* obviously put Pamela Lee’s picture on the cover and reprinted the intimate pictures of the Lees in order to attract buyers”); *Fogel v. Forbes, Inc.*, 500 F. Supp. 1081, 1088–89 (E.D. Pa. 1980); *Stephano v. News Group Publ’ns, Inc.*, 474 N.E.2d 580, 585 (N.Y. 1984) (“The fact that the defendant may have included this item in its column solely or primarily to increase the circulation of its magazine . . . does not mean that the defendant has used the plaintiff’s picture for trade purposes . . .”).

<sup>105</sup> *Lahiri*, 295 N.Y.S. at 382.

<sup>106</sup> *Oma*, 118 N.Y.S.2d at 724 (“This was an article on a matter of current interest. Plaintiff was . . . a well-known boxer. As such, he had projected himself into the area of public view and comment.”).

<sup>107</sup> *Murray v. N.Y. Magazine Co.*, 267 N.E.2d 256, 258 (N.Y. 1971) (declaring the image to be connected to “a matter of legitimate public interest to readers” (quoting *Pagan v. N.Y. Herald Tribune, Inc.*, 301 N.Y.S. 2d 120, 123 (App. Div. 1969)) (internal quotation mark omitted)).

<sup>108</sup> *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 138–39 (2d Cir. 1984).

<sup>109</sup> *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 507 (Sup. Ct. 1968) (calling the images “newsworthy and of public interest”).

discussion boards about Stern's gubernatorial bid<sup>110</sup> were all protected by the First Amendment.<sup>111</sup>

Although the First Amendment poses a large hurdle for any privacy protection,<sup>112</sup> a legislative opt-out regime for search engines is compatible with current doctrine. A decision by a possible employer or romantic interest to pry into the past does not transform photo tagging from a commercial service into newsworthy material.

Congress can overcome these significant First Amendment concerns and regulate commercial speech when the government can both assert a substantial interest and establish a reasonable fit between the government's ends and its means.<sup>113</sup> Applying this standard, the Tenth Circuit upheld the opt-out system of the National Do Not Call Registry.<sup>114</sup> A system to opt out of image searches will likely find equal support in the courts.

There are weighty reasons for limiting facial recognition search engines that should satisfy the substantial interest test. Deciding what information about ourselves we will share with others helps define the boundaries of different relationships; "One shares more of himself with a friend than with an employer, more with a life-long friend than with a casual friend, more with a lover than an acquaintance."<sup>115</sup> On a more basic level, the ability to keep parts of our lives private is central

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<sup>110</sup> Stern v. Delphi Internet Servs. Corp., 626 N.Y.S.2d 694, 700 (Sup. Ct. 1995).

<sup>111</sup> Courts are so concerned about privacy claims possibly interfering with the news that they have protected publishers who revealed the names of crime victims, even if doing so endangered the victims' lives. See, e.g., Fla. Star v. B.J.F., 491 U.S. 524, 535-41 (1989).

<sup>112</sup> Courts have limited the First Amendment's application only in narrow circumstances, such as duplicating a news story for use as an advertisement, see Flores v. Mosler Safe Co., 164 N.E.2d 853, 857-58 (N.Y. 1959), or publishing a photo of a woman whose skirt blew up when she emerged from a funhouse, see Daily Times Democrat v. Graham, 162 So. 2d 474, 478 (Ala. 1964). In the latter case the court said that "[t]o hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy merely because she happened at the moment to be part of a public scene would be illogical, wrong, and unjust." *Id.* Also, courts have shown less concern for the First Amendment when the image appears in a commercial setting. See Grant v. Esquire, Inc., 367 F. Supp. 876, 879-80, 882-83 (S.D.N.Y. 1973) (noting that "public personages" get little protection when their images appear in connection to news stories, but declaring that a claim regarding the use of Cary Grant's head on a model's body posed no threat to the First Amendment); see also *supra* p. 1880 (discussing viability of privacy tort claims when image has commercial value). The First Amendment is particularly strong in protecting image searching because using small thumbnails of pictures in search results has been held to be a fair use, see Kelly v. Arriba Soft Corp., 280 F.3d 934, 944 (9th Cir. 2002), and fair use has in turn been given First Amendment protection, see Eldred v. Ashcroft, 537 U.S. 186, 219-20 (2003); Michael Dockins, Comment, *Internet Links: The Good, the Bad, the Tortious, and a Two-Part Test*, 36 U. TOL. L. REV. 367, 381 (2005).

<sup>113</sup> See United States v. Edge Broad. Co., 509 U.S. 418, 427-28 (1993); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980).

<sup>114</sup> Mainstream Mktg. Servs., Inc. v. FTC, 358 F.3d 1228, 1246 (10th Cir. 2004).

<sup>115</sup> Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 30 (1976) (discussing the theories of Professor James Rachels).

to our ability to feel unique — when our lives are laid bare for all the world to see, we can take no more ownership over them than anyone else.<sup>116</sup>

Perhaps just as damaging as the erosion of identity is the erosion of any incentive to strive to be a better person. If all adults were told today that for the rest of their lives they would be recorded and that record would be made public and searchable, they would face the heart-breaking choice between striving for an unattainable level of perfection and laying bare all of their faults and foibles. Any mistakes would be lasting and would “deny them the opportunity to reconstitute themselves as better people as they mature and develop through their lifetimes.”<sup>117</sup> The face one puts out to the world is one that, just like a celebrity’s persona,<sup>118</sup> is carefully crafted to reflect one’s best parts.<sup>119</sup> That people take the time to improve themselves so that they can put their best face forward, that people can be forgiven for past faults as they start anew, is something that should be celebrated and not easily cast aside.<sup>120</sup>

An opt-out program would also likely be narrow enough to satisfy the commercial speech doctrine’s reasonable fit test. The solution this Note offers limits only the right to tag images using facial recognition technology. Such a restriction would still leave quite a few troubling uses for such technology unaddressed. For example, if someone opts out of a facial recognition search engine and is in a photo with two friends who do not opt out, the photo would still be discoverable in a search for the other two friends. Additionally, the right to place a photo on Flickr or use it in a blog would remain unchanged. Thus, under the opt-out program, those who wish to use a photo in more

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<sup>116</sup> See *id.* at 39–42 (“[P]rivacy is necessary to the creation of selves out of human beings, since a self is at least in part a human being who regards his existence — his thoughts, his body, his actions — as his *own*.” (citation omitted)); see also ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7, 23–24 (1968), (“Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”); Bergelson, *supra* note 24, at 431 (“In fact, what can be more essential to an individual’s ‘sense of continuity of self over time’ than personal information — one’s name, personal attributes, and the record of interests, preferences, past acts, and choices?” (citation omitted) (quoting Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 1004 (1982))); Kahn, *supra* note 36, at 219 (discussing privacy’s importance for human dignity and individual identity).

<sup>117</sup> Natalie L. Regoli, *A Tort for Prying E-Eyes*, 2001 *U. ILL. J.L. TECH. & POL’Y* 267, 272.

<sup>118</sup> Cf. *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 870 (C.D. Cal. 1999) (observing that “[s]ince appearing in the film *The Graduate*, Mr. Hoffman has scrupulously guided and guarded the manner in which he has been shown to the public”).

<sup>119</sup> See *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144, 146 (Sup. Ct. 1973) (“[A celebrity] must be considered as having invested years of practice and competition in a public personality which eventually may reach marketable status. That identity is a fruit of his labors and a type of property . . .”).

<sup>120</sup> See *Lugosi v. Universal Pictures*, 603 P.2d 425, 441 (Cal. 1979) (Bird, C.J., dissenting) (stating that legal protections create “powerful incentive[s]” for developing desirable skills).

substantive ways may do so, while those who are simply digging for dirt would be stymied. In summary, this proposal would help advance a substantial interest while limiting only a narrow band of commercial speech.<sup>121</sup>

### B. *The Importance of Verification*

The second major counterargument to a congressional opt-out requirement is that it would prevent people from acquiring full information about those with whom they interact and do business. Anonymity is dangerous because it “makes it easier to spread wild conspiracy theories, smear people, conduct financial scams or victimize others sexually.”<sup>122</sup> Indeed, the dangers posed by anonymity on the Internet have led to problems of spam e-mail, “phishing,” and eBay scams.<sup>123</sup> Analogously, just as some want to strip away anonymity on the Internet for the good of society,<sup>124</sup> one could argue that society would benefit if we knew more about those we employ or date.

As important as it may seem to know everything about the people with whom we interact, Congress frequently allows anonymity to trump total knowledge.<sup>125</sup> For example, having access to consumer credit reports might say quite a bit about potential employees, but that information is subject to statutory limitations.<sup>126</sup> In addition, credit reports are not given the same level of First Amendment protection that is given to various types of news.<sup>127</sup> Similarly, one’s video rental history is protected information,<sup>128</sup> even if employers or significant

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<sup>121</sup> People who are part of newsworthy events are understandably subjects of public discussion, cf. *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 489 (N.Y. 1952) (noting that a football halftime performer had “consented to perform before 35,000 spectators” and the show was therefore newsworthy and protected), and this proposal would not restrict that. Instead, this proposal would limit only a narrowly defined and particularly intrusive form of commercial exposure.

<sup>122</sup> Walter S. Mossberg, *Accountability Is Key to Democracy in the On-Line World*, WALL ST. J., Jan 26, 1995, at B1; see also George P. Long, III, Comment, *Who Are You?: Identity and Anonymity in Cyberspace*, 55 U. PITT. L. REV. 1177, 1181–85 (1994) (discussing the dangers of anonymity on online bulletin boards).

<sup>123</sup> See, e.g., Katie Hafner, *With Internet Fraud Up Sharply, eBay Attracts Vigilantes*, N.Y. TIMES, Mar. 20, 2004, at A1 (reporting that nearly \$200 million was lost to online fraud in 2003 and that half of FTC online fraud complaints were related to online auctions).

<sup>124</sup> See, e.g., Microsoft, Sender ID Framework Overview (Feb. 17, 2005), <http://www.microsoft.com/mscorp/safety/technologies/senderid/overview.aspx> (describing technology to improve e-mail verification).

<sup>125</sup> This is particularly true when democratic debate is at stake. See Shawn C. Helms, *Translating Privacy Values with Technology*, 7 B.U. J. SCI. & TECH. L. 288, 300–05 (2001); Long, *supra* note 122, at 1184.

<sup>126</sup> See Consumer Credit Reporting Reform Act of 1996, 15 U.S.C. § 1681b(b) (2000 & Supp. IV 2004).

<sup>127</sup> See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (stating that credit reports are a “matter[] of purely private concern”).

<sup>128</sup> See 18 U.S.C. § 2710 (2000). Disclosures of health information are also carefully regulated. See, e.g., 45 C.F.R. § 164.502 (2006).

others would love to know what some people put on their Blockbuster cards. Although people will always want more information about those with whom they interact, the law already delineates special categories of data users and carefully circumscribes how they use the information obtained. Ultimately, given the wide array of information already available, the small added benefit from photo tagging cannot outweigh the loss of privacy that tagging entails.<sup>129</sup>

*C. The Threat to the Internet and the Effect of the Free Market*

Another concern that may be raised about any congressionally imposed Internet regulation is that it would distort developing technology. This was certainly the motivation behind the safe harbor provision of the Communications Decency Act of 1996<sup>130</sup> (CDA), which protects Internet service providers from some liability for material that others place on their sites.<sup>131</sup> Congress created this immunity to prevent lawsuits that would harm the development of the Internet and endanger passive intermediaries because of the actions of their uncontrollable users.<sup>132</sup> Although it may be possible to argue that the act of matching names to faces somehow raises Polar Rose and Riya beyond the realm of passive intermediary,<sup>133</sup> most courts have applied the

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<sup>129</sup> Employment background checks can include driving records, criminal records, court records, character references, neighbor interviews, medical records, incarceration records, sex offender registries, and other sources. See Privacy Rights Clearinghouse, *Employment Background Checks: A Jobseeker's Guide* (Jan. 2006), <http://www.privacyrights.org/fs/fs16-bck.htm>. There are also alternative systems, like the eBay rating system, that maintain anonymity while providing a reliable rating system. See eBay, *Feedback & The eBay Community*, [http://www.ebayuniversity.com/gotraining/Feedback\\_And\\_The\\_EBay\\_Community](http://www.ebayuniversity.com/gotraining/Feedback_And_The_EBay_Community) (last visited Apr. 7, 2007) (describing the eBay rating system); see also Paul Resnick et al., *The Value of Reputation on eBay: A Controlled Experiment*, 9 EXPERIMENTAL ECON. 79, 96 (2006) (noting that sellers' positive reputations increase the price of the sales).

<sup>130</sup> Pub. L. No. 104-104, tit. V, sec. 509, § 230, 110 Stat. 133, 137 (codified as amended at 47 U.S.C. § 230 (2000)).

<sup>131</sup> See 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."); see also *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) ("Section 230 . . . plainly immunizes computer service providers like AOL from liability for information that originates with third parties."). Similarly, Internet service providers that happen to transmit copyrighted material are excluded from liability for copyright infringement. See 17 U.S.C. § 512 (2000).

<sup>132</sup> See *Zeran*, 129 F.3d at 330. There have, of course, been scholarly objections to this immunity. See Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 SUP. CT. ECON. REV. 221, 224 (2006) ("[F]aced with the growing problem of cyber-insecurity, ISPs should be called into the service of the law."); Rustad & Koenig, *supra* note 19, at 126 ("Section 230 does not provide sufficient incentives to encourage ISPs to develop new technologies that would help detect or control third party wrongdoing on their networks.")

<sup>133</sup> Courts have credited such an argument, see, e.g., *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at \*10 (N.D. Tex. Apr. 19, 2004); *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055, 1067 (C.D. Cal. 2002), but only rarely.

CDA's safe harbor provision liberally.<sup>134</sup> Despite the fact that these engines are the types of passive intermediaries that Congress has codded, such broad immunity seems less desirable when these entities can inflict harm automatically, on a wide scale, through the conscription of the world's photographers. Considering that an opt-out regime would not impose upon search engines large damages for any loss of privacy but would only limit their effectiveness, perhaps the concerns that motivated Congress over a decade ago are less salient today.

For similar reasons, the market cannot address this problem without intervention. For market pressures to work, there must be choice between alternatives. Unfortunately, the uploader does not have easy ways to choose whether and which facial recognition search engines grab his images.<sup>135</sup> Furthermore, even if he could choose, the uploader may not know any of the subjects of his images and thus may lack incentives to choose a more protective service. The search companies themselves are trying to make a business out of exposing the lives of others and benefit more with each photo added, especially the more salacious ones. Therefore, unless Congress steps in, people will keep putting photos on the Internet, and the search engines will keep grabbing them.

## V. SAVING FACE

Years ago, the American auto industry famously claimed that seatbelt regulations would bankrupt the industry.<sup>136</sup> Although the auto industry has seen better days, its current problems are not the fault of seatbelt laws. Instead, seatbelts are estimated to save 15,000 lives a year.<sup>137</sup> When an industry is in its earliest stages, it is easy to fear that even the slightest intervention can have a devastating impact. Although that fear might have been justified for the Internet a decade ago, it is worth reconsidering today. The dangers that accompany Privacy 2.0, as Professor Zittrain calls it, are capable of more invasive and damaging harms than were conceivable at the birth of the Internet.<sup>138</sup> The law has yet to catch up to these new harms, but now it is time to try.

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<sup>134</sup> See Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 163, 197-98 & n.204 (2006) (listing the few cases in which courts have not granted safe harbor immunity).

<sup>135</sup> "Robots.txt," a hidden document on websites that informs search engines about what parts of the site may be indexed, might point the way toward a future method of expressing privacy preferences, but no such analog currently exists for photos. See ZITTRAIN, *supra* note 28.

<sup>136</sup> See JIM MOTAVALLI, FORWARD DRIVE 41, 193 (2000); RALPH NADER, UNSAFE AT ANY SPEED 309 (expanded ed. 1972).

<sup>137</sup> Steven D. Levitt & Jack Porter, *Sample Selection in the Estimation of Air Bag and Seat Belt Effectiveness*, 83 REV. ECON. & STAT. 603, 614 (2001).

<sup>138</sup> See ZITTRAIN, *supra* note 28.