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**CLIMBING IN OUR WINDOWS & SNATCHING OUR LIKENESSES  
UP: VIRAL VIDEOS & THE SCOPE OF THE RIGHT OF PUBLICITY  
ON THE INTERNET**

*Lorelle A. Babwah\**

*Modern technologies, including digital cameras and media-sharing, Web sites have made it possible for anyone to upload anything at any time and rapidly transmit this content to a world-wide audience. This digital environment fosters the creation of instant Internet celebrities via viral videos. The stars of these videos, such as “Bed Intruder”’s Antoine Dodson, are often unwitting “actors” whose ability to control the use of their likenesses should be protected. This right varies by state and is typically addressed either under the right of publicity or an invasion of privacy by misappropriation of identity action. State laws regarding the right of publicity and privacy protections should construe consent as narrowly as possible to protect the rights of an individual private citizen to exert control over his or her personal identity. Specifically, the consent to be filmed should not be interpreted as consent for that content to then be uploaded, manipulated, and broadcasted throughout the Internet. Furthermore, the uploading and distribution of content in this manner should not be justified by the doctrine of first sale.*

**I. INTRODUCTION**

*He’s climbing in your windows. He’s snatching your people up, trying to rape ‘em. So y’all need to hide your kids, hide your wife, hide your kids, hide your wife, and*

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\* J.D. Candidate, University of North Carolina School of Law, 2012. I’d like to thank my parents and other family members for their endless support, my biking partners for the rides, and my friends for creating distractions when I needed them. In loving memory of Baylee Babwah.

*hide your husbands, cuz [sic] they're raping everybody out here.*<sup>1</sup>

If it is surprising that these are the lyrics to the chorus of one of the summer's most popular songs, it is likely because the circumstances surrounding the genesis of "Bed Intruder Song" are equally bizarre. In the early morning hours of July 28, 2010, Antoine Dodson awoke with a start upon hearing his sister scream.<sup>2</sup> He rushed into his sister's room to find a man in bed with her with his hands around her neck. Dodson struggled with the assailant, who then fled through a window.<sup>3</sup> The following day, Dodson and his sister were interviewed by northern Alabama's NBC affiliate station, WAFF-48 News, in a story focusing on police attempts to find the attempted-rapist.<sup>4</sup> A news clip of Dodson's interview appeared on the Internet almost immediately following the broadcast.<sup>5</sup> This interview containing a colorful description of the incident and an impassioned warning to the assailant quickly became the most viewed video on the social-networking site *Facebook*<sup>6</sup> and video-sharing site *YouTube*<sup>7</sup>. In the blink of an eye, the clip went "viral"<sup>8</sup> and countless derivatives of the original interview sprang up like mushrooms, seemingly

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<sup>1</sup> ANTOINE DODSON AND THE GREGORY BROTHERS, BED INTRUDER SONG (FEAT. KELLY DODSON) (Autotune the News 2010).

<sup>2</sup> Elizabeth Gentle, *Woman wakes up to find intruder in her bed*, WAFF 48 NEWS (July 28, 2010), <http://www.waff.com/Global/story.asp?S=12883477>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Elizabeth Gentle, *Overnight internet sensation reacts to new-found fame*, WAFF 48 NEWS (July 30, 2010), <http://www.waff.com/Global/story.asp?S=12901080>.

<sup>6</sup> <http://www.facebook.com> (last visited Oct. 14, 2010).

<sup>7</sup> *Antoine Dodson warns a PERP on LIVE TV!*, [http://www.youtube.com/watch?feature=iv&v=EzNhaLUT520&annotation\\_id=annotation\\_576468](http://www.youtube.com/watch?feature=iv&v=EzNhaLUT520&annotation_id=annotation_576468), (last visited Oct. 14, 2010); Gentle, *supra* note 5.

<sup>8</sup> Viral videos are "online video clips that gain widespread popularity when they are passed from person to person via e-mail, instant messages, and media-sharing Web sites." Kevin Wallsten, "Yes We Can": *How Online Viewership, Blog Discussion, Campaign Statements, and Mainstream Media Coverage Produced a Viral Video Phenomenon*, 7 J. INFO. TECH. & POL. 163, 163 (2010).

overnight.<sup>9</sup> Most notably, a group called The Gregory Brothers<sup>10</sup> autotuned<sup>11</sup> and remixed clips from Dodson's interview to create "Bed Intruder Song," a music video that they posted to *YouTube*.<sup>12</sup> Shortly thereafter, "Bed Intruder Song" was made available for purchase on iTunes.<sup>13</sup> It reached as high as 25 on iTunes' singles chart, No. 89 on Billboard's Hot 100 chart, and went on to sell more than 91,000 copies.<sup>14</sup> Despite its inauspicious beginning, there is a silver lining to Dodson's story: the proceeds from both the sale of "Bed Intruder Song" and other merchandise have enabled Dodson and his family to move out of the public housing development where his sister was attacked.<sup>15</sup> Luckily for Dodson, The Gregory Brothers have a policy of compensating the individuals featured in their source material:

[W]e're trying to set precedents by making it so that Antoine, or whoever that artist might be in the future, has a stake not only as an artist but as a co-author of the song . . . . He wrote the lyrics, he's the one who put it out there. What we're doing on iTunes and on any other sales, we're splitting the revenue after it gets through Apple down the

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<sup>9</sup> See *Antoine Dodson/Bed Intruder* (2010), KNOW YOUR MEME, <http://knowyourmeme.com/memes/antoine-dodson-bed-intruder> (last visited Oct. 14, 2010).

<sup>10</sup> The Gregory Brothers, [www.thegregorybrothers.com](http://www.thegregorybrothers.com) (last visited Oct. 25, 2010).

<sup>11</sup> Autotune is a pitch-correction effect that can distort the human voice to sound robotic. Josh Tyrangiel, *Auto-Tune: Why Pop Music Sounds Perfect*, TIME MAG., FEB. 5, 2009, available at <http://www.time.com/time/magazine/article/0,9171,1877372,00.html>.

<sup>12</sup> *AutoTune The News: BED INTRUDER SONG!!!*, <http://www.youtube.com/watch?v=hMtZfW2z9dw> (last visited Oct. 12, 2010).

<sup>13</sup> ANTOINE DODSON & THE GREGORY BROTHERS, BED INTRUDER SONG (FEAT. KELLY DODSON) (Gregory Residence 2010), available at <http://itunes.apple.com/us/album/bed-intruder-song-feat-kelly/id386478006>.

<sup>14</sup> "Bed Intruder" Song Sells 91,000 Copies on iTunes, Listed on Billboard Charts, NEWSONE ENT., Sept. 6, 2010, available at <http://newsone.com/entertainment/newsonestaff4/bed-intruder-song-sells-91000-copies-on-itunes-listed-on-billboard-charts/> [hereinafter *Bed Intruder Sells*].

<sup>15</sup> Josie Raymond, "Bed Intruder" Guy Earns Enough to Leave the Projects, POVERTY IN AMERICA (Aug. 23, 2010 9:41AM), [http://uspoverty.change.org/blog/view/bed\\_intruder\\_guy\\_earns\\_enough\\_to\\_leave\\_the\\_projects](http://uspoverty.change.org/blog/view/bed_intruder_guy_earns_enough_to_leave_the_projects).

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middle. And that [also applies] if we ever license the song for TV or a movie. Whatever happens to the song, he has a 50 percent writing credit.<sup>16</sup>

In terms of cashing in on one's Internet celebrity, it would appear that the arrangement between Antoine Dodson and The Gregory Brothers represents the exception rather than the rule.<sup>17</sup> Although videos that reach viral status may generate a great deal of revenue from advertisements and merchandise sales, few of the actors featured are able to profit from their fame<sup>18</sup> or control their likeness. The advent of digital media has made it so that nearly anything available on the Internet can be downloaded, manipulated, copied, and distributed by almost anyone at any time, making it difficult for an individual with any kind of web presence to maintain total control over his or her likeness. It is expected that an increasing number of right of publicity claims will be brought by private individuals because of the diminished control of one's likeness and inability to receive compensation for the individual's own work.

This Recent Development examines the scope of an individual's rights when his or her individual's likeness goes viral and recommends that the right of publicity be recognized and carefully protected for vulnerable non-celebrities. Part II uses the Dodson fact pattern in a hypothetical lawsuit. This exercise highlights problem areas regarding issues of consent and First Amendment protections as exceptions to the right of publicity. Part III gives a brief overview of the relevant terms of use of two popular sites for user uploaded content, and pinpoints potential problem areas. Based on public policy considerations that favor

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<sup>16</sup> Eliot Van Buskirk, *Gregory Brothers of 'Bed Intruder' Fame Discuss TV Pilot, Antoine Dodson*, WIRED MAG., Aug. 13, 2010, available at <http://www.wired.com/epicenter/2010/08/gregory-brothers-bed-intruder-antoine-dodson-autotune/all/1>.

<sup>17</sup> "Clips get downloaded and reposted without permission, and there are sites that specialize in selling T-shirt designs within hours of a video's meteoric rise on the Web, making money the original stars never see." Dan Fletcher, *YouTube Effect: Making Money from Viral Videos*, TIME MAG., Nov. 23, 2009, available at <http://www.time.com/time/magazine/article/0,9171,1938731,00.html>.

<sup>18</sup> *Id.*

the protection of naïve participants, Part IV recommends a limited interpretation of consent as applied to the use of an individual's likeness in circumstances that fall within grey areas in the current legal and cyber policy landscape.

## II. *DODSON V. BARK & BARK CO.: A HYPOTHETICAL*

In Dodson's situation, a large portion of his profits are generated from downloads of "Bed Intruder Song,"<sup>19</sup> however, other unauthorized commercial products have surfaced from which Dodson receives no revenue.<sup>20</sup> What follows is a hypothetical lawsuit Dodson could bring against *Bark & Bark Co.*, the purveyor of an unauthorized iPhone application called "Talking Antoine: The Bed Intruder SoundBoard," a program which shows pictures of Dodson and allows users to play sound-bites from his interview that is currently available for purchase on iTunes.<sup>21</sup>

### A. *Applicable State Law and the Right of Publicity*

The right of publicity is defined as "the inherent right of every human being to control the commercial use of his or her identity."<sup>22</sup> Unlike laws governing trademark or copyright, the right of publicity has not been codified by federal statute and therefore remains a state-based claim.<sup>23</sup> At present, only nineteen states recognize a statutory right of publicity; twenty-eight states find this

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<sup>19</sup> Selling over 91,000 downloads on iTunes at \$1.29 each would generate a profit of at least \$117,390. See *Bed Intruder Sells*, *supra* note 14. See also *DODSON & THE GREGORY BROTHERS*, *supra* note 13.

<sup>20</sup> Some of these products include: posters, available at <http://www.cafepress.com/+antoine-dodson+posters> (last visited Oct. 14, 2010); T-shirts, available at <http://t-shirts.cafepress.com/antoine-dodson> (last visited Oct. 14, 2010); and even an (albeit Dodson-sanctioned) Halloween costume available at <http://www.bedintrudercostume.com/> (last visited Oct. 12, 2010).

<sup>21</sup> *Talking Antoine: The Bed Intruder SoundBoard*, Bark & Bark Co. (2010), available at <http://itunes.apple.com/us/app/talking-antoine-the-bed-intruder/id391256245?mt=8>.

<sup>22</sup> 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2000).

<sup>23</sup> *Statutes*. RIGHT OF PUBLICITY, <http://rightofpublicity.com/statutes> (last visited Oct. 18, 2010).

right via common law.<sup>24</sup> In the remainder of the states, the right of privacy is either protected under invasion of privacy torts or has yet to be addressed. The lack of uniform or widespread law in this area most likely stems from the fact that some states rarely see these types of actions. Most lawsuits concerning the right of privacy have traditionally been brought by celebrity plaintiffs, most often involving cases of impersonation.<sup>25</sup> Because an individual's rights and remedies will vary by state, the choice of law is an important factor in the outcome. Courts have not been consistent in determining which state law applies; these options vary based on the law of the domicile of the plaintiff and the law of the situs of the injury.<sup>26</sup> This exercise will focus on the law of Dodson's home state of Alabama and of California, where iTunes, (the situs of this injury because the app is sold here) is headquartered.

Alabama state courts do not expressly recognize the right of publicity and instead analyze the issue using invasion of privacy torts, which are seen to address the same interests and harms as the right of publicity.<sup>27</sup> Specifically, this tort applies to situations where "the defendant appropriates . . . the plaintiff's name or likeness [without consent] to advertise the defendant's business or product, or for some other similar commercial purpose."<sup>28</sup> In order to establish a cause of action for misappropriation of likeness (a type of invasion of privacy tort), a plaintiff must show "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting

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<sup>24</sup> Arizona, California, Florida, Illinois, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin currently have right of publicity statutes. *Id.*

<sup>25</sup> See, e.g., *Waits v. Frito-Lay, Inc.* 978 F.2d 1093 (9th Cir. 1992); *White v. Samsung Elec. America, Inc.*, 971 F.2d 1395 (9th Cir. 1992); *Midler v. Ford Motor Co.* 849 F.2d 460 (9th Cir. 1989).

<sup>26</sup> 1 MCCARTHY, *supra* note 22, § 1:3.

<sup>27</sup> *Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1447 (11th Cir. 1998).

<sup>28</sup> *Id.*

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injury.”<sup>29</sup> In the instant case, defendant Bark & Bark Co. used Dodson’s identity. Specifically, they appropriated his name, his likeness, and his voice for use in a commercial product without his consent, causing Dodson financial injury in the form of lost profits. Based on these facts, it would seem that all elements of a *prima facie* invasion of privacy misappropriation of likeness claim would be met because his likeness was both identifiable and used for the commercial benefit of another.<sup>30</sup>

If California law is applied, Dodson may rely on the state’s statutory right of publicity as a cause of action.<sup>31</sup> The statute states in relevant part:

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, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.<sup>32</sup>

It would appear that Dodson meets the elements of a right of publicity claim under California law as well. Here, defendant Bark & Bark Co. knowingly used Dodson’s name, likeness, and voice (all of which appear in the soundboard app) without his consent to create a product for commercial sale. In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,<sup>33</sup> the California Supreme Court found that the defendant artist violated the plaintiff’s (registered owner of the rights to the Three Stooges comedy act) right of publicity by selling lithographs and t-shirts bearing the Three Stooges’

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<sup>29</sup> *Id.*

<sup>30</sup> See *Schifano v. Greene County Greyhound Park, Inc.*, 624 So.2d 178, 181 (Ala. 1993); see also *Kyser-Smith v. Upscale Commc’ns, Inc.*, 873 F. Supp. 1519 (M.D. Ala. 1995) (denying defendant company summary judgment on commercial misappropriation claim wherein it used photos of plaintiff model in magazine advertisements without her consent and she was neither notified nor compensated).

<sup>31</sup> CAL. CIV. CODE § 3344 (West 2009).

<sup>32</sup> *Id.* § 3344(a).

<sup>33</sup> 25 Cal. 4th 387 (2001).



likenesses without permission.<sup>34</sup> There, the court bases its decision on the fact that “the marketability and economic value of [the defendant’s] work derives primarily from the fame of the celebrities depicted.”<sup>35</sup> Similarly, in Dodson’s case, the soundboard would be entirely devoid of content and value without using Dodson’s likeness and voice.

### B. Remedies

Naturally, the plaintiff’s remedies in this hypothetical situation will also vary by state. Because Dodson’s suit in Alabama would come under the invasion of privacy by misappropriation of likeness tort, the recovery sum is not limited to actual damages.<sup>36</sup> Although damages would hinge upon commercial harm in a right of publicity claim, here they will depend on the emotional and physical distress Dodson suffers.<sup>37</sup> This distress has been interpreted as stemming from an individual’s “right not to have his feelings hurt . . . by publication [of his likeness].”<sup>38</sup> In contrast, in a right of publicity action under California law, Dodson would be entitled to injunctive relief and monetary damages “equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered . . . as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages.”<sup>39</sup> Because Dodson does not appear to be distressed by his newfound

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 409.

<sup>36</sup> *Birmingham Broad. Co. v. Bell*, 259 Ala. 656, 662 (1953).

<sup>37</sup> 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:6 (4th ed. 1997); *see Minnifield v. Ashcraft*, 903 So.2d 818 (Ala. Civ. App. 2004). It is argued, however, that non-celebrities should not be forced into basing a claim upon mental distress and that the fact that one’s likeness has been used for a commercial purpose proves its commercial value. *But see* 1 MCCARTHY, *supra* note 22, § 4:18.

<sup>38</sup> The court explains that when a ball player’s picture is put up all over the subway without his permission, it is his wallet and not his feelings that have been hurt. *Haelan Labs., Inc., v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). But when a private individual’s likeness is used, that person is suing based on emotional damage. *Id.*

<sup>39</sup> CAL. CIV. CODE § 3344 (West 2009).

fame,<sup>40</sup> it may be more lucrative for him to seek recovery based on proceeds made on products featuring his likeness that have been sold without his consent.

*C. Defenses and Exceptions to the Right of Publicity*

Thus far, it seems to be an easy case for Dodson, but he may encounter complications in bringing this lawsuit, stemming from the fact that the source material at issue is a public news broadcast for which he consented to be interviewed. Under the first-sale doctrine, a copyright holder may no longer control the ownership or distribution of a particular copy once it has been sold.<sup>41</sup> Under trademark law, the producer no longer has the right to control the distribution of its trademarked product beyond the first sale; resale is neither unfair competition nor a trademark infringement.<sup>42</sup> Both the first-sale doctrine defense and the public news exception may provide obstacles to Dodson in a hypothetical lawsuit against Bark & Bark.

Although the first-sale doctrine has traditionally been applied to other areas like copyright and trademark law,<sup>43</sup> the Eleventh Circuit has extended the first-sale doctrine as a limitation to the right of publicity.<sup>44</sup> “[R]eselling a product that [is] lawfully obtained does not give rise to a cause of action for violation of the right of publicity.”<sup>45</sup> In *Allison v. Vintage Sports Plaques*,<sup>46</sup> the plaintiff’s right of publicity claim against a company that sold

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<sup>40</sup> The proceeds from Bed Intruder products have allowed him to move his family into a better neighborhood. See Raymond, *supra* note 15. Dodson also performed at the Black Entertainment Television Music Awards. Mariel Concepcion, *Antoine Dodson Performs ‘Bed Intruder Song’ at BET Awards*, BILLBOARD.COM (Oct. 13, 2010 12:48 PM), <http://www.billboard.com/column/the-juice/antoine-dodson-performs-bed-intruder-song-1004120596.story#/column/the-juice/antoine-dodson-performs-bed-intruder-song-1004120596.story>.

<sup>41</sup> Copyright Act of 1976, 17 U.S.C. § 109 (2006).

<sup>42</sup> Lanham Trade-Mark Act, §§ 32(1), 43(a)(a), 15 U.S.C. §§ 1114(1), 1125(a)(1) (2006).

<sup>43</sup> *Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1448 (11th Cir. 1998).

<sup>44</sup> See *id.* at 1451.

<sup>45</sup> *Id.*

<sup>46</sup> 136 F.3d 1443 (11th Cir. 1998).

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mounted sports trading cards was dismissed under the first-sale doctrine because the plaintiff had previously given permission to the trading card company for his likeness to be used in trading cards.<sup>47</sup> The United States Court of Appeals for the Eleventh Circuit made the distinction between simply reselling the cards in a more attractive display and “using the Plaintiffs’ names and likenesses to sell frames and clocks.”<sup>48</sup> The latter instance is protected under the right of publicity; however, the Court concluded that the mounted cards were simply a resale, explaining that it is “unlikely that anyone would purchase one of Vintage’s plaques for any reason other than to obtain a display of the mounted cards themselves.”<sup>49</sup>

In Dodson’s case, the product in question is a soundboard program in which the user can choose from different backgrounds featuring Dodson’s likeness and tap the screen to hear him say different phrases.<sup>50</sup> Applying the reasoning from *Allison*, it is unlikely that anyone would purchase this application for any reason other than to see images of Dodson and to hear him saying phrases from his interview. As in *Allison*, it may be argued that in giving the news station permission to use his likeness for an interview, Dodson is barred by the first sale doctrine from asserting a right of publicity claim stemming from the subsequent commercial use of the news story. However, it is worth noting that the facts in the instant case are distinguishable from those in *Allison*, in that the plaintiff in *Allison* originally consented to the use of his likeness commercial product (trading cards),<sup>51</sup> whereas Dodson consented only to appear in a news story.

California courts have not yet addressed the issue of whether the first-sale doctrine is a defense to a right of publicity action. However, California’s right of publicity statute does contain an exception for newsworthy content that may further complicate the

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1451.

<sup>50</sup> *Talking Antoine: The Bed Intruder SoundBoard*, *supra* note 21.

<sup>51</sup> *Allison*, 136 F.3d at 1448.

claim.<sup>52</sup> No consent is needed to use a person's name, voice, or likeness in connection with news or public affairs.<sup>53</sup> The intent behind this exception stems from First Amendment<sup>54</sup> protections of free speech and matters of public concern.<sup>55</sup> The United States Supreme Court has stated that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . [S]peech concerning public affairs is more than self-expression; it is the essence of self-government" and thus should be entitled to special protection.<sup>56</sup> In general, First Amendment protections are not a bar to a right of publicity claim if the news story is then reproduced for a commercial purpose.<sup>57</sup> In evaluating the reuse of news media, courts tend to focus on whether the news was still current and served an enlightening purpose at the time it was reused.<sup>58</sup> California courts will balance "(1) the social value of the facts published; (2) the depth of intrusion into ostensibly private affairs; and (3) the extent to which the party voluntarily acceded to a position of public notoriety."<sup>59</sup> Despite these factors, however, the United States District Court for the District of Columbia held that advertisements fall under this First Amendment newsworthy/public concern protection.<sup>60</sup> Here, Dodson's story is

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<sup>52</sup> CAL. CIV. CODE § 3344(d) (West 2009).

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

<sup>54</sup> U.S. CONST. amend. I.

<sup>55</sup> See 1 MCCARTHY, *supra* note 22, § 8:51; see, e.g. Red Lion Broadcasting Co. v. Fed. Comm'n. Comm'n., 395 U.S. 367, 390 (1969) (holding that the First Amendment protects "the [right] of public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences.").

<sup>56</sup> Connick v. Myers, 461 U.S. 138, 145 (1983) (citing Roth v. United States, 354 U.S. 476, 484 (1957); Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

<sup>57</sup> See 1 MCCARTHY, *supra* note 22, § 7:13.

<sup>58</sup> *Id.*

<sup>59</sup> Newsworthiness exception did not bar a celebrity couple's claim to a violation of right of privacy over the distribution of a tape depicting them engaging in intercourse. The court found that their interests in privacy outweighed other factors and that the "news" was merely sensational prying and served no legitimate public interest. Michaels v. Internet Entm't Grp., Inc., 5 F. Supp. 2d 823, 841 (C.D. Cal. 1998).

<sup>60</sup> See Raymen v. U.S. Senior Ass'n. Inc., 409 F. Supp. 2d 15 (D.D.C. 2006) (holding that a photograph published as part of a news story and later used in an

certainly still very timely and newsworthy since the rapist is still on the loose; however, the products<sup>61</sup> bearing his likeness are primarily for entertainment purposes rather than for public concern and therefore should not be protected by the First Amendment.

### III. FROM LIFE TO THE INTERNET: ARE TERMS OF USE ACTUALLY USEFUL?

The preceding section analyzed Dodson's remedies under the law with regards to the soundboard app; however, it is worth discussing what, if any, protections are afforded to him by the websites through which his video was brought to public attention. The Dodson interview was filmed by the news station, uploaded to their website, manipulated, and shared on YouTube by third parties.<sup>62</sup> However, oftentimes the person doing the filming and the individual featured have a more personal relationship. Due to the informal nature of this type of scenario, it is less likely that the parties involved will have discussed the bounds of consent and exactly what types of usage is permitted.

This issue was raised in a recent issue of *Wired* magazine.<sup>63</sup> A reader writes, "A friend of mine is actually making a mint off a YouTube clip he posted—it's drawing zillions of pageviews. Trouble is, he filmed the video in my backyard and used my dog as one of his 'actors.' Am I entitled to a cut of the revenue?"<sup>64</sup> The legal advice he receives is that, "[i]n such situations, when no written or verbal contract exists, the copyright holder determines who gets what. And because your pal shot the video, he is the

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unrelated advertisement was exempt from liability for appropriation of based on First Amendment protection).

<sup>61</sup> Among these products are a Halloween costume, t-shirts, and posters. See *supra* note 20.

<sup>62</sup> See *Antoine Dodson/Bed Intruder (2010)*, *supra* note 9.

<sup>63</sup> WIRED is a monthly magazine that reports on technology and how it affects culture, politics, and the economy. Brendan I. Koerner, *Mr. Know-It-All: Hunting Small Fossils, Sharing YouTube Revenue, Ratting Out the Boss*, WIRED, Aug. 26, 2010, at 34.

<sup>64</sup> *Id.*

copyright holder.”<sup>65</sup> In the scenario above, the advice-seeker would like compensation based on his friend’s use of his dog and backyard. But would the analysis be the same if his claim stemmed from the use of his likeness in the video?

The applicable law in the case of the use of an individual’s likeness, however, is the right of publicity. The House Report on the Copyright Act states that federal copyright law is not meant to preempt state laws regarding the right of publicity if the state cause of action consists of different elements than a federal copyright claim.<sup>66</sup> This report was cited as the basis for the New York court’s finding that a privacy/publicity claim was not preempted by copyright law.<sup>67</sup> The type of issue posed by the *Wired* reader is likely to become more common. In the not-so-distant past, the term “home movies” meant just that—a person would film his or her loved ones in order to keep a personal memento of special events. More often than not, the person being recorded could be sure the video would not be viewed anywhere more public than the living room couch. Privacy considerations have substantially changed with the proliferation of digital cameras and social networking and media-sharing Web sites. These technologies have made it easier than ever for an individual to create content and instantly distribute it worldwide. While the ability to share one’s artistic work with a wider audience can be advantageous to those seeking fame and exposure, not everyone who ends up memorialized on the Internet is a willing participant.<sup>68</sup>

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<sup>65</sup> *Id.* See also *Ippolito v. Ono-Lennon*, 139 Misc. 2d 230 (1988) (holding that a right of publicity claim based on unauthorized use of film clips from a musician’s performance in a later film is not preempted by federal copyright law).

<sup>66</sup> H.R. DOC NO. 1476, at 132 (1976).

<sup>67</sup> *Ippolito*, 139 Misc. 2d at 236.

<sup>68</sup> “Star Wars Kid,” for example, features a high school student pretending to use a golf ball retriever as a light saber. This video eventually ended up in the hands of his classmates, who uploaded it to YouTube. Other users added special effects and music. The young man featured in the video dropped out of school and ended up checking into a psychiatric ward. R. Jones, *Viral Video and Its Victims*, CHICAGO READER (Oct. 14, 2010), <http://www.chicagoreader.com/chicago/winnebago-video-jack-rebney-video/Content?oid=1956487>. The original “Star Wars Kid” video is available at

Because anyone can upload any material at any time, and there is very little oversight or specific guidance in terms of what is permitted, Web sites like YouTube and Facebook, and the people who use them, could be vulnerable to a variety of potential lawsuits. In order to prevent abuse and protect against these violations, nearly all websites of this user-driven nature have extensive terms of use detailing their copyright and privacy policies. YouTube's community guidelines state that users should only upload videos that they themselves made or are authorized to use.<sup>69</sup> Users are further advised that videos featuring people who are readily identifiable must have been filmed with those parties consent.<sup>70</sup> Without such consent, the content will be subject to removal if there is a privacy complaint.<sup>71</sup>

Like YouTube, Facebook prohibits users from uploading copyrighted material.<sup>72</sup> Its terms of use also state that users must not "post content or take any action on Facebook that infringes or violates someone else's rights or otherwise violates the law."<sup>73</sup> This language is, perhaps purposely, broad to the point of being unhelpful. In reality, individuals seem to have only nominal control over the use of their likenesses once content is uploaded to

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<http://www.youtube.com/watch?v=HPPj6viBmU>; Pedro Ruz Gutierrez, *agent sues government*, ORLANDO SENTINEL (Apr. 15, 2006), [http://articles.orlandosentinel.com/2006-04-15/news/AGENTSUES15\\_1\\_paige-unloaded-gun-glock](http://articles.orlandosentinel.com/2006-04-15/news/AGENTSUES15_1_paige-unloaded-gun-glock) (recounting how DEA Agent Lee Paige accidentally shot himself during a demonstration and (unsuccessfully) sued the Drug Enforcement Administration for leaking the video tape of the incident).

<sup>69</sup> *Don't Cross the Line*, YOUTUBE COMMUNITY GUIDELINES, [http://www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines) (last visited Sept. 12, 2010),.

<sup>70</sup> *Community Guideline Tips: Privacy*, YOUTUBE COMMUNITY GUIDELINES, [http://www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines) (last visited Sept. 12, 2010).

<sup>71</sup> *Id.*

<sup>72</sup> *How to Appeal Claims of Copyright Infringement*, FACEBOOK, [http://www.facebook.com/legal/copyright.php?howto\\_appeal=1](http://www.facebook.com/legal/copyright.php?howto_appeal=1) (last visited Oct. 17, 2010).

<sup>73</sup> *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/home.php?#!/terms.php?ref=pf> (last modified Aug. 25, 2010).

*Facebook*. For example, another portion of the site's terms of use indicates that *Facebook* prohibits "tagging"<sup>74</sup> users in media without their consent,<sup>75</sup> but neglects to address acts of posting the photo in the first place. For example, if Gretchen uploads an unflattering or embarrassing picture of her friend Diane, Diane's only remedy is to "de-tag" herself<sup>76</sup> from the picture so that it no longer links to her profile. The picture containing Diane's likeness is still visible to whomever Gretchen chooses to share her photos with on the site; this and all content posted to the Web site is still stored on *Facebook's* servers.<sup>77</sup>

As demonstrated above and in the preceding Dodson hypothetical in Part II, *supra*, discerning the rights and remedies of an individual regarding the use of his or her likeness online can be problematic in that it is unclear whether permission to be filmed also grants permission for that content to be uploaded and/or manipulated on the Internet. The guidelines found in these interactive Web sites' terms of use are often unclear and not instructive to a user uploading content. In effect, the main purpose of terms of use seem to be simply to insulate the website from liability should an individual bring a privacy or copyright action.<sup>78</sup> Further complicating the matter is that the applicable state law regarding the right of publicity may fail to directly address the rights of an individual who is featured in media that is created with consent, but later distributed without express permission.

#### IV. AN ARGUMENT FOR AN INTERPRETATION OF LIMITED CONSENT AND AGAINST THE FIRST-SALE DOCTRINE

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<sup>74</sup> "Tagging" is the process by which people are identified by name in photos, videos, and other posts on Facebook.

<sup>75</sup> *Statement of Rights and Responsibilities*, *supra* note 73.

<sup>76</sup> In other words, to unlink her name from the photo.

<sup>77</sup> Even after information is "deleted," it is stored on Facebook's data servers for a "reasonable" period of time. *Statement of Rights and Responsibilities*, *supra* note 72.

<sup>78</sup> Both *YouTube* and *Facebook* have indemnification clauses written into their terms of use. *YouTube Contest Platform Terms of Use*, YOUTUBE, [http://www.youtube.com/t/contest\\_platform\\_rules](http://www.youtube.com/t/contest_platform_rules) (last visited Oct., 17, 2010); *Statement of Rights and Responsibilities*, *supra* note 73.



Even in the seemingly simple above hypothetical case involving Antoine Dodson, there are issues regarding exactly what it means to give consent. California's statutory language gives very little guidance as to the bounds of consent,<sup>79</sup> and Alabama's application of the first-sale doctrine to the right of publicity seriously threatens an individual's ability to control the use of his or her identity.<sup>80</sup> It is the recommendation of this Recent Development that in these situations an individual's consent should be construed as limited rather than as a blanket waiver granting consent to any and all subsequent uses of his or her likeness. Furthermore, due to public policy considerations favoring the protection of human identity as a natural property right<sup>81</sup> and the protection of the privacy interests of legally vulnerable non-celebrities, the first-sale doctrine should not be applied to the right of publicity.

*A. Consent Should Be Construed Narrowly*

Some commentators have proposed that only celebrities should have a right of publicity and that non-celebrities should merely have a right to privacy protecting them from indignity and physical or mental suffering.<sup>82</sup> The majority rule, though, is that non-celebrities do have a right of publicity and that the commercial value of a non-celebrity's likeness is proven by the defendant's use of it for commercial purposes.<sup>83</sup> This concept is increasingly significant now that the Internet has created the potential for almost anyone to become a commercially viable entity in a very short period of time.<sup>84</sup> "Bed Intruder Song," for example, made

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<sup>79</sup> CAL. CIV. CODE § 3344 (West 2009).

<sup>80</sup> *Supra* Part II.C.

<sup>81</sup> See 1 MCCARTHY, *supra* note 22.

<sup>82</sup> See, e.g., *id.* § 4:14.

<sup>83</sup> *Id.* § 4:17.

<sup>84</sup> The creator of "Keyboard Cat," a video of a cat being manipulated to play a keyboard, made \$20,000 from this clip and a father who filmed his son who was still drugged after a trip to the dentist in "David Goes to the Dentist" earned \$30,000 in advertisement revenues. Dan Fletcher, *YouTube Effect: Making Money from Viral Videos*, TIME MAG., Nov. 23, 2009, available at <http://www.time.com/time/magazine/article/0,9171,1938731,00.html>.

more than \$117,000 from iTunes downloads in just two weeks.<sup>85</sup> By narrowly construing consent, private citizens would be able to use the right of publicity to enjoy the benefits from the commercial use of something as personal and unique as their own identities. There is support from other jurisdictions which indicates that explicit consent to publish a person's likeness is required. In *Genesis Publications, Inc. v. Goss*,<sup>86</sup> the Florida District Court of Appeals upheld the ruling of an invasion of privacy when the plaintiff, a model, had pictures taken by a photographer for her portfolio and the photographer later gave them to an ad agency for use in a commercial advertisement.<sup>87</sup> Similarly, in *Brinkley v. Casablancas*,<sup>88</sup> the New York Supreme Court, Appellate Division, the intermediate appellate court in New York, distinguished between consent to being photographed and consent to have that content distributed.<sup>89</sup> "While [the plaintiff] undoubtedly permitted photographs of herself to be taken which might be used on a poster for commercial sale, she reserved the right, prior to their commercial exploitation, to reject or approve the use to which the photographs would be put."<sup>90</sup> The facts in these cases are similar to the scenarios proposed in this paper wherein an individual consents to the initial capture of his or her likeness, but not necessarily to subsequent dissemination via the Internet. Given that express consent for distribution has been required in privacy actions brought by public figures, it follows that these protections should be at least as strong for private citizens who are unlikely to have "voluntarily acceded to a position of public notoriety" (a factor

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<sup>85</sup> "Bed Intruder" Song Sells 91,000 Copies on Itunes, Listed on Billboard Charts, *supra* note 14.

<sup>86</sup> *Genesis Publications, Inc. v. Goss*, 437 So.2d 169 (Fla. Dist. Ct. App. 1983).

<sup>87</sup> *Id.*

<sup>88</sup> *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004 (N.Y. App. Div. 1981).

<sup>89</sup> *Id.* at 1008–09. The court found that unauthorized distribution of a poster made from a photo of model Christie Brinkley during the filming of a television broadcast was a violation of her right of privacy. *See id.*

<sup>90</sup> *Id.*

considered in California's balancing test regarding privacy actions).<sup>91</sup>

B. *The Right of First-Sale Should Not Apply*

As discussed earlier in Part II.C, in *Allison* the Eleventh Circuit applied the first-sale doctrine to the right of publicity, holding that a celebrity could only control the initial use of his likeness.<sup>92</sup> The court suggested that there is no case law in any state supporting the application of the doctrine of first-sale to the right of publicity because the applicability of the doctrine was obviously "taken for granted."<sup>93</sup> It was further suggested that failing to apply the doctrine here "would have profoundly negative effects on numerous industries and would grant a monopoly to celebrities over their identities that would upset the delicate balance between the interests of the celebrity and those of the public."<sup>94</sup>

*Allison* was decided in 1998; at that time, the right of publicity most often protected celebrities who conceivably employed sophisticated agents and legal teams. Furthermore, Internet usage and participation in social media was not yet as pervasive as it is today. However, changes in technology have made content more accessible, easier to distribute, and have subsequently altered the nature of celebrity. Because of these changes, the rationale for applying the doctrine of first-sale described in *Allison* is no longer good public policy.

The proposed abandonment of *Allison*'s first sale doctrine is supported by the rationale in *Minnifield v. Ashcraft*,<sup>95</sup> in which the Alabama Court of Appeals distinguished the harms suffered by a private person from those suffered by a public figure.<sup>96</sup> "For a private person, psychological interests [rather than commercial interests] would likely be the main concern resulting from the

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<sup>91</sup> *Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 2d 823, 841 (C.D. Cal. 1998).

<sup>92</sup> *Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1448 (11th Cir. 1998).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1448–49 (internal quotations omitted).

<sup>95</sup> 903 So.2d 818 (Ala. Civ. App. 2004).

<sup>96</sup> *Id.* at 824.

appropriation of his or her likeness, even if only their family members or close friends were to recognize their likeness.”<sup>97</sup> When the average person grants consent to being filmed or having his or her picture taken, whether by a friend or even for a news interview, he or she is unlikely to have contemplated every conceivable use of this content in the future. There are a variety of policy justifications favoring recognition of the right of publicity, including protection of natural property rights, economic incentives, and the right of self-definition.<sup>98</sup> The justifications behind this right should be especially protected for a non-celebrity, who is less likely to possess the legal savvy to know the extent of her rights regarding her likeness. For these reasons, using the first-sale doctrine to shut the door on a future right to publicity claim leaves private individuals vulnerable to commercial exploitation in situations where the initial consent may be uninformed.

## V. CONCLUSION

The ability to control something as personal as one’s identity is an integral part of our fundamental right to privacy:

Security of person is as necessary as the security of property, and for that complete personal security which will result in the peaceful and wholesome enjoyment of one’s privileges as a member of society there should be afforded protection, not only against the scandalous portraiture and display of one’s features and person, but against the display and use thereof for another’s commercial purposes or gain.<sup>99</sup>

Although some seventy years have passed since this opinion was written, the interests protected by the right of publicity are as important now as they were then.

In the last decade, technology has progressed in such a manner so as to facilitate the dissemination of content in a way that is both rapid and widespread. Whereas previously, photos and video existed only in hard copy, now the average person on *Facebook* may have hundreds of photos and several videos containing his or her likeness available for other users to access and use however

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<sup>97</sup> *Id.*

<sup>98</sup> See 1 MCCARTHY, *supra* note 22, § 2:2.

<sup>99</sup> *Flake v. Greensboro New Co.*, 195 S.E. 55, 63–64 (N.C. 1938).

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they like. Social networking and community media sites thrive on user-generated content and yet provide very little guidance or oversight as to acceptable conduct. While these websites provide remedies for individuals who feel their rights have been infringed upon, by the time the media is removed the damage may have already been done. Given the transformation of private individuals into public personae via the internet and the ease with which this content may be appropriated, we are likely to see more and more litigation involving the right of publicity as applied to “non-celebrities.”

Perhaps as these claims become more prevalent, the issue of federal legislation will come to the fore.<sup>100</sup> Until that time, it is important first, that states recognize and protect this right in some fashion. And second, in interpreting the scope of permission and consent, the rights of the individual to privacy and control over one’s identity should be favored and given the proper weight against commercial interests.

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<sup>100</sup> The International Trademark Association has recommended that Congress create a federally preemptive right of publicity. *See Federal Right of Publicity*, International Trademark Association, Mar. 3, 1998, available at [http://www.inta.org/index.php?option=com\\_content&task=view&id=285&Itemid=153&getcontent=3](http://www.inta.org/index.php?option=com_content&task=view&id=285&Itemid=153&getcontent=3).