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## A (Thigh) Gap in the Law: Addressing Egregious Digital Manipulation of Celebrity Images

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## A (THIGH) GAP IN THE LAW: ADDRESSING EGREGIOUS DIGITAL MANIPULATION OF CELEBRITY IMAGES

Jessica L. Williams-Vickery\*

### INTRODUCTION

In 2012, world-renowned supermodel Coco Rocha agreed to be photographed for the cover of one of Elle's magazine publications, *Elle Brazil*.<sup>1</sup> Rocha posed for the pictures in a dress with significant cutouts, covered only by a sheer layer of skin-toned fabric.<sup>2</sup> In keeping with her firm policy of no full or partial nudity, Rocha wore a bodysuit underneath the dress to limit her exposure.<sup>3</sup> When Elle published the magazine, the final product shocked Rocha; the magazine had altered the image to remove her bodysuit, giving the impression Rocha had shown more skin than she in fact had.<sup>4</sup> Rocha took to her personal blog to express her frustration and disappointment at Elle's disrespectful editing.<sup>5</sup> Unfortunately, this

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1. *Coco Rocha Could Sue Elle Brazil for Not Honoring Her No-Nudity Policy*, POPSUGAR (Apr. 24, 2012), <http://www.popsugar.com/fashion/Coco-Rocha-Could-Sue-Elle-Brazil-Nude-May-2012-Cover-22813916> [<https://perma.cc/7H76-HLBN>].

2. *Id.*

3. *Id.*

4. *Id.*; Jenna Sauers, *Top Model Coco Rocha Slams Mag for Photoshopping Off Her Underwear*, JEZEBEL (Apr. 25, 2012, 2:00 PM), <http://jezebel.com/5905088/top-model-coco-rocha-slams-mag-for-photoshopping-off-her-clothes> (noting that given Rocha's "firm policy against doing nude work, implied nude work, or anything that might be read as too sexualized for her tastes . . . it's very strange that Coco Rocha should appear looking practically topless on the May cover of Brazilian *Elle* magazine") [<https://perma.cc/CV2J-FULH>].

5. Coco Rocha, *Elle Brazil Cover—May 2012*, OH SO COCO: A BLOG BY COCO ROCHA (Apr. 20, 2012), <http://oh-so-coco.tumblr.com/post/21728809733/elle-brazil-cover-may-2012>

[<https://perma.cc/2T2N-VZE2>]. In this blog post, Coco Rocha explains her longstanding policy of no nudity or partial nudity in photoshoots. *Id.* She mentions that although she wore a bodysuit under her dress in the *Elle* photoshoot, the image was edited to make it appear as though she was "showing much more skin than [she] actually was or [was] comfortable with." *Id.* Rocha further states, "I strongly believe every model has a right to set rules for how she is portrayed and for me these rules were clearly

problem is not limited to Rocha—she is only one of many models and celebrities who have expressed frustration about excessive image manipulation.<sup>6</sup>

The right to privacy and right of publicity protect individuals' abilities to control when their identities are promulgated and when

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circumvented." *Id.* Although Rocha claimed she contractually prohibited this type of image manipulation by *Elle*, the exact language of the agreement was not revealed. See *Coco Rocha Could Sue Elle Brazil for Not Honoring Her No-Nudity Policy*, *supra* note 1. This Note focuses on whether, even absent prohibitory contractual language, a celebrity or model in a situation like Rocha's could sue for egregious image manipulation.

6. See Cindi Leive, *Crystal Renn on Her Skinny Photos: "I Don't Look Like That,"* GLAMOUR (July 15, 2010, 6:08 AM), <http://www.glamour.com/story/on-the-cl-crystal-renn-on-her> [<https://perma.cc/6C9U-KS36>]; Amy Odell, *Crystal Renn Says She Was Photoshopped Thinner in Her Fashion for Passion T-Shirt Shoot*, N.Y. MAG. (July 15, 2010, 5:20 PM), [http://nymag.com/thecut/2010/07/crystal\\_renn\\_says\\_she\\_was\\_phot.html](http://nymag.com/thecut/2010/07/crystal_renn_says_she_was_phot.html) [<https://perma.cc/CMB7-ZUXR>]. Model Crystal Renn, who struggled for years with anorexia before returning to health and becoming a plus-size model, did a photoshoot for a charitable campaign, Fashion for Passion, with the campaign's founder and photographer, Nicholas Routzen. Leive, *supra*. When the finished photographs were published, Renn's fans were concerned by Renn's portrayed thinness. *Id.* Given her publicized eating disorder battle, the media and fans wondered whether Renn had experienced an anorexia relapse. *Id.* In actuality, Routzen had manipulated the images significantly, making Renn appear much thinner than she was in reality. See *id.* Of the photos, Renn said,

I was shocked. When I saw the pictures, I think I was silent for a good five minutes, staring with my mouth open. I don't know what was done to the photos or who did it, but they look retouched to me. And listen, everybody retouches, but don't make me into something I'm not. . . . Having had an eating disorder, I know what that very thin body looks like on me, and it's not something I find attractive. It's not something I aspire to. I feel completely confident in my own health because I know I don't look like that, but even to see it in an image was really disturbing to me. . . . People who have followed my story and heard my voice might think I've turned my back on that.

*Id.* See also Tricia Gilbride, *8 Celebrities Who Spoke Out Against Photoshop in 2015*, MASHABLE (Dec. 18, 2015), <http://mashable.com/2015/12/18/celebrities-reject-photoshop-2015/#SH1on2IBagqR> [<https://perma.cc/GM5Y-K8PZ>]; Peggy Truong, *Kerry Washington Doesn't Recognize Herself on the Cover of Adweek*, COSMOPOLITAN (Apr. 6, 2016), <http://www.cosmopolitan.com/entertainment/celebs/news/a56370/kerry-washington-photoshop-adweek-magazine-cover> [<https://perma.cc/4UEA-9EEU>] (explaining Washington's frustration concerning the final product of her *Adweek* magazine cover, which she said had been so altered that she "felt weary" and strange because the image was so far from what she sees when she looks in the mirror); *Celebrity Photoshop Fails: Kate Winslet, E!* ONLINE, <http://www.eonline.com/photos/12299/celebrity-photoshop-fails/377403> (last visited Jan. 28, 2018) [<https://perma.cc/T7E3-AZNH>] (explaining Kate Winslet's frustration with her final 2003 *GQ* magazine cover, which Winslet said "reduced the size of [her] legs by about a third"). Model Zendaya complained on Instagram of a photo of her in which her hips and torso were substantially altered, arguing altered photos are what create and perpetuate unhealthy beauty ideals; she released the original photograph, saying, "Anyone who knows who I am knows I stand for honest and pure self love." Gilbride, *supra*. Regarding digitally manipulated images of herself, Demi Lovato shared she often gets frustrated because, without her consent, people alter her photograph to the point that she feels it no longer represents her body. *Id.*

their identities are commercially used, respectively.<sup>7</sup> But these rights only protect people's decisions regarding *when* their image is shared by requiring permission; if permission has been granted, the right to privacy and right of publicity do not address individuals' rights to control *how* their image is subsequently portrayed.<sup>8</sup>

This Note identifies gaps in current relevant law and the resulting need to recognize individuals' right to control not just *when* their image is used commercially or otherwise, but *how* it is used. Part I introduces the right to privacy and the right of publicity, and explains the current state of the law in those areas as it applies to digitally-manipulated celebrity images.<sup>9</sup> Part II then offers a critical analysis of current law and evaluates whether it effectively allows individuals to control how their identity is used.<sup>10</sup> Finally, Part III proposes solutions to the law's shortcomings in an attempt to better protect individuals' right to determine how their identity is publicly represented.<sup>11</sup>

### I. Background

The vast majority of images published in magazines and advertisements are digitally manipulated.<sup>12</sup> Today, the practice of

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7. Andrew Berger, "Hey, That Publication Is Using a Photo of Me": *The Right of Publicity Explained*, COPYRIGHT NEWS YOU CAN USE (Tannenbaum Helpm Syracuse & Hirschtritt LLP, New York, N.Y.), June 2005, at 1, 3.

8. *Compare Spiegel v. Schulmann*, 604 F.3d 72, 78 (2d Cir. 2010) (finding no valid claim for violation of right to privacy where the plaintiff clearly gave the defendant consent to make any desired changes to the disputed image), *with Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985) (finding defendant liable for violations of plaintiff's right to privacy and right of publicity where the defendant disseminated nude photographs of the plaintiff without authorization).

9. See discussion *infra* Part I.

10. See discussion *infra* Part II.

11. See discussion *infra* Part III.

12. See *Career Confidential: The Photo Retoucher Who Usually Doesn't Have to Distort Bodies*, BUZZFEED (July 20, 2012, 10:24 AM), [https://www.buzzfeed.com/buzzfeedshift/career-confidential-the-photo-retoucher-who-usual?utm\\_term=.rjdNXNvZGv#.xmRknkpv9p](https://www.buzzfeed.com/buzzfeedshift/career-confidential-the-photo-retoucher-who-usual?utm_term=.rjdNXNvZGv#.xmRknkpv9p) [<https://perma.cc/WF66-L2EH>] (interviewing a professional retoucher, who stated that because of the number of advertisements both in and outside of magazines, there are probably more images retouched for advertisements than for magazines); Hayley Phelan, *Anonymous Retoucher Says '100 Percent' of Fashion Images Have Been Altered, Calls Beauty Ads the 'Biggest Lie of All,'* FASHIONISTA (July 20, 2012), <http://fashionista.com/2012/07/anonymous-retoucher-says-100-percent-of-fashion-images-have-been-altered-calls-beauty-ads-the-biggest-lie-of-all> [<https://perma.cc/5S2D-N8X8>] (quoting a career retoucher who said that every image published in the fashion or beauty industry has been retouched); Dylan

image editing is not just commonplace—it is expected in professional publications.<sup>13</sup> When people permit their photograph to appear in a publication or advertisement, they typically consent to the publisher’s use of their image through a model release.<sup>14</sup> Model releases are “liability waiver[s] or exculpatory agreement[s] typically signed by the subject of a photograph granting permission to publish or sell the photograph in one form or another,”<sup>15</sup> and they often contain provisions that allow the publishing entity to alter the licensed photograph as it sees fit.<sup>16</sup>

Two legal principles are particularly relevant to the use and modification of a celebrity’s image: the right of publicity and the right to privacy.<sup>17</sup> The right of publicity, which developed out of the right to privacy, protects the property interest in the commercial value of one’s identity.<sup>18</sup> The right to privacy, in contrast, provides individuals with control over disbursement and distribution of information about themselves.<sup>19</sup> Although there are differences

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Stableford, *Photoshopping Mag Covers: How Much Is Too Much?*, FOLIO MAG. (Oct. 4, 2007), <http://www.foliomag.com/photoshopping-mag-covers-how-much-too-much/> [https://perma.cc/J6LF-LZJ4] (stating photo manipulation in magazines has become so common that some publications have a “retouching” budget).

13. See generally Phelan, *supra* note 12; *Career Confidential: The Photo Retoucher Who Usually Doesn’t Have to Distort Bodies*, *supra* note 12.

14. DAN HELLER, A DIGITAL PHOTOGRAPHER’S GUIDE TO MODEL RELEASES: MAKING THE BEST BUSINESS DECISIONS WITH YOUR PHOTOS OF PEOPLE, PLACES, AND THINGS 41 (Robyn B. Siesky et al. eds., 2008) (stating that model releases are “almost always used in the context of a photograph”).

15. *Tharpe v. Lawidjaja*, 8 F. Supp. 3d 743, 779 (W.D. Va. 2014).

16. See, e.g., *Spiegel v. Schulmann*, 604 F.3d 72, 78 (2d Cir. 2010) (referencing a broad release signed by the plaintiff that allowed the defendant to use the image at issue “for all purposes, to the sale, reproduction and/or use in any manner of any and all photographs”); *Krupnik v. NBC Universal, Inc.*, No. 103249, 2010 WL 9013658, at \*4 (N.Y. Sup. Ct. June 29, 2010) (referencing model agreement that granted the licensee the right to “use, reuse, publish, modify, or license” video, photographs, and audio recordings taken by the licensee of the plaintiff “in any way whatsoever”).

17. Although use and modification of celebrity images potentially implicate other areas of the law—such as defamation, misappropriation, etc.—the right to privacy and right of publicity are arguably best suited for analysis of egregious image manipulation because, together, they remedy the harm suffered in such instances. Thus, the applicability of other areas of law are outside the scope of this Note.

18. *Right of Publicity*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining the right of publicity as “[t]he right to control the use of one’s own name, picture, or likeness and to prevent another from using it for commercial benefit without one’s consent”).

19. *Right of Privacy*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining the right of privacy as “[t]he right of a person . . . to be free from unwarranted public scrutiny or exposure”); see also *Invasion of Privacy*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining the invasion of one’s right to privacy as “[a]n unjustified exploitation of one’s personality or intrusion into one’s personal activities, actionable under tort law”).

between these two rights, they overlap to such a degree that distinguishing them can be difficult, and attempts to label claims as one or the other sometimes causes confusion.<sup>20</sup> This difficulty has also extended to determining who may bring a claim based on these rights. Specifically, courts struggled to identify *who holds* the right to privacy and right of publicity.<sup>21</sup> For example, courts previously doubted whether celebrities may claim a violation of their right to privacy because they arguably forfeited their right to privacy in exchange for fame and money.<sup>22</sup> However, the law now recognizes that celebrities' fame does not undo their susceptibility to "emotional distress or humiliation from an unauthorized exploitation of their name or likeness."<sup>23</sup> Because the right to privacy exists to rectify this type of harm, and celebrities are—despite their fame—susceptible to it, celebrities do have a right to privacy.<sup>24</sup> The legal community also wrestled with whether the right of publicity belongs only to public figures or whether it extends to private persons.<sup>25</sup> Although celebrities may more frequently invoke the right of publicity, current law states that "the identity of even an unknown person may possess commercial value."<sup>26</sup> Accordingly, in most jurisdictions, private persons may bring a claim for violation of their right of publicity if an appropriation of their identity diminishes its value.<sup>27</sup> Thus, despite prior confusion surrounding who holds these rights, celebrities and private individuals alike generally hold both the right of publicity and the right to privacy.<sup>28</sup>

#### *A. Right to Privacy: False Light Invasion of Privacy*

In 1905, the Georgia Supreme Court decided the "leading case" nationally in favor of the right to privacy. Between then and 1960,

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20. J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:7 (2d ed. 2016).

21. *Id.* § 4:10.

22. *See id.*

23. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. b (AM. LAW INST. 1995).

24. *Id.*

25. MCCARTHY, *supra* note 20, § 4:15.

26. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (AM. LAW INST. 1995).

27. *See id.*; MCCARTHY, *supra* note 20, § 4:16.

28. MCCARTHY, *supra* note 20, §§ 4:9, 4:10, 4:14.

many jurisdictions accepted the right to privacy, but there was little consistency regarding its scope and application.<sup>29</sup> William Prosser attempted to clarify the law by suggesting four distinct categories of the right to privacy, one being “false light” invasion of privacy.<sup>30</sup> This cause of action allows recourse for individuals when objectionable publicity falsely attributes to them “characteristics, conduct, or beliefs” that resultantly invade their privacy.<sup>31</sup> To successfully bring a claim for false light invasion of privacy, a plaintiff must prove each of the following four elements: (1) the defendant’s representation regarding the plaintiff was, in fact, false; (2) a reasonable person would find the representation highly offensive; (3) where the plaintiff is a “public figure,” as is generally the case with celebrities, that the defendant had knowledge of the representation’s falsity or recklessly disregarded whether it was truthful; and (4) the false representation was publicized.<sup>32</sup> Even if a plaintiff successfully proves all elements and has suffered damage, the defendant may assert one of several available defenses in an attempt to evade liability.<sup>33</sup> If a plaintiff succeeds, however, the

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29. *Id.* §§ 1:17, 1:18. In *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68 (Ga. 1905), the Georgia Supreme Court recognized the existence of an individual’s right to privacy as necessary in light of natural law and prior court decisions. *Id.* Following this decision, courts slowly began to accept the right to privacy. However, as William Prosser noted, by 1960, “[i]n nearly every jurisdiction the first decisions were understandably preoccupied with the question whether the right of privacy existed at all, and gave little or no consideration to what it would amount to if it did.” William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 388 (1960).

30. Prosser, *supra* note 29, at 389 (breaking the right to privacy into four distinct categories: (1) “[i]ntrusion upon the plaintiff’s seclusion or solitude, or into his private affairs”; (2) “[p]ublic disclosure of embarrassing private facts about the plaintiff”; (3) “[p]ublicity which places the plaintiff in a false light in the public eye”; and (4) “[a]ppropriation, for the defendant’s advantage, of the plaintiff’s name or likeness”) (emphasis added).

31. MCCARTHY, *supra* note 20, § 1:22 (explaining that an action for the false light invasion of privacy, although similar to a claim for defamation, is distinguishable because it protects “injury to human dignity” that results when a person is given “unreasonable and highly objectionable publicity that attributes to him characteristics, conduct, or beliefs that are false,” whereas defamation focuses on the injury to a person’s reputation).

32. 33 RICHARD E. KAYE, CAUSES OF ACTION: CAUSE OF ACTION FOR FALSE LIGHT INVASION OF PRIVACY § 4 (2d ed. 2016); MCCARTHY, *supra* note 20, § 5:112.

33. See KAYE, *supra* note 32, § 9 (listing the following as potential defenses to a claim for false light invasion of privacy: unpublicized representation; representation not highly offensive to a reasonable person; representation was truthful; defendant did not know the representation was false and did not act with reckless disregard to its truthfulness; representation was privileged; and plaintiff consented to the representation).

damages awarded are intended to remedy reputational harm and mental or emotional hardship resulting from the false representation.<sup>34</sup>

### B. *Right of Publicity*

Whereas false light invasion of privacy offers recourse for damage to an individual's reputation or mental and emotional harm, the right of publicity permits compensation for the commercial value of the plaintiff's identity to the degree it was used without consent.<sup>35</sup> Beyond monetary damages, a violation of the right of publicity often results in an injunction barring the defendant's further unauthorized commercial use of the plaintiff's persona.<sup>36</sup> Although the right of publicity extends to all individuals, celebrities most often invoke its protection.<sup>37</sup> To obtain monetary or injunctive relief, a plaintiff must prove that the defendant's conduct constituted "knowing use, without consent, of another's name, photograph or likeness for the purposes of advertising or solicitation of purchases."<sup>38</sup> As with false light invasion of privacy, a defendant accused of violating an individual's right of publicity may assert a defense to avoid liability.<sup>39</sup>

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34. *See id.* § 19 (explaining a plaintiff may recover in an action for false light invasion of privacy for harm to the individual's "privacy interest," for "mental and emotional distress," for "special damages," and for "punitive damages"); MCCARTHY, *supra* note 20, § 5:114 ("[D]amage is usually measured by mental distress and perhaps injury to reputation.").

35. MCCARTHY, *supra* note 20, § 11:30 (explaining that the damage to the plaintiff's "proprietary property right" is a key distinguishing characteristic of the right of publicity, and in measuring the damage to that property right, "the plaintiff's *commercial injury* guides).

36. MCCARTHY, *supra* note 20, § 11:22; 31 THOMAS PHILLIP BOGGESS V, CAUSES OF ACTION: CAUSE OF ACTION FOR AN INFRINGEMENT OF THE RIGHT OF PUBLICITY § 38 (2d ed. 2016).

37. *A Brief History of the Right of Publicity*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/brief-history-of-rop> [https://perma.cc/HM8C-MWTL] (last visited Jan. 5, 2018).

38. *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983).

39. *See* BOGGESS, *supra* note 36, § 14 (listing the potential defenses a defendant may bring against a plaintiff in a right of publicity suit as (1) refuting an element of the right of publicity claim, (2) raising an issue regarding the statute of limitations, (3) arguing federal law preemption of the plaintiff's asserted right, and (4) asserting the defendant's First Amendment right to freedom of speech protects the defendant from any potential liability). For egregious image manipulation, showing the plaintiff consented to the use at issue is one of the most relevant defenses.

### C. *Applicable Precedent*

Although the above-stated principles of law include relatively clear elements, their application nonetheless proves difficult. This is particularly true given that the right of publicity and right to privacy are state-defined causes of action and as such vary—typically in minor ways—from state to state.<sup>40</sup> Within the context of digital manipulation, courts generally hold that consent to image manipulation and publication via a model release bars the subject from bringing a claim against the publishing entity for a violation of the right to privacy or right of publicity.<sup>41</sup>

However, this publisher protection only extends to the degree of consent granted in the model release—any use beyond the scope authorized could result in liability for breach of the model release and violations of the right to privacy and right of publicity.<sup>42</sup> Further, a defendant may be held liable where the model release language is ambiguous and extrinsic evidence successfully proves the defendant violated the parties’ intended image use boundaries.<sup>43</sup> Conversely, if a model release unambiguously permits the defendant’s allegedly improper image manipulation and use, extrinsic evidence attempting to prove a contrary meaning is impermissible; the clear meaning of the model release controls, and the defendant is not liable.<sup>44</sup>

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40. See generally MCCARTHY, *supra* note 20, § 6. Although some states have chosen to enact statutes addressing the right of publicity, other states decide right of publicity cases based on common law and judicial precedent. *Id.* § 6:2. For states with a statutory right of publicity, significant variation exists between the statutory language and scope. *Id.* § 6:5. For example, some of the right of publicity statutes extend to cover protection of the commercial use of a deceased person’s persona, whereas other states limit the protection to living persons. *Id.*

41. See *Krupnik v. NBC Universal, Inc.*, No. 103249, 2010 WL 9013658, at \*4 (N.Y. Sup. Ct. June 29, 2010) (concluding no liability where the defendant altered and used the plaintiff’s photo within the terms of the signed model release, in which the plaintiff granted consent for use); *Spiegel v. Schulmann*, 604 F.3d 72, 78 (2d Cir. 2010) (finding no violation of the plaintiff’s rights of publicity or right to privacy where the plaintiff’s image was altered beyond what he anticipated for a weight-loss advertisement because the agreement plaintiff had signed specifically allowed for the defendant to make any desired changes to the image).

42. *Shields v. Gross*, 448 N.E.2d 108, 112 (N.Y. 1983) (“[A] defendant’s immunity from a claim for invasion of privacy is no broader than the consent executed to him.”); see *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985) (finding defendant *Playboy* magazine, acted outside the scope of its model release with the plaintiff in selling the plaintiff’s nude images to defendant *Hustler* magazine for publication).

43. MCCARTHY, *supra* note 20, § 10:24.

44. *Id.*

Although courts most often find defendants liable only where their use exceeds the scope of the model release, some courts have held defendants responsible where their use fell within the limitations of the agreement but “the licensee ma[de] a significant change in the substance of the particular use which [was] licensed.”<sup>45</sup> In applying this “substantial modification” principle, the *Russell v. Marboro Books* court said of the image manipulation at issue, “[I]f the picture were altered sufficiently in situation, emphasis, background or context, I should think that it would no longer be the same portrait, but a different one.”<sup>46</sup> Because the *Russell* defendant altered the photo so extensively, the court considered it a different image altogether from the one for which the plaintiff granted consent, and the model release thus failed to shield the defendant from liability.<sup>47</sup> As the *Russell* decision demonstrates, courts pay particular attention to the degree of the plaintiff’s consent in evaluating whether a defendant’s use violates the individual’s rights to privacy, publicity, or both.

## II. Analysis

Current interpretation of relevant law and policy effectively denies celebrities the power to control their images following consent to publication.<sup>48</sup> Because no express legal recognition of egregious image manipulation exists, determining the availability of a remedy for celebrities in such situations requires a close analysis of existing law and public policy. The rights of publicity and privacy, together with relevant precedent, provide a framework by which to determine celebrities’ rights in instances of egregious image manipulation.

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45. *Id.* § 10:37.

46. *Russell v. Marboro Books*, 183 N.Y.S.2d 8, 27 (N.Y. Sup. Ct. 1959).

47. *Id.*; MCCARTHY, *supra* note 20, § 10:37 (indicating there are some circumstances in which the defendant may so manipulate an image that the use no longer falls within the scope of the model release between the parties).

48. *See, e.g., Auscape Int’l v. Nat’l Geographic Soc’y*, 461 F. Supp. 2d 174, 192 (S.D.N.Y. 2006) (holding consent barred a right of publicity claim where plaintiff signed a contract with a magazine permitting the defendant to use his “name, likeness and biographical material in connection with the publication of any Photographs produced”); *Furman v. Sheppard*, 744 A.2d 583, 587 (Md. Ct. Spec. App. 2000) (“Complete defenses exist where (1) the statement is true, or (2) the plaintiff consented to the publication.”).

Specifically, these causes of action provide insight into whether celebrities have recourse when their images are so extensively manipulated that they feel the image no longer represents them or blatantly contradicts the public persona they have created.

*A. Do Model Releases Allow Recourse in Instances of Excessive Digital Image Manipulation?*

Model releases, signed by celebrities consenting to the publication of their images, often contain clauses granting the publishing entity power to manipulate the images prior to publication.<sup>49</sup> In bringing a claim for violation of the right to privacy or infringement of the right of publicity, consent is a critical question.<sup>50</sup> Subsequently, a model release granting digital manipulation rights presents one of the most significant obstacles to a celebrity's ability to recover for egregious image manipulation.<sup>51</sup>

Consent is a central issue in actions for infringement of the right of publicity or right to privacy.<sup>52</sup> If a defendant can prove that the plaintiff validly consented to the contested use of the plaintiff's image, then the plaintiff cannot successfully sue for violation of either right.<sup>53</sup> Thus, the existence of a signed model release granting the defendant the unqualified right to alter and manipulate the images at issue threatens the success of the celebrity's cause of action.<sup>54</sup> This formulaic approach to model releases stems from a fundamental principle of contract law: respecting the right of private parties to contract as they choose.<sup>55</sup> For this reason, courts hesitate to look

49. See *Krupnik v. NBC Universal, Inc.*, No. 103249, 2010 WL 9013658, at \*4 (N.Y. Sup. Ct. June 29, 2010) (analyzing model release granting defendant right to "use, reuse, publish, modify, or license" images of plaintiff); *Marboro Books*, 183 N.Y.S.2d at 18 (evaluating model release granting "unrestricted use" of images of the plaintiff-model).

50. See BOGGESS, *supra* note 36, § 17; KAYE, *supra* note 32, § 15.

51. See *Marboro Books*, 183 N.Y.S.2d at 18–19.

52. See BOGGESS, *supra* note 36, § 17; KAYE, *supra* note 32, § 15.

53. See BOGGESS, *supra* note 36, § 17; KAYE, *supra* note 32, § 15.

54. See *Auscape Int'l v. Nat'l Geographic Soc'y*, 461 F. Supp. 2d 174, 192 (S.D.N.Y. 2006); *Spiegel v. Schulmann*, 604 F.3d 72, 78 (2d Cir. 2010).

55. See Nancy Hylden, *Contracts—A Rose by Any Other Name: No Tolling of an Arbitration Agreement Limitation Period, but Unreasonableness Achieves the Same End in Rose Revocable Trust v. Eppich*, 29 WM. MITCHELL L. REV. 635, 646 (2002) (referencing the "highly regarded private right to freely contract").

outside the terms of the release where they are clear and unequivocal, despite a plaintiff's understandable objection to how the defendant used or altered the image.<sup>56</sup> Such objections are perceived as an issue of hindsight.<sup>57</sup> Where the defendant's conduct technically complies with the terms of the model release, courts find the plaintiff made the personal decision to allow alteration and use of the image at the defendant's discretion.<sup>58</sup>

Despite this hurdle, precedent reveals a potential method for circumventing the terms of a model release.<sup>59</sup> Where contract provisions authorizing image manipulation existed, at least one court nonetheless found the defendant liable for the use of egregiously manipulated images.<sup>60</sup> The New York Supreme Court cleared the model release hurdle by emphasizing the degree and manner in which the defendant altered the image in question.<sup>61</sup> The court found that, given the substantial degree of image manipulation involved, the manipulated image constituted a new image altogether—an image for which the plaintiff had not granted consent.<sup>62</sup> This exception to the model release bar on recovery perfectly suits instances of egregious manipulation of celebrity images. Where a defendant–publisher edits an image so extensively that it taints the celebrity–subject's reputation or makes the celebrity look like a different person altogether, the image is arguably a new image—one for which the publisher must *new* consent for its use.

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56. *See, e.g.*, *Krupnik v. NBC Universal, Inc.*, No. 103249, 2010 WL 9013658, at \*4 (N.Y. Sup. Ct. June 29, 2010).

57. *Morgan v. Hustler Magazine, Inc.*, 653 F. Supp. 711, 718 (N.D. Ohio 1987) (granting summary judgment in favor of the defendant, who published the plaintiff's picture in a pornographic publication without the plaintiff's prior knowledge, where the terms of the model release were "clear and unambiguous" and thus could not be overcome by the plaintiff's "[t]wenty-twenty hindsight").

58. *See, e.g., id.*

59. *See Russell v. Marlboro Books*, 183 N.Y.S.2d 8, 27–28 (N.Y. Sup. Ct. 1959) (finding the defendant's use outside the scope of the consent granted by the plaintiff); *Sauers*, *supra* note 4 (suggesting unequal bargaining power between models and publishing entities, stating, "[T]he fact that a major magazine would ignore even Coco's efforts to have some control over her own image gives a sense of how little authority models really have") (internal quotation marks omitted).

60. *Marlboro Books*, 183 N.Y.S.2d at 27.

61. *Id.*

62. *Id.*

Beyond exceeding the scope of the model release, other considerations suggest a need to look beyond model releases.<sup>63</sup> Those who purport strict adherence to clear model release provisions suggest celebrities take preventative measures to avoid manipulation of their image.<sup>64</sup> Specifically, they advise more thorough model release negotiations to give celebrities and models increased power in determining how and to what extent their image may be altered.<sup>65</sup> Those involved in the modeling and fashion industry, however, claim the context of model agreements complicates negotiations.<sup>66</sup> In the fashion industry in particular, businesses and publishing entities may have unequal bargaining power compared to those whose images they seek to use.<sup>67</sup> Models are often replaceable; if one does not agree to a model release granting permission to edit the images, another will.<sup>68</sup> Subsequently, success in the industry hinges on one's willingness to submit to publisher-friendly model release provisions.<sup>69</sup> Because egregious image manipulation may fall outside the scope of even an expansive model release, however, and because unequal bargaining power exists in the relevant industries, the hurdle of model release consent is potentially overcome.

*B. Do the Rights of Publicity and Privacy Currently Support a Remedy?*

Even if able to clear the hurdle of consent, recourse for egregious digital image manipulation does not fit perfectly within an existing cause of action. First, neither the right of publicity nor the right to

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63. See Sauer, *supra* note 4 (suggesting unequal bargaining power between models and publishing companies and that models who object to the way they are represented may face scrutiny and the possibility of being blacklisted in the industry).

64. MCCARTHY, *supra* note 20, § 10:24.

65. *Id.*

66. See Sauer, *supra* note 4.

67. *Coco Rocha Could Sue Elle Brazil for Not Honoring Her No-Nudity Policy*, *supra* note 1. Advocates within the industry suggest the unequal bargaining power that exists is partially due to the "systemic disempowerment in the industry" of models and subjects of photographs. Sauer, *supra* note 4. To be successful, it is often necessary for celebrities and models to comply with the terms put forth by the publishing entity or risk being replaced by someone willing to do so. *Id.*

68. See *Coco Rocha Could Sue Elle Brazil for Not Honoring Her No-Nudity Policy*, *supra* note 1.

69. See Sauer, *supra* note 4.

privacy wholly remedies the scope of damage suffered.<sup>70</sup> Whenever a celebrity's image is liberally altered, the injury may be to both the personal right to privacy and the property right of publicity—impacting not only the celebrity's reputation but the monetary value of the celebrity's persona as well. Thus, neither cause of action alone is sufficient to remedy the harm. Further, neither cause of action's elements alone, as currently interpreted, provide a well-fitted solution to the problem of excessive image manipulation.<sup>71</sup>

### 1. *False Light Invasion of the Right to Privacy*

Although some elements of false light invasion of privacy easily fit instances of excessive image manipulation, others are more difficult to apply. The elements requiring that the representation be false and given publicity are satisfied in these instances; celebrities' frustration with heavily-edited photographs stems from the publicly-made, false representations of the celebrities' appearances in the photographs.<sup>72</sup> Although the degree of falsity involved in instances of image manipulation varies, generally, a claim requires only that the plaintiff show that the publicity at issue “[has] the capacity to give rise to a false public impression.”<sup>73</sup> For some celebrities, this was the primary concern regarding a manipulated image—that the image would cause the public to believe they were different than they really were, whether it be thinner, more scantily clad, etc.<sup>74</sup>

However, these two elements of falsity and publicity are not the only requirements in a false light invasion of privacy claim.<sup>75</sup> Another element, requiring that a reasonable person would find the false representation highly offensive, is more difficult to satisfy in the

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70. See discussion *infra* Part II.B.1–2.

71. See discussion *infra* Part II.B.1–2.

72. See, e.g., Truong, *supra* note 6; Gilbride, *supra* note 6.

73. Russell G. Donaldson, Annotation, *False Light Invasion of Privacy—Cognizability and Elements*, 57 A.L.R. 4th 22 § 12 (1987).

74. See Odell, *supra* note 6 (explaining model Crystal Renn's frustration that her edited image made her appear drastically thinner to the public); Rocha, *supra* note 5 (explaining Rocha's frustration that her edited image made her appear scantily clad before the public, in contradiction of her policy).

75. KAYE, *supra* note 32, § 4. The right to privacy requires two other elements, including (1) that the falsity be highly offensive to a reasonable person, and, particularly in instances involving public figures, (2) that the defendant knew or recklessly disregarded the falsity of the representation at issue. *Id.*

context of image manipulation. This difficulty arises out of case law, which indicates that a plaintiff's subjective outrage at the false representation fails to meet the reasonable person requirement.<sup>76</sup> However, the *Restatement of Torts* indicates the plaintiff's circumstances and position ought to be taken into account in determining whether the false representation was offensive enough to constitute a false light invasion of privacy.<sup>77</sup> Depending on the degree to which a court considers a plaintiff's circumstances in determining the offensiveness of the false representation, a situation like that of Coca Rocha's—in which the publishing magazine edited her image to remove her bodysuit despite her policy of showing minimal skin—may be sufficiently offensive.<sup>78</sup>

The final element of a false light invasion of privacy claim requires defendants to have knowingly or recklessly disregarded the falsity of their representation regarding the plaintiff.<sup>79</sup> Proving this

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76. *Id.* To satisfy the element of offensiveness, the false representation must be so offensive as to offend a reasonable person. *Id.*; *Godbehere v. Phx. Newspapers, Inc.*, 783 P.2d 781, 786 (Ariz. 1989) (explaining that “trivial indignities” are insufficient, and a plaintiff’s “subjective threshold of sensibility is not the measure” for determining whether a representation is highly offensive, but that, instead, the measure is what would be highly offensive to a reasonable person). Although the reasonableness standard does indicate objectivity, many courts introduce a subjective element as well. *See, e.g., Uhl v. Columbia Broad. Sys., Inc.*, 476 F. Supp. 1134, 1139 (W.D. Pa. 1979).

77. Donaldson, *supra* note 73, § 35; RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977) (“It is only when there is such a major misrepresentation of *his character, history, activities or beliefs* that serious offense may reasonably be expected to be taken by a reasonable man *in his position*, that there is a cause of action for invasion of privacy.”) (emphasis added). Case law supports this proposition, as well, indicating the importance of considering the plaintiff’s subjective circumstances in determining whether the offensiveness reaches the degree required by the element. *See Welling v. Weinfeld*, 866 N.E.2d 1051, 1056 (Ohio 2007) (“Recognizing ‘highly offensive’ information, even framed within the context of what a reasonable person would find highly offensive, necessarily involves a subjective component.”).

78. *Coco Rocha Could Sue Elle Brazil for Not Honoring Her No-Nudity Policy*, *supra* note 1. Even if editing Rocha’s image to remove the body suit beneath her dress would not have been sufficiently offensive to an average person, when considered in light of her known policy of showing minimal skin, such conduct by the publishing entity may be enough to meet the threshold of offensiveness required by the element. *See Uhl*, 476 F. Supp. at 1139. The *Uhl* court found the highly offensive element met because the representation of the plaintiff—hunter as having shot walking—as opposed to flying—geese was “a rather nasty thing to say about a hunter” in the geographic area. *Id.* This case illustrates the impact of considering subjective characteristics of the plaintiff—here, the plaintiff’s status as a hunter and the geographic area—in determining whether a representation qualifies as highly offensive. *Id.* Rather than evaluate the element of offensiveness to a reasonable person from a purely objective standpoint, the *Uhl* court understood it to necessarily require a consideration of the circumstances surrounding the false representation. *Id.*

79. KAYE, *supra* note 32, § 7.

presents an interesting tension. On one hand, when a defendant edits an image, the purpose of the edits is to create an image that is false to some degree—that is, not true to the reality of the original photograph or subject.<sup>80</sup> Conversely, to say defendants knowingly or recklessly made a false representation regarding a plaintiff simply because they altered an image, even to a slight degree, would sweep broadly to characterize the defendants’ conduct—widely accepted in the media and fashion industry—as potentially liability-inducing.<sup>81</sup> Given this tension, instances of image manipulation fail to categorically fit one way or the other within this element. Subsequently, although false light invasion of privacy offers a potentially viable remedy for celebrities suffering harm due to egregious image manipulation, the fit is an imperfect one.

## 2. *Right of Publicity*

One of the prominent requirements for a violation of the right of publicity is a showing that the defendant did not have consent to use the plaintiff’s name, photograph, or likeness.<sup>82</sup> The consent issue presents a substantial challenge to the availability of a remedy in the context of image manipulation; but, as previously discussed, this obstacle may be overcome by the combination of precedent recognizing egregious changes to an image as outside the scope of the consent granted and by recognition of the unequal bargaining power prominent in the industry.<sup>83</sup> Beyond the obstacle of consent, use of an egregiously-manipulated image arguably fits well within the remaining elements of the right of publicity because the

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80. *Deception and Disguise*, PHOTOSHOP IN THE MEDIA (May 3, 2011), <https://sabinahicks.wordpress.com/2011/05/03/deception-and-disguise/> [https://perma.cc/NK5Z-UVPN].

81. See *Photoshopping: Altering Images and Our Minds*, BEAUTY REDEFINED (Mar. 12, 2014), <http://www.beautyredefined.net/photoshopping-altering-images-and-our-minds/> [https://perma.cc/N38J-MDL5] (quoting an editor at *Self* magazine who responded to criticism for extreme manipulation of the magazine’s cover images, saying, “Yes, of course we do post-production corrections on our images. Photoshopping is an industry standard.”).

82. BOGESS, *supra* note 36, § 12.

83. See *Russell v. Marboro Books*, 183 N.Y.S.2d 8, 27–28 (N.Y. Sup. Ct. 1959); Sauers, *supra* note 4.

defendant in these instances knowingly used the celebrity's photograph for commercial gain.

Even if a claim for egregious image manipulation fits within the right of publicity, the remedies provided for violations of the right match only a portion of the harm suffered.<sup>84</sup> First, an injunction, though commonly issued in right of publicity cases and sufficient to prevent the defendant from further unpermitted use of the celebrity's image, would do nothing to compensate for the harm already suffered.<sup>85</sup> A celebrity could, under the right of publicity, be compensated for the "market value of nonpermitted use" given the public value of a celebrity's image, but this would only address the financial harm suffered by the celebrity.<sup>86</sup> The right of publicity does not provide recourse for emotional or reputational harm, and resultantly fails to provide a remedy matching the injury.<sup>87</sup> Thus, although a claim for infringement of the right of publicity may address a portion of a celebrity's damaged interests, it is an imperfect solution on its own.

### C. *Is Recognizing a Right in the Interest of Public Policy?*

In addition to recourse for egregious digital manipulation nearly fitting within existing causes of action, public policy further reveals the need to recognize celebrities' right to a legal remedy in these situations. If recognized, this right would allow celebrities more control over what their image is used to impliedly endorse—an interest courts have protected. In the Ninth Circuit case *Waits v. Frito-Lay, Inc.*, the plaintiff—singer, Tom Waits, brought a claim against Frito-Lay for an advertisement which used the voice of his sound-a-like, giving the impression he had participated in the advertisement himself.<sup>88</sup> Waits, however, had previously publicly denounced artists' participation in commercials.<sup>89</sup> The court found

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84. See BOGCESS, *supra* note 36, §§ 37 to 38.

85. *Id.* § 38.

86. *Id.* § 40.

87. *Id.* § 39.

88. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097–98 (9th Cir. 1992).

89. *Id.* at 1097.

Waits was entitled to recovery because, given his “outspoken public stance” against commercial endorsements, the advertisement made him an “apparent hypocrite.”<sup>90</sup> This is the same concern often expressed by celebrities regarding altered images.<sup>91</sup> For example, for a celebrity who publicly promoted positive body image in an attempt to combat eating disorders, subsequent manipulation of her image to make her appear significantly thinner than in reality would make her a hypocrite before the public.<sup>92</sup> Recognizing celebrities’ right to control how, and for what purpose, their image is used may thus help prevent this type of issue.

### *III. Proposal*

The problem of egregious celebrity image manipulation requires a response. Recognizing that the areas of law most implicated in this issue—contract law, the right to privacy, and the right of publicity—are traditionally state-determined, the response ought to be state-driven as well.<sup>93</sup> To efficiently address the problem of egregious manipulation of celebrity images, states should provide recourse either by expanding judicial interpretation of existing law or enacting new legislation.

#### *A. Remediating the Harm of Egregious Image Manipulation*

In states that already recognize the right of publicity and false light invasion of privacy, courts should expand their interpretation of the common law or statutory causes of action.<sup>94</sup> States that do not

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90. *Id.* at 1103.

91. *See* Leive, *supra* note 6 (quoting actress Crystal Renn, “People who have followed my story and heard my voice might think I’ve turned my back on [being a healthy weight], and that it’s only beautiful to be thin.”); Odell, *supra* note 6.

92. *See* Leive, *supra* note 6. Model Crystal Renn had reentered the modeling world as a plus-size model following a public eating disorder battle and had taken a public stance against the thinness promoted in the modeling industry and media. *Id.* However, despite her known stance, a business she agreed to do a photoshoot with edited her image to make her appear very thin. *Id.* She subsequently expressed concern that people would think she had not been genuine in her prior denunciations of the unhealthy ideal advanced by the American media. *Id.*

93. *Preferred Care, Inc. v. Howell*, No. CV 16-13-ART, 2016 WL 4470746, at \*2 (E.D. Ky. Aug. 19, 2016); MCCARTHY, *supra* note 20, § 6:1.

94. Some states recognize these causes of action in common law, while others have enacted statutes

recognize the right of publicity or false light invasion of privacy should either recognize these causes of action—and view them as permitting recovery for egregious image manipulation—or enact legislation specifically creating recourse in such situations.<sup>95</sup>

### 1. *Expanding Preexisting Law*

States that recognize both the right of publicity and false light invasion of privacy should expand these doctrines to cover the harm resulting from extreme image alteration. Courts could easily accomplish this expansion themselves. Specifically, courts should expand the common law or statutory judicial interpretation so the scope of existing causes of action allows recovery in these instances.

As previously noted, the harm caused by image manipulation very nearly fits the harms protected by the right of publicity and false light invasion of privacy.<sup>96</sup> Courts could not adequately provide a remedy by either cause of action alone because each protects a different interest affected by egregious digital image manipulation.<sup>97</sup> Thus, by expanding the interpretation of a limited number of elements within these causes of action, courts could fit a remedy within preexisting law. Specifically, courts must expand their approach to the elements addressing consent, offensiveness, and the defendant's known or reckless false representation. This solution remedies the current lack of recourse while simultaneously avoiding the challenge of passing new legislation.

Successful expansion of these causes of action requires several changes to judicial interpretation. First, courts must be willing to look

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creating the causes of action. MCCARTHY, *supra* note 20, § 6:1. Some of the states that recognize these rights by statute include California, Indiana, Illinois, and Massachusetts. *Id.* §§ 6:10, 6:55, 6:58, 6:64. Other states have chosen to recognize these rights under common law, which provides greater flexibility for courts in determining claims. *Id.* § 6:1. A few of the states that recognize the rights of publicity and privacy under common law include Arizona, Illinois, and Ohio. *See id.* §§ 6:2, 6:3.

95. For example, many states have yet to recognize the right of publicity. MCCARTHY, *supra* note 20, § 6:1. Some states recognize one of the relevant causes of action but do not recognize both. *Id.*

96. *See* discussion *supra* Part II.

97. *Compare* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983) (explaining that the right of publicity protects “the commercial interest of celebrities in their identities”), with MCCARTHY, *supra* note 20, § 11:27 (explaining that false light invasion of privacy protects individuals from indignity and reputational harm).

beyond the existence of model release agreements to determine whether the celebrity gave valid consent. Rather than end the consent inquiry at the existence of a broadly-drafted model release, courts should conduct a fact-based analysis to determine whether the publishing entity's image manipulation and publication exceeded the intended scope of the agreement.<sup>98</sup> Following the example of the court in *Russell*, courts should ask whether the edits made were so extensive or out-of-character as to have created a new image altogether—one for which the celebrity did not give consent.<sup>99</sup> Not only does this broader consent consideration recognize the danger of finding absolute consent, it also provides leeway for celebrities and models in light of the unequal bargaining power that exists in the industry.<sup>100</sup>

Beyond consent, recourse for image manipulation also requires courts to more broadly interpret two elements specific to false light invasion of privacy claims: that the false representation be (1) offensive to a reasonable person and (2) made recklessly or knowingly by the defendant.<sup>101</sup> Courts should allow celebrity-plaintiffs to meet these requirements by showing that the highly edited image directly contradicts their public reputation or publicly-held beliefs.<sup>102</sup> Courts ought to determine whether image manipulation meets the reasonable offensiveness threshold by evaluating the offensiveness not purely objectively, but in light of the “subjective component” of the plaintiff's circumstances, as many courts already do.<sup>103</sup> In the context of digital image manipulation, a claim would then meet this standard if a celebrity showed that the

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98. See generally *Russell v. Marboro Books*, 183 N.Y.S.2d 8, 27 (N.Y. Sup. Ct. 1959).

99. *Id.* at 27.

100. Sauer, *supra* note 4.

101. KAYE, *supra* note 32, § 4.

102. This public, apparent contradiction is precisely what models Coco Rocha and Crystal Renn complained of regarding their published, edited images. See Odell, *supra* note 6; Rocha, *supra* note 5. Coca Rocha expressed frustration that the image of her on the cover of *Elle* Brazil contradicted her known policy of showing minimal skin. Rocha, *supra* note 5. Similarly, Crystal Renn was frustrated because the edited image of her, making her appear extremely thin, gave the public the impression that she was disingenuous in her public eating disorder battle and recovery. Odell, *supra* note 6.

103. See, e.g., *Uhl v. Columbia Broad. Sys., Inc.*, 476 F. Supp. 1134, 1139 (W.D. Pa. 1979) (considering the plaintiff's status as a hunter and the geographic location in making offensiveness determination).

image, as edited, would offend a person in their shoes. For example, consider a situation in which a celebrity publicly supports People for the Ethical Treatment of Animals (PETA) and criticizes animal-derived clothing, only to subsequently have her image edited to make it appear as though she wore a minx fur coat in a photoshoot. In that context, the image manipulation would likely be considered offensive to a reasonable person because the altered image makes the celebrity appear self-contradicting. Courts should further interpret this showing of apparent contradiction to also satisfy the requirement that the defendant recklessly or knowingly made a false representation. If the highly-edited image contradicts the celebrity's *public* reputation or stance, the publishing entity—privity to the same information as the public—likely knew and disregarded, or was at least “reckless[ly] indifferen[t]” to, the image’s misrepresentative nature.<sup>104</sup>

By implementing a more inclusive interpretation of the aforementioned elements, courts would allow celebrity–plaintiffs recourse for egregious image manipulation but only in a limited set of circumstances. This broadened interpretation would not make courts susceptible to a flood of litigation; rather, it would limit recovery for image manipulation to those instances in which the publishing entity’s extensive edits made the celebrity–plaintiff an “apparent hypocrite.”<sup>105</sup>

## 2. *Enacting New Legislation*

States that do not recognize the requisite causes of action, or whose statutory schemes are too narrowly written to allow expanded judicial interpretation, should enact new legislation providing recourse for egregious image manipulation. Like states expanding preexisting doctrine, new legislation ought to be narrowly-focused and provide recourse in limited situations. New legislation should provide a remedy where the celebrity–plaintiff shows that the

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104. KAYE, *supra* note 32, § 7. For a cause of action to stand under false light invasion of privacy, the plaintiff must show actual malice on behalf of the defendant. *Id.* This standard is satisfied for public figures by showing the defendant made the false representation either knowingly or recklessly. *Id.*

105. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1103 (9th Cir. 1992).

manipulated image was (1) outside the scope of any consent granted, (2) would be offensive to a reasonable person in the celebrity's circumstances, and (3) directly conflicts with the celebrity's public reputation or known stance on an issue.<sup>106</sup>

### 3. *Matching the Remedy to the Harm*

As previously discussed, celebrities facing egregious image manipulation suffer at least two types of harm: (1) harm to the pecuniary value of their public image and (2) reputational, mental, and emotional harm from the misrepresentation. Celebrities bringing a claim for egregious image manipulation—whether under an expanded interpretation of the right of publicity and false light invasion of privacy or under a new piece of legislation—should have access to damages for both types of harm.

For celebrities bringing a claim under expanded existing law, the usual remedies for the rights of publicity and privacy together perfectly redress the harm suffered by the celebrity. Further, the remedy due for egregious image manipulation is consistent with the type of harm the right of publicity and false light invasion of privacy were created to protect.<sup>107</sup> The right of publicity remedy would compensate the celebrity–plaintiffs for damage to the commercial value of their identity.<sup>108</sup> The supplemental false light invasion of privacy remedy would compensate celebrity–plaintiffs for the noncommercial harm to their psyche and reputation as a result of being made an “apparent hypocrite” before the public.<sup>109</sup> Lastly, the equitable remedy of an injunction must be available to keep the defendant from further perpetuating the damaging image.<sup>110</sup> This

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106. These requirements closely correspond with the elements of a claim for false light invasion of privacy and violation of the right of publicity under expanded judicial interpretation of common law or statute. See discussion *supra* Part III.A.1.

107. See MCCARTHY, *supra* note 20, §§ 1:7, 11:27.

108. *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 (AM. LAW INST. 1995).

109. *Waits*, 978 F.2d at 1103; see KAYE, *supra* note 32, at § 19.

110. *Prohibitory Injunction*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining this most common form of injunction as “[an] injunction that forbids or restrains an act”); *Conrad v. Kaup*, 291 N.W. 687, 688 (Neb. 1940) (explaining the purpose of an injunction “is not to afford a remedy for what is past, but to prevent future mischief, not being used for the purpose of punishment or to compel person to do right,

would not expand the remedies already available under the right of publicity and false light invasion of privacy; courts have often granted injunctions in conjunction with these causes of action to prevent further damage to the plaintiff.<sup>111</sup>

Celebrities suing under new legislation ought to have access to the same scope of recourse. Thus, newly-enacted legislation addressing image manipulation should contemplate damages for commercial and noncommercial damage, as well as the availability of injunctions.

Beyond addressing the harm suffered by the celebrity, public policy further supports allowing recourse in these instances because doing so may help remedy the harm of negative body image that so pervades U.S. culture.<sup>112</sup> Many celebrities today voice their opposition to the unhealthy body ideals purported in the media.<sup>113</sup> Allowing these celebrities recourse when their image has been edited to look unrealistically thin has two benefits: it provides them the opportunity to positively impact body ideals in the media, and it punishes defendant–publishers whose excessive image manipulation contributes to the negative body image epidemic.

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but merely to prevent them from doing wrong”).

111. *See generally, e.g.,* Loftus v. Greenwich Lithographing Co., 182 N.Y.S. 428, 432 (N.Y. App. Div. 1920) (granting an injunction in an invasion of privacy claim to prevent defendant from continuing to use the plaintiff’s photograph in an advertisement); Ali v. Playgirl, Inc., 447 F. Supp. 723, 731 (S.D.N.Y. 1978) (granting a preliminary injunction and scheduling a hearing for a permanent injunction based on a violation of right of publicity claim, recognizing an injunction as the most appropriate remedy for stopping the defendant’s violation of the plaintiff’s right).

112. *See* Kelly Wallace, *Kids as Young as Five Concerned About Body Image*, CNN (Feb. 13, 2015, 11:47 AM), <http://www.cnn.com/2015/02/13/living/feat-body-image-kids-younger-ages/> [<https://perma.cc/8VZE-2U5S>] (revealing new research that indicates up to “half of girls and one-third of boys as young as 6 to 8 think their ideal weight is thinner than their current size”); *Self Image/Media Influences*, JUST SAY YES, <https://www.justsayyes.org/topics/self-image-media-influences/> [<https://perma.cc/365A-FKCM>] (last visited Jan. 30, 2018) (citing many studies that reflect the prevalence of negative body image in the U.S. and its connectedness to the media, including one in which “69% of girls in 5th–12th grades reported that magazine pictures influenced their idea of a perfect body shape”); *What Are Eating Disorders?*, NAT’L EATING DISORDERS ASS’N, <https://www.nationaleatingdisorders.org/learn/general-information/what-are-eating-disorders> (last visited Jan. 30, 2018) [<https://perma.cc/FM6G-8NT6>] (explaining that an estimated “20 million women and 10 million men in America will have an eating disorder at some point in their lives”).

113. *See* Claire Schmidt, *Jennifer Lawrence to Lena Dunham: Fifteen Inspiring Celebrity Quotes About Body Image*, TODAY (May 3, 2014, 6:51 PM), <http://www.today.com/style/jennifer-lawrence-lena-dunham-15-inspiring-celebrity-quotes-about-body-2D79604323> [<https://perma.cc/Y42D-PPV3>].

## CONCLUSION

Digital image manipulation is pervasive, and the current state of the law fails to provide recourse for celebrities who suffer egregious manipulation of their images at the hands of publishing entities.<sup>114</sup> As matters stand, courts will generally end any inquiry into potential violations of the rights of privacy or publicity if an expansive model release agreement exists.<sup>115</sup> Consent to image alteration effectively bars recovery, no matter how extensive or offensive the manipulation.<sup>116</sup> Subsequently, celebrities are left with no legal recourse for the harm they suffer.

States should allow celebrities a legal remedy in instances of egregious image manipulation if the altered image directly contradicts the celebrity's public reputation or convictions. First, courts should deem some image manipulation so egregious as to fall outside the scope of even an expansive model release agreement.<sup>117</sup> If courts take this stance, then the doctrines of right of publicity and false light invasion of privacy can provide a remedy that matches the harm suffered. States that recognize these doctrines should expand their scope to allow recovery. Further, states that do not recognize either the right of publicity or false light invasion of privacy should enact legislation to do so. These laws ought to permit damages for both commercial and noncommercial harm, as well as injunctive relief for ongoing conduct. By requiring celebrities to show the manipulated image directly contradicts their public reputation, states would provide due recourse for egregious manipulation without exposing courts to voluminous or burdensome litigation.

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114. Phelan, *supra* note 12; Stableford, *supra* note 12.

115. *See, e.g.*, *Auscage Int'l v. Nat'l Geographic Soc'y*, 461 F. Supp. 2d 174, 192 (S.D.N.Y. 2006); *Spiegel v. Schulmann*, 604 F.3d 72, 78 (2d Cir. 2010); *Krupnik v. NBC Universal, Inc.*, No. 103249, 2010 WL 9013658, at \*4 (N.Y. Sup. Ct. 2010).

116. *See Krupnik*, 2010 WL 9013658 at \*2, \*8 (holding no liability for the defendant where the image was made part of a movie scene in which one of the characters impliedly masturbates while looking at the plaintiff's image).

117. *See Russell v. Marboro Books*, 183 N.Y.S.2d 8, 27 (N.Y. Sup. Ct. 1959).

