

SEX, DEATH, AND INTELLECTUAL PROPERTY

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I. INTRODUCTION

Dozens of strangers show up at a man's apartment looking for sex.<sup>1</sup> A local newscaster tries to hold onto her career after participating in a wet t-shirt contest.<sup>2</sup> A woman's naked video tape

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1. See *Herrick v. Grindr, LLC*, No. 17-CV-932 (VEC), 2017 WL 744605, at \*1 (S.D.N.Y. Feb. 24, 2017).

2. See *Balsley v. LFP, Inc.*, 691 F.3d 747, 755 (6th Cir. 2012); *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 917–18 (N.D. Ohio 2004).

becomes ammunition for a hip-hop feud.<sup>3</sup> A dead rapper introduces Beyoncé at the Super Bowl.<sup>4</sup> A newspaper tries to publish a family member's autopsy photos.<sup>5</sup> A father's lifelong work becomes a Vegas slot machine.<sup>6</sup>

Intellectual property ("IP") has nothing and everything to do with these circumstances. IP laws are traditionally intended to incentivize the creation and dissemination of intangible goods, not to enhance physical safety, protect employment prospects, maintain privacy, assist with mourning, or dignify the deceased.<sup>7</sup> Yet the powers created by IP laws — namely the ability to substantially control the use of names, images, voices, and texts — implicate far more than intellectual production. In each of the above cases, control over the subject matter of IP was central to securing the plaintiff's economic, emotional, and cultural interests. More specifically, one or more copyright, trademark, or publicity rights claim were expressly asserted in each. In these and in many other cases, IP is doing work that it was not intended to do. And this is okay.

This Article examines topics that IP tends to ignore. Courts and scholars insist that IP should remain moored to its traditional concern of sufficiently incentivizing expensive creative endeavors, but IP laws increasingly advance a broad range of interests that have little to do with economic incentives.<sup>8</sup> Especially in the context of the Internet and social media, control over the subject matter of IP enables greater control over self-representation and an enhanced ability to navigate individual, familial, and cultural boundaries around some of the most sensitive and intimate aspects of people's lives. In particular, this Article focuses on the role of IP in addressing two of our culture's most uncomfortable, yet deeply important topics: sex and death.

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3. See *Leviston v. Jackson*, 980 N.Y.S.2d 716, 718 (N.Y. Sup. Ct. 2013).

4. See *Estate of Barré v. Carter*, 272 F. Supp. 3d 906, 912 (E.D. La. 2017).

5. See *Earnhardt ex rel. Estate of Earnhardt v. Volusia Cty.*, No. 2001-30373-CICI, 2001 WL 992068 (Fla. Cir. Ct. July 10, 2001).

6. See *Fourth Age Ltd. v. Warner Bros. Dig. Distrib. Inc.*, No. CV 12-9912 ABC (SJHx), 2013 WL 11316952 (C.D. Cal. July 11, 2013).

7. See, e.g., *Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015) (en banc) ("[C]opyright law offers a limited monopoly to encourage ultimate public access to [creative works] . . . . Although we do not take lightly threats to life or the emotional turmoil Garcia has endured, her harms are untethered from . . . copyright's function as the engine of expression.").

8. For broader critiques of economic framings of intellectual property, see generally JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* (2012); MADHAVI SUNDER, *FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE* (2012).

IP theory has relatively little to say about sexual autonomy and privacy,<sup>9</sup> or about family mourning,<sup>10</sup> yet in a wide range of cases, these concerns are central to the assertion of IP rights. In the first set of cases, copyright, trademark, and rights of publicity are combatting “revenge porn” and other nonconsensual dissemination of sexual imagery. In the second set of cases, families of deceased artists and public figures are asserting IP rights in order to help them mourn, maintain continuity with a loved one, and shape the cultural memory of the deceased.<sup>11</sup> These cases are highly diverse, but they share important unifying characteristics: the rights they assert fall squarely within the doctrinal scope of IP laws, yet at the same time they almost entirely fail to map onto the policy justifications for those laws.<sup>12</sup> In other words, they follow the letter, but violate the spirit, of IP.

Each of the IP regimes invoked in these disputes typically imagines a distinct set of actors with a distinct set of needs typically operating in distinct cultural and economic domains.<sup>13</sup> Copyright incentivizes authors to produce creative works; trademark law protects commercial entities against false associations; publicity rights give individuals the right to authorize commercial uses of their identities. Each category of IP has a different duration, a different measure of infringement, and different set of defenses. Yet in the context of sex and death, IP regimes begin to blur. Rights holders do

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9. Some who do include Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U.J. GENDER, SOC. POL’Y & L. 273 (2007); Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799 (2008); Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025 (2014). Outside of the sexual privacy context, there is some IP scholarship discussing the IP/privacy interface more generally. For scholarship debating whether to provide IP-style protections for consumer data, see for example, Pamela Samuelson, *Privacy as Intellectual Property*, 52 STAN. L. REV. 1125 (2000); Mark A. Lemley, *Private Property*, 52 STAN. L. REV. 1545, 1553–54 (2000).

10. Some who do, include, Andrew Gilden, *IP, R.I.P.*, 95 WASH. U. L. REV. 639 (2017); PAUL K. SAINT-AMOUR, *THE COPYRIGHTS* 121–58 (2003).

11. See generally Gilden, *IP, R.I.P.*, *supra* note 10 (arguing that IP can serve as a vehicle for processing the death of a loved one).

12. See Gilden, *IP, R.I.P.*, *supra* note 10, at 647 (arguing that although copyright and publicity right “extend significant power to successor rights holders, such power is only weakly justified by IP theory”); see also Rebecca Tushnet, *How Many Wrongs Make a Copyright?*, 98 MINN. L. REV. 2346, 2361 (2014) (arguing that incentive theory does not justify extending copyright remedies to revenge porn victims because “copyright doctrine’s levers for affecting human motivations don’t fit the behaviors at issue, though privacy law’s might”).

13. See generally Laura A. Heymann, *The Trademark/Copyright Divide*, 60 SMU L. REV. 55 (2007) (outlining the threat copyright law poses to “remix culture” and proposing alternative models of reform); Laura A. Heymann, *How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825 (2009) (discussing the tension between creators’ copyright interests at the moment of fixation and public privacy interests in the digital age).

not appear to attach any particular significance to whether it is a “work,” “mark,” or “identity” that is appropriated in undesired ways by third parties; they instead care about the remedies that any combination of these regimes provide.<sup>14</sup> Copyright, trademark, and publicity rights may be doctrinally distinct, but all typically provide relatively easy access to injunctive relief,<sup>15</sup> secondary liability for Internet platforms,<sup>16</sup> the advantages of alienability,<sup>17</sup> and postmortem protections.<sup>18</sup> These shared qualities enable rights holders to effectively block the dissemination of undesired representations and to transfer control to others in a position to protect their privacy, autonomy, and dignity. In other words, IP is attractive not because any of its subcategories perfectly map onto the needs and experiences of rights holders, but because IP provides multiple ways of accessing the remedial toolkit of property.

Part II positions “non-traditional” IP assertions within broader scholarly debates about the role of IP rights in the digital age. As technological advances and empirical research on creativity continue to undermine the dominant incentives-based justifications for IP,<sup>19</sup> debates have emerged about whether there is a role for IP to play where it does not map onto an incentive justification, or whether IP justifications should be shifted to accommodate how those rights are actually used or valued. Although some scholars have been willing to

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14. See Heymann, *The Trademark/Copyright Divide*, *supra* note 13, at 57 (noting copyright disputes that are “not about creators who are seeking to control the use of the work *qua* work”).

15. See generally Andrew Gilden, *Copyright Essentialism and the Performativity of Remedies*, 54 WM. & MARY L. REV. 1123 (2013) (evaluating the wide body of scholarship on the proposed remedies for low injunctive relief standards); David H. Bernstein & Andrew Gilden, *No Trolls Barred: Trademark Injunctions After eBay*, 99 TRADEMARK REP. 1037 (2009) (arguing that the presumption of irreparable harm and easy access to injunctive relief should continue in trademark law).

16. See 47 U.S.C. § 230(e)(2) (2012) (providing intermediaries protection against liability imposed by the Communication Decency Act).

17. See Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 349 (1993) (explaining that copyright is alienable). See generally Jennifer Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185 (2012) (explaining that copyright and patents are easily and often alienable).

18. See, e.g., 17 U.S.C. § 302 (2012) (providing 70-year postmortem copyright); Cal. Civ. Code § 3344.1(g) (Deering 2012) (providing 70-year postmortem publicity rights); *Cairns v. Franklin Mint Co.*, 24 F. Supp. 2d 1013 (C.D. Cal. 1998) (the phrase “another person” in § 43(a)(1)(A) of the Lanham Act indicates that “Congress selected language broad enough to encompass a claim by a deceased celebrity’s Estate or by any celebrity’s assignee.”).

19. See, e.g., Mark Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460 (2015).

expand the justificatory bases for IP,<sup>20</sup> most scholars nonetheless are reluctant to allow IP to become unmoored from authorship or intellectual labor.<sup>21</sup>

These debates, however, have too often excluded the voices and needs of individuals who use the IP system to shore up vulnerabilities they encounter in their everyday lives. Accordingly, Part III surveys a variety of IP disputes that implicate emotional and cultural entanglements and that are rather difficult to explain using the traditional, market-based principles of IP theory, such as incentives, authorship, or intellectual labor. The examination of non-traditional IP disputes will first turn to disputes concerning sexual autonomy and privacy and then turn to the noneconomic interests often asserted by heirs, family members, and similar successors-in-interest to IP rights. These individuals in Part III *happened* to become rights holders, either due to inheritance or the automatic vesting of copyright and publicity rights. These examples show that IP can be used to address a broad range of social and emotional vulnerabilities associated with the viral spread of images and text.

Part IV sets forth an understanding of IP as a tool for boundary management in these non-traditional cases. Through the proliferation of text-, image-, and video-sharing technologies, individuals today have unprecedented opportunities to participate in multiple social contexts, and IP allows individuals a means to negotiate the risks and rewards of social media and other digital platforms. Part IV suggests that IP enables individuals to better manage social boundaries and control the social representation of themselves and their loved ones against the cultural backdrop of big data aggregation and online harassment. IP laws, as a normative matter, have distinct practical and conceptual advantages that can usefully supplement other legal interventions, such as criminal statutes, privacy torts, contracts, and consumer protection laws, in protecting sexual autonomy and various forms of individual and family privacy. Part IV also proposes several doctrinal reforms that might follow from more explicitly embracing IP as a vehicle for sexuality, mourning, and privacy. These include improved privacy protections during copyright registration, greater

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20. See, e.g., ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 2 (2011).

21. See, e.g., Tushnet, *supra* note 12, at 2348 (arguing copyright remedies should not be extended to revenge porn victims); Edward Lee, *Suspect Assertions of Copyright*, 15 CHL-KENT J. INTELL. PROP. 379, 394 (2016) (identifying suspect assertions of copyright from a First Amendment view); Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV. 613, 616 (2014) (arguing that copyright should serve creative authorship rather than noncreative labor).

uniformity in rights of publicity, and harmonization of free speech defenses across IP regimes.

## II. IP'S SHIFTING TERRAIN

In the United States, IP is traditionally understood to provide economic incentives for activities whose resource-intensive fruits are otherwise too easily appropriated by third parties without compensation. Copyright and patents protect artists and inventors whose activities are expensive to undertake but cheap to copy;<sup>22</sup> publicity rights incentivize celebrities to develop their public personae through rights in the commercial value of their image;<sup>23</sup> trademarks encourage commercial actors to invest in consumer goodwill and to build a valuable brand around an exclusively owned word or design.<sup>24</sup> While each area of IP has a distinctive narrative about a particular group of people, they all engage in some type of socially beneficial activity based on economic incentives. Only recently has the consensus among scholars about the traditional economic-incentives argument started to erode,<sup>25</sup> particularly as digital technologies have yielded unprecedented amounts of freely available creative works.<sup>26</sup>

At the same time, the widespread dissemination of creative technologies, combined with the broad substantive scope of IP statutes, has led to a widening universe of individuals with potentially cognizable IP interests. Given that copyright protection merely

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22. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[Copyright] is intended to motivate the creative activity of authors and inventors by the provision of a special reward”); *Diamond v. Chakrabarty*, 447 U.S. 303, 307 (1980) (“[P]atent laws . . . offer[] inventors exclusive rights for a limited period as an incentive for their inventiveness and research efforts”).

23. See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (stating Ohio’s right of publicity not only compensates performers for time and effort but also provides economic incentives to produce performances of interest to the public).

24. See, e.g., *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 537 (1987) (explaining Congress’s intent behind granting the USOC trademark of the word “Olympic” was to incentivize production of a “quality product” that benefits the public).

25. See Elizabeth L. Rosenblatt, *Intellectual Property’s Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441, 442–43 (2013) (surveying creative communities in fashion, tattoos, standup comedy, cuisine, and open source software, which make little use of IP laws yet are able to thrive); Robert P. Merges, *Against Utilitarian Fundamentalism*, 90 ST. JOHN’S L. REV. 681, 700–01 (2016) (advocating a pluralistic approach to IP justifications); Brian L. Frye, *Machiavellian Intellectual Property*, 78 U. PITT. L. REV. 1, 15 (2016) (suggesting reconciliation of consequentialist and deontological theories of IP is possible).

26. See Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 461 (2015)

requires a “modicum of creativity,”<sup>27</sup> every Facebook post, Instagram photo, and YouTube video created with a smartphone potentially gives rise to a new bundle of copyright interests.<sup>28</sup> Advances in highly targeted social media advertising mean that everyone’s mother, neighbor, or acquaintance can provide commercial value to Facebook, Instagram, or Twitter through their “likes” and recommendations. In other words, everyone is a nascent trademark or publicity rights holder.<sup>29</sup> Moreover, these rights often descend — like other property interests — to families, friends, and other entities with a relationship to the decedent, bringing this new generation of rights holders’ families and friends into the IP fold.<sup>30</sup>

The results of these changes are that IP is everywhere, IP owners are everyone, and IP law is now forced to cover a diverse new generation of IP owners. These new owners have interests that are markedly different than the traditional beneficiaries of IP laws; they often pursue IP disputes for reasons having little to do with revenue streams, creativity, or intellectual labor. As these “non-traditional” interests have come within the purview of courts and scholars, they have faced a largely skeptical audience. The remainder of this Part will outline this skepticism towards non-traditional IP owners and suggest some potential dangers of excluding such owners from the IP system.

#### A. The Garcia Roadblock

Perhaps the most prominent lawsuit representing such “non-traditional” interests is *Garcia v. Google, Inc.*,<sup>31</sup> in which the actress Cindy Garcia attempted to remove the highly controversial film *The Innocence of Muslims* from YouTube. Garcia was cast in the film *Desert Warrior*, supposedly an adventure film set in ancient Egypt, but her lines were dubbed over and replaced by a short series of insulting comments about the Prophet Mohammed.<sup>32</sup> The movie was

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27. *Feist Publ’ns. Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

28. *See, e.g.*, Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 613–30 (2010) (suggesting creativity empowered by digital technology has crowded the copyright system with numerous works, rights, and rights holders).

29. *See, e.g.*, *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 809 (N.D. Cal. 2011) (finding that plaintiff’s allegation “advertisers’ ability to conduct targeted marketing has now made friend endorsements a valuable marketing tool” withstands dismissal).

30. *See generally* Gildea, *IP, R.I.P.*, *supra* note 10.

31. 786 F.3d 733 (9th Cir. 2015) (*en banc*).

32. *See id.* at 737.

condemned worldwide,<sup>33</sup> and Garcia suffered considerably due to her unwitting participation in the film: she received multiple death threats, was forced to relocate, lost her primary source of income, and was unable to secure other acting opportunities.<sup>34</sup> After initially bringing state law publicity, privacy, and related tort actions against the film's producer as well as Google and YouTube, she ultimately refiled in federal court, claiming copyright in her 5-second performance in the film.<sup>35</sup>

Ultimately, the Ninth Circuit held that Garcia had no cognizable copyright interest in her short performance,<sup>36</sup> and could not establish sufficient irreparable harm to obtain a preliminary injunction pursuant to the Copyright Act:

Although we do not take lightly threats to life or the emotional turmoil Garcia endured, her harms are untethered from — and incompatible with — copyright and copyright's function as the engine of expression. In broad terms, “the protection of privacy is not a function of the copyright law . . . .”<sup>37</sup>

The court left open the possibility that Garcia might pursue publicity or privacy claims,<sup>38</sup> though such claims against Google<sup>39</sup> would almost certainly be precluded by the federal Communication Decency Act.<sup>40</sup>

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33. *See id.* at 738.

34. *See* Complaint at ¶¶ 13–17, *Garcia v. Nakoula*, No. BC492358, 2012 WL 4099105 (Cal. Sup. Ct. dismissed Sept. 25, 2012).

35. *See* 786 F.3d at 738.

36. *See id.* at 742 (explaining that recognition of copyright interests in a 5-second performance within a motion picture would make “Swiss cheese of copyrights,” splintering a unitary film into an impractical multitude of copyrighted works).

37. *Id.* at 745 (quoting *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003)).

38. *See id.*; *see also* Jennifer E. Rothman, *The Other Side of Garcia: The Right of Publicity and Copyright Preemption*, 39 COLUM. J.L. & ARTS 441, 442 (2016).

39. Publicity rights claims against the film's producer would not be precluded by the Communications Decency Act, but the core of Garcia's lawsuit was an attempt to force Google to remove *The Innocence of Muslims* from YouTube. *See Garcia*, 786 F.3d at 736–37.

40. Under Section 230 of the CDA, a website provider cannot be held liable on account of publishing or distributing content created by a third-party user. This broadly shields online intermediaries from tort liability stemming from user-generated content. Section 230(e)(2) expressly exempts claims “pertaining to intellectual property,” which has been interpreted in the Ninth Circuit *not* to include state-based right of publicity claims. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1107–08 (9th Cir. 2007). Courts in other circuits have held that state-based publicity claims *are* included in Section 230's IP carve-out. *See, e.g., Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009).



In the wake of *Garcia*, numerous commentators emphasized the fundamental mismatch between Garcia's claims and copyright policy. Judge M. Margaret McKeown, the author of *Garcia*, has vigorously defended the opinion, emphasizing that even though privacy and reputation are important interests generally, protecting them through copyright law opens the door to serious constraints on the free speech interests of downstream users of copyrighted works.<sup>41</sup> Professor Alfred Yen is similarly skeptical of copyright plaintiffs who "sue to protect personal interests that bear little relation to income streams associated with the exploitation of copyright rights."<sup>42</sup> Professors Deidré Keller and Edward Lee also worry about the mismatch between privacy and copyright laws and the use of copyright to advance reputational interests, particularly when such interests are asserted by third-party transferees.<sup>43</sup> Professor Lee emphasizes that even though IP interests are typically alienable, IP's ability to police reputation should not be.<sup>44</sup>

Professor Jeanne Fromer has looked more systemically at the mismatch between traditional justifications for IP and a wide range of real-world disputes, and has argued that "assertions of rights with ill-fitting motivations are sufficiently worrisome that courts ought to strongly consider weighing these motivations before granting relief."<sup>45</sup> She surveys "numerous contexts in which rights holders seek to protect privacy and reputational interests" — including informational privacy, sexual privacy, "an heir's interest in preserving his or her predecessor's reputation," and religious secrecy<sup>46</sup> — and argues that

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41. M. Margaret McKeown, *Keynote Address: Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 1, 16 (2016) (arguing "no matter how noble and important the values of privacy and protection of reputation," copyright should not be the "direct vehicle for [victims'] vindication").

42. Alfred C. Yen, *The Challenges of Following Good Advice About Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 412, 413 (2016).

43. See Deidré A. Keller, *Copyright to the Rescue: Should Copyright Protect Privacy?*, 20 UCLA J.L. & TECH. 1, 30–33 (2016); Lee, *supra* note 21, at 381–82. Although far less definitive in her objection, Professor Pamela Samuelson similarly notes the privacy and copyright mismatch, noting that "privacy harms were quite different in nature from the market harms with which copyright is mainly concerned." Pamela Samuelson, *Protecting Privacy Through Copyright Law?*, in *PRIVACY IN THE MODERN AGE: THE SEARCH FOR SOLUTIONS* 191, 198 (Marc Rotenberg et al., eds., 2015); see also Wendy J. Gordon, *Copyright Owners' Putative Interests in Privacy, Reputation, and Control: A Reply to Gould*, 103 VA. L. REV. ONLINE 36, 47–51 (2017).

44. See Lee, *supra* 21, at 386.

45. Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 551 (2015).

46. *Id.* at 557.

lawsuits motivated by these interests have the potential to “distort the intellectual property system.”<sup>47</sup>

Most scholarship (and some case law) discussing IP estates similarly critiques the mismatch between the interests of families and the policy goals of the IP system. When family members have used inherited intellectual property rights to maintain privacy in unpublished letters<sup>48</sup> or to ensure that their loved one has been sufficiently recognized for their contributions,<sup>49</sup> they have met a chorus of critics.<sup>50</sup> These motivations have a very loose connection to economic incentives and are at least a step removed from the initial rights holder’s intellectual labor, making IP estate claims look wasteful, abusive, and otherwise unjustified.<sup>51</sup> IP estates, in the view of skeptical scholars, are “idle rich,”<sup>52</sup> exert an “iron grip” over their ancestors’ works,<sup>53</sup> and are “privileged and sometimes arbitrary custodians of culture.”<sup>54</sup>

### *B. Missing Voices*

Cindy Garcia’s circumstances presented a highly unusual set of concerns, and her case set the stage for a broader debate about how IP laws should address claims that are not primarily driven by economic incentives, but instead by a desire to protect oneself against social and psychological vulnerabilities associated with social media. Scholars and courts are understandably concerned about the inefficiencies and free speech costs of expanding non-traditional IP claims. Sidelining the concerns of Cindy Garcia, however, effectively limits the broader potential to use IP to push back against powerful actors who detrimentally exploit and profit from other peoples’ images, voices, and texts. For example, social media platforms provide diverse

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47. *Id.* at 587.

48. *See* Shloss v. Sweeney, 515 F. Supp. 2d 1068, 1080–81 (N.D. Cal. 2007) (rejecting a copyright claim by the estate of James Joyce against a biographer who wished to publish portions of letters by Joyce’s daughter, as it lacked “a nexus between the copyright holder’s actions and the public policy embedded in the grant of a copyright”).

49. *See, e.g.*, Williams v. Gaye, 885 F.3d 1150 (9th Cir. 2018) (the “Blurred Lines” litigation).

50. *See* Gilden, *IP, R.I.P.*, *supra* note 10, at 642–43 (surveying criticisms of IP estates).

51. *See, e.g.*, Deven R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219, 258–59 (2011) (arguing that heirs passively “collect rent” unlike authors who actually labored).

52. William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 909 (1997).

53. Robert Spoo, *Ezra Pound’s Copyright Statute: Perpetual Rights and the Problem of Heirs*, 56 UCLA L. REV. 1775, 1824 (2009).

54. *Id.* at 1827.

opportunities to express oneself through information, opinion, or creative content, but these opportunities are often difficult to contain within the individual user's intended social context.<sup>55</sup> IP rights wielded by everyday users provide some of the few opportunities to fight against the intermediary platforms that disseminate digital artifacts and profit from users' vulnerabilities.<sup>56</sup>

This search for power, or at least some leverage, against powerful intermediaries was central to Cindy Garcia's efforts to remove her image from YouTube, and it would be similarly central to many claims by everyday social media users. As Professor Margaret Chon — one of the few scholars to push back against *Garcia* — observes, "If we limit our understanding of legitimate goals of copyright protection to market actors or commercial ends, we are missing a lot of the copyright story, past and especially present."<sup>57</sup> Cindy Garcia may seem like a strange outlier due to the unusual circumstances of fake voiceovers and death threats, but her case is merely the tip of the iceberg of IP being used by vulnerable people to protect themselves from physical, emotional, and professional harm.

Perhaps the highest-profile example of non-commercial use of IP is in the context of nonconsensual pornography — commonly referred to as revenge porn — where several scholars embrace using copyright law to stop the unwanted spread of private sexual imagery on the Internet.<sup>58</sup> Although none of these scholars *expressly* advocate a more capacious theory of IP's legitimate ends,<sup>59</sup> their work nonetheless acknowledges the ability of IP to meaningfully improve the lives of everyday people.

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55. See Leysia Palen & Paul Dorish, *Unpacking "Privacy" for a Networked World*, 5 ACM 129, 132 (2003) ("[P]roblems emerge when participation in the networked world is not deliberate, or when the bounds of identity definition are not within one's total control.").

56. See Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 142–43 (2017).

57. Margaret Chon, *Copyright's Other Functions*, 15 CHI-KENT J. INTELL. PROP. 364, 366 (2016).

58. See Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025 (2014); Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422 (2014); Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1 (2012).

59. Professors Bartow and Levendowski have emphasized the practical advantages of copyright in these circumstances — for example, using DMCA takedown notice provisions to decrease distribution and the possibility of six-figure statutory damages for infringement. See Bartow, *supra* note 58, at 45; Levendowski, *supra* note 58, at 444. Professor Bambauer has tried to fit revenge porn assertions within an incentive framework — copyright protection can incentivize the sharing of intimate images between romantic partners without fear that the images will be further disseminated without their consent. See Bambauer, *supra* note 58, at 2031–32.

But what message does *Garcia* and its supporters send to such individuals about the values of the IP system? When someone seeks to stop an ex-lover from spreading their naked image to family, friends, and employers, or to remove such image from a revenge porn website, they are likely not concerned with capturing income streams or controlling markets but instead with protecting their privacy, dignity, and well-being. *Garcia* signals that individuals who cannot assimilate their stories to IP's traditional economic narratives are out of luck, even though the images they seek to control fall squarely within IP's subject matter. Hewing closely to IP's traditional values means turning away individuals asking the legal system to respond to a new set of social harms. None of the enacted IP statutes speak to the motivations behind asserting the rights granted therein, yet the reasoning in *Garcia* prevents the law, as currently written, from addressing novel fact patterns that fall within its scope.

One response might be that privacy, dignity, and emotional interests *can* be legitimate objects of our legal system, but that they should be pursued outside of IP, or at the very least outside of copyright law. Professor Rebecca Tushnet, for example, supports providing legal remedies for revenge porn through invasion of privacy lawsuits, but she strongly objects to expanding copyright laws to do so: “[C]oncern for the victims of these reprehensible sites is understandable, but distorting copyright law is not the right solution.”<sup>60</sup> Professor Tushnet sees a “profound misfit between every aspect of copyright and the interests at issue here.”<sup>61</sup> Professor Keller is similarly skeptical of copyright as a vehicle for privacy, but fully

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60. Rebecca Tushnet, *Performance Anxiety: Copyright Embodied and Disembodied*, 60 J. COPYRIGHT SOC'Y U.S.A. 209, 238 (2013); *see also id.* at 241 (arguing that “victims of revenge porn should have an invasion of privacy remedy,” rather than a copyright remedy).

61. Tushnet, *supra* note 12, at 2348. Much of Professor Tushnet's critique of Bambauer's article centers on his incentives-based argument for having an express copyright interest in the subjects of intimate media. Most saliently, she is skeptical that intimate decision making, even if mediated through digital technologies, will be responsive to the legal incentives provided by an expanded copyright regime. I am sympathetic to this critique, given scant evidence that sexual decision making reflects classical economic rationality. Nonetheless, to the extent that fear of the increasingly well-publicized problem of “revenge porn” discourages the sharing of intimate images, and perhaps sows distrust among sexual partners, IP protections for intimate imagery might remove some *disincentive* to share. The trouble with trying to fit sexual autonomy into a utilitarian model is that the socially optimal amount of sexual communication is ultimately unknowable. My preference instead would be to acknowledge that IP can be a vehicle for sexual autonomy but to avoid, if possible, attempts at legally dictating how much sexual communication our society should engage in.

supports effective civil remedies for online privacy violations outside of copyright.<sup>62</sup>

The irony, though, is that IP is *already* doing this work, just under the guise of the traditional incentives narrative.<sup>63</sup> As further discussed below, a celebrity sex tape or an ad-supported YouTube video may implicate, like revenge porn, concerns with dignity, autonomy, and well-being, but because there is an identifiable revenue stream for these works, an IP claim rooted in emotion can be reframed as an IP claim rooted in market exclusivity.<sup>64</sup> The substance of the IP claim may be the same, but in a system dominated by a narrow set of animating values, success may ultimately hinge on the ability to conform to a narrow set of traditional narratives. This ability to wield IP's dominant economic narratives is unlikely to be evenly distributed,<sup>65</sup> and the emerging insistence on narrative conformity risks marginalizing important perspectives on the role of IP subject matter in contemporary life.

### III. SEX, DEATH, AND NON-TRADITIONAL IP ASSERTIONS

When Nancy Daus was twenty-three years old, she posed for a series of nude photographs. Soon after the photo session, she had second thoughts and asked the photographer to destroy the photos, which he agreed to do.<sup>66</sup> Over the next two decades, Nancy became a successful professional wrestler, married fellow wrestling-star Chris Benoit, and together they had a son in 2000.<sup>67</sup> Chris Benoit, however, came to suffer from serious mental illness, culminating in him killing Nancy, their son, and himself in 2007.<sup>68</sup> Soon thereafter, Nancy's twenty-year-old nude photos resurfaced in *Hustler* magazine: "NANCY BENOIT Au Naturel: The long lost images of wrestler Chris Benoit's doomed wife."<sup>69</sup> Nancy's mother, Maureen Toffoloni, inherited Nancy's intellectual property under Florida law, and

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62. See Keller, *supra* note 43, at 22.

63. See Andrew Gilden, *Copyright's Market Gibberish*, 94 WASH. L. REV. (forthcoming 2019).

64. See *infra* Section IV.B

65. See Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355, 375–82 (2016).

66. *Toffoloni v. LFP Publ'g Grp.*, 572 F.3d 1201, 1204 (11th Cir. 2009).

67. See *id.*

68. See *id.*

69. *Id.* at 1204, 1209.

successfully sued Hustler for violations of her daughter's publicity rights.<sup>70</sup>

The nude images at issue in the *Toffoloni* case were the subject of economically valuable intellectual property rights that both Hustler magazine and Nancy's 1987 photographer sought to commercially exploit. But so much more than money was embedded within them. For Maureen Toffoloni and her family, these images were the repositories of complex histories of violence, loss, sexuality, disease, ambition, and breached trust. When asked about how she understood her responsibilities as administrator of Nancy's estate, Toffoloni responded that her duty was to protect her daughter and grandson from mistreatment after they died.<sup>71</sup> Toffoloni's inherited IP rights allowed her to insulate her daughter's intimate decisions from future exploitation, but these IP rights had little to do with capturing the market for Nancy's image — Toffoloni testified that she had not made any commercial use of it in the four years since her death.<sup>72</sup> Instead, IP was a way to limit a well-financed publisher's ability to profit off her daughter's body and perhaps move her family forward with some semblance of closure and healing.<sup>73</sup>

For Maureen Toffoloni and many other rights holders, IP is less about financial opportunities and more about opportunities to dictate how each of their life stories are authored.<sup>74</sup> The remainder of this article approaches IP disputes from the ground up, focusing on the work IP is actually doing for its motley crew of rights holders. Although the case law addressing non-traditional motivations is relatively sparse,<sup>75</sup> this does not imply that these non-traditional concerns are a small and relatively unimportant sliver of contemporary IP disputes. For instance, numerous revenge porn activists have cited the frequent usefulness of merely threatening a website with an IP dispute if they retain an image or video,<sup>76</sup> yet there

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70. *See id.* at 1204; *see also id.* at 1210 (refusing to rule that someone's notorious death constitutes a carte blanche for the publication of any and all images of that person during his or her life).

71. Transcript of Jury Trial Proceedings (Volume I) at 151, *Toffoloni v. LFP Publ'g Grp.*, 572 F.3d 1201 (11th Cir. 2009) (No. 1:08-cv-421).

72. *See id.* at 156.

73. *See id.*

74. *See infra* Section IV.B

75. Aside from *Garcia*, the other cases that reappear in several articles cited in the previous Part include *Balsley v. LFP, Inc.*, 691 F.3d 747 (6th Cir. 2012); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012); and *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000).

76. *See, e.g.*, Caitlin Dewey, *How Copyright Became the Best Defense Against Revenge Porn*, WASH. POST (Sept. 8, 2014), <https://www.washingtonpost.com/news/the-intersect/wp/2014/09/08/how-copyright-became-the-best-defense-against-revenge-porn>

is very little published case law involving revenge porn scenarios. This suggests that there may be something important happening outside of the federal reporters and under-examined in IP scholarship. Accordingly, this section relies heavily on litigation documents and reports of disputes that did not result in a reported decision. The prevalence of IP assertions in PACER but not on Westlaw may demonstrate that IP protections are more common *and* practically effective in addressing socio-emotional concerns than the case law suggests.

### *A. Sexual Autonomy*

Sexuality does not develop in a vacuum.<sup>77</sup> Instead, sexuality is the product of ongoing interaction with the outside world—searching, exploring, talking, and experimenting about which types of people and communities trigger a sense of desire and belonging.<sup>78</sup> Although sex and IP may seem like an unusual pairing at first blush, contemporary sexuality is deeply tied up in the ability to communicate one’s desires via image, text, and video over a broad range of social media platforms.

The trouble with this technologically mediated sexual landscape is that it often leaves behind a very easily publicized archive of intimate moments. When individuals share sexually explicit content, they often trust both the recipient of their communications and the underlying communication platform that the shared images, videos, and texts will remain within their desired context<sup>79</sup> — “public” in the sense that copies are no longer strictly within an individual’s control, but not “public domain” in the sense that they are available for all to see and use. Yet this trust can be precarious and is often breached<sup>80</sup>: relationships end, and their digital archive becomes fodder for revenge and humiliation; recipients of sexual imagery share

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[<https://perma.cc/Q6GN-X6G3>]. This dynamic is often rightly criticized as bullying or trolling when it concerns corporate rights holders, but it may also provide useful leverage when the plaintiff has less financial resources than the defendant.

77. See Andrew Gilden, *Cyberbullying and the Innocence Narrative*, 48 HARV. C.R.-C.L. L. REV. 357, 378–79 (2013).

78. See Gary W. Harper et al., *The Role of the Internet in the Sexual Identity Development of Gay and Bisexual Male Adolescents*, in *THE STORY OF SEXUAL IDENTITY: NARRATIVE PERSPECTIVES ON THE GAY AND LESBIAN LIFE COURSE* 297, 310–20 (Phillip L. Hammack & Bertram J. Cohler eds., 2009).

79. See Ari E. Waldman, *Privacy as Trust: Sharing Personal Information in a Networked World*, 69 U. MIAMI L. REV. 559, 600–01 (2015).

80. See Ari E. Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 IOWA L. REV. 709, 718 (2017).

them with friends and brag about their conquests; and commercial entities try to sell these materials to voyeuristic audiences. And it is precisely in these moments when trusts are breached, and control over semi-public content is in question, that IP comes into play. Copyright, trademark, and publicity rights can be used to control the dissemination of sexual images when they either were created without an individual's consent or were spread into contexts their creators did not want. In the diverse set of cases surveyed in this section, IP protects sexual autonomy by potentially limiting the humiliation, fear of physical harm, and employment consequences of losing control over sexual artifacts. In these cases, IP reinforces important boundaries around past sexual activities and assists rights holders in moving forward with new familial and professional relationships.

### 1. Revenge Porn

One of the most widely discussed forms of sexual misconduct online is revenge porn, the non-consensual sharing of intimate imagery that prototypically involves an ex-lover looking to exact emotional, economic, or physical retribution on the victim.<sup>81</sup> Although a majority of states have passed criminal statutes prohibiting such conduct,<sup>82</sup> and there are a variety of civil and criminal causes of action — for example stalking, threats, invasion of privacy — that have proven useful in combatting revenge porn,<sup>83</sup> IP claims are repeatedly asserted against perpetrators of revenge porn.<sup>84</sup> Where the plaintiff captured or otherwise created the image or video at issue, the plaintiff likely is the exclusive author of the content and has a protectable copyright interest to wield against a spiteful ex.<sup>85</sup> Where

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81. Victims' rights advocates insist, and I do not suggest otherwise, that sharing of intimate images can occur for a much broader set of reasons than "revenge" — for example boasting among frat brothers about sexual conquests and the recent controversy around the Marines United private Facebook group. See Jeff Schogol, *'I Don't Want to Leave My House': Victims Haunted by Marines' Nude Photo Scandal*, MARINE CORPS TIMES (Mar. 6, 2017), <https://www.marinecorpstimes.com/news/pentagon-congress/2017/03/06/i-don-t-want-to-leave-my-house-victims-haunted-by-marines-nude-photo-scandal> [<https://perma.cc/GY9N-FR49>].

82. See *State Revenge Porn Laws*, C.A. GOLDBERG, PLLC (last updated Apr. 16, 2018), <http://www.cagoldberglaw.com/states-with-revenge-porn-laws> [<https://perma.cc/9584-QT9X>].

83. See Eric Goldman & Angie Jin, *Judicial Resolution of Nonconsensual Pornography Dissemination Cases*, 14 I/S: J.L. & POLY FOR INFO. SOC'Y 283, 297–99 (2018).

84. For some comparative advantages of IP causes of action, see *infra* Section IV.A. See also Levendowski, *supra* note 58 (discussing the usefulness of copyright in combatting revenge porn).

85. See Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009) (noting that



the victim was not the exclusive author of the image but instead the *subject* of a sexually explicit photograph, and defendant used the image for some plausibly commercial or financial gain, rights of publicity laws in some states may provide relief.<sup>86</sup> Publicity rights may also be the only viable IP claim where the plaintiff coauthored a sexually explicit image or video with a former sexual partner — copyright law in such circumstances would allow a coauthor to unilaterally exploit and license the work.<sup>87</sup>

Although copyright and publicity rights are doctrinally distinct, they advance seemingly identical privacy and autonomy interests in the revenge porn context. For example, in *Doe v. Elam*,<sup>88</sup> the plaintiff brought a copyright claim against her ex-boyfriend, who had uploaded sexually explicit videos that she had given him on various websites, sent links to the videos to plaintiff’s friends, family, and classmates, and impersonated her on multiple websites, including OkCupid, Facebook, and AdultSpace.<sup>89</sup> She received “countless messages and requests from strange men,” “has not been able to sleep,” “has had to work hard to repair her professional reputation,” and “continually feared for her physical safety.”<sup>90</sup> The court awarded plaintiff \$450,000 in statutory damages and issued a permanent injunction.<sup>91</sup> Similarly in *Hubbard v. Azzara*,<sup>92</sup> the plaintiff sued for publicity rights violations where her ex-boyfriend created a website with her name as the domain name and stated that he would post “nude, explicit, amateur leather/bondage and discipline” scenes that the two had consensually

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statutory damages of up to \$150,000 per infringed work can exert tremendous leverage over defendants, particularly those with relatively shallow pockets).

86. On the inconsistent mix of economic and privacy interests in right of publicity disputes, see generally JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (2018). In some states, publicity rights provide statutory damages and potential attorneys’ fees, and may additionally offer punitive damages. See, e.g., Cal. Civ. Code § 3344(a) (1984). Several states require registration of publicity rights, but typically only for postmortem rights holders. See, e.g., Tex. Prop. Code Ann. § 26.008(b) (1987).

87. See, e.g., *Oddo v. Ries*, 743 F.2d 630, 632–33 (9th Cir. 1984).

88. *Doe v. Elam*, No. 2:14-cv-09788 (C.D. Cal. Apr. 4, 2018).

89. Complaint at ¶¶ 28–37, *Doe v. Elam*, No. 2:14-cv-09788 (C.D. Cal. Apr. 4, 2018) (ex-boyfriend created fake OkCupid profile and sent other members sexual images; posted naked photos and videos to Tumblr, porn sites, and revenge porn-specific sites; and registered her naked photos (not pseudonymously though, effectively unmasking Jane Doe)).

90. *Id.* at ¶¶ 24–26.

91. See *Doe v. Elam*, No. 2:14-cv-09788-PSG-SS, at 8 (C.D. Cal. Apr. 4, 2018). The court also awarded plaintiff an additional \$6 million in compensatory and punitive damages for her claims of intentional infliction of emotional distress, online impersonation with intent to cause harm, and stalking. *Id.*

92. No. 8:01-CV-1154-T-24EAJ, 2008 WL 2782828 (M.D. Fla. July 16, 2008).

made years earlier.<sup>93</sup> He contacted the plaintiff's new husband about the website and further threatened to contact every department store that bought the plaintiff's makeup line. She argued that injunctive relief was necessary to prevent "injury to her familial relationship and her reputation, personal and professional."<sup>94</sup> The court ultimately issued a preliminary injunction, noting it "would assure the public that intimate details of a private sexual relationship are protected from unwarranted disclosure by a disgruntled former lover."<sup>95</sup>

Although copyright, publicity rights, and trademark claims can be useful legal tools for restraining individuals who post or threaten to post sexual imagery,<sup>96</sup> they often supplement tort claims for invasion of privacy, stalking, and harassment.<sup>97</sup> IP claims are particularly and uniquely valuable where sexual imagery has already been disseminated online, and the individuals in those images want to claw them back. In these circumstances, tort law claims against search engines, websites, and other online intermediaries are generally unavailable due to § 230 of the Communications Decency Act ("CDA"),<sup>98</sup> which broadly immunizes online intermediaries from liability based on content posted by third parties.<sup>99</sup> § 230, however, does not apply to "any law pertaining to intellectual property,"<sup>100</sup> meaning that rights holders may use copyright, trademark, and potentially publicity rights to the extent those laws would impose secondary liability on online intermediaries.<sup>101</sup> For example, in *Toups*

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93. In Camera Report and Recommendation at 2–3, *Hubbard v. Azzara*, No. 8:01-CV-1154-T-24EAJ (M.D. Fla. July 16, 2008).

94. *Id.* at 4.

95. *Id.* at 9.

96. *See, e.g.*, *Miranda v. Guerrero*, No. 08-22326-CIV-MORENO/TORRES, 2009 U.S. Dist. LEXIS 40898, at \*20 (S.D. Fla. May 5, 2009) (enjoining aspiring pop singer's former manager from posting nude photos to the website paolamorena.com, noting that the public could develop a certain unwanted perception of Plaintiff if she continues to be associated with the posted pictures).

97. *Cf. Goldman & Jin, supra* note 83, at 303 (explaining tort remedies are sometimes inadequate against judgment proof defendants).

98. 47 U.S.C. § 230 (2012).

99. *See, e.g.*, *Jane Doe No. 1 v. Backpages.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016) (denying civil claims against Backpages.com by women who were sexually trafficked via Backpages advertisements listed by third parties); *Doe v. Myspace, Inc.*, 528 F.3d 413, 422 (5th Cir. 2008) (denying negligence claims against Myspace for failing to properly verify the age of its users and prevent the sexual assault of a thirteen-year-old user).

100. 47 U.S.C. § 230(e)(2).

101. The Ninth Circuit has held that § 230(e)(2) only applies to *federal* IP claims, meaning that websites are immunized to state law-based publicity rights claims, while every other court to address the issue has disagreed. *See supra* note 40; *see also Jane Doe No. 1 v. Backpages.com, LLC*, 817 F.3d 12, 26 (1st Cir. 2016) (dismissing tort claims under Section 230, but addressing and dismissing publicity rights claims on the merits).

v. *Google, Inc.*,<sup>102</sup> the plaintiff sued Google for allegedly not removing search listings for photos of her on two revenge porn websites.<sup>103</sup> Despite numerous factual disputes regarding the images in question,<sup>104</sup> Google ultimately removed links to requested images, and the plaintiff voluntarily dismissed her claim.<sup>105</sup>

Employing copyright, publicity rights, and trademark laws against operators of dedicated revenge porn websites has proven effective as well. For example, IP claims were asserted against Kevin Bollaert and other operators of the website U Got Posted, which encouraged its users to post naked photos alongside social media and contact information about its subjects.<sup>106</sup> The website then offered to remove photos if the subjects paid them a fee.<sup>107</sup> In a Michigan lawsuit, one woman claimed to be the copyright owner of an image posted on U Got Posted; she sought injunctive and monetary relief after the pictures spread to family and friends, and she had received numerous unwanted solicitations.<sup>108</sup> In an Ohio lawsuit, the plaintiff sued the U Got Posted operators after her ex-boyfriend posted sexually explicit photos of her when she was sixteen years old and listed her full name and city of residence.<sup>109</sup> She asserted civil child pornography claims (which were likely immunized under CDA § 230) and violation of Ohio's statutory and common law right of publicity law (which may not have been). Without discussing the potential CDA § 230 obstacles, the courts entered default judgment in the amount of \$301,658.55 in the Michigan case and \$385,000 in the Ohio case.<sup>110</sup>

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102. 1:14-CV-00127 (E.D. Tex. Sept. 19, 2014).

103. See First Amended Complaint and Request for Injunctive Relief at 2–3, *Toups v. Google*, No. 1:14-cv-00127 (E.D. Tex. Sept. 19, 2014).

104. See Motion to Dismiss Plaintiff's First Amended Complaint at 4, *Toups v. Google*, No. 1:14-cv-00127 (E.D. Tex. Sept. 19, 2014).

105. See Minute Entry: Scheduling Conference, *Toups v. Google*, No. 1:14-cv-00127 (E.D. Tex. Sept. 19, 2014).

106. See *Middleton v. Bollaert*, No. 13-11968-cv (E.D. Mich. Sept. 4, 2013); *Doe v. Bollaert*, No. 2:13-cv-486, 2014 WL 972000 (S.D. Ohio Mar. 18, 2014).

107. See Jessica Contrera, 'Revenge Porn' Distributors are Finally Seeing Legal Ramifications. This Web Site Owner Will Go to Prison for 18 Years, WASH. POST (Apr. 5, 2015), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/04/05/revenge-porn-distributors-are-finally-seeing-legal-ramifications-this-web-site-owner-will-go-to-prison-for-18-years> [https://perma.cc/D8ML-5ZPJ].

108. See Complaint at 9, *Middleton v. Bollaert*, No. 13-11968-cv (E.D. Mich. Sept. 4, 2013).

109. See Complaint at 2, *Doe v. Bollaert*, No. 2:13-cv-00486, 2014 WL 972000 (S.D. Ohio Mar. 18, 2014).

110. See *Middleton v. Bollaert*, No. 13-11968-cv (E.D. Mich. Sept. 4, 2013); *Doe v. Bollaert*, No. 2:13-cv-486, 2014 WL 972000 (S.D. Ohio Mar. 18, 2014).

Other notorious operators of revenge porn websites have also faced liability for IP claims.<sup>111</sup>

One recurring variation of revenge porn involves the impersonation of an ex-lover on social media website and apps, using some combination of their name, image, and identifying information to solicit sexual partners. In *Herrick v. Grindr, LLC*,<sup>112</sup> the plaintiff's ex-boyfriend created numerous fake and sexual profiles on Grindr, a geolocation app designed for men looking to meet other men, often for sex.<sup>113</sup> The fake profiles used Herrick's photo and address, and allegedly around 1100 men responded to the impersonating profiles to engage in highly fetishistic or masochistic forms of sex.<sup>114</sup> Allegedly, dozens of these men actually appeared at his home and workplace looking for sex; some were visibly high on drugs;<sup>115</sup> some physically attacked or verbally harassed Herrick's roommates and coworkers;<sup>116</sup> several lingered even after being informed of the fake profiles.<sup>117</sup> Indeed, some of the fake profiles indicated that Herrick would try to turn the men away but that his resistance would just be part of the fantasy.<sup>118</sup> After contacting the police proved ineffective, Herrick filed more than one hundred complaints with Grindr.<sup>119</sup>

Herrick eventually sued Grindr on a variety of tort and products liability claims—based in part on Grindr's failure to warn users of its “inherently dangerous product” and to implement standard security measures.<sup>120</sup> He also submitted four photos to the Copyright Office and asserted copyright infringement against Grindr, alleging that “the impersonating accounts have repeatedly used . . . photos for which Plaintiff holds the copyright, interspersed with images of male

111. “Revenge porn pioneer” Hunter Moore, who was separately convicted of a variety of felonies, see Dana Littlefield, *SD ‘Revenge Porn’ case a landmark*, SAN DIEGO UNION-TRIBUNE (Feb. 7, 2015), <http://www.sandiegouniontribune.com/sdut-revenge-porn-california-law-bollaert-2015feb07-story.html> [<https://perma.cc/8S7Y-Z4WZ>], has been found liable for trademark infringement, trademark dilution, and publicity rights violations, see *Passante v. Moore*, No. 8:12-cv-01866 (C.D. Cal. June 14, 2013).

112. 306 F. Supp. 3d 579 (S.D.N.Y. 2018).

113. *See id.* at 584–85.

114. *See id.* at 584–85.

115. *See* First Amended Complaint at ¶ 63, *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579 (S.D.N.Y. 2018) (No. 17-cv-932).

116. *See id.* at ¶¶ 59–64.

117. *See id.* at ¶ 61.

118. *See* 306 F. Supp. 3d at 585.

119. *See id.*

120. First Amended Complaint at ¶¶ 82–86, *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579 (S.D.N.Y. 2018) (No. 17-cv-932) (including detecting unauthorized photo use, implementing account verification protocols and geographic information protection, establishing community standards, and banning generic display names).

genitals purported to be Plaintiff's but which are not."<sup>121</sup> The court dismissed Herrick's tort claims with prejudice, finding that § 230 provided immunity.<sup>122</sup> The court, however, allowed Herrick leave to amend his copyright claim once the Copyright Office completed consideration of his applications.<sup>123</sup> Other "fake profile" cases similarly show the potential for utilizing IP to pursue legal action against intermediaries where § 230 would otherwise preclude relief.<sup>124</sup>

The revenge porn cases above vary greatly in terms of the nature of the defendant — vengeful ex-boyfriends, revenge porn businesses, hookup apps, Google — and in the combination of IP claims they assert. But they dovetail substantially in the harms they seek to redress. Rights holders are using IP to protect their careers, enhance physical safety, minimize intrusions into their homes and offices, and ultimately move forward with their lives, less fettered by past sexual decisions captured in smartphones and home recording devices. Under CDA § 230, Congress and courts have sharply limited the doctrinal toolkit available to those harmed via Internet platforms. Against this backdrop, IP can provide useful protections while keeping the U.S. intermediary liability structure largely intact.

## 2. Celebrity Sex Tapes

The unwanted dissemination of images, videos, and names in the previous Section were largely motivated by a desire to harm, harass, or seek vengeance against former lovers through sexually explicit depictions. In contrast, the unwanted disseminations in this Section

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121. *Id.* at ¶ 79.

122. 306 F. Supp. 3d at 588, 601.

123. *Id.* at 600–01; 17 U.S.C. § 411 (2012) (copyright registration is not required to obtain copyright protection in the United States but applying for registration is a prerequisite to actually bringing a lawsuit). Courts have split over whether copyright plaintiffs can file a lawsuit while their applications are pending or whether they need to wait until the registration is fully processed by the Copyright Office — either granted or rejected. *Compare* *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386–87 (5th Cir. 1984) (finding the Copyright Office's receipt of application suffices), *with* *Gaiman v. McFarlane*, 360 F.3d 644, 655 (7th Cir. 2004) (requiring an application to register must be filed, and either granted or refused, before suit). *See also* *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 856 F.3d 1338 (11th Cir. 2017), *cert. granted*, 138 S. Ct. 2707 (U.S. June 28, 2018) (No. 17-571).

124. In *Doe v. Friendfinder*, the plaintiff sued AdultFriendFinder, which billed itself as "the World's Largest SEX and SWINGER Personal Community," after she was alerted of a profile on the website that used her identifying information. 540 F. Supp. 2d 288, 291–92 (D.N.H. 2008). The court dismissed six of plaintiff's tort claims under the CDA because they were premised on AdultFriendFinder's publication or facilitation of third-party content, but it allowed plaintiff to proceed with her right of publicity and Lanham Act claims. *Id.* at 297, 304–05.

have an additional catalyst: money. In the past two decades, there has been an explosion of voyeuristic interest in the sex lives of celebrities, and the seemingly constant leaks of naked selfies and sex tapes — from Kim Kardashian<sup>125</sup> to the various Fappening<sup>126</sup> — have driven eyeballs to lucrative websites seeking to capitalize on such voyeurism. Even though celebrities may give up a substantial degree of day-to-day privacy, the commercially motivated dissemination of celebrities' sexual imagery can produce many of the same impacts as revenge porn: <sup>127</sup> a deep sense of violation, constant paranoia, disrupted relationships, limits on professional opportunities, and a sense of sexual shaming, particularly for women.<sup>128</sup>

IP can be an effective tool for celebrities to address these concerns and to limit the viral spread of sexual imagery. Numerous celebrities — including Emma Watson, Lindsey Vonn, and Tiger Woods — recently have sued or threatened to sue websites that have hosted nude images that were hacked from their phones or iCloud accounts.<sup>129</sup> Watson, for example, obtained the copyright in a topless photo posted on the notorious website *Celebrity Jihad*, and she was able to get the photo “promptly” removed with a demand letter.<sup>130</sup> Remarkably, even though the website is one of the primary repositories of hacked photos, prominent sexual privacy attorney

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125. Lorenzo Benet, *Kim Kardashian Sues Over Sex Tape*, PEOPLE, (Feb. 21, 2007), <http://people.com/celebrity/kim-kardashian-sues-over-sex-tape> [<https://perma.cc/M8FG-AJTC>].

126. Jason Murdock, *What is the Fappening? A Guide to the Nude Photo Scandal that Shook the Celebrity World*, INT'L BUS. TIMES, (Mar. 16, 2017), <http://www.ibtimes.co.uk/what-fappening-guide-nude-photo-scandal-that-shook-celebrity-world-1611999> [<https://perma.cc/Y4ZU-8DFT>]; Aditya Tiwari, *Fappening 3.0 Continues: Private Pictures of Dakota Johnson and Nicole Scherzinger Leaked*, FOSSBYTES (Aug. 24, 2017), <https://fossbytes.com/fappening-3-0-private-pictures-dakota-johnson-nicole-scherzinger-leak> [<https://perma.cc/PQP4-LH97>].

127. See, e.g., Raisa Bruner, *'I Feel Like I Got Gang-Banged.'* Jennifer Lawrence Opens Up About Nude Photo Hack, TIME (Nov. 21, 2017), <http://time.com/5033679/jennifer-lawrence-nude-hack-icloud-fappening> [<https://perma.cc/78LZ-895R>].

128. See Marlow Stern, *A Fappening Victim Speaks Out: Teresa Palmer on the Celebrity Nude Photo Hack*, DAILY BEAST (Feb. 5, 2015), <https://www.thedailybeast.com/a-fappening-victim-speaks-out-teresa-palmer-on-the-celebrity-nude-photo-hack> [<https://perma.cc/D6NC-V9KH>] (explaining the prevalence of female victims is essentially personal attacks and shaming of women).

129. See Teresa Lo, *Emma Watson Threatens to Sue Celebrity Website for Posting Nude Photo*, JDJOURNAL (Sept. 20, 2016), <https://www.jdjournal.com/2016/09/20/emma-watson-threatens-to-sue-celebrity-website-for-posting-nude-photo> [<https://perma.cc/36FL-ENTM>]; Andrew Blake, *Tiger Woods, Lindsey Vonn, Threaten Lawsuits After Nude Photos Surface on Celeb Jihad Website*, WASH. TIMES (Aug. 22, 2017), <http://www.washingtontimes.com/news/2017/aug/22/tiger-woods-lindsey-vonn-threaten-lawsuits-after-n> [<https://perma.cc/YHWS-RR3R>].

130. Lo, *supra* note 129.

Carrie Goldberg has observed that Celebrity Jihad “is very responsive to our takedown demands.”<sup>131</sup>

Following a large leak of nude iCloud photos in 2014, an attorney representing dozens of female celebrities threatened to sue Google for failing to expeditiously remove links to infringing photos, as required under the Digital Millennium Copyright Act.<sup>132</sup> The demand letter accused Google of “making millions and profiting from the victimization of women” and mused that “if your wives, daughters, or relatives were the victims of such blatant violations of basic human rights, surely you would take appropriate action.”<sup>133</sup> Google has since substantially bolstered its processes for removing hacked nude photos and revenge porn from its search products.<sup>134</sup>

Before the most recent onslaught of nude images, several other celebrities also used IP to stem the distribution of sex tapes. For example, in 2009, Jennifer Lopez used publicity rights to stop the release of hotel room footage during her first honeymoon.<sup>135</sup> Similarly, in 2005 Colin Farrell used publicity rights to block a video he made with his ex-girlfriend from being posted on malecelebrities.com.<sup>136</sup> And in 2006, Kid Rock used trademark and publicity rights to take down the website kidrocksextape.com, which contained a video of him, Creed lead singer Scott Stapp, and four women having sex in a tour bus.<sup>137</sup> Stapp brought a similar lawsuit to halt the website scottstappsextape.com.<sup>138</sup>

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131. Carrie A. Goldberg (@cagoldberglaw), TWITTER (Aug. 24, 2017, 8:12 AM), <https://twitter.com/cagoldberglaw/status/900737560460374021> [<https://perma.cc/AQ5H-FXGR>].

132. See Eriq Gardner, *Celebrities Threaten Google with \$100 Million Lawsuit for “Facilitating” Hacked Nude Photo*, HOLLYWOOD REP. (Oct. 2, 2014), <http://www.hollywoodreporter.com/thr-esq/celebrities-threaten-google-100-million-737544> [<https://perma.cc/J9HQ-NLHJ>]; 17 U.S.C. § 512(c) (2018).

133. Gardner, *supra* note 132, Jim Vassallo, *Google Responds to Lawsuit Threat Regarding Nude Photo Leak*, JDJOURNAL (Oct. 3, 2014), <https://www.jdjournal.com/2014/10/03/google-responds-to-lawsuit-threat-regarding-nude-photo-leak> [<https://perma.cc/YLZ7-U96J>].

134. See Jeff J. Roberts, *Google to Remove “Revenge Porn” Links at Victims’ Request*, FORTUNE (June 19, 2015), <http://fortune.com/2015/06/19/google-revenge-porn-removal> [<https://perma.cc/975N-64LG>].

135. See Eriq Gardner, *Jennifer Lopez Sex Tape Update: TRO Granted, But This Isn’t Over*, HOLLYWOOD REP. (Nov. 10, 2009), <http://reporter.blogs.com/thresq/2009/11/jennifer-lopez-sex-tape.html> [<https://perma.cc/ZQX4-5CFD>].

136. See Stephen Silverman, *Colin Gets Restraining Order over Sex Tape*, PEOPLE (July 20, 2005), <http://people.com/celebrity/colin-gets-restraining-order-over-sex-tape> [<https://perma.cc/GM8M-RF6Y>].

137. See *Kid Rock Sues to Block Sale of Sex Tape*, BILLBOARD (Feb. 22, 2006), <https://www.billboard.com/articles/news/59628/kid-rock-sues-to-block-sale-of-sex-tape> [<https://perma.cc/SL7R-AM9K>]; Natalie Finn, *Stapp Settles Lawsuit, Scuttles Sex Tape*, E!

Although these and undoubtedly many other examples show that IP assertions can be practically quite effective in forcing websites to remove sexual images or to force a quick settlement, there is very little case law actually grappling with whether IP claims may function to protect celebrities' sexual autonomy. The two highest profile cases to do so, reveal the potential precariousness of such nontraditional claims within IP jurisprudence, and they show that judges may be reluctant to endorse the de facto utility of IP in halting the dissemination of sexually explicit images.

Terry Bollea's — also known as Hulk Hogan — lawsuit against the now-defunct website Gawker, perhaps best-known for its eventual \$140 million jury verdict and its secret funding by billionaire investor Peter Thiel,<sup>139</sup> has an important IP backstory. Gawker posted a minute-and-a-half clip of Bollea,<sup>140</sup> allegedly fully naked, receiving oral sex, and having sexual intercourse.<sup>141</sup> At least four million people allegedly viewed the clip.<sup>142</sup> Bollea subsequently obtained copyright in the secretly recorded video from its author, and sued Gawker for copyright infringement, right of publicity violations, and a variety of tort claims.<sup>143</sup> The district court denied his request for a preliminary injunction, noting there was “no evidence demonstrating that he will suffer irreparable harm *in the copyright sense* absent a preliminary injunction,”<sup>144</sup> since it was quite likely that Bollea's sole purpose of recovering the copyrighted video was to destroy rather than to publish it in the future.<sup>145</sup> In other words, if Bollea wished to stop third parties from disseminating his copyrighted material, he must be motivated by a desire to reap the commercial rewards of disseminating that material.

In contrast, musician Bret Michaels and actress Pamela Anderson Lee were able to dodge this privacy pitfall. In 1998, Michaels brought an action against Internet Entertainment Group (“IEG”) alleging

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NEWS (Apr. 2, 2007), <https://www.eonline.com/news/54797/stapp-settles-lawsuit-scuttles-sex-tape> [<https://perma.cc/454N-E8VG>].

138. Finn, *supra* note 137.

139. Andrew Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker*, N.Y. TIMES (May 25, 2016), <https://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html> [<https://perma.cc/Q9RL-TQTW>].

140. *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1327 (M.D. Fla. 2012).

141. Plaintiff's Response to Defendants' Motion to Dismiss at 2–3, *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325 (M.D. Fla. Dec. 24, 2012) (No. 8:12-cv-02348).

142. *See id.*

143. *See* 913 F. Supp. 2d at 1327.

144. *Id.* at 1329 (emphasis added).

145. *See id.* at 1330.



copyright infringement, invasion of privacy, and publicity rights violations based on IEG's attempts to distribute a sex tape that Michaels and Lee had filmed of themselves.<sup>146</sup> The court issued a preliminary injunction, noting that "distribution of the Tape on the internet would conflict with the plaintiffs' exclusive rights to distribute copies of the tape to the public" should they ever choose to reap them.<sup>147</sup> The court observed that because users can easily copy and transmit images viewed on web sites, these segments would propagate quickly through the Internet, saturating the potential market for the plaintiffs' copyrighted work.<sup>148</sup>

When sex and commerce collide, IP provides a valuable tool for stopping third parties from profiting off celebrities' sex lives and naked bodies. But the continued insistence by some courts that copyright law is fundamentally about market exploitation means that celebrities may need to dance a somewhat disingenuous dance. They must insist they are public figures with commercially valuable personas who have the exclusive rights to reap the financial rewards of works they have authored or in which they are featured. But if they fully let go of market and economic incentives — and are entirely transparent about their true motivations — they may be out of luck.

### 3. Other Intersections of IP and Sexual Autonomy

Although the vast majority of disputes involving the intersection of IP and sexual autonomy involve revenge porn, celebrity sex tapes, and photo hacks, there are a few other scenarios in which IP may facilitate sexual autonomy in a digitally networked world. For example, disputes involving celebrity sex tapes implicate everyday people caught in the middle between celebrities and the distributors who seek to profit from them. In the Kid Rock and Scott Stapp sex tape dispute, one of the women in the video filed a publicity rights lawsuit against Stapp and the putative distributors of the film.<sup>149</sup> In another publicity rights lawsuit, Lastonia Leviston sued rapper 50 Cent for posting a sexually explicit video of her on his website as part of his "ongoing rap war" with Rick Ross.<sup>150</sup> Ross and Leviston had a child together before Ross was famous, and 50 Cent wanted to

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146. See *Michaels v. Internet Entm't Grp., Inc.*, 5 F. Supp. 2d 823, 828–31 (C.D. Cal. 1998).

147. *Id.* at 830–31, 836.

148. See *id.* at 836.

149. See Complaint, *Doe v. World Wide Red Light Dist.*, No. 2006-0040560CA-01 (Fla. Cir. Ct. Mar. 2, 2006).

150. *Leviston v. Jackson*, 43 Misc. 3d 229, 231 (N.Y. Sup. Ct. 2013).

humiliate Ross by exposing his ex-girlfriend as a “call girl.”<sup>151</sup> 50 Cent was ordered to pay \$7 million to Leviston, including \$2.5 million for publicity rights violations.<sup>152</sup> Both of these women were able to use publicity rights to assert their autonomy and sexual privacy in the midst of disputes between much more famous, wealthy, and powerful actors.

Another scenario in which IP and sexual autonomy may collide involves vacation photos that make their way back to an individual’s hometown and workplace. For example, in *Bosley v. WildWetT.com*,<sup>153</sup> an Ohio news reporter participated in a wet t-shirt contest while she was on vacation in Florida.<sup>154</sup> Videos and images of the “naked anchorwoman” went viral online, causing her employer to request that she resign and preventing her from obtaining other employment in the news field.<sup>155</sup> The court issued an injunction against several websites who were commercially distributing the videos and images,<sup>156</sup> further explaining that the plaintiff’s appearance in a public event did not automatically imply she relinquished all aspects of her privacy, including her right to be free from the appropriation of her persona for another’s gain.<sup>157</sup> However, she was back in court again several years later when Hustler Magazine published the photos in a “Hot News Babes” segment.<sup>158</sup> This time, she obtained a copyright assignment from the photographer and sued Hustler Magazine for copyright infringement.<sup>159</sup> The court awarded her \$268,000 in damages and attorney’s fees, finding ample evidence of a market for Bosley’s photograph, that defendants’ use directly competed for that market share, and that it was immaterial whether plaintiff currently desired to exploit the market.<sup>160</sup> Bosley’s saga is not the only incident where IP has been used to minimize the impact of racy vacation photos.<sup>161</sup>

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151. *Id.* at 232.

152. *See id.* at 237 (finding that 50 Cent used the ongoing rap war with Ross to generate interest in himself and to attract viewers, which qualified as a trade purpose as required under New York’s publicity rights statute).

153. 310 F. Supp. 2d 914 (N.D. Ohio 2004).

154. *See id.* at 917.

155. *See id.* at 918.

156. *See id.* at 936.

157. *See id.* at 932.

158. *Balsley v. LFP, Inc.*, 691 F.3d 747 (6th Cir. 2012).

159. *See id.* at 754.

160. *See id.* at 757, 761.

161. *See, e.g., Topheavy v. Doe*, No. 03-05-00022-CV, 2005 Tex. App. LEXIS 6462, at \*1–5 (Tex. App. Aug. 11, 2005) (affirming preliminary injunction where defendant incorporated topless spring break photos of plaintiff in its adult trivia game, giving rise to a misappropriation of likeness claim).

Sexuality is increasingly mediated by digital networks and their associated recording technologies, thus creating both new avenues for sexual exploration and an extremely diverse set of sexual vulnerabilities. The disputes in this Section demonstrate that such vulnerabilities can be experienced by nearly anyone: women, men, LGBT people, celebrities, and people of all different socioeconomic statuses. And to the extent that these vulnerabilities implicate the images, names, and likenesses protected by IP, IP in turn has evolved, whether intentionally or not, into an important part of the legal regulation of sexuality.

### *B. Death, Mourning, and Legacy*

Many of the same cultural and technological changes that have embroiled IP in contemporary disputes concerning sexual autonomy have also implicated IP in another typically private human experience: death. For both celebrities and everyday individuals, death and mourning increasingly are no longer localized experiences; the continued circulation of images, videos, and sounds representing the decedent increasingly means that physical death does not equate with social absence. The digital archive left behind by everyday social media users — tweets, posts, photos, YouTube videos — can be circulated and virtually preserved forever, providing a degree of immortality previously only available to public figures and celebrity artists. With respect to celebrities, their deaths present new opportunities for fans to participate in collective mourning, or to share, rework, or comment on the famous person's life work, exponentially more so in today's social media environment. As much as the psychology of mourning may continue to crave privacy and solitude, in reality, social media and celebrity cultures increasingly push mourning into a shared public activity overseen by IP laws.<sup>162</sup> A person's legacy is increasingly bound up in the continued circulation of IP-protected subject matter, and the legal ground rules for copying such subject matter implicates far more than profit streams for rights holders.<sup>163</sup> They implicate questions of mourning, family privacy, and the ongoing emotional bonds between the living and the deceased.

IP laws generally place initial decision-making authority over a decedent's legacy in the hands of family and friends who inherit copyright, trademark, and publicity rights. As a result, IP laws are often used by successor rights holders not just for financial reward but

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162. See Gilden, *IP, R.I.P.*, *supra* note 10, at 641.

163. See *id.* at 642.

also to ensure dignified representations of the deceased and respect for the family's often painful loss. As with circumstances surrounding sexual autonomy, in the postmortem context IP laws are doing a wide range of important cultural work that cannot be assimilated into traditional economic justifications or moral rights theories rooted in authorship or intellectual labor. Family members assert IP not just as surrogate decision makers for the absent creator — as moral rights theories might arguably allow — but also as individuals with their own complex identities and attachments.<sup>164</sup> Just as traditional IP theory has had little to say about sexual autonomy, it has had little to say about mourning, family ties, and continuing bonds between the living and the deceased. But in practice, IP — in its varied, overlapping forms — is used to protect the intimate connections between the living and the deceased.

Social media platforms have enabled deceased individuals to be virtually resurrected without recognition and without consultation. In such moments, IP can be a valuable tool for surviving family members seeking proper recognition for their loved one. For example, in *Estate of Barré v. Carter*,<sup>165</sup> Beyoncé sampled two YouTube videos of Anthony Barré — also known as Messy Mya — a queer rapper and performance artist who was murdered in New Orleans in 2012. Barré's estate asserted that his voice and several distinctive phrases appeared in the opening of Beyoncé's hit song "Formation," her "Lemonade" video album, her world tour, and her Super Bowl halftime performance.<sup>166</sup> The estate further alleged that Beyoncé and her co-producers never sought a license or publicly recognized Barré's contribution,<sup>167</sup> and his sister Angel, his sole heir, sued for copyright and trademark infringement.<sup>168</sup> In doing so, Angel leaned heavily on themes of mourning, recognition, and exploitation: "'Formation' opens with the sound of death, of memory: a sample from Messy Mya . . . . It is simply a fact that 'Formation' and the 'Lemonade' album and video are exploitive of his voice, music, lyrics, reputation, and his violent tragic death."<sup>169</sup>

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164. *See id.* at 648.

165. 272 F. Supp. 3d 906 (E.D. La. 2017).

166. *See id.* at 912.

167. *See id.* at 913.

168. *See id.* at 912–13.

169. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 5, *Estate of Barré v. Carter*, 272 F. Supp. 3d 906 (E.D. La. 2017) (No. 2:17-cv-01057); *see also id.* at 6 ("[T]he defendants not only exploited his word, his voice, his life as an MC of New Orleans street music, but also his death by including . . . the same streets that he walked in the YouTube videos and where 'his life was cut short when he was gunned down.'").

Before the case ultimately settled,<sup>170</sup> the district court denied the defendants' motion to dismiss.<sup>171</sup> The estate had plausibly alleged that the use of the Messy Mya clips "used unmodified clips without adding anything new,"<sup>172</sup> notwithstanding defendants' argument that they used the audio from the YouTube videos as the "raw material" in the creation of a music video for a song about black Southern resilience.<sup>173</sup> Although the court noted that defendants deprived the estate of substantial revenues that would come from express attribution of Messy Mya,<sup>174</sup> important questions of death, dignity, and recognition linger just below the surface in the *Barré* case.

Numerous other heirs have similarly tried to use IP to ensure that the contributions of a deceased loved one have not been erased, though with widely varying degrees of success.<sup>175</sup> For example, in *Estate of Smith v. Cash Money Records, Inc.*,<sup>176</sup> the plaintiffs sued rap artist Drake for sampling deceased jazz musician's Jimmy Smith's spoken-word recording about the superiority of jazz to other forms of music.<sup>177</sup> Pushing back against Drake's argument that he was making a fair use "commentary" on Smith's work, the estate emphasized that Drake did not identify Jimmy Smith in a way someone would realize that a "comment" was being attempted.<sup>178</sup> The court ultimately found fair use, observing that Drake used the copyrighted work as raw

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170. Julie Zerbo, *Beyoncé Settles One Lawsuit, Gets Hit With Another Over 'Formation'*, FASHION LAW (Jan. 23, 2018) <http://www.thefashionlaw.com/home/beyonce-settles-one-lawsuit-gets-hit-with-another-over-formation> [<https://perma.cc/4CUA-U45P>].

171. See 272 F. Supp. 3d at 911.

172. *Id.* at 933.

173. Motion to Dismiss First Amended Complaint at 10, Estate of Anthony Barré v. Knowles-Carter, 272 F. Supp. 3d 906 (E.D. La. 2017) (No. 2:17-cv-01057).

174. 272 F. Supp. 3d at 944.

175. A jury absolved Led Zeppelin of infringement in the *Stairway to Heaven* litigation. See Kory Grow, *Led Zeppelin Win in 'Stairway to Heaven Trial'*, ROLLING STONE (June 23, 2016), <http://www.rollingstone.com/music/news/led-zeppelin-prevail-in-stairway-to-heaven-lawsuit-20160623> [<https://perma.cc/MN8G-4X8D>]. A jury found liability in the Marvin Gaye *Blurred Lines* litigation. See Eriq Gardner, *'Blurred Lines' Jury Orders Robin Thicke and Pharrell Williams to Pay \$7.4 Million*, HOLLYWOOD REP. (Mar. 10, 2015), <https://www.hollywoodreporter.com/thr-esq/blurred-lines-jury-orders-robin-779445> [<https://perma.cc/T73V-N3TC>]. The judge dismissed the complaint in *Chase* due to insufficient renewal of the copyright in 1964. See Jonathan Stempel, *Lawsuit Claiming 'Big Bang Theory' Stole 'Soft Kitty' is Dismissed*, REUTERS (Mar. 29, 2017), <https://www.reuters.com/article/us-television-bigbangtheory/lawsuit-claiming-big-bang-theory-stole-soft-kitty-is-dismissed-idUSKBN170304> [<https://perma.cc/CR4P-ARMW>].

176. 253 F. Supp. 3d 737 (S.D.N.Y. 2017).

177. See *id.* at 742–44.

178. Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment Dismissing the Complaint at 14–15, Estate of Smith v. Cash Money Records, Inc., 253 F. Supp. 3d 737 (S.D.N.Y. 2017) (No. 1:14-cv-02703).

material in furtherance of creative objectives.<sup>179</sup> Although the “rawness” of Drake’s use was sufficient to insulate him from copyright liability, the invisibility of Smith’s raw material was deeply enmeshed in Smith’s family’s motivations for asserting their inherited IP.

Related to the desire for recognition of the deceased is a desire to honor their memory and at least symbolically correct the injustices they suffered.<sup>180</sup> In this vein, IP claims can be used as a way of vindicating the mistreatment of a family member received during their lifetime. For example, Connie Brooks brought a right of publicity claim against Topps for releasing a baseball card using the image of her father, James “Cool Papa” Bell, without authorization.<sup>181</sup> Bell played, managed, coached, and scouted for the Negro Leagues from 1922 to 1950, and he was inducted into the Baseball Hall of Fame in 1974.<sup>182</sup> Brooks stated that her father nonetheless subsequently worked twenty-two years as a custodian, emphasizing that her father “endured tremendous injustices during his career and . . . refused to let racism or segregation discourage him.”<sup>183</sup> Particularly in the context of African-Americans unable to achieve equal prosperity for their successes, the court recognized that “the right of publicity protects a person from losing the benefit of his work.”<sup>184</sup> Similarly, blues singer Bessie Smith’s heirs brought copyright and right of publicity claims against Columbia Records, alleging that its licensing arrangements with Smith reflected systemic racial discrimination and took advantage of Smith’s illiteracy and ignorance of financial matters.<sup>185</sup> Through inheriting property rights in a family member’s creative work and in the commercializable aspects of their identity, estates can use the legal system to push back against some of the socioeconomic forces that negatively impacted those family members’ lives and left behind a legacy of mistreatment.

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179. See 253 F. Supp. 3d at 749.

180. See Patrick R. Goold, *Corrective Justice and Copyright Infringement*, 16 VAND. J. ENT. & TECH. L. 251, 254–55 (2014).

181. Brooks *ex rel.* Estate of Bell v. Topps Company, Inc., No. 06-CV-2359, 2007 U.S. Dist. LEXIS 94036, at \*8 (S.D.N.Y. Dec. 21, 2007).

182. See *id.* at \*2.

183. Declaration of Connie Brooks in Opposition to Defendants’ Motion for Summary Judgment at 2–3, Brooks *ex rel.* Estate of Bell v. Topps Company, Inc., No. 06-CV-2359, 2007 U.S. Dist. LEXIS 94036 (S.D.N.Y. Dec. 21, 2007).

184. Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment at 14, Brooks *ex rel.* Estate of Bell v. Topps Company, Inc., No. 06-CV-2359, 2007 U.S. Dist. LEXIS 94036 (S.D.N.Y. Dec. 21, 2007).

185. *Gee v. CBS, Inc.*, 471 F. Supp. 600, 632, 637 (E.D. Pa. 1979).

Numerous other heirs have connected their inheritance of IP with protection of their loved ones against exploitation or continued mistreatment. For example, Fred Astaire's widow needed to "go after" unauthorized uses of his likeness because he had "been taken advantage of all [his] life."<sup>186</sup> Jean-Michel Basquiat's father "tightly controlled" his son's work because he was concerned that people who took advantage of Jean-Michel's youth and loose life style would come up with groundless claims soon after his death.<sup>187</sup> Jack Kirby's children sued Marvel Comics because Kirby "worked in his basement with no contract, no financial security, and no employment benefits" to create Fantastic Four, Iron Man, Thor, X-Men, and other jewels of the Marvel universe.<sup>188</sup> The families of Jim Morrison and Notorious B.I.G. were outraged when Kendall and Kylie Jenner advertised \$125 t-shirts featuring their faces superimposed over the musical icons.<sup>189</sup> The Jenners backed down and apologized that the "designs were not well thought out."<sup>190</sup>

Postmortem IP can provide a valuable, continuing bond between the dead and the living, empowering successors to continue their loved one's vision and actively shape their cultural legacy.<sup>191</sup> Ross Bagdasarian Sr., created and popularized Alvin & the Chipmunks in the late 1950s to early 1960s, but died of a heart attack at the age of fifty-two in 1972.<sup>192</sup> His son, Ross Jr., decided to revive the Chipmunks in 1978, and made it his life work: "I didn't want the

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186. Mark Goodman, *Keeping the Flame*, PEOPLE (Feb. 22, 1993), <http://people.com/archive/keeping-the-flame-vol-39-no-7> [<https://perma.cc/A9QX-W2Y9>].

187. Grace Glueck, *The Basquiat Touch Survives the Artist in Shows and Courts*, N.Y. TIMES, July 22, 1991, at C13.

188. Reply Brief for Petitioners on Petition for Writ of Certiorari at 13, *Kirby v. Marvel Characters, Inc.*, 135 S. Ct. 42 (2014) (No. 13-1178).

189. Jason Newman, *The Doors Issue Cease-and-Desist Letter to Jenners over T-Shirts*, ROLLING STONE (June 29, 2017), <http://www.rollingstone.com/music/news/the-doors-issue-cease-and-desist-letter-to-jenners-over-t-shirts-w490497> [<https://perma.cc/5JFY-Q45T>].

190. *Id.*

191. This adherence to the decedent's vision can, of course, be taken to extremes, for example insisting that a play be cast only with white actors, see Michael Paulson, *A Black Actor in 'Virginia Woolf'? Not Happening, Albee Estate Says*, N.Y. TIMES (May 21, 2017), <https://www.nytimes.com/2017/05/21/theater/a-black-actor-in-virginia-woolf-not-happening-albee-estate-says.html> [<https://perma.cc/KJ79-WSRT>], or that licensees exclude all mention of homosexuality, see David D. Kirkpatrick, *A Writer's Tough Lesson in Birthin' a Parody*, N.Y. TIMES (Apr. 26, 2001), <http://www.nytimes.com/2001/04/26/books/a-writer-s-tough-lesson-in-birthin-a-parody.html> [<https://perma.cc/C85H-JCDZ>].

192. See Ryan Pearson, *Chipmunks Legacy is a Family Affair*, L.A. TIMES, (Dec. 21, 2007) <http://articles.latimes.com/2007/dec/21/entertainment/et-chipmunks21> [<https://perma.cc/QP3B-E73T>].

Chipmunks to pass away as suddenly as my dad did.”<sup>193</sup> For Ross, Jr., reviving the Chipmunks brand was a way of keeping his father and his creative legacy alive. When a partnership with Universal Studios broke down, Ross, Jr. and his wife Janice sued to prevent destruction of a family owned and operated business which took forty years of the family’s dedicated efforts.<sup>194</sup> Ross and Janice successfully reclaimed all rights to the Chipmunks. “For us, it was a custody battle . . . They finally realized, ‘OK, these two are really fighting for their kids.’”<sup>195</sup>

IP has enabled many other heirs to continue the life projects of their late family members.<sup>196</sup> Christopher Tolkien, J.R.R. Tolkien’s son, resigned from an Oxford professorship to continue his father’s excavations of Middle Earth — “a patrimony which has been his life’s work.”<sup>197</sup> This has involved carefully completing and releasing his father’s stories and suing to limit commercial knockoffs.<sup>198</sup> Gia Prima, the widow of swing musician Louis Prima, has dedicated herself to continuing her husband’s legacy — publishing unreleased works, limiting authorized uses by commercial entities like the Olive Garden, and suing Disney for *Jungle Book* royalties.<sup>199</sup> Janie Hendrix is the CEO of Experience Hendrix.<sup>200</sup> Tina Sinatra is the director of Frank

193. See *How I Built This with Guy Raz — The Chipmunks: Ross Bagdasarian Jr. & Janice Karman*, NAT’L PUB. RADIO (Sept. 18, 2017), <https://www.npr.org/templates/transcript/transcript.php?storyId=551231472> [<https://perma.cc/5W MK-L7Y3>].

194. Complaint at ¶ 1, *Bagdasarian Prods., LLC v. Universal Studios Artists, Ltd.*, No. BC236607 (Super. Ct. Cal. Sept. 11, 2000), 2000 WL 34483123.

195. Pearson, *supra* note 192.

196. Cf. Sean H. Williams, *Lost Life and Life Projects*, 87 IND. L.J. 1745, 1773–74 (2012) (arguing that giving the ability to pursue a decedent’s life project is a desirable remedy for wrongful death under relational corrective justice theory).

197. Raphaëlle Rérolle, *My Father’s “Eviscerated” Work — Son of Hobbit Scribe J.R.R. Tolkien Finally Speaks Out*, WORLD CRUNCH (Dec. 5, 2012), <http://www.worldcrunch.com/world-affairs/my-father039s-quot-eviscerated-quot-work-son-of-hobbit-scribe-jrr-tolkien-finally-speaks-out> [<https://perma.cc/JEK3-SNWD>].

198. See *id.*; see also Sopan Deb, *Tolkien Estate and Warner Bros. Settle Lawsuit Over Licensing*, N.Y. TIMES (July 3, 2017), <https://www.nytimes.com/2017/07/03/movies/tolkien-estate-and-warner-bros-settle-lawsuit-over-licensing.html> [<https://perma.cc/5J3B-KGPJ>].

199. See *Prima v. Darden Restaurants, Inc.*, 78 F. Supp. 2d 337, 337 (D.N.J. 2000); Keith Spera, *Louis Prima’s Legacy Was Incomplete Until 2002, When His Wife Reissued Long-Lost Songs*, NEW ORLEANS MUSIC NEWS (Oct. 13, 2002), [http://www.nola.com/music/index.ssf/2002/10/post\\_12.html](http://www.nola.com/music/index.ssf/2002/10/post_12.html) [<https://perma.cc/2UFK-ND LF>]; see also Mark Miester, *The Monkey vs. the Mouse*, GAMBIT (Aug. 20, 2001), [https://www.theadvocate.com/gambit/new\\_orleans/news/article\\_8f6466cc-cf6d-5c45-bcde-4f05484753d0.html](https://www.theadvocate.com/gambit/new_orleans/news/article_8f6466cc-cf6d-5c45-bcde-4f05484753d0.html) [<https://perma.cc/D2LL-5VWK>].

200. Harvey Kubernik, *The Guardian of Forever: An Interview with Janie Hendrix*, GOLDMINE (Apr. 28, 2010), <http://www.goldminemag.com/articles/the-guardian-of-forever-an-interview-with-janie-hendrix> [<https://perma.cc/73G2-Z3VD>].



Sinatra Enterprises.<sup>201</sup> In each of these cases, IP has given rise to intergenerational family businesses and a complex mix of a socio-emotional and economic rewards for surviving loved ones.<sup>202</sup> In many cases, the protective vigilance of surviving family members ultimately must give way to the free speech interests of the general public, but IP nonetheless cannot be disentangled from a family's complex emotional attachments to the past.

#### IV. TOWARDS A THEORY OF IP AS BOUNDARY MANAGEMENT

The traditional market protection justifications for IP thus fail to capture a broad range of contemporary IP disputes. A deluge of individuals has come forward and asserted IP rights in service of a wider range of emotional, cultural, and economic interests. One response to this disconnect between theory and practice — already embraced by some courts and scholars — might be to reject lawsuits driven by the emotional entanglements of sex and death. First, there are plenty of other areas of law that can address these concerns; second, IP laws should not be distorted to include concerns so peripheral to its foundational theories.<sup>203</sup> This Part challenges both of these responses. IP laws both fill important practical and jurisprudential gaps in the legal treatment of noneconomic interests and have some important advantages over other legal interventions. Moreover, a small, but growing, body of scholarship recognizes that IP law can and should facilitate cultural participation and human flourishing more broadly, both in granting and limiting the interests of rights holders.<sup>204</sup> Accordingly, rather than try and slot the above disputes into traditional utilitarian or deontological justifications for IP,<sup>205</sup> it embraces IP's demonstrated ability to effectively manage

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201. Andrew Gilden, *Sinatra's Mug and Postmortem Publicity Rights*, PRAWFSBLAWG (Dec. 11, 2015), <http://prawfsblawg.blogs.com/prawfsblawg/2015/12/sinatras-mug-and-postmortem-publicity-rights.html> [<https://perma.cc/W465-2QEE>].

202. See Shelly Kreiczer-Levy, *Property's Immortality*, 23 CARDOZO J.L. & GENDER 107, 108–09 (framing cultural artifacts as paths for continuity); see also Shelly Kreiczer-Levy, *Inheritance Legal Systems and the Intergenerational Bond*, 46 REAL PROP. TR. & EST. L.J. 495, 498 (2012) (explaining that the giver and receiver can stay connected through time through the continuity of property interest).

203. See Keller, *supra* note 43, at 22; Tushnet, *supra* note 12, at 241.

204. See, e.g., Brett M. Frischmann, *Capabilities, Spillovers, and Intellectual Progress: Toward a Human Flourishing Theory for Intellectual Property*, 14 REV. ECON. RES. ON COPYRIGHT ISSUES 1, 1–4 (2017).

205. See, e.g., Merges, *supra* note 25, at 687; ROBERTA KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 140–41 (2010).

social boundaries in the face of a diverse range of real-world vulnerabilities.

*A. Comparative Advantages of IP*

Given that IP laws are typically understood as shoring up economic interests of creators, what is it about IP rights that draws in both subjects of sexual imagery seeking to protect their autonomy as well as surviving family members seeking to reinforce their continuing bonds with the deceased? To the extent that these interests trigger questions of respecting privacy or creating legal obligations that respect other people's dignitary interests, there would appear to be other areas of law better tailored to these non-traditional IP interests. Why distort IP theory in order to achieve results that other areas of law should be perfectly comfortable providing? Although IP is not, and should not be, the sole vehicle for vindicating the interests discussed in Part III, this Subsection spells out a few of the comparative advantages of IP.

Particularly with respect to sexual privacy, the most common legal response to autonomy violations has been to deploy criminal laws. Over two-thirds of states and a number of municipalities have enacted laws that expressly criminalize nonconsensual disseminations of intimate imagery,<sup>206</sup> and a federal bill has received bipartisan support.<sup>207</sup> Although deterrence and punishment are appropriate in many of the revenge porn situations documented above, there is nonetheless reason to be at least somewhat wary of exclusive and expansive use of criminal laws in this context. As previous scholarship has shown, criminal law can be insensitive to the nuances and norms of online spaces, particularly sexual spaces.<sup>208</sup> Relying on criminal laws to address sexual harms requires relying on law enforcement to investigate the spaces in which such harms occur and to make decisions about which individuals to pursue, test, or nudge into violating the law. Such reliance can result in both under- and over-enforcement. Scholars such as Professors Mary Anne Franks and

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206. See *40 States + DC Now Have Revenge Porn Laws*, CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws> [<https://perma.cc/ZNM5-LRCT>].

207. ENOUGH Act, S. 2162, 115th Cong. (2017).

208. See Andrew Gilden, *Punishing Sexual Fantasy*, 58 WM. & MARY L. REV. 419, 422–23 (2016); see also Amy Zimmerman, *Sex Workers Fear for Their Future: How SESTA is Putting Many Prostitutes in Peril*, DAILY BEAST (Apr. 4, 2018), <https://www.thedailybeast.com/sex-workers-fear-for-their-future-how-sesta-is-putting-many-prostitutes-in-peril> [<https://perma.cc/JX9C-WKN7>].

Danielle Citron have shown that victims of revenge porn are frequently dismissed by law enforcement, who blame or shame them for appearing in sexual photos or videos.<sup>209</sup> On the other hand, criminal laws, particularly broadly or vaguely worded ones,<sup>210</sup> can empower law enforcement to helicopter into sexual contexts they do not understand — or are potentially hostile to — and make decisions that impact sexual minorities particularly negatively. For example, LGBT activists should be cautious of inviting law enforcement into spaces where naked images are shared regularly, as it may be difficult for state actors to distinguish the unconscionable activities underlying *Herrick v. Grindr* from other forms of sexual image-sharing that fall within the community's norms.

Compared with the statist, one-size-fits-all tendencies of criminal law, IP allows individuals to decide for themselves the proper boundaries of their sexual privacy. Individuals asserting IP rights in order to stop the spread of sexual imagery need not garner the sympathy of law enforcement and can instead make enforcement decisions themselves while fully immersed in the norms of the community in which the asserted harms are occurring. There are of course drawbacks of IP boundary management — it requires at the very least either: some knowledge of the applicable law; or the time and tenacity to lodge takedown requests and register works; or the financial resources to employ a lawyer. Moreover, IP enforcement can absolutely be abused and function as a tool for censorship against online speakers,<sup>211</sup> making it crucial that fair use and free speech defenses remain robust. But the consequences of an overly aggressive IP assertion may pale in comparison with overly aggressive law

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209. See Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 226 (2011). Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 366–67 (2014).

210. Arizona's criminal revenge porn statute, for example, has been struck down on First Amendment grounds, largely due to its overbreadth. See Miriam Wasser, *AZ Revenge Porn Law Not to Be Enforced, Says Federal Judge*, PHX. NEW TIMES (July 13, 2015), <http://www.phoenixnewtimes.com/news/az-revenge-porn-law-not-to-be-enforced-says-federal-judge-7486054> [<https://perma.cc/4MUJ-SGXC>].

211. See, e.g., Grant Gross, *Critics of DMCA Takedowns Flood Copyright Office with Thousands of Comments*, PCWORLD (Apr. 1, 2016), <https://www.pcworld.com/article/3050843/internet/critics-of-dmca-takedowns-flood-copyright-office-with-thousands-of-comments.html> [<https://perma.cc/PG99-VKWC>]; Sarah Jeong, *The Sunday Times' Absurd DMCA Takedown Notice is Part of a Larger Problem*, VERGE (June 18, 2015, 10:42 AM), <https://www.theverge.com/2015/6/18/8803571/sunday-times-intercept-greenwald-dmca-takedown> [<https://perma.cc/BHE3-VWCJ>]; Paul Sieminski, *Corporations Abusing Copyright Laws Are Ruining the Web for Everyone*, WIRED (Jan. 17, 2014), <https://www.wired.com/2014/01/internet-companies-care-fair-use> [<https://perma.cc/VM8T-JLXC>].

enforcement and its life-changing consequences for defendants. Particularly where the violation at issue does not indisputably and squarely map onto the prototypical revenge porn scenario, IP is an appealing supplement that places the onus on rights holders, who are at least arguably more attuned to surrounding norms, to police their own boundaries.

Compared to criminal laws, tort- or contract-based approaches to privacy, dignity, and autonomy concerns have the benefit of being initiated by those experiencing the harm in question. Nonetheless, these approaches are severely limited in their ability to capture the concerns raised by the disputes above. Tort and contract claims typically can only be brought by the individuals who are directly, or foreseeably harmed by the conduct at issue — proximate cause in tort; privity or third-party beneficiaries in contract.<sup>212</sup> And because tort and contract tend to be individualized, personal causes of action, they typically do not survive death and descend to heirs and devisees.<sup>213</sup>

IP rights, by contrast, generally can be transferred to and asserted by nearly anyone during life and after death, enabling a broader community of stakeholders to challenge unwanted distributions of images, sounds, and texts.<sup>214</sup> As shown in cases above involving sexual autonomy, one of the attributes of IP that makes it effective in controlling sexual imagery is its alienability — Catherine Bosley, Hulk Hogan, and Emma Watson, for example, were not the authors of the copyrighted works they sought to control, but they were able to negotiate assignments and assert their rights under the Copyright Act. Although alienability can be a tool for exploitation, unwanted commercialization,<sup>215</sup> and ultimately degradation of personhood,<sup>216</sup> it can nonetheless also facilitate assignees' interests in sexual autonomy and privacy by creating continuity between rights holders and

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212. See Sean H. Williams, *Gossip and Gore: A Ghoulish Journey into a Philosophical Thicket*, 116 MICH. L. REV. 1187, 1190 (2018).

213 For example, defamation causes of action do not descend to heirs; you cannot defame the dead. See generally DON HERZOG, DEFAMING THE DEAD (2017).

214. See Jennifer E. Rothman, *supra* note 17.

215. See Jennifer Rothman, *Only Robin Wright Should Own Robin Wright*, VOLOKH CONSPIRACY (May 9, 2018), <https://reason.com/volokh/2018/05/09/only-robin-wright-should-own-robin-wright> [<https://perma.cc/6F6R-3KHY>] (pointing out that transferability of IP can lead to transferring one's own identity to someone else who could block public appearances or exploit commercial opportunities).

216. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1855–57 (1987) (arguing that commodification of certain aspects of human life hinders a proper conception of personhood); see also Jessica Litman, *What We Don't See When We See Copyright as Property*, 77 CAMBRIDGE L.J. 536, 550 (2018) (“Our copyright system empowers publishers and record labels to structure licensing deals for their own benefit, since they own the copyrights, and set the terms and conditions for copyright licenses.”).

allowing initial rights holders to entrust others to protect them better than they may be able to protect themselves.<sup>217</sup> In the “big data” and social media contexts, personal information and content are already being commodified and sold, and IP allows commodified subjects to respond by reclaiming their own power to control the circulation of their cultural artifacts.<sup>218</sup> Also, unlike tort and contract rights, IP rights are *in rem*;<sup>219</sup> they generally are good as against the world, necessary characteristics when trying to address the viral spread of images across social media.

Another particularly compelling, and seemingly novel, example of such use of assignments involves transfers of copyright in child pornography.<sup>220</sup> When an individual is convicted of producing child pornography, prosecutors and victims’ advocates request that the defendant transfer their copyright interests in the offending images to the victim.<sup>221</sup> The transfer enables the victim “to utilize copyright protections to limit their distribution and to seek damages from both individuals and ISPs who play a role . . . in perpetuating her victimization.”<sup>222</sup> Such use of copyright runs expressly contrary to dominant economic incentives theory but nonetheless shows how this area of law can effectively respond to various forms of sexual violations involving the Internet and social media.

Lastly, IP imposes takedown duties on online intermediaries, while nonetheless avoiding some of the dangers of clawing back § 230 CDA and imposing general tort duties. The interplay between CDA immunities and IP liability, and the ultimate advantage of IP over tort liability, is perhaps illustrated best by the arguments set forth in *Herrick v. Grindr*. To support its product liability claims, the

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217. The rise of reputation management companies to address revenge porn, such as Leakserv and DMCA Defender, shows how IP can be used to facilitate sexual privacy. See LEAKSERV, <https://leakserv.com> [<https://perma.cc/R7FA-WE7M>]; DMCA DEFENDER, <http://dmcadefender.com/victim-of-revenge-porn> [<https://perma.cc/M4WV-PEMT>].

218. See Margaret Jane Radin & Madhavi Sunder, *The Subject and Object of Commodification*, in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 8, 14 (Martha M. Ertman & Joan C. Williams eds., 2005) (“[M]oral agents are not the mere victims of commodification and markets. Far from it, they can — and do — appropriate the chains that bind them.”); Madhavi Sunder, *Property in Personhood*, in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 164, 164–65 (Martha M. Ertman & Joan C. Williams eds., 2005).

219. See Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 102 (1997).

220. See Warren Binford et al., *Beyond Paroline: Ensuring Meaningful Remedies for Child Pornography Victims at Home and Abroad*, 35 CHILD. LEGAL RTS. J. 117, 153–54 (2015).

221. *Id.*

222. *Id.* at 154.

plaintiff alleged that Grindr enabled a “campaign of harassment” by failing to adopt a range of security protocols, such as facial recognition software and IP address tracking.<sup>223</sup> The court disagreed, suggesting such claim was merely another way to hold Grindr liable for failure to police or remove content.<sup>224</sup> While such features might make the platform “safer” for some users, it might make maintaining sexual privacy or comfortably exploring sexual fantasies more difficult for other users. There are many well-documented benefits for queer people to have anonymity in online spaces,<sup>225</sup> and a platform aimed at queer sexualities faces a difficult set of questions about how to balance anonymity for some vulnerable users with safety for others.<sup>226</sup> The IP exception to CDA immunities has the benefit of forcing intermediaries to respond to specific claims of harm by their users without eliminating the general flexibility to balance safety and privacy that the CDA otherwise provides.

Although the question of whether IP is property has long divided scholars, IP laws as currently constructed nonetheless have nearly all the hallmarks of property: alienable, descendible, divisible, good against the world, and tempered by both time and the material needs of third parties who come in contact with the resources in question. Non-IP property laws allow rights holders to use these qualities in service of a seemingly endless range of values, including autonomy, privacy, community, continuity, and financial well-being.<sup>227</sup> IP scholars have largely resisted such pluralism, but such resistance both discounts the plural values IP already serves and undermines its future value as a key legal response to emerging social vulnerabilities.

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223. *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 585 (S.D.N.Y. 2018).

224. *See id.* at 590.

225. *See, e.g.*, Edward Stein, *Queers Anonymous*, 38 HARV. C.R.-C.L. L. REV. 159 (2003).

226. For example, Grindr recently enabled users in countries often hostile to LGBT people (such as Egypt, Iran, or Lebanon) to change the standard Grindr app icon into another innocuous one so that it remains hidden to family, employers, or law enforcement. *See* David Hudson, *Grindr to Allow Users in Anti-Gay Countries to Change Grindr Icon on Their Phone to Keep Them Safe*, GAY STAR NEWS (Nov. 28, 2017), <https://www.gaystarnews.com/article/grindr-icon-anti-gay-countries> [<https://perma.cc/S8S4-CP4G>].

227. *See, e.g.*, Hanoch Dagan & Avihay Dorfman, *The Human Right to Private Property*, 18 THEORETICAL INQUIRIES L. 391, 392 (2017) (arguing that private property is crucial to people’s personal autonomy and to their relational equality); *Ark Land Co. v. Harper*, 599 S.E.2d 754, 761–62 (W. Va. 2004) (finding sales of inherited ancestor family home would harm “emotional interest” in the property).

*B. Normative Functions of IP*

The nontraditional IP assertions examined in this Article reveal a broad range of motivations, a diverse cast of rights holders and defendants, and a shifting mix of IP doctrines. Yet there are certain repeated, unifying themes that connect everyone from revenge porn victims to YouTube personalities to JLo to Biggie's mother. All of these individuals are using IP to assert autonomy and control over the representation of themselves and their families in the face of an economy and culture increasingly built off the widespread collection and dissemination of expressive content and personal information. Regardless of whether this social environment is making it more difficult to hide your sex life from your coworkers, or to keep pop superstars from making millions off your family, or to simply move quietly past the loss of a loved one, IP provides one of the precious few, widely obtainable opportunities to create some useful friction within emerging socioeconomic practices.<sup>228</sup>

IP laws accordingly can serve as a demand for recognition in the face of appropriation by much more powerful actors. In the disputes above, rights holders push back against the powerlessness and invisibility that accompany seeing yourself or someone you love showcased before the world without recognition, consultation, or compensation. Whether the defendant is Beyoncé, Google, or Grindr, IP rights are a reminder that the individuals captured in photographs, videos, and sound recordings are *not* "merely raw materials" ready for anyone's taking.<sup>229</sup> Even though a YouTube clip or a Facebook post or an Instagram photo can be copied, shared, and reworked simultaneously by millions of individuals around the world, there are nonetheless flesh-and-blood individuals behind these intermediated and commodified representations who are concretely impacted by their circulation.<sup>230</sup> Even with respect to celebrities and their families, IP rights can remind everyone that celebrities are real people with real autonomy interests who have families with complex, genuine, and

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228. See COHEN, *supra* note 8, at 1906 (arguing that privacy is crucial in fostering self-determination in a world of pervasive social shaping of subjectivity).

229. See Gilden, *Raw Materials*, *supra* note 65, at 358 (arguing fair use and free speech protections granted under IP laws can make cultural resources freely available to entities that can "cook" them in a "judicially appreciable way"); Julie E. Cohen, *The Biopolitical Public Domain: The Legal Construction of the Surveillance Economy*, 30 PHIL. & TECH. 213, 213 (2017) (arguing that contemporary practices of personal information processing constitute taking from a repository of raw materials in the public domain for particular types of productive activity).

230. See, e.g., Franks, *supra* note 209, at 227.

evolving emotional attachments to them.<sup>231</sup> Ultimately, and perhaps counterintuitively, a set of laws providing rights in intangibles can function as a broad reminder of the tangible, corporeal reality behind the image.<sup>232</sup>

As technology continues to find new ways of repackaging human experience, there undoubtedly will be new opportunities for powerful actors to use IP to their benefit and craft the cultural landscape. This possibility is captured in the *Estate of Barré v. Carter* litigation:

These parties are not economic equals. The case represents those who have received nothing for their creations versus those who have made millions, tens of millions and more using that work. It's all part of a sordid history of exploitation which should end. What's next; the use of an artist's words, music, voice and hologram?<sup>233</sup>

Improvements in CGI animation and video editing software already provide ample opportunities to exploit individuals' "words, music, voice, and hologram," entirely independently of whether that individual is even alive.<sup>234</sup> Against this backdrop, IP laws increasingly represent a refusal to be repackaged for the benefit of others. As our cultural lives increasingly become detached from physical presence and even human mortality, some degree of control over images, sounds, and texts becomes a precondition for control over our life stories. In this context, IP becomes inseparable from autonomy, self-definition, and identity-development.

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231. See Mark P. McKenna, *Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 229 (2005) (arguing all individuals, including celebrities, deserve protection against uses of their identities that implicate a legitimate interest in autonomous self-definition).

232. See James Y. Stern, *Intellectual Property and the Myth of Nonrivalry 7* (working paper) (manuscript on file with author) (arguing that information goods are not intrinsically less rivalrous than physical objects and that they are capable of generating the kind of conflicts that property systems exist to mediate).

233. Surreply in Opposition to Motion to Dismiss at 6, *Barre v Knowles-Carter*, Case No. 17-cv-1057 (E.D. La. Jun. 12, 2017).

234. See, e.g., Olivia Solon, *The Future of Fake News: Don't Believe Everything You Read, See or Hear*, GUARDIAN (July 26, 2017), <https://www.theguardian.com/technology/2017/jul/26/fake-news-obama-video-trump-face2face-doctored-content> [https://perma.cc/5CF9-QCFC] (demonstrating new audio and video editing technologies that can match facial movements of someone with a completely different set of words).



IP ownership, however, is not typically associated with identity development or cultural participation.<sup>235</sup> If anything, IP ownership is most often associated with *limiting* social discourse surrounding brands and creative works that might be deeply bound up in identity and community building.<sup>236</sup> These critiques are deeply important and largely spot-on, but at the same time the disputes above show that the same set of tools used to stifle critique and outsider speech can be used by marginalized groups to provide discursive space for their own meaningful cultural participation.<sup>237</sup> Rather than silencing marginalized groups, IP provides recognition, and with recognition comes a voice.<sup>238</sup>

Outside the copyright and trademark context, the notion that IP ownership can be a vehicle for identity development does have some scholarly pedigree, particularly with the right of publicity. For example, Professor Mark McKenna has connected rights to control commercial use of name and likeness with the public representation of the self, and the lived experience of identity-development.<sup>239</sup> Professor Jennifer Rothman argues that publicity rights are foundationally about an autonomy interest in one's public representation, and that they can effectively prevent individuals from becoming "puppets that can be used to speak others' words and messages."<sup>240</sup>

Although this body of scholarship does capture the motivations of many of the publicity rights disputes discussed in Part III, those disputes illustrate the need for a broader conception of identity-development in IP. First, autonomy and dignity interests transcend the doctrinal barriers between copyright, trademark, and publicity rights; rights holders will use whatever combination of IP interests they can

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235. A prominent exception in the United States is the Visual Artist Rights Act, which provides a limited set of moral rights to visual artists. *See* 17 U.S.C. § 106A (2012).

236. *See* Sonia Katyal, *Privacy vs. Piracy*, 7 *YALE J.L. & TECH.* 222, 224 (2004) (arguing that property rights in cyberspace can have "deleterious implications for privacy, anonymity, and freedom of expression").

237. *See* Madhavi Sunder, *IP3*, 59 *STAN. L. REV.* 257, 321 (2006) (arguing that modern battles for freedom and equality will concern access to discursive space beyond the physical space); HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* 46 (2011) (explaining how the decision-making power that often flows from ownership of private property can be particularly important to the nonorganized public or of a marginal group with minor political clout).

238. *See, e.g.*, Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM* 25, 36 (Amy Gutmann ed., 1994) (equating withholding of recognition to oppression).

239. *See* McKenna, *supra* note 231, at 229 (arguing that unauthorized uses of a person's identity in connection with products or services threaten to recreate the perception of the individual in an unwarranted way).

240. *See* ROTHMAN, *supra* note 86, at 111.

to gain control over a damaging image, video, or text. This does not mean that courts should dismantle these barriers and embrace the mush of undifferentiated IP, but it does mean that the distinct narratives we attach to each silo just do not map onto what's happening on the ground. Second, many of the other publicity rights disputes are not so much about *self*-representation, but about public representations of *other people* to whom the rights holder maintains an important emotional attachment.<sup>241</sup> Identity development, and the related notion of life narrative,<sup>242</sup> is deeply tied up in family and community; as a result, there is a constellation of individuals whose sense of self is implicated by the use of a certain name or likeness. To the extent that IP theory does stress autonomy and identity, the disputes above require looking at those issues through a wider lens.

The most robust embrace of IP ownership as a pathway to autonomy, community, equality, and cultural participation has emerged in the context of IP protections for indigenous peoples and racial minorities. Professor Madhavi Sunder's work has embraced the "affirmative" use of IP rights by traditional communities, such as by Indian artisans seeking protections for Darjeeling tea and Mysore silk, Native American tribes seeking protection of their spiritual symbols, and Australian Aboriginals seeking collective copyrights in their artistic work.<sup>243</sup> Sunder observes that these groups' IP claims utilize the narrative of identity politics, cultural survival, and human rights,<sup>244</sup> mirroring how they assert IP rights for recognition and redistribution both for individual creators and the communities in which they are situated.<sup>245</sup> Professors Kristen Carpenter, Sonia Katyal, and Angela Riley similarly embrace IP ownership for indigenous cultural groups, conceiving of such rights as a form of "property in peoplehood."<sup>246</sup> IP can be a tool for reshaping prejudicial public representations of certain groups, for example, where a Native

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241. Professor Rothman makes some accommodations for "certain living heirs" to control the public representation of a deceased individual. *Id.* at 136.

242. See, e.g., Phillip L. Hammack & Erin Toolis, *Narrative and the Social Construction of Adulthood*, 145 *NEW DIRECTIONS CHILD & ADOLESCENT DEV.* 43, 43 (2014).

243. See Sunder, *IP3*, *supra* note 237, at 271; see also Sunder, *Property in Personhood*, *supra* note 218, at 165.

244. See Sunder, *IP3*, *supra* note 237, at 272.

245. See *id.* at 273, 314–15; see also J. Janewa Osei-Tutu, *Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus*, 20 *VAND. J. ENT. & TECH. L.* 207, 248 (2017) (claiming that a human rights approach recognizes the need for individuals and the community to flourish).

246. Kristen A. Carpenter et al., *In Defense of Property*, 118 *YALE L.J.* 1022, 1103 (2009).

American child “recognizes that using the Indian race as a mascot is a badge of inferiority” and does not see any other race similarly caricatured on a daily basis.<sup>247</sup> Professor K.J. Greene has critiqued the historical failure of the copyright system to protect the work of black artists, connecting this lack of recognition and compensation to “the systemic subordination based on race that characterized most of U.S. history.”<sup>248</sup> For these scholars, the rights of exclusion afforded by IP are crucial steps toward cultural inclusion, fair representation, and equality.

Contemporary IP disputes emphasize that this desire for recognition, community, cultural participation, and dignified representation is even more universal.<sup>249</sup> Although vulnerabilities in social media environments certainly track social hierarchies more broadly,<sup>250</sup> vulnerabilities are nonetheless experienced across the lines of race, gender, class, and sexual orientation.<sup>251</sup> Anyone who releases cultural artifacts into a digital network — whether via text message, cloud storage, or Facebook — risks that artifact being used by others in ways that reshape their work, family, and romantic relationships and limit their ability to set the terms of their own cultural participation.<sup>252</sup> When someone’s public representation marks them merely as a source of sexual pleasure or as a consumable commercial resource, it ignores, debases, and potentially weakens the more complex web of cultural relationships in which that person is enmeshed.<sup>253</sup> One might respond that such loss of control is sadly the price we pay by constantly using “free” digital networks, but such resignation cedes far too much power to those who seek to exploit our

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247. *Id.* at 1109 (quoting Lawrence R. Baca, *Native Images in Schools and the Racially Hostile Environment*, 28 J. SPORT & SOC. ISSUES 71, 76–77 (2004)).

248. K.J. Greene, *Copynorms, Black Cultural Production and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1181 (2008); *see also* Anjali Vats & Deidré Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735, 736 (summarizing efforts by racial minorities to reclaim rights in their work and representations).

249. *See* Sunder, *IP3*, *supra* note 237, at 301 (arguing that people desire recognition of their creativity and contributions to science and culture, rich and poor alike).

250. *See* Scott Skinner-Thompson, *Privacy’s Double Standards*, 93 WASH. L. REV. (forthcoming) (observing public disclosure tort has often been effective for privileged people but largely ineffective for those already in precarious social positions).

251. *See* Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8 (2008) (recognizing the term “vulnerable” for its potential in describing a universal, inevitable, enduring aspect of the human condition).

252. *See* Ryan Calo, *Privacy, Vulnerability, and Affordance*, 66 DEPAUL L. REV. 591, 593 (2017).

253. *See* Danielle Citron, *Sexual Privacy*, YALE L.J. (forthcoming).

potential vulnerabilities.<sup>254</sup> Disputes around sex, death, and IP reveal a diverse group of individuals looking to our legal system for ways to reassert agency in the face of vulnerability. IP laws, as written, often match these needs quite closely. These laws may have been designed with a narrow set of market-oriented concerns in mind, but they can evolve into a more capacious tool for managing boundaries in a social media environment and addressing a broader set of concerns.<sup>255</sup> The Internet lets us play, and IP provides some protection.<sup>256</sup>

Boundary management is a concept more fully developed in the context of privacy law,<sup>257</sup> but it explains a lot of what is happening in IP. The harm in nearly every one of the disputes above involves an image, video, or text crossing some perceived, context-specific line of impropriety, and IP provides a path toward agency and control.<sup>258</sup> Boundaries may shift, overlap, and blur over time,<sup>259</sup> but they profoundly shape the quality of lived, situated cultural experiences.<sup>260</sup> Boundary management of course is nothing new; whenever we make decisions about what aspects of ourselves we reveal to others, we are drawing lines within our social networks and hoping that our resulting

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254. See Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1211 (2016) (arguing that people have a right to participate in forms of power that reshape and alter them because “what is literally at stake is their own selves”).

255. See Sunder, *IP3*, *supra* note 237, at 285 (arguing that IP law can address a plurality of values beyond originalist utilitarianism); see also Shyamkrishna Balganes, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664, 1681 (2012) (suggesting that regulation of copyright be justified in many ways so long as they connect to the core act of copying that the institution regulates); Joan C. Williams & Viviana A. Zelizer, *To Commodify or Not Commodify: That is Not the Question*, in RETHINKING COMMUNICATION 366 (Martha M. Ertman & Joan C. Williams eds., 2005) (“Instead of living in segregated spheres, people participate in dense networks of social relations that intertwine the intimate and economic dimensions of life . . . . [People] manage different ties simultaneously rather than moving them from one sealed chamber to another.”).

256. See generally Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 148–49 (1998).

257. See Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1905 (2013) (arguing privacy shelters individuals and communities from commercial and government actors). See generally IRWIN ALTMAN, *THE ENVIRONMENT AND SOCIAL BEHAVIOR* (1975).

258. See Margot Kaminski, *Regulating Real-World Surveillance*, 90 WASH. L. REV. 1113, 1138–39 (2015) (arguing boundary management can shift the focus from the characteristics of the information to the impact of technological changes on individual autonomy); Tiffany Wong, *Helen Nissenbaum’s Privacy in Context: Technology, Policy, and the Integrity of Social Life*, 12 GER. L.J. 957, 959–60 (2011) (developing the concept of “contextual integrity”).

259. See Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, 30 REPRESENTATIONS 162, 163 (1990) (rejecting individualized notions of rigid legal boundaries and instead envisioning boundaries of property as fluid).

260. See Kaminski, *supra* note 258, at 1139 (arguing boundary management relates to the idea of autonomous, unrestricted self, which constantly influences and is influenced by others and society at large).

social boundaries hold up as intended.<sup>261</sup> What's new though is an additional layer of intermediation in today's social interactions, and IP is being used to shore up the particularly leaky boundaries surrounding digital communications.<sup>262</sup>

Boundaries simultaneously exclude and include. The *inclusive* aspects of boundary management add an important dimension to the autonomy-enhancing potential of IP. Boundaries — whether physical or social — rarely only include a solitary individual; they instead are notably group-minded, variously embracing family, friends, neighbors, coworkers, or sexual partners. The importance of inclusion within cultural and kinship networks is often recognized in the context of traditional knowledge and cultural property protections,<sup>263</sup> but similar desires for continuity, connection, and belonging also pervade contemporary Western social media environments.<sup>264</sup>

By conceiving of IP as a tool for boundary management, as a tool for including others within the acceptable reach of our personal information, we can appreciate the interpersonal, familial, and subcultural connections that are embedded within the images, sounds, and texts we share within those boundaries.<sup>265</sup> When someone's image is pulled into an unintended context, it is not just that person's boundaries that are crossed; it is the boundaries of everyone else inside. When family members assert control over the image or voice of a loved one, they are shoring up a set of boundaries they share with them, potentially even years after that person has died. The loved one may be gone, but the boundary remains.

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261. See Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 984 (1989) (understanding information as confined within normatively determined boundaries, in which individuals expect to control certain informational territories).

262. See Palen & Dourish, *supra* note 55, at 131 (assessing how information technology destabilizes the regulation of boundaries). See generally Cristina Miguel, *Visual Intimacy on Social Media: From Selfies to the Co-Construction of Intimacies Through Shared Pictures*, 2 SOC. MEDIA + SOC'Y 1, 2 (2016) (observing how social media users negotiate the breadth and depth of their public disclosures to simultaneously develop intimacy while also protecting themselves from potential harm).

263. See *supra* Section IV.B.

264. See Betsy Rosenblatt, *Belonging as Intellectual Creation*, 82 MO. L. REV. 91, 99 (2017).

265. See Sarah Keenan, *Subversive Property: Reshaping Malleable Spaces of Belonging*, 19 SOC. & LEGAL STUD. 423, 426 (2010) (defining property as a relationship of belonging held up by the surrounding space).

*C. Potential Reforms*

If IP laws are increasingly a tool for managing social boundaries and for mediating emotional and cultural issues with which they are rarely associated, what would follow when, instead of limiting the types of harms IP may redress, courts and scholars embraced a more pluralistic notion of IP values? This section suggests some potential areas for reform.

One fairly straightforward reform would be to make it easier for IP owners seeking to vindicate privacy interests to register their IP without turning private correspondences or naked images into public records. For example, in the *Doe v. Elam* case, the revenge porn victim — like all copyright owners — had to register her work with the Copyright Office as a prerequisite for bringing a copyright lawsuit.<sup>266</sup>

*Butt Colorful Underwear.*

Type of Work: Visual Material  
 Registration Number / Date: VA [REDACTED] 473 / 2013-06-12  
 Application Title: Butt colorful underwear.  
 Title: Butt Colorful Underwear.  
 Description: Electronic file (eService)  
 Copyright Claimant: [REDACTED], 1988-. Address: 2 [REDACTED] Mission Viejo.  
 Date of Creation: 2013  
 Authorship on Application: [REDACTED], 1988-. Domicile: United States; Citizenship: United States. Authorship: photograph(s)  
 Rights and Permissions: [REDACTED]  
 Copyright Note: C.O. correspondence.  
 Names: [REDACTED] e.1988-

Figure 1: Example of Registration in *Doe*

The resulting registrations in *Doe* list awkwardly sexual titles, provide access to a public record of her intimate images,<sup>267</sup> and disclose contact information for the otherwise anonymous Jane Doe plaintiff (the above redactions are my own). The Copyright Office does not yet have a formal procedure for registering intimate images, and registrants are forced to request redactions on a case-by-case basis.<sup>268</sup> IP enforcement, like all litigation, carries the risk of the

266. See 17 U.S.C. § 411 (2012).

267. The deposit copies with the Copyright Office are public records but are not currently viewable over the Internet. See UNITED STATES COPYRIGHT OFFICE, OBTAINING ACCESS TO AND COPIES OF COPYRIGHT OFFICE RECORDS AND DEPOSITS 1, <https://www.copyright.gov/circs/circ06.pdf> [<https://perma.cc/7JY3-68JZ>].

268. See *Copyright Registration, WITHOUT MY CONSENT*, <http://www.withoutmyconsent.org/resources/copyright-registration#special-relief> [<https://perma.cc/N2R8-5MFD>].

Streisand Effect,<sup>269</sup> but there are fairly simple reforms that could be used to minimize the embarrassment of having to submit sexually explicit depictions of yourself — or other highly private subject matter — to a government agency.<sup>270</sup>

Most of the other forms needed to better embrace sex, death, and other nontraditional values are likely necessary *irrespective* of whether one agrees with the normative thrust of this Article. Several aspects of the rights of publicity stand out in particular. Publicity rights law is currently a patchwork of state laws that vary greatly in terms of the length of protection, scope, defenses, and available remedies;<sup>271</sup> moreover, courts have taken varied and inconsistent approaches in determining when publicity rights in photographs or video are preempted by copyright interests in those same media.<sup>272</sup> Furthermore, there is currently a split between the Ninth Circuit and every other court to address the issue about whether state law publicity rights are laws “pertaining to intellectual property” exempted from CDA 230 immunities.<sup>273</sup> The publicity rights holders above largely pursued the same interests as did the copyright holders, and the uncertainty about the availability and scope of publicity rights makes it highly difficult to advise rights holders *and* potential defendants about their respective legal responsibilities.

Relatedly, the disputes above scream out for greater harmonization across IP doctrines. For example, when an IP claim implicates the expressive interests of a defendant, the relevant free speech defense is entirely different — and may lead to different results — depending on whether the claim is under copyright, trademark, or publicity rights law.<sup>274</sup> Anthony Barré’s family brought

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269. See T.C., *What is the Streisand Effect?*, *ECONOMIST* (Apr. 16, 2013), <https://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect> [<https://perma.cc/YAK3-RECM>] (named after the actress Barbra Streisand, the Streisand Effect describes how efforts to suppress online information can backfire).

270. A related concern has been raised with respect to Facebook’s newly launched program for combatting revenge porn, in which victims send the photo in question to Facebook so that it can create a database of digital fingerprints against which all uploaded photos are screened. See Liz Pozner, *Should Women Trust Facebook with Their Nude Selfies?*, *MEDIUM* (Nov. 11, 2017), <https://theestablishment.co/should-women-trust-facebook-with-their-nude-selfies-d49f89efb39f> [<https://perma.cc/JL9U-JE3G>].

271. See Jennifer Rothman, *Right of Publicity State-by-State*, *ROTHMAN’S ROADMAP TO RIGHT OF PUBLICITY*, <https://www.rightofpublicityroadmap.com> [<https://perma.cc/B5FN-2TKQ>] (stating that right of publicity claim protections varies widely from state to state).

272. See Rebecca Tushnet, *Raising Walls Against Overlapping Rights: Preemption and the Right of Publicity*, 92 *NOTRE DAME L. REV.* 1539, 1539 (2017).

273. See *supra* note 40 and cases cited therein.

274. Compare *Hart v. Electronic Arts Inc.*, 717 F.3d 141 (3rd Cir. 2013) with *Keller v. Electronic Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010)

copyright and trademark claims against Beyoncé (and plausibly could have brought publicity rights claims as well); she in turn was forced to separately argue that her use was “transformative” for purposes of copyright’s fair use doctrine and that there was “artistic relevance” for purposes of the Lanham Act’s First Amendment defense. Plaintiff’s interests in recognition and fair compensation underlay all of plaintiff’s claims, and Beyoncé’s interest in engaging in artistic expression underlay all her defenses, but the outcome of the case may vary substantially based upon which causes of action survive into later stages of litigation. To the extent nearly identical interests transcend doctrinal boundaries, both free speech and the available remedies should be synthesized and harmonized to avoid the unpredictability and irrationality of unintended overlap.<sup>275</sup>

## V. CONCLUSION

Many of the frequent critiques of IP laws hinge on their unpredictability and inconsistent impact on the free speech interests of fans and future artists.<sup>276</sup> Regardless of whether the claim at issue is motivated by financial concerns or emotional ones, the malleability of validity, infringement, and defenses makes the IP system unpredictable, expensive, and confusing for all involved.<sup>277</sup> It is possible, however, that if courts embraced a broader range of acceptable motivations and were transparent about the interests at stake in a particular dispute, the resulting case law would be better reasoned and more consistent. Rather than set forth inconsistent gibberish about market interests in private sexual images and ponder how that would be impacted by defendants’ use, courts would be better served by setting forth the actual stakes on each side: privacy vs. news reporting; physical safety vs. commerce; recognition vs.

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(finding use of football player’s likenesses in video games protected by First Amendment under trademark law but not under California’s publicity rights statute).

275. Laura Heyman’s suggestion that we deal with messy overlap questions via an election of remedies among those doctrines would be a useful reform in this context. See Laura A. Heymann, *Overlapping Intellectual Property Doctrines: Election of Rights Versus Selection of Remedies*, 17 STAN. TECH. L. REV. 239, 241 (2013) (“Rather than requiring intellectual property owners to elect among overlapping intellectual property rights on the front end, courts should address the overlap concern by being more attentive to harms and remedies on the back end.”).

276. Several scholars have, however, argued that this critique is somewhat overblown. See, e.g., Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 49 (2012).

277. See Mark Lemley & Mark McKenna, *Scope*, 57 WM. & MARY L. REV. 2197, 2198 (2016).



artistic expression.<sup>278</sup> The jurisprudential questions may not get any easier, but at least the right questions would be asked.

IP laws provide substantial control over the images, sounds, and texts that permeate our everyday lives, and such control arguably has never been more important. IP is far from perfect, both as a general matter and in the disputes above, but it can, should, and already does accommodate a broader range of interests than it traditionally has. As technology and culture change, the law will be called upon to adapt and respond to an evolving set of social vulnerabilities, presenting legal actors with a choice. They might adhere to inherited principles and narratives about what interests the law serves, and thus refuse to distort the law in the face of social change; or they might let go of those narratives and adapt their guiding principles to reflect the law's potential to make the lives of its subjects materially better.

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278. See McKenna, *supra* note 231, at 226 (“Because the right of publicity has focused entirely on the economic value of a celebrity’s identity, courts considering claims have no basis to differentiate among the variety of ways in which others might exploit that value.”).