

## A RIGHT THAT SHOULD'VE BEEN: PROTECTION OF PERSONAL IMAGES ON THE INTERNET

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“The right to the protection of one’s image is ... one of the essential components of personal development.”

*Grand Chamber of the European Court of Human Rights*

### ABSTRACT

*This paper provides an overview of the current legal protection of personal images that are uploaded and shared on social networks within an Australian context. The paper outlines the problems that arise with the uploading and sharing of personal images and considers the reasons why personal images ought to be protected. In considering the various areas of law that may offer protection for personal images such as copyright, contract, privacy and the tort of breach of confidence. The paper highlights that this protection is limited and leaves the people whose image is captured bereft of protection. The paper considers scholarship on the protection of image rights in the United States and suggests that Australian law ought to incorporate an image right. The paper also suggests that the law ought to protect image rights and allow users the right to control the use of their own image. In addition, the paper highlights that a right to be forgotten may provide users with a mechanism to control the use of their image when that image has been misused.*

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## **I. INTRODUCTION**

This paper examines the effectiveness of the existing legal regimes in protecting personal images that are shared online. In Australia, the stark reality is that while there is some legal protection for personal images shared online, the protection is limited. The paper examines how the law in this area can be improved. In particular, it argues that people whose image is captured in photographs that are shared on social networks ought to have the ability to control the use of those images through a right of publicity and a right to be forgotten. In considering the developments and legal protection afforded to personal images in the United States and Europe, it will be argued that Australian law is lagging behind these jurisdictions.

The last decade or so has seen an explosion in social networking. Web 2.0 sparked the growth of online participatory culture, where the user is a central actor in

creating and sharing information.<sup>1</sup> The introduction of new websites and services enabled users to create and share things about themselves with other users on the Internet in an unprecedented way. Previously, online communication technologies such as email, email lists, text messaging and instant messaging existed in isolation.<sup>2</sup> Social networks changed the ways in which people share and disseminate personal images in an online environment. This has created a number of problems, particularly when images are used without permission or are altered, changed, or used for different purposes. Problems also arise when circumstances change, such as when a creator or subject changes their mind about an uploaded image, or when a creator or subject dies.

The origin of social network sites can be traced back to the formation of SixDegrees.com in 1997.<sup>3</sup> At the time, SixDegrees was a pioneering online social network site that fused the features of creating profiles, friends lists, and email messaging; the site allowed users to create profiles, list friends and view the lists of their friends.<sup>4</sup> SixDegrees paved

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<sup>1</sup> Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User Generated Content*, 11 VAND. J. OF ENT. & TECH. L. 841, 843 (2009); see also David Beer, *Social network(ing) Sites . . . Revisiting the Story So Far: A Response to Danah Boyd and Nicole Ellison*, 13 J. COMPUT.–MEDIAT. COMM. 516, 519 (2008). See generally Alessandro Acquisti & Ralph Gross, *Imagined Communities: Awareness, Information Sharing, and Privacy on the Facebook*, in PROCEEDINGS OF 6TH WORKSHOP ON PRIVACY ENHANCING TECH. 36–58 (P. Golle and G. Danezis eds., 2006) [hereinafter *Imagined Communities*]; Alessandro Acquisti & Ralph Gross, *Information Revelation and Privacy in Online Social Networks*, in PROCEEDINGS OF THE 2005 ACM WORKSHOP ON PRIVACY IN THE ELEC. SOC'Y 71–80 (2005) (Conf. Rep.) [hereinafter *Information Revelation*]; Niva Elkin-Koren, *User-Generated Platforms, in WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROP.* 111, 112–13 (2010).

<sup>2</sup> Danah M. Boyd & Nicole Ellison, *Social Network Sites: Definition, History and Scholarship*, 13 J. COMPUT.–MEDIAT. COMM. 210, 214 (2008).

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

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

the way for other sites that supported combinations of various profile and “friend” articulated networks such as AsianAvenue, BlackPlanet and MiGente.<sup>5</sup> These sites not only enabled users to create their own profiles, but also allowed them to add friends without the friends needing to approve the connections.<sup>6</sup>

While SixDegrees closed down in 2000 due to its inability to implement features other than accepting friend requests,<sup>7</sup> various new sites were launched between 1997 and 2001 that shared some form or a combination of communication technologies. LiveJournal, for example, allowed users to mark people as friends, follow their journals and manage privacy settings.<sup>8</sup> In 2001, the next surge of sites centered on linking personal and professional networks.<sup>9</sup> Notably, the people behind sites such as “Tribe.net, LinkedIn, Friendster, and Ryze were tightly entwined personally and professionally” because the people behind the sites were all connected, “[t]hey believed they could support each other without competing.”<sup>10</sup>

In 2002, the popular social network site Friendster was developed to compete with Match.com, an online dating

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<sup>5</sup> *Id.*

<sup>6</sup> Profiles existed as part of dating sites and email lists prior to SixDegrees starting up. For example, profiles were visible on the user’s end for instant messaging service like AIM (American Instant Messenger), but not visible to other people. *See* Boyd & Ellison, *supra* note 2, at 214; Kevin Lewis, Jason Kaufman & Nicholas Christakis, *The Taste for Privacy: An Analysis of College Student Privacy Settings in an Online Social Network*, 14 J. COMPUT.–MEDIAT. COMM. 79, 80–81 (2008).

<sup>7</sup> *See* Boyd & Ellison, *supra* note 2, at 214.

<sup>8</sup> *Id.* at 215. *See generally Imagined Communities*, *supra* note 1, at 36–58.

<sup>9</sup> *See* Boyd & Ellison, *supra* note 2, at 215.

<sup>10</sup> Boyd & Ellison, *supra* note 2, at 215; *see also* Paul Festa, *Investors Snub Friendster in Patent Grab*, CNET (Apr. 19, 2004, 11:21 AM), <https://www.cnet.com/news/investors-snub-friendster-in-patent-grab/> [<https://perma.cc/FN2V-RWSM>]

site.<sup>11</sup> Building on the common features of dating sites, it focused on introducing people to “strangers.”<sup>12</sup> The distinguishing feature of Friendster was that it was “designed to help friends-of-friends meet, based on the assumption that friends-of-friends would make better romantic partners than strangers.”<sup>13</sup> Friendster’s popularity quickly surged to 300,000 users via word of mouth among various groups, particularly bloggers, attendees at the Burning Man arts festival, and gay men.<sup>14</sup> As Friendster’s popularity grew, the site began to experience difficulties.<sup>15</sup> Specifically, Friendster’s databases and servers were unable to keep up with the growing demands of users.<sup>16</sup> The users became frustrated with the faltering site, especially those who had and replaced email with Friendster.<sup>17</sup> After the failure of Friendster, various new social networks launched, adopting the popular features of Friendster, such as the profile-centric feature.<sup>18</sup>

Following the failure of Friendster, social networks surged in the early 2000s, first with MySpace and then with Facebook.<sup>19</sup> Since 2003, a range of new social networks have proliferated.<sup>20</sup> There are now social networks for everyone: from activists, religious groups and gamers, to travelers and

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<sup>11</sup> Boyd & Ellison, *supra* note 2, at 215.

<sup>12</sup> *Id.* at 215.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 216; See Richard Sanvenero, *Social Media and Our Misconceptions of the Realities*, 22 INFO. & COM. TECH. L. 89, 90–91 (2013) (describing the foundation of Facebook).

<sup>19</sup> Scholarship places the first online social network as SixDegrees in 1997. After the failure of SixDegrees, other sites emerged during the period between 1998 and 2001. See generally Boyd & Ellison, *supra* note 2, at 214–16; *Imagined Communities*, *supra* note 1, at 38–39.

<sup>20</sup> See Boyd & Ellison, *supra* note 2, at 216.

photographers.<sup>21</sup> Presently, there are billions of users of social media with Facebook citing 2.6 billion monthly active users,<sup>22</sup> 330 million Twitter users,<sup>23</sup> and 1 billion Instagram users.<sup>24</sup> Popular sites such as Facebook, Twitter, Instagram, Pinterest, Flickr, Google+, YouTube, and Windows Live have transformed the way people communicate and interact with each other. Social networks have enabled people to translate their existing physical networks into visible digital connections within social network structures.<sup>25</sup> Before a person can gain access to a social network, they are first required to create and complete an online profile.<sup>26</sup> From the profile, users are also

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<sup>21</sup> *Id.*

<sup>22</sup> *Facebook Q1 2020 Results*, FACEBOOK, at 3, [https://s21.q4cdn.com/399680738/files/doc\\_financials/2020/q1/Q1-2020-FB-Earnings-Presentation.pdf](https://s21.q4cdn.com/399680738/files/doc_financials/2020/q1/Q1-2020-FB-Earnings-Presentation.pdf) [<https://perma.cc/F7Q3-ZZHT>].

<sup>23</sup> *Number of Twitter Users 2021/2022: Demographics, Breakdowns & Predictions*, FINANCESONLINE, <https://financesonline.com/number-of-twitter-users/> [<https://perma.cc/5AEB-FVTV>]; see *The top 500 sites on the web*, ALEXA (Oct. 27, 2020), <https://www.alexa.com/topsites> [<https://perma.cc/VU4N-3ZFX>] (showing, as of Oct. 27, 2020, that Twitter is the 43<sup>rd</sup> most visited website).

<sup>24</sup> *Instagram Revenue and Usage Statistics*, BUSINESS OF APPS (Jan. 28, 2021), <https://www.businessofapps.com/data/instagram-statistics/> [<https://perma.cc/D47R-E268>] (saying that Instagram hit 1 billion monthly active users by June 2018).

<sup>25</sup> See generally *Imagined Communities*, *supra* note 1; Boyd & Ellison, *supra* note 2, at 214; Won Kim, Ok-Ran Jeong & Sang-Won Lee, *On Social Web Sites*, 35 INFO. SYS. 215, 215–17 (2010); *Information Revelation*, *supra* note 1, at 72–74.

<sup>26</sup> See *Imagined Communities*, *supra* note 1, at 36–37; Cliff Lampe et al., *A Familiar Face(book): Profile Elements as Signals in an Online Social Network*, in PROC. OF CONFERENCE ON HUMAN FACTORS IN COMPUTING SYS. 435, 435 (2007); Mike Thelwall, *Social Networks, Genders and Friending: An Analysis of MySpace Member Profiles*, 59 J. ASSOC. INF. SCI. TECHNOL. 1321, 1324 (2008). See generally David Fono & Kate Raynes-Goldie, *Hyperfriendship and Beyond: Friends and Social Norms on LiveJournal*, in INTERNET RESEARCH AN. VOLUME 4: SELECTED PAPERS FROM THE AOIR CONF. 91, 93 (M. Consalvo and C. Haythornthwaite ed., 2006); Peter Lang & Caroline Haythornthwaite, *Social Networks and Internet Connectivity Effects*, 8 INFO., COMMC’N,

able to share and control the information distributed to their contacts.<sup>27</sup> Some social networks have a varied user base and offer photo-sharing, video-sharing, instant-messaging, or blogging features that people can use to communicate with one another.<sup>28</sup> These networks allow people to share their lives in an online environment.<sup>29</sup>

## II. WHAT IS A SOCIAL NETWORK?

Social networks allow users to network and communicate with other users. There are many different types of social networks, including Google+, Windows Live, MySpace, Bebo IMBD, Flickr, LinkedIn, Tumblr, YouTube, Photobucket, Twitter, Facebook, Pinterest, and Instagram.<sup>30</sup> These are multifaceted social networks with tools for a user to share and exchange personal images. While these social network platforms vary significantly in appearance, they all have a number of core features. These core features include profiles, contacts, content/information, and control (or access to control). For the purpose of the paper, social network sites are taken to mean:

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& SOC'Y 125, 126–27 (2005); Leucio Antonio Cutillo et al., *Security and Privacy in Online Social Networks*, in HANDBOOK OF SOCIAL NETWORK TECHNOLOGIES AND APPLICATIONS 501–03 (B. Furht ed., 2010).

<sup>27</sup> This allows the users to be interconnected with one another through a visible social network structure. See *Imagined Communities*, *supra* note 1, at 38–39.

<sup>28</sup> See Boyd & Ellison, *supra* note 2, at 214; David Fono & Kate Raynes-Goldie, *supra* note 26, at 92 (describing LiveJournal as a “blogging service”); see also Danah Boyd & Jeffrey Heer, *Profiles as Conversation: Networked Identity Performance on Friendster*, in *PROC. OF THE HAWAII INT'L CONF. ON SYS. SCI. (HICSS-39) PERSISTENT CONVERSATION TRACK* 59, 59 (2006) (discussing the impact of blogs and photosharing communities on the idea of “conversation”).

<sup>29</sup> See generally *Imagined Communities*, *supra* note 1; Boyd & Ellison, *supra* note 2, at 214; *Information Revelation*, *supra* note 1, at 72–73.

<sup>30</sup> This is not an exhaustive list.

[W]eb-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system. The nature and nomenclature of these connections may vary from site to site.<sup>31</sup>

There are a number of key characteristics of a social network site. One key characteristic is the user's profile. The profile influences how people communicate information, and how they interact and engage with other people within the social network. A profile, like one that can be found on Facebook, contains information about users including their name, age, marital status, gender, likes and dislikes, education, and friends/contacts.<sup>32</sup> It may also include the names of other people users are connected to or wish to be connected to.<sup>33</sup> Each person who is on a social network completes a profile, thus revealing information about themselves. This is irrespective of whether a person is creating content about themselves or another person. A person's profile information can take various forms, including images, videos, audio, written comments, posts, and written information, as well as combinations thereof.<sup>34</sup>

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<sup>31</sup> Boyd & Ellison, *supra* note 2, at 211 (noting while this definition has been widely accepted, it does not reflect the crucial role that personal information plays within a social network; nor does it account for the importance of information sharing and exchanging by users. The definition provides limited consideration of social network analysis and social network theory).

<sup>32</sup> Leslie Walker, *Facebook Basics: Manage Your Profile, News Feed, and More*, LIFEWIRE (Nov. 11, 2020), <https://www.lifewire.com/use-facebook-profile-wall-and-news-feed-2654605> [<https://perma.cc/52J3-38EH>].

<sup>33</sup> *See Information Revelation*, *supra* note 1, at 79–80.

<sup>34</sup> This is not an exhaustive list. *See Privacy Act 1988* (Cth), §6(1) (Austl.) (defining personal information as: information or an opinion (including information or an opinion forming part of a database) about an individual whose identity is apparent, or can reasonably be



A second key characteristic of social networks is that they connect people.<sup>35</sup> The networking function has a dual purpose of supporting the social network and allowing the user to establish connections with other users.<sup>36</sup> This provides a link between one user and another user or multiple users.<sup>37</sup> This is done by way of a notification, which may be accepted or ignored by the user.<sup>38</sup> Accepted requests are added to a user's contact lists, which may or may not be visible.<sup>39</sup> The networking function also facilitates the sharing of information/content<sup>40</sup> created by the users to their contacts on the social network. Profiles may contain links to a user's friend's profile. Through the profile function, users can view other users' friends lists. For example, Facebook's "People You Know" feature allows a user to view other users who are connected to their friends' profiles.<sup>41</sup> Twitter has follower lists and following lists which shows who the person follows.<sup>42</sup> Each social network has its own version of these features.<sup>43</sup> All social networks provide a profile for people to create and allow the person to show their contacts, friends, or followers.

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ascertained, from the information or opinion. Information qualifies as "personal information" whether it is true or not, and whether or not it is recorded in a material form. This means that content that is uploaded and shared online falls within the scope of personal information that may be protected under privacy law.)

<sup>35</sup> See Cutillo et al., *supra* note 26, at 501 (explaining that "networking" is a main function of a social network).

<sup>36</sup> *See Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *See Information Revelation, supra* note 1, at 79–80.

<sup>41</sup> *People You May Know*, FACEBOOK, <https://www.facebook.com/help/336320879782850> [<https://perma.cc/REC2-AZ9S>].

<sup>42</sup> *Following FAQs*, TWITTER, <https://help.twitter.com/en/using-twitter/following-faqs> [<https://perma.cc/9N5T-F92K>].

<sup>43</sup> *See generally* Boyd & Ellison, *supra* note 2.

Another key characteristic of social networks is that they facilitate the exchange of information. This is done by way of blogs, posts, emails, chats, uploading of videos and images, wall-to-wall (Facebook),<sup>44</sup> private messaging, and notes.<sup>45</sup> A post is a block of information comprised of written text, images, videos, and links.<sup>46</sup> This forms part of the main thread of the profile. Here the person, along with their contacts, can comment and interact with one another by depicting their own self as well as other users through posts, comments, image, and video sharing. They can also link their own content to other users via features such as “tagging” or “liking.” The tag feature allows people to identify another person in their content.<sup>47</sup> Personal images that are shared on a person’s profile are stored on a social network.<sup>48</sup> When people share personal images on a profile page, other information about a user may also be revealed such as the user’s identity, name, age, and address.<sup>49</sup> It may also contain information of all of the user’s connections on their network and the information exchanged within the social network by all users.<sup>50</sup>

Another key characteristic of social networks is the privacy settings that allow users to control who accesses their images. The privacy settings of a social network commonly determine how peoples’ profile information and personal images are shared with their friends and other users in the network. The privacy settings provide different levels

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<sup>44</sup> Facebook’s wall-to wall feature allows where a user to post a comment on another user’s wall.

<sup>45</sup> This is not an exhaustive list of features. Cutillo et al., *supra* note 26, at 501; *See* Boyd & Ellison, *supra* note 2, at 213.

<sup>46</sup> Cutillo et al., *supra* note 26, at 502.

<sup>47</sup> *Id.* Tagging is a feature best known in Facebook.

<sup>48</sup> *See id.*

<sup>49</sup> *See* James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137, 1149–51 (2009) (providing an overview of a general discussion about identity); *Imagined Communities*, *supra* note 1.

<sup>50</sup> *See* Cutillo et al., *supra* note 26, at 503.

of access to a person's images when uploaded on a profile page.<sup>51</sup> From the privacy settings, people can also control whether their profile (along with its contents) is visible to and accessible by other users, and whether third parties have access to their content and posts.<sup>52</sup> This in turn allows users to have some control over their profile within the network.<sup>53</sup>

A social network's contract terms also regulate the network's privacy settings, which allow users to restrict access to their images. As will be shown, people's ability to control their images depends on the network's settings. When a user's profile is restricted, control may be overridden by the social network's default settings, which are public.<sup>54</sup> This occurs, for example, in Facebook's graph search because people's information on their profile can be viewed publicly if their privacy settings are not changed. However, even if a user did restrict their individual privacy setting, they would still have very little control over the use of their images. This is because when a person uploads and shares an image on a profile page, that image is also subject to the privacy settings of third parties such as contacts/friends.<sup>55</sup> One of the consequences of gaining

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<sup>51</sup> *See id.* at 502.

<sup>52</sup> *Id.* at 502–03.

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

<sup>54</sup> For example, Facebook's announcement of its facial recognition technology in 2010 reignited privacy concerns from privacy advocates and lawmakers in Europe and the United States. At the time, Facebook used facial recognition technology to identify people in photos on its website. *See* Geoffrey A. Fowler & Christopher Lawton, *Facebook Again in Spotlight on Privacy*, WALL ST. J. (Jun. 8, 2011), <http://online.wsj.com/article/SB10001424052702304778304576373730948200592.html> [<https://perma.cc/X5BZ-CCNN>]. *See generally* Eugenia Georgiades, *Reusing Images Uploaded Online: How Social Networks Contracts Facilitate the Misuse of Personal Images*, 40 EUR. INTELL. PROP. REV. 435 (2018) (discussing how popular social networks regulate the use of images that users upload on their service) [hereinafter Georgiades, *Reusing Images*].

<sup>55</sup> *See* Adi Kamdar, *Facebook Graph Search: Privacy Control You Still Don't Have*, ELECTRONIC FRONTIER FOUNDATION (Jan. 29, 2013),

access to a social network service is that people involuntarily relinquish control over their personal images because the contract terms are mandated by the social network.<sup>56</sup> One example of the problems that arise is the licencing and ownership of content clause that users agree to when they join the network.<sup>57</sup> This clause enables the network to use any information that is created by users; for example, when a user uploads an image, the network needs to obtain the user's consent so as to be able to publish the image on the network.<sup>58</sup>

The social networks such as Facebook, Twitter, and Instagram illustrate the different problems that arise when personal images are exchanged, used and shared within each network. These social networks each illustrate different problems that occur when personal images are shared, exchanged and used online.

Facebook demonstrates the problems that arise when users share, exchange and use images with their contacts. Facebook was launched in February 2004, and by 2020 had

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<https://www.eff.org/deeplinks/2013/01/facebook-graph-search-privacy-control-you-still-dont-have> [<https://perma.cc/B8YJ-XAA7>]; Adi Kamdar, *The Creepy Details of Facebook's New Graph Search*, ELECTRONIC FRONTIER FOUNDATION (Jan. 18, 2013), <https://www.eff.org/deeplinks/2013/01/facebooks-graph-search> [<https://perma.cc/QAL9-33A3>]; See also Adi Kamdar, *Experimenting With Your Privacy, Facebook Begins Selling Access to Your Inbox*, ELECTRONIC FRONTIER FOUNDATION (Dec. 22, 2012), <https://www.eff.org/deeplinks/2012/12/experimenting-privacy-facebook-sells-access-your-inbox> (describing Facebook's 2012 plan allow people to pay money to send an email to any user's mailbox) [<https://perma.cc/C2MV-H62M>].

<sup>56</sup> See Georgiades, *Reusing Images*, *supra* note 54, at 438.

<sup>57</sup> See *id.*

<sup>58</sup> *Id.* at 438; Eugenia Georgiades, *Protecting the Image: Applying a Right of Publicity to Images Uploaded on Social Networks*, 41 EUR. INTEL. PROP. REV. 38, 45 (2019) [hereinafter Georgiades, *Protecting the Image*].

more than 2.6 billion users.<sup>59</sup> Facebook offers its users the ability to create a personal profile, add other users as friends, receive automatic notifications when they update their profiles, exchange messages, instant message, join common interest groups, and like fan pages that comprise workplace, organisations, schools, or colleges.<sup>60</sup> Users must register prior to using the site and use real names and information; they must also be at least 13 years old.<sup>61</sup> Presumably due to these features, Facebook is the number one ranked social network.<sup>62</sup> This is due to its attractiveness for users to engage in a range of online communications such as chatting, apps, games, uploading and sharing images, notes, videos, and tagging.<sup>63</sup> Facebook highlights the problems with the misuse of personal images that occur when people upload images on their profile pages. When a person enters into a social network contract, they often sign away many of their intellectual property rights.<sup>64</sup> Consequently, images may be misused when third parties reuse and reshare images that

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<sup>59</sup> *Facebook Q1 2020 Results*, *supra* note 22; See Craig Smith, *250 Facebook Statistics and Facts in 2020 | By the Numbers*, DMR (July 14, 2020), <http://expandedramblings.com/index.php/by-the-numbers-17-amazing-facebook> [<https://perma.cc/96AQ-HWF7>]; See also *The Top 500 Sites on the Web*, ALEXA (Feb. 11, 2021), <http://www.alexa.com/topsites> (reflecting that Facebook is also ranked as the number one social network site) [<https://perma.cc/VT94-L3CD>].

<sup>60</sup> See generally *Your Profile and Settings*, FACEBOOK, [https://www.facebook.com/help/239070709801747/?helpref=hc\\_global\\_nav](https://www.facebook.com/help/239070709801747/?helpref=hc_global_nav) [<https://perma.cc/74M8-J8R6>] (last visited Feb. 11, 2021).

<sup>61</sup> *Creating an Account*, FACEBOOK, [https://www.facebook.com/help/570785306433644/?helpref=hc\\_fnav](https://www.facebook.com/help/570785306433644/?helpref=hc_fnav) (last visited Feb. 11, 2021) (explaining how to create a Facebook account, mentioning that you must be at least 13 years old to create a Facebook account, and stating that users are required to “use the name they go by in everyday life”) [<https://perma.cc/X4Y9-RKX9>].

<sup>62</sup> See *The Top 500 Sites on the Web*, *supra* note 59.

<sup>63</sup> Andrés Sanchez, *The Facebook Feeding Frenzy: Resistance-Through-Distance and Resistance-Through-Persistence in the Societed Network*, 6 SURVEILLANCE & SOC’Y 275, 277 (2009).

<sup>64</sup> See Georgiades, *Reusing Images*, *supra* note 54, at 438.

have been uploaded; for example, when an uploaded image is subsequently distorted or altered. Social network contracts usually contain wide licence terms that enable a social network to use, reuse and sub-license their photographs.<sup>65</sup> The consequence of this clause is that when a person becomes a member of a network, they give the network a very broad license over the use of their images. This facilitates the misuse of personal images.<sup>66</sup> These problems are made worse by the fact that social networks can alter the terms of service without allowing the users to negotiate the terms.<sup>67</sup> An example of this occurred in *Fraleley v. Facebook, Inc.* where it was argued that users, when they sign up, give permission for their profile images to be used in Facebook’s sponsored stories feature.<sup>68</sup> In particular, it exemplifies the problems that arise when third parties reuse images that have been uploaded and shared by people on their profile pages.

Another platform that illustrates the misuse of personal images that are uploaded online is Twitter. Twitter highlights the problems that arise when users share personal images and third parties reuse those images. Twitter was launched in 2006, and, as of 2015, had 1.3 billion registered

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<sup>65</sup> *Id* at 435–36, 438.

<sup>66</sup> *See* *Fraleley v. Facebook*, 830 F. Supp. 2d 785, 802 (N.D. Cal. 2011); *Cohen v. Facebook, Inc. (Cohen I)* 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011); *Cohen v. Facebook, Inc. (Cohen II)*, No. C 10-5282 RS, 2011 WL 5117164, at \*3 (N.D. Cal. Oct. 27, 2011) (dismissing plaintiff’s amended complaint even though the court previously dismissed the plaintiffs’ complaint with leave to amend and despite the amendments made by the plaintiffs); Jesse Koehler, *Fraleley v. Facebook: The Right of Publicity in Online Social Networks*, 28 *BERKELEY TECH. L.J.* 963, 984 (2013).

<sup>67</sup> *Fraleley*, 830 F. Supp. 2d at 814.

<sup>68</sup> *Id.* at 814 (stating that “[Plaintiffs were] likely to be deceived into believing [they] had full control to prevent [their] appearance in Sponsored Story advertisements while otherwise engaging with Facebook’s various features, such as clicking on a ‘Like’ button, when in fact members lack such control.”).

users.<sup>69</sup> It is a social networking and micro blogging service that allows users to send and receive short text-based messages of, originally, up to 140 characters.<sup>70</sup> The messages that are sent and received are called “tweets,” and are publicly visible by default although the users can restrict the messaging delivery to their friends.<sup>71</sup> Twitter’s functionality works based on a “following” system where a user may follow another user without any reciprocity.<sup>72</sup> Twitter’s function of establishing connections is similar to Facebook’s friends and friending; Twitter users “follow” other users and can have “followers.”<sup>73</sup> A user creates a public profile which has the user’s “full name, the location, a web page, a short biography, and the number of tweets of the user.”<sup>74</sup> Users must register before they can post a tweet, follow or be followed.<sup>75</sup>

Another social network that highlights the misuse of personal images is Instagram. Instagram is an image-sharing

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<sup>69</sup> Adrianus Wagemakers, *There is a Possibility That the Quality of Twitter’s Users is Deteriorating*, BUSINESS INSIDER TECH (Aug. 3, 2015, 6:45 AM), <http://www.businessinsider.com/twitter-monthly-active-users-2015-7?r=UK&IR=T> [<https://perma.cc/DJ3J-KBCM>]; Nicholas Carlson, *The Real History of Twitter*, BUSINESS INSIDER TECH (APR. 13, 2011, 1:30 PM), <https://www.businessinsider.com/how-twitter-was-founded-2011-4> [<https://perma.cc/VEY2-FNG9>].

<sup>70</sup> *Counting Characters*, TWITTER, <https://developer.twitter.com/en/docs/counting-characters>, [<https://perma.cc/T8NQ-CKMQ>]; see also *It’s What’s Happening*, TWITTER, <https://about.twitter.com/company> [<https://perma.cc/NY8F-Z555>].

<sup>71</sup> Haewoon Kwak et al., *What is Twitter, a Social Network or News Media?*, WWW ‘10: Proceedings of the 19<sup>th</sup> International Conference on World Wide Web 591, 591 (April 2010), <https://doi.org/10.1145/1772690.1772751> [<https://perma.cc/LEL9-UFHC>]; Joshua Phillips, *How to Have Private Conversations on Twitter*, CHRON, <https://smallbusiness.chron.com/private-conversations-twitter-71465.html> [<https://perma.cc/7RJS-9743>].

<sup>72</sup> Kwak et al., *supra* note 71, at 591.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 592.

<sup>75</sup> See *Id.* at 591–92.

and hosting social network site that provides various filters for “images” and then allows people to share them on other social networks.<sup>76</sup> Recently, Instagram has expanded to include the uploading of videos by adding “Instagram Live” as a feature.<sup>77</sup> Instagram, as a platform, also highlights the problems that arise when users upload images and those images are reused, and reshared by third parties. Instagram enables users to capture an image on their mobile phone and then, using a filter, enhance the image and then share it via Instagram.<sup>78</sup> As Facebook owns Instagram, the platform enables users to post content from their Instagram profile directly to Facebook.<sup>79</sup> Users on Instagram can upload photographs, share photos, and follow other users.<sup>80</sup> Features on Instagram include a web profile which contains biographical information, personal details, and personal images.)<sup>81</sup>

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<sup>76</sup> William Antonelli, *A beginner’s guide to Instagram, the wildly popular photo-sharing app with over a billion users*, BUSINESS INSIDER TECH (Dec. 14, 2020, 12:14 PM), <https://www.businessinsider.com/what-is-instagram-how-to-use-guide> [<https://perma.cc/N9BF-FKTY>].

<sup>77</sup> Josh Constine, *Instagram Launches Disappearing Live Video and Messages*, TECHCRUNCH (Nov. 21, 2016, 10:00 AM), <https://techcrunch.com/2016/11/21/instagram-live/> [<https://perma.cc/9HR3-XJ9Z>].

<sup>78</sup> Antonelli, *supra* note 76.

<sup>79</sup> Instagram allows users the option to share Instagram posts to Facebook after they have already been posted on Instagram. See Gillon Hunter, *3 Ways to Republish Instagram Content on Facebook*, SOCIAL MEDIA EXAMINER (Dec. 14, 2016), <https://www.socialmediaexaminer.com/3-ways-to-republish-instagram-content-on-facebook> [<https://perma.cc/VFZ7-JVG8>].

<sup>80</sup> Antonelli, *supra* note 76.

<sup>81</sup> Jared Newman, *Instagram’s Webfeed Keeps It Clean, Keeps It Simple*, TIME (Feb. 3, 2013), <http://techland.time.com/2013/02/07/instagrams-web-feed-keeps-it-clean-keeps-it-simple/#ixzz2L7fai7np> [<https://perma.cc/V6KZ-BCDL>].



### III. PROBLEMS BROUGHT ABOUT BY SOCIAL NETWORK SITES

Social networks have brought about a convergence of public and private worlds. Before social networks, people shared photographs by sending physical photographs via the post or digital photographs via email. As communication technologies evolved, so too did social networks. Most social networks allow people to upload and share their images with multiple people instantaneously.<sup>82</sup> In some situations, people who upload images on a social network page are able to identify or “tag”<sup>83</sup> a third party captured in a photograph. One consequence that arises when images are uploaded online is that third parties are able to upload images of other people without their permission or knowledge.<sup>84</sup> Another consequence is that, when personal images are shared online, they may be reused and reshared with ease and with limited restrictions.<sup>85</sup>

While sharing information on social networks allows people to interact and communicate with greater ease, it also raises a number of problems. Problems may arise, for example, when a person uploads an image of themselves and that image is reshared and reused, or when people’s images are uploaded by third parties without permission. In thinking about the problems that potentially arise when personal images are captured and uploaded on social networks, it is important to note that two different groups are potentially affected: the people who create the images and the people whose images are captured in the photographs.

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<sup>82</sup> See generally Donath & Boyd, *supra* note 28; Boyd & Ellison, *supra* note 2.

<sup>83</sup> “Tagging” is a Facebook feature that allows users to identify people in an uploaded image. Cutillo et al., *supra* note 26, at 502.

<sup>84</sup> See Georgiades, *Protecting the Image*, *supra* note 58, at 38.

<sup>85</sup> See generally Georgiades, *Reusing Images*, *supra* note 54, at 4–9.

When a person takes a photograph of themselves and uploads it, the personal images may be reused and reshared without the permission of the person who uploaded the image. A well-known example of this occurred in 2012, when Randi Zuckerberg posted an image of her family on her Facebook page and a third party reposted the image on Twitter without her permission.<sup>86</sup> While access to the uploaded image was restricted to “friends”, there was little she could do to stop her friends from reposting or re-sharing her image.<sup>87</sup>

Problems may also arise when a social network reuses or reshapes images that have been uploaded on a person’s profile page. This occurs because, when people upload and share images on their profile page, the network is able to collect the images and reuse them. When a third party takes a photograph and uploads the image onto their own profile page, problems may arise if the subject of the photograph does not wish to have their image captured and uploaded online. Because copyright law protects the form of a copyright work and not the subject matter, copyright protection does not extend to the person whose image is captured in a photograph.<sup>88</sup> Problems can arise when the uploaded image is reshared or reused by other parties or by

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<sup>86</sup> Sam Biddle, *Watch Randi Zuckerberg Have a Facebook Freak Out over Her Photo Going Viral*, GIZMODO (Dec. 28, 2012, 11:12 PM), <http://gizmodo.com/5971918/watch-randi-zuckerberg-have-a-facebook-freakout-over-her-photo-going-viral> (last visited Feb. 10, 2021).

<sup>87</sup> A person may think that they are only sharing their image with their contacts, but may not realize that their contacts’ friends and contacts may also be able to access the image(s); see Alessandro Acquisti & Jens Grossklags, *Privacy Attitudes and Privacy Behavior*, Econ. Info. Sec. 165, 165–178 (2004); Acquisti & Gross, *supra* note 1, at 36; Amanda Nosko et al., *All About Me: Disclosure in Online Social Networking Profiles: The Case of FACEBOOK*, 26 COMPUTS. IN HUM. BEHAV. 406, 406–07 (2010); Cliff Lampe et al., *supra* note 26, at 436–37.

<sup>88</sup> See Eugenia Georgiades, *The Limitation of Copyright: Sharing Personal Images on Social Networks*, 40 EUR. INTELL. PROP. REV. 230, 231–34 (2018).

a social network. The person whose image is captured has a limited ability to control the use of their image and prevent any misuse. Problems may also arise when the image is distorted or altered. There may also be a change in circumstance of the person uploading the image—for example, when a creator of an image has a change of mind or dies.

As social media has become increasingly pervasive, people's images have become more prone to misuse, abuse, and exploitation. One way that personal images are exploited is when third parties use people's images for advertising purposes without permission.<sup>89</sup> Social networks receive revenue through targeted advertising; each advertisement that appears on a person's profile is specific to the information contained in their posts and images.<sup>90</sup> In sharing and exchanging personal images on social networks, each person that becomes a user of a social network has competing interests with other users.

While Instagram, Twitter and Facebook all collect images that are uploaded and shared on their networks, each network uses the images differently. Social networks, such as Twitter, collect personal images and allow their affiliates and third party advertisers to access the images.<sup>91</sup> For example, images may be indexed in search engines or used for advertising purposes.<sup>92</sup> In contrast, Instagram uses personal images to personalise content and provide information to users for advertising and marketing purposes.<sup>93</sup> The network shares user activity and

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<sup>89</sup> Georgiades, *Reusing Images*, *supra* note 54, at 435–36.

<sup>90</sup> *See id.* at 439 (describing Facebook's targeted advertising practices).

<sup>91</sup> *See Twitter Privacy Policy*, TWITTER (June 18, 2020), <https://twitter.com/privacy?lang=en> [<https://perma.cc/LU23-DZ6V>].

<sup>92</sup> *Id.*

<sup>93</sup> *See Data Policy*, INSTAGRAM (Aug. 21, 2020), <https://help.instagram.com/155833707900388> [<https://perma.cc/4QU8-M484>]; *Data Policy*, FACEBOOK (Aug. 21, 2020), <https://www.facebook.com/policy.php> [<https://perma.cc/C9XS-V8N2>].

information with their advertisers for marketing and advertising purposes.<sup>94</sup> Facebook uses personal images to “provide, improve and develop” their service, it also provides “short cuts” to people by making suggestions such as tagging friends in photographs or liking a product when they upload and share images on their profile page.<sup>95</sup>

As a result of people sharing and exchanging personal images online, networks are able to collect personal images and use these images for advertising or marketing purposes. The social network contracts/policies allow the networks to use and access all images that are uploaded, even if they are subject to restricted privacy settings.<sup>96</sup> The result of this is that even though social networks have privacy settings, these settings do not necessarily guarantee that personal images are not misused.

Another problem that potentially arises when a person uploads their image onto a profile page is that a third party may distort or alter the image—for example, by turning the personal image into a meme.<sup>97</sup> In these circumstances, copyright and moral rights may protect the creator of an image.<sup>98</sup> This is because in Australia, copyright law

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<sup>94</sup> *About Instagram Ads*, INSTAGRAM, <https://help.instagram.com/478880589321969/> [<https://perma.cc/8QUY-RHA3>].

<sup>95</sup> *Data Policy*, FACEBOOK, <https://www.facebook.com/about/privacy/previous> [<https://perma.cc/TT4F-9UZF>].

<sup>96</sup> See Georgiades, *Reusing Images*, *supra* note 54, at 440–46.

<sup>97</sup> *Meme*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/meme> (defining a meme as “an idea, behavior, style, or usage that spreads from person to person within a culture”) [<https://perma.cc/62L8-SWMX>]; see Bethany Ramos, *Mom Finds Toddler’s Photos Were Turned Into Disturbing Internet Memes*, SHEKNOWS.COM (Oct. 16, 2015), <https://www.sheknows.com/parenting/articles/1099383/offensive-facebook-memes-stolen-photos/> (describing a mother finding out that pictures of her daughter, which her daughter had posted to her personal Facebook page, had been turned into offensive memes) [<https://perma.cc/Y8RL-BQUJ>].

<sup>98</sup> See Georgiades, *The Limitation of Copyright*, *supra* note 88, at 239–41.

provides a creator of an artistic work with moral rights that may protect the integrity of their work.<sup>99</sup> For example, the right to integrity may protect the integrity of the creator of the image, but it does not protect the creator from ridicule.<sup>100</sup> In this situation, the subject of the meme must seek alternative means of protection for the misuse of their image.<sup>101</sup>

Problems also potentially arise when a person uploads an image and there is a change of circumstance—for example, if the person changes their mind about the sharing of an image online. In situations where a person poses for a photograph and later changes their mind about the image being shared, they have a limited ability to prevent the use of their image. This is because the person who captures (or takes the photograph) of a third party is the creator of the image and the copyright owner. A creator of an image has rights over the use and distribution of the image, whereas the subject of image is not afforded copyright protection.<sup>102</sup> At best, a subject in an image can request the copyright owner to remove their image from the social network.<sup>103</sup> In the event that a copyright owner is unwilling to remove the photograph from their profile page the same problems that were discussed above arise.<sup>104</sup> A creator may have a limited ability to prevent the misuse of their images, if they have changed their mind about uploading the photographs when those images are subsequently reshared by third parties. In contrast, a subject of an image who changes their mind about having their image captured and subsequently uploaded and shared is

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<sup>99</sup> *Id.* at 239.

<sup>100</sup> *Id.* at 240–41.

<sup>101</sup> *See id.* at 241–42.

<sup>102</sup> *See id.* at 231–35, 239–42 (discussing ownership of copyright and the rights that flow from it).

<sup>103</sup> *See id.* at 241–42.

<sup>104</sup> *See id.*

unable to prevent the use of their image in most circumstances. This is because the creator controls the use of the image, whereas the subject of the image cannot control the use of the image. Consequently, a person who is photographed by a third party has limited control over the use of their image that captured in a photograph.<sup>105</sup> In situations where the subject and creator of an image are different, the subject must seek alternate avenues of legal protection.<sup>106</sup>

Further problems potentially arise when someone dies. While social networks like Facebook have provisions for how a person’s profile page may be accessed after they die, such as providing a “legacy” contact, the provisions are limited in scope and provide little protection against misuse.<sup>107</sup> A well-known example of the problems that arise when a person dies is the case of Nikki Catsouras who, in October 2006, was decapitated when she lost control of her father’s Porsche.<sup>108</sup> The Californian Highway Patrol (CHP) followed standard procedure and took photographs of the crime scene.<sup>109</sup> The crime scene was so gruesome that the coroner refused to allow the parents to identify the body.<sup>110</sup> Two CHP employees then emailed nine of the gruesome

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<sup>105</sup> *See id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See What will happen to my Facebook account if I pass away*, FACEBOOK, <https://www.facebook.com/help/103897939701143> [https://perma.cc/72QX-7B5X].

<sup>108</sup> *Catsouras v. Dep’t of Cal. Highway Patrol*, 181 Cal. App. 4th 856, 863, 865 (Cal. Ct. App. 2010); Jeffrey Toobin, *The Solace of Oblivion: In Europe the Right to Be Forgotten Trumps the Internet*, THE NEW YORKER (Sept. 22, 2014), <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion> [https://perma.cc/S3NC-PB92]; *see also* Daniel Solove, *Family Privacy Rights in Death Scene Images of the Deceased*, TEACHPRIVACY (Apr. 27, 2009), <https://teachprivacy.com/family-privacy-rights/> [https://perma.cc/2AVX-TA8R].

<sup>109</sup> Toobin, *supra* note 108.

<sup>110</sup> *Id.*

photographs to their friends and family members on Halloween to take advantage of the photograph's shock value.<sup>111</sup> The photographs subsequently went viral.<sup>112</sup> The Supreme Court of Appeal held that the dissemination of the images "was not in furtherance of the investigation, the preservation of evidence, or any other law enforcement purpose, to deliberately make a mutilated corpse the subject of lurid gossip."<sup>113</sup> It is significant to note that the plaintiff's claims did not fit within the ambit of a privacy right as the court asserted that "California law clearly provides that surviving family members have no right of privacy in the context of written media discussing, or pictorial media portraying, the life of a decedent. Any cause of action for invasion of privacy in that context belongs to the decedent and expires along with him or her."<sup>114</sup> Californian law is different to Australian law in the fact that "family members have a common law privacy right in the death images of a decedent."<sup>115</sup> In this respect, Australian privacy law does not provide protection to deceased persons nor does it allow family members to bring actions on the decedent's behalf.<sup>116</sup> After a long legal battle spanning negligence, infliction of

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Catsouras, 181 Cal. App. 4th, at 864.

<sup>114</sup> *Id.* at 863–64 (citing *Flynn v. Higham*, 149 Cal. App. 3d 677, 683 (Cal. Ct. App. 1983)).

<sup>115</sup> *Id.* at 864 (stating that "[t]he publication of death images is another matter, however. How can a decedent be injured in his or her privacy by the publication of death images, which only come into being once the decedent has passed on? The dissemination of death images can only affect the living. As cases from other jurisdictions make plain, family members have a common law privacy right in the death images of a decedent, subject to certain limitations").

<sup>116</sup> See *Privacy Act 1988* (Cth) s 6(1) (Austl.) (defining an individual as a natural person; notably, this does not include deceased individuals); *Natural Person*, LEGAL DICTIONARY (Apr. 12, 2017), <https://legaldictionary.net/natural-person/> [https://perma.cc/N896-5PAF] (stating that a natural person is a living human being).

emotional distress, copyright, and invasion of privacy issues, the defendants settled with the Catsouras family in 2012.<sup>117</sup> At the time of the litigation, developments in strengthening data protection laws were emerging in Europe with the decision of *Google Spain v Gonzalez*.<sup>118</sup> This decision was significant because the court held that users had a right to request the removal of their data in certain situations.<sup>119</sup> In a court mandated settlement conference order the two parties to settled ahead of a jury trial.<sup>120</sup> The Catsouras case highlighted that there was limited protection in the United States for a privacy right that extended to family members, allowing them to bring claims for privacy breaches of deceased persons. The Supreme Court in Catsouras recognised that a familial right to privacy in autopsy images, or similar images, existed for family members of deceased persons.<sup>121</sup>

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<sup>117</sup> Toobin, *supra* note 108.

<sup>118</sup> See Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, ECLI:EU:C:2014:317, ¶ 34, (May 13, 2014).

<sup>119</sup> See Eugenia Georgiades, *Down the Rabbit Hole: Applying a Right to Be Forgotten to Personal Images Uploaded on Social Networks*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1111, 1118 (2020) [hereinafter Georgiades, *Down the Rabbit Hole*].

<sup>120</sup> Greg Hardesty, *Family Gets \$2.4 Million Over Grisly Crash Images*, THE ORANGE COUNTY REG. (Jan. 31, 2012, 7:16 AM), <http://www.ocregister.com/articles/family-337967-catsouras-nikki.html> [<https://perma.cc/7KGP-3NH9>] (stating that “[t]he family was compensated for the emotional pain and suffering associated with the release of the photos,” and the Catsouras family attorney saying “The CHP came to the table with significant funds in an effort to resolve this case and remove any chances of a monumental verdict”).

<sup>121</sup> Solove, *supra* note 108 (noting that some scholars argue that “[f]amilies have a privacy interest in death-scene photos of deceased relatives”); see also *Nat’l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 167–68 (2004) (where the United States Supreme Court stated: “We have little difficulty ... in finding in our case law and traditions the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family



Problems also arise when people share and exchange images of deceased Aboriginal and Torres Strait Islander people on social networks because the publication may cause distress to family members.<sup>122</sup> There are also customary practices among these peoples against publishing images of deceased people during mourning periods.<sup>123</sup> Another cultural practice is the prohibition on publishing names of

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member's remains for public purposes ... In addition this well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized at common law. Indeed, this right to privacy has much deeper roots in the common law ... An early decision by the New York Court of Appeals is typical: 'It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased.'" (quoting *Schuyler v. Curtis*, 147 N.Y. 434, 447 (1895)). See generally Clay Calvert, *The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture*, 26 LOY. L.A. ENT. L. REV. 133, 133–42 (2006); Clay Calvert, *A Familial Privacy Right Over Death Images: Critiquing the Internet-Propelled Emergence of a Nascent Constitutional Right that Preserves Happy Memories and Emotions*, 40 HASTINGS CONST. L.Q. 475, 503–07 (2013); Catherine Leibowitz, "A Right to be Spared Unhappiness": *Images of Death and the Expansion of the Relational Right of Privacy*, 32 CARDOZO ARTS & ENT. L.J. 347, 347–50 (2013).

<sup>122</sup> Jens Korff, *Aboriginal use of social media*, CREATIVE SPIRITS (Feb. 8, 2021), <https://www.creativespirits.info/aboriginalculture/media/aboriginal-use-of-social-media> [<https://perma.cc/R265-3AV9>]. See generally Alpana Roy, *Recent Developments in Law Reform and Indigenous Cultural and Intellectual Property in Australia*, 31 EUR. INTELL. PROP. L.R. 1 (2009).

<sup>123</sup> See Korff, *supra* note 122; See generally Michael Blakeney, *Protecting the Spiritual Beliefs of Indigenous Peoples: Australian Case Studies*, 22 PAC. RIM L. & POL'Y J. 391 (2013) (discussing the spiritual beliefs of indigenous peoples in the context of their legal rights).

deceased Aboriginal and Torres Strait Islander people.<sup>124</sup> While the name of the deceased person may be withheld, the publication of the image may still cause distress and harm to the family and the community.<sup>125</sup>

#### **IV. WHY SHOULD WE PROTECT PERSONAL IMAGES?**

While there are many situations in the online world where images may be misused, the mere fact that something has been misused is not necessarily a reason why it should be protected. This section considers what might be considered a fundamental question; namely, why should we protect images online? Before considering the questions of why personal images should be protected, it is necessary to consider whether all images should be treated equally or whether the law should differentiate between different types of images. This is important because there are many different types of images online, from the mundane and trivial to the highly personal, each of which may warrant different protection.

In some situations, Australia, like the United Kingdom, has treated personal images differently, depending on the nature of the image.<sup>126</sup> For example the

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<sup>124</sup> Jens Korff, *Mourning an Aboriginal Death*, CREATIVE SPIRITS (July 17, 2021), <https://www.creativespirits.info/aboriginalculture/people/mourning-an-aboriginal-death> [<https://perma.cc/4P6P-MT9Q>]. See generally Natalie Stoianoff & Alpana Roy, *Indigenous Knowledge and Culture in Australia - The Case for Sui Generis Legislation*, 41 MONASH U. L. REV. 745 (2015).

<sup>125</sup> See Korff, *supra* note 122; see also *Indigenous Portal*, Queensland Government, <https://indigenousportal.education.qld.gov.au/> [<https://perma.cc/P6SB-Y6UE>] (noting that the summary applies to journalists and Australian media to observe cultural protocols); Michael Blakeney, *Protecting the Spiritual Beliefs of Indigenous Peoples: Australian Case Studies*, 22 PAC. RIM L. & POL'Y J. 391, 397 (2013).

<sup>126</sup> *Privacy Act 1988* (Cth) s 6(1) (Austl.) (Personal images are a subset of “personal information” that is currently protected under the Act and includes written information about a person. Because an image allows a

law of breach of confidence has treated images differently depending on the information that is depicted in the photograph.<sup>127</sup> While images that are of a sexual or intimate nature may be protected, an image of a person walking outside may not warrant protection.<sup>128</sup> Here, the law has been willing to pass judgment over the nature and quality of the information, changing the way the law applies accordingly.<sup>129</sup> In other contexts, however, the law has been less willing to pass judgement over the quality of the

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person to be identified (even without written information identifying them), it is one of the most significant forms of identification because the image represents a person thus “identification of the person appears to be an obvious and sufficient condition for awarding protection.”); Tatiana Synodinou, *Image Right and Copyright Law in Europe: Divergences and Convergences*, 3 LAWS 181, 183 (2014); Susan Corbett, *The Retention of Personal Information Online: A Call for International Regulation of Privacy*, 29 COMPUT. L. & SEC. REV. 246, 248 (2013).

<sup>127</sup> *Campbell v. MGN Ltd.* [2004] UKHL 22, [122] (appeal taken from Eng.) (stating that “[a] person who just happens to be in the street when the photograph was taken and appears in it only incidentally cannot as a general rule object to the publication of the photograph. . . [b]ut the situation is different if the public nature of the place where a photograph is taken was simply used as background for one or more persons who constitute the true subject of the photograph.”).

<sup>128</sup> See *Wilson v Ferguson* [2015] WASC 15, ¶ 56 (implying confidentiality in cases where the photographs are of an intimate nature but refusing protection for a photograph taken on a public street).

<sup>129</sup> *Campbell v. MGN Ltd.* [2004] UKHL 22, [154] (opinion of B. Hale) (stating that “We have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must be private. If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint. She makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk. There is nothing essentially private about that information nor can it be expected to damage her private life.”).

image.<sup>130</sup> This is the case, for example, with copyright law which has traditionally refused to pass judgement over the relative quality of artistic works, once a work is classified as an artistic work (such as a photograph), no consideration is given to the quality of the photograph.<sup>131</sup>

It is clear that there are many different types of images online. Some contain sensitive and important information, while other images are trivial and of fleeting interest. While the former are deserving of protection, the latter are less so. Having said this, this does not mean that we should create a two-tier system which only protects certain types of images. As copyright law has long acknowledged, it is often difficult, or dangerous, to pass judgement on artistic works such as photographs.<sup>132</sup> This is particularly the case with personal images—some people may be highly sensitive to disclosure, while others thrive on it. A better option would be to accept all images from the sensitive to the trivial, but to take account of these

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<sup>130</sup> See *Douglas v. Hello! Ltd.* [2005] EWCA Civ 595, [106] (stating “Nor is it right to treat a photograph simply as a means of conveying factual information. A photograph can certainly capture every detail of a momentary even in a way which words cannot, but a photograph can do more than that. A personal photograph can portray, not necessarily accurately, the personality and the mood of the subject.”).

<sup>131</sup> 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2A.08[3][a][i] (Matthew Bender, Rev. Ed. 2021) (citing *Ets-Hokin v. Sky Spirits, Inc.*, 225 F.3d 1068, 1076 (9th Cir. 2000)).

<sup>132</sup> See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) (saying that it is dangerous for judges to be the final arbiters of whether a “pictorial illustration[]” has artistic merit, because it is ultimately the public that judges the worth of a work); see also 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2A.08[3][a][i] (Matthew Bender, Rev. Ed. 2021) (stating that “almost any photograph may claim the necessary originality to support a photograph merely by virtue of the photographers’ personal choice of the rendition of the image, the subject matter, or the precise time when the photograph is taken.”) (citing *Ets-Hokin v. Sky Spirits, Inc.*, 225 F.3d 1068, 1076 (9th Cir. 2000)).

differences in the application of the law. This approach would work especially well in relation to remedies and damages. With this in mind we now revisit the question: why should we bother protecting personal images online?

Given the diversity of images online and the myriad of different interests potentially affected, it is not surprising that there is no single reason why personal images should be protected. Instead there is a patchwork of different reasons why images might be protected that will differ depending on the type of image in question. There are a number of different reasons why a person's image warrants protection that span economic and non-economic considerations that are associated with image rights.<sup>133</sup> The following section examines the arguments for protecting a person's image.<sup>134</sup>

One reason why we should protect a person's image is because the image is an intangible asset.<sup>135</sup> As Beverley-Smith suggests, "the increasing commodification of the human image demands that any modern classification of interests in personality should take account of the fact that a person's name or features are also valuable economic

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<sup>133</sup> HUW BEVERLY-SMITH, *THE COMMERCIAL APPROPRIATION OF PERSONALITY* 8-9 (2002); Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 *Geo. L.J.* 2381, 2381-82 (1996). See generally Debbie V. S. Kasper, *The Evolution (Or Devolution) of Privacy*, 20 *Sociological Forum* 69(2005) (describing the evolution of notions of privacy as they have appeared in various historical and cultural contexts); Synodinou, *supra* note 126.

<sup>134</sup> See Synodinou, *supra* note 126, at 182, (stating that "Protection of a person's image often takes a dual form based on the privacy/property dichotomy that fails to express in legal terms the autonomy and the particular features of a person's image. Based on the foregoing, a person's image appears to be a legal asset with a multiple identity and an indiscernible nature."). See generally BEVERLY-SMITH, *supra* note 133 (analyzing the problem of commercial appropriation and offering various recommendations and means to address the issue).

<sup>135</sup> See Synodinou, *supra* note 126, at 196.

assets.”<sup>136</sup> This typically occurs where celebrity’s, athlete’s, and musician’s images are used in connection with advertising and marketing purposes.<sup>137</sup> Another reason for protecting images builds on the protection of personality,<sup>138</sup> which in turn, is founded on Lockean labor theory.<sup>139</sup> As Locke said:

[E]very man has a property in his own person. This nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.<sup>140</sup>

Given, as Locke said, that everyone has “a property in his own person” it can be argued that a person’s image is their property.<sup>141</sup> Nimmer built upon Locke’s labor theory when he said, “it would seem to be a first principle of Anglo-

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<sup>136</sup> BEVERLY-SMITH, *supra* note 133, at 6–7. *See generally* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330–64 (1988) (exploring the “personality justification” of intellectual property).

<sup>137</sup> *See* Alisa M. Weisman, *Publicity as an Aspect of Privacy and Personal Autonomy*, 55 S. Cal. L. Rev. 727, 730 (1982) (stating that “[b]ecause most publicity cases have arisen in the commercial advertising context, many courts and commentators have thought and written about publicity primarily in economic terms”). *See* BEVERLY-SMITH, *supra* note 133, at 8–10 (describing the economic interests present in personality rights).

<sup>138</sup> *See* Synodinou, *supra* note 126, at 182. *See generally* PATRICK BRÜGGEMEIER ET AL., PERSONALITY RIGHTS IN EUROPEAN TORT LAW 567–77 (2010) (describing the basis of personality protection).

<sup>139</sup> JOHN LOCKE, TWO TREATISES, Book II, Chapter V, para 27. JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 177–83 (1988) (providing a discussion of Locke’s labor theory).

<sup>140</sup> LOCKE, *supra* note 139. *See also* Walton H. Hamilton, *Property According to Locke*, 41 YALE L.J. 864, 867 (1932) (quoting Locke and explaining his initial premises).

<sup>141</sup> LOCKE, *supra* note 139.

American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations.”<sup>142</sup> In *Edison v Edison Polyform Mfg.*,<sup>143</sup> the court remarked that: “If a man’s name be his own property. . . it is difficult to understand why the peculiar cast of one’s features is not also one’s property, and why it’s a pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it.” The Lockean labor theory is particularly important for celebrities who often invest a considerable amount of time and energy in their images. As Judge Neville says in *Uhlander v. Henricksen*:

[A] celebrity has a legitimate proprietary interest in his public personality. A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics and other characteristics, is the fruit of his labors and is a type of property.<sup>144</sup>

One of the most powerful reasons why we should protect personal images is because abuse of a personal image potentially impinges on the fundamental human values of dignity and autonomy. The need to protect dignity and

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<sup>142</sup> Melville B. Nimmer, *The Right of Publicity*, 19 L. & Contemp. Probs. 203, 216 (1954). *But see* BEVERLY-SMITH, *supra* note 133, at 294–96 (arguing that Lockean labor theory falls short in this application, and explaining that the expended labor is often directed at a different task and that publicity is a secondary consideration, e.g., an athlete training for competition is expending effort for the competition and fame may not necessarily follow).

<sup>143</sup> *Edison v. Edison Polyform Mfg. Co.*, 67 A. 392, 394 (N.J. Ch. 1907); Michael Madow, *Private Ownership of the Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 156 (1993).

<sup>144</sup> *Uhlander v. Henricksen*, 316 F. Supp. 1277, 1282 (1970), *abrogated by* *Dryer v. National Football League*, 55 F. Supp. 3d 1181 (2014).

autonomy is reflected in Article 1 of the *International Convention on Human Rights*, which provides that “all human beings are born free and equal in dignity and rights.”<sup>145</sup> That need is also reflected in the preamble of *The Universal Declaration of Human Rights*, which provides that all human beings should have fundamental human rights of dignity and worth of human person.<sup>146</sup> Allowing the misuse of personal images online has the potential to impinge on dignity and autonomy. This is because, as the Canadian Supreme Court said,

The camera lens captures a human moment at its most intense, and the snapshot “defiles” that moment. . . . A person surprised in his or her private life by a roving photographer is stripped of his or her transcendence and human dignity, since he or she is reduced to the status of a “spectacle” for others. . . . The “indecentcy of the image” deprives those photographed of their most secret substance.<sup>147</sup>

As Beverley-Smith argues, many “violations of individual personality are of a non-pecuniary nature, not only because they cannot be assessed in monetary terms with any mathematical accuracy, but also because they are usually of inherently non-economic value.”<sup>148</sup> In part, this is because there is an “organic link between the intangible value of image and the core of personality, human

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<sup>145</sup> G.A. Res. 217 A, Art. 1 (Dec. 10, 1948).

<sup>146</sup> *Id.* (providing, in Article 3, that “everyone has the right to life, liberty and security of person.” Article 18 states that “[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”)

<sup>147</sup> *Les Editions Vice-Versa Inc v Aubry*, [1998] S.C.R. 591 (Can.).

<sup>148</sup> BEVERLY-SMITH, *supra* note 133, at 6; *see also* BRÜGGEMEIER ET AL., *supra* note 138, at 565–69.



dignity.”<sup>149</sup> Because a person’s image is an element of personality that is “inextricably linked to the self,” the economic aspects cannot be divorced from the moral aspects of personality that include human dignity.<sup>150</sup>

While there may not be a “coherent notion of human dignity as a legal value,” nonetheless, dignitary interests in a personal image often reflect a broad spectrum of factors including reputation, privacy, and liberty.<sup>151</sup> As Rosen points out, misuse of a person’s image constitutes “an intrinsic offense against individual dignity.”<sup>152</sup> As the Canadian Supreme Court said in *Les Editions Vice-Versa Inc. v Aubry*,<sup>153</sup> it is important to protect personal images in order to safeguard a person’s “individual autonomy and the control of each person over their identity. . . .”<sup>154</sup>

Protecting dignity is closely aligned with the protection of autonomy. Autonomy “is a complex assumption about the capacities, developed or underdeveloped, of persons, which enable them to develop, want to act on, and act on higher-order plans of action which take as their self-critical object one’s life and the way it is

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<sup>149</sup> Synodinou, *supra* note 126, at 197; *see also* BRÜGGEMEIER ET AL., *supra* note 138, at 567–69.

<sup>150</sup> Synodinou, *supra* note 126, at 197.

<sup>151</sup> BEVERLY-SMITH, *supra* note 133, at 10–11.

<sup>152</sup> JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 19 (2000). *See also* Richard C. Post, *Three Concepts of Privacy* 89 *GEO. L.J.*, 2087, 2092 (2001) (stating that “to equate privacy with dignity is to ground privacy in social forms of respect that we owe each other as members of a common community”); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 *CLR* 199 (Austl.), (Gleeson C.J., noting that the foundation of the rights of privacy is human dignity).

<sup>153</sup> *Aubry*, *supra* note 147, at ¶ 52.

<sup>154</sup> *Id.*; *see* Jonathan Morgan, *Privacy, Confidence and Horizontal Effect: “Hello” Trouble*, 62 *CAMBRIDGE L.J.* 444, 446–47 (2003) (Discussing the *Aubry* decision).

lived.”<sup>155</sup> Autonomy is also an important value because it requires that a person should be able to take “self-critical responsibility for one’s ends and the way they cohere in a life.”<sup>156</sup> Autonomy is the freedom that an individual has to control what is revealed about them.<sup>157</sup> It has been suggested that “autonomy, and the separation of the personal and the public are rights based[.]”<sup>158</sup> These rights, as one scholar suggests, reflect the “primacy of the individual over society.”<sup>159</sup> This is particularly significant because “privacy theory is focused on individual freedom and not only sees the individual as the locus of privacy rights, but also sees the protection of individual freedom as the ultimate goal of privacy.”<sup>160</sup> Autonomy allows an individual the power and freedom to choose for themselves what is private and what is not.<sup>161</sup>

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<sup>155</sup> David A. J. Richards, *Rights and Autonomy*, 92 *ETHICS* 3, 6 (1981); see also Harry Frankfurt, *Freedom of the Will and The Concept of a Person*, 68 *J. PHIL.* 5, 7 (1971) (the author states, that persons “are capable of wanting to be different, in their preferences and purposes, from what they are. Many animals appear to have the capacity for. . . “first order desires” or “desires of the first order,” which are simple desires to do or not to do one thing or another. No animal other than man, however, appears to have the capacity for reflective self-evaluation that is manifested in the formation of second-order desires”).

<sup>156</sup> Richards, *supra* note 155, at 9.

<sup>157</sup> See generally Ari Ezra Waldman, *Privacy as Trust: Sharing Personal Information in a Networked World*, 69 *U. MIAMI L. REV.* 559, 585 (2015) (explaining that theories of privacy are concepts of autonomy and choice: the choice to disseminate information. . . and the correlative right to control what others know about us. He further argues that “[a]utonomy and choice are central to both Locke and Kant, as both agree that the freedom to choose defines man”).

<sup>158</sup> *Id.* at 566.

<sup>159</sup> *Id.* (stating that these rights reflect Lockean and Kantian ideals which are “united by the respect they offer the individual and individual rights”).

<sup>160</sup> *Id.* at 567.

<sup>161</sup> *Id.* at 581 (claiming that individual freedom is viewed from a privacy perspective that is a “necessary condition for generating the ideals of

Another reason why images should be protected is because misuse of a personal image may unduly intrude upon the private life of an individual. As another scholar noted, “nothing is better worthy of legal protection than private life, or, in other words, the right of every man to keep his affairs to himself, and to decide for himself to what extent they shall be the subject of public observation and discussion.”<sup>162</sup> The sanctity of the private sphere is reflected in many human rights treaties, including the *European Convention of Human Rights*, which seek to protect a person’s private or family life.<sup>163</sup> Importantly, respect for the private life of an individual extends beyond the invasion of private physical spaces (such as the home) to include the taking of a photograph of someone in a public place.<sup>164</sup> While “we venture into the public, in order to further our private lives, we do not ipso facto relinquish all claims to a private sphere. Even tacit consent to being observed by others cannot automatically extend to their taking and, a

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independence and autonomy” and also stating that “previous theories of privacy reflected the individual’s right to seclude himself and exclude others from certain aspects of his life, whether intimate, deviant, or not. They appreciated privacy as guaranteeing freedom *from* something: private places and private things were so called because they belonged to the individual, who had the power to control dissemination”).

<sup>162</sup> E. L. Godkin, *Libel and Its Legal Remedy*, 46 THE ATLANTIC MONTHLY, July–Dec. 1880, at 729, 736.

<sup>163</sup> Eur. Conv. H.R., Art. 8 (Rome, 1950) (providing: “Right to respect for private and family life 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”).

<sup>164</sup> See, e.g., Morgan, *supra* note 154, at 446–47. *But see* AUSTRALIAN LAW REFORM COMMISSION, SERIOUS INVASION OF PRIVACY IN THE DIGITAL ERA ¶ 5.16 (stating the proper question should be centered on whether a plaintiff would have a reasonable expectation of privacy).

fortiori, publishing photographs.”<sup>165</sup> As Lord Hoffmann, in *Campbell v MGN Ltd*, said, “the publication of a photograph taken by intrusion into a private place (for example, by a long distance lens) may in itself by [sic] such an infringement [of the privacy of one’s personal information], even if there is nothing embarrassing about the picture itself[.]”<sup>166</sup>

A person’s image is one of the core features that identifies them to others.<sup>167</sup> The protection of a person’s image is important because the face is “the most transparent part of the body”;<sup>168</sup> it captures a person’s facial expression which shows “‘real’ feelings, character, and personality.”<sup>169</sup> An image consists of a person’s identification and often is a representation of them which is an “obvious and sufficient condition for awarding protection.”<sup>170</sup> A “person’s image constitutes one of the chief attributes of his or her personality, as it reveals the person’s unique characteristics and distinguishes the person from his or her peers.”<sup>171</sup> This is because it “presupposes the individual’s right to control the use of that image, including the right to refuse

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<sup>165</sup> Morgan, *supra* note 154, at 446 (emphasis original).

<sup>166</sup> *Campbell v. MGN Ltd.* [2004] 2 AC 457 (HL) 75 (appeal taken from Eng.).

<sup>167</sup> See *von Hannover v. Germany* (no 2) (2012) 55 E.H.R.R. 15, ¶ 96; see generally JILL MARSHALL, *PERSONAL FREEDOM THROUGH HUMAN RIGHTS LAW? AUTONOMY, IDENTITY AND INTEGRITY UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS* (2008) (discussing the European Court of Human Rights’ treatment of privacy, personal autonomy, and personal identity); Synodinou, *supra* note 126 (discussing the treatment of image rights in Europe).

<sup>168</sup> Robert E. Mensel, *Kodakers Lying in Wait: Amateur Photography and the Right of Privacy in New York, 1885-1915*, 43 AM. Q. 24, 31 (1991) (citing KAREN HALTTUNEN, *CONFIDENCE MEN AND PAINTED WOMEN: A STUDY OF MIDDLE-CLASS CULTURE IN AMERICA, 1830–70, 1883* (1982)).

<sup>169</sup> *Id.*

<sup>170</sup> Synodinou, *supra* note 126, at 183.

<sup>171</sup> *von Hannover*, 55 E.H.R.R. ¶ 96.

publication thereof.”<sup>172</sup> As the Grand Chamber of the European Court of Human Rights noted, “the right to the protection of one’s image is thus one of the essential components of personal developments.”<sup>173</sup>

Another reason why we should protect images online is because of Australia’s obligations under international law. Specifically, we should provide effective protection to images of people because Australia is a signatory to the *International Covenant on Civil and Political Rights*.<sup>174</sup> Of key importance here is Article 17, which provides that member states should ensure that citizens are protected from the unlawful interference with family, privacy, home or correspondence, and reputation.<sup>175</sup> Further, Article 1 provides that all people have the “right of self-determination and are free to determine and freely pursue their economic, social and cultural development.”<sup>176</sup> These provisions demand that we “recognise the significance of individual privacy, particularly in view of the privacy threats posed by rapidly developing information, communication and surveillance technologies and an increasingly invasive

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.* See also *Reklos & Davourlis v. Greece*, IPPT20090115 Eur. Ct. H.R. (2009), at ¶ 40 (stating “[w]hilst in most cases the right to control such use involves the possibility for an individual to refuse publication of his or her image, it also covers the individual’s right to object to the recording, conservation and reproduction of the image by another person. As a person’s image is one of the characteristics attached to his or her personality, its effective protection presupposes, in principle and in circumstances such as those of the present case. . . obtaining the consent of the person concerned at the time the picture is taken and not simply if and when it is published. Otherwise an essential attribute of personality would be retained in the hands of a third party and the person concerned would have no control over any subsequent use of the image.”).

<sup>174</sup> G.A. Res. 2200A (XXI), *Covenant on Civil and Political Rights* (Mar. 23, 1976), in accordance with Article 49.

<sup>175</sup> *Id.* at art. 17.

<sup>176</sup> *Id.* at art. 1.

media industry.”<sup>177</sup> They also suggest that we should “encourage the protection of other privacy interests founded on personal autonomy and dignity, such as the interest in protecting against intrusions upon seclusion.”<sup>178</sup>

While Australia has incorporated elements of the *International Covenant on Civil and Political Rights* into domestic law (notably anti-discrimination law), the extent of existing protection is inadequate.<sup>179</sup> This is because there is no recognized right to one’s image (or to personal privacy) in Australia. In order to comply with Australia’s international obligations more effective legal protection needs to be introduced.

## V. BALANCING COMPETING INTERESTS

The law dealing with personal images builds upon and balances a range of competing interests. These include freedom of expression, the right for the public to know (e.g., public interest), the right to private life, and the interests of

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<sup>177</sup> Jillian Caldwell, *Protecting Privacy Post Lenah: Should the Courts Establish a New Tort or Develop Breach of Confidence?*, 26 U. N.S.W. L.J. 90, 124 (2003).

<sup>178</sup> *Id.*

<sup>179</sup> G.A. Res. 2200A (XXI), *Covenant on Civil and Political Rights* (Mar. 23, 1976); see *International Covenant on Civil and Political Rights – List of Issues Prior to Reporting*, AUSTL. HUM. RTS. COMM’N (Aug. 10, 2012), <https://humanrights.gov.au/our-work/legal/international-covenant-civil-and-political-rights-list-issues-prior-reporting> (showing Australia’s progress, as of 2012, incorporating the International Covenant on Civil and Political Rights into domestic law) [<https://perma.cc/4862-3HVK>]; see also *International Human Rights System*, AUSTL. GOV’T: A’TTY-GEN.’S DEPT., <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/international-human-rights-system> (showing that Australia was a party to the International Covenant on Civil and Political Rights) [<https://perma.cc/GT7M-GQ79>].

creators.<sup>180</sup> In determining where and how these different interests are to be balanced, the law grapples with a range of cultural, technological, and ethical considerations. Traditionally, when drawing the balance, the law has consistently prioritized freedom of expression over all other interests. This traditional view was captured in a comment by Lord Hoffman in *R. v. Central Television Plc* that:

It cannot be too strongly emphasized that outside the established exceptions, or any new ones which Parliament may enact in accordance with its obligations under the Convention [for the Protection of Human Rights and Fundamental Freedoms], *there is no question of balancing freedom of speech against other interests. It is a trump card which always wins.*<sup>181</sup>

Over the last two decades there has been a lot of commentary on the way in which digital technologies have challenged and unsettled traditional arrangements.<sup>182</sup> This commentary is equally true in relation to the protection of personal images. The advent of the internet in general and social networks in particular means that the traditional balancing of interests used in relation to images needs to be rethought and re-evaluated. Of particular importance is the

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<sup>180</sup> *Schering Chems. Ltd. v. Falkman Ltd.* [1981] 2 WLR 848 (AC) at 865 (Eng.) (stating “Freedom of the press is of fundamental importance in our society. It covers not only the right of the press to impart information of general interest or concern, but also the right of the public to receive it. It is not to be restricted on the ground of breach of confidence unless there is a ‘pressing social need’ for such restraint. In order to warrant a restraint, there must be a social need for protecting the confidence sufficiently pressing to outweigh the public interest in freedom of press.”).

<sup>181</sup> *R. v. Cent. Television Plc* [1994] 2 WLR 20 (AC) at 30 (Eng.).

<sup>182</sup> See Gervais, *supra* note 1, at 855. See generally Beer, *supra* note 1, at 519; *Imagined Communities*, *supra* note 1; *Information Revelation*, *supra* note 1; Elkin-Koren, *supra* note 1, at 112–13.

need to rethink the balance between freedom of expression and the right to private life. The new digital world means that ordinary people are all creators with competing interests.<sup>183</sup> One of the recurrent themes of this paper is that changes in technology mean that we need to recalibrate the line between freedom of expression and other interests.

## VI. CURRENT LEGAL FRAMEWORK FOR PROTECTING PERSONAL IMAGES

The current legal framework offers a piecemeal approach to protect personal images uploaded online. Presently, the law offers limited protection to personal images in which copyright, breach of confidence, privacy, and contract issues that arise within social networks in Australia.<sup>184</sup> Specifically, this paper will *not* deal with patent and trademark issues on social networks. Patent and trademark infringement relate to commercial intellectual property rights; this paper focuses on the amateur copyright interests. In the earlier stages of Facebook's social network development, several trademark and patent infringement issues occurred.<sup>185</sup> In 2008, Hasbro, which has the rights to

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<sup>183</sup> See Gervais, *supra* note 1, at 849. See generally Beer, *supra* note 1, at 519; *Imagined Communities*, *supra* note 1; *Information Revelation*, *supra* note 1, at 71–80; Elkin-Koren, *supra* note 1, at 112–13.

<sup>184</sup> See generally Eugenia Georgiades, *Ignoring the Call for Law Reform: Is It Time to Expand the Scope of Protection for Personal Images Uploaded on Social Networks?*, 26 TORT L. REV. 166, 166 (2019) [hereinafter Georgiades, *Ignoring the Call for Law Reform*]; Georgiades, *Protecting the Image*, *supra* note 58, at 10.

<sup>185</sup> See Andrew Harris, *Facebook, Timelines Website End Trademark Lawsuit*, BLOOMBERG (May 7, 2013, 6:25 PM EDT), <http://www.bloomberg.com/news/2013-05-07/facebook-timelines-website-end-trademark-infringement-suit-1-.html> [<https://perma.cc/ZH7D-5D9P>] (reporting on an example where the parties settled out of court); see also James Johnson, *Facebook Sued Over 'Like' Button, Other Patent Technologies*, Sky News (Feb. 11, 2013, 7:51 PM GMT), <http://news.sky.com/story/facebook-sued-over->



sell Scrabble, launched a trademark infringement action against Facebook for its “Scrabulous” app.<sup>186</sup> While patent and trademark issues are significant to social networks; they fall outside the scope of protection of personal images. The tort of breach of confidence may provide protection in the absence of copyright protection, and confidential information captured under the *Patent Act 1990* (Cth).<sup>187</sup>

Social networks have generated a range of issues that arise with the misuse of social media that span from pedophilia, through to identity theft, and fraud, as well as defamatory content and passing off.<sup>188</sup> While these issues are important, the focus of the paper is on whether personal images on social networks ought to be protected and considers whether images are protected adequately under the existing legislative framework.

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like-button-patent-10454872 [https://perma.cc/BEY4-MEQR]  
(reporting on a patent infringement suit brought by the family of a Dutch inventor over Facebook’s use of the ‘like’ button and ‘newsfeed’).

<sup>186</sup> See Declan McCullagh, ‘Scrabble’ maker Hasbro’s sues over ‘Scrabulous’, CNET (July 25, 2008, 5:27 AM PT), <https://www.cnet.com/news/scrabble-maker-hasbro-sues-over-scrabulous/> [https://perma.cc/6VS5-DNKC]; see also Alex Pham, *Scrabble vs. Scrabulous: A lesson in copyright law*, L.A. TIMES (July 30, 2008, 7:03 PM), <http://latimesblogs.latimes.com/technology/2008/07/scrabulous-sc-1.html> [https://perma.cc/ZN57-PGMT].

<sup>187</sup> Any information that is confidential is potentially protected under the law of confidence. It also is not simply restricted to the technical or formal requirements required for protection under the Patents Act 1990 (Cth). For instance, see § 7 of Patents Act 1990 (Cth), which lays out the novelty and an inventive step requirements and § 29 of Patents Act 1990 (Cth), which describes some of the formal requirements that a patent application must meet.

<sup>188</sup> See *Information Revelation*, *supra* note 1, at 73; Henderson et al., *Legal Risks for Students Using Social Networking Sites*, 25 AUSTRALIAN EDUC. COMPUTING 3, 3–5 (2010) (discussing the various risks that students run into on social networking websites); Ryan Lex, *Can Myspace Turn into My Lawsuit: The Application of Defamation Law to Online Social Networks*, 28 LOY. L.A. ENT. L. REV. 47, 62–69 (2007) (discussing defamation law in the context of MySpace).

When a person takes and uploads their photograph and that image is reused and reshared online, the law provides limited protection. For example, copyright protects against misuse of the image in some situations—such as when people take photographs of themselves and shares them on a profile page. In some situations, however, like when the use falls within the defence of fair dealing—notably where the image is used to report the news or the image is used for parody or satire purposes—the reuse of an image may not constitute a copyright infringement.<sup>189</sup> Other areas of the law, such as privacy, the tort of breach of confidence, and contract, are also of little use. For example, privacy law will not prevent the misuse of a person’s image when that image has been reshared online. While there is some protection for personal images under the *Privacy Act 1988* (Cth), the protection is inadequate. The reason for this is that the *Privacy Act* only applies to government agencies and departments, and to Australian corporations that collect, use, and disclose images; the *Privacy Act* does not apply to individuals who collect, use and disclose personal images on social network sites.<sup>190</sup> Another limitation of the *Privacy Act* is that personal images shared on social networks are not protected when journalists use them for journalistic purposes.

While in some cases the law of confidence potentially provides protection when a person shares their image online, this protection is limited. There are many problems here, the key one being that the law of confidence does not protect personal images that fall within the public

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<sup>189</sup> Georgiades, *The Limitation of Copyright*, *supra* note 88 at 236–40.

<sup>190</sup> See Eugenia Georgiades, *Blind Hope, Magnificent Delusions: The Need for Privacy Protection of Personal Images Uploaded on Social Networks*, 43 EUR. INTELL. PROP. REV. (forthcoming 2021) [hereinafter Georgiades, *Blind Hope, Magnificent Delusions*].

domain.<sup>191</sup> The problem here is that when people share and exchange personal images on social networks, the images fall within in the public domain. This means that they lose the condition of confidentiality; this is the case even if the images that are disclosed are private and access is restricted.<sup>192</sup>

Another problem that potentially arises when personal images are shared online is when third parties distort or alter the images. This occurs, for example, when third parties turn photographs into memes.<sup>193</sup> The legal protection here is limited. In rare cases, copyright may offer protection. When an image is reshared and reused without attributing the creator of the image, this may amount to a breach of the moral right to attribution.<sup>194</sup> While this offers some protection, it is limited in that the only person who can

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<sup>191</sup> *Austl Broad Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, ¶ 34 (Austl.) (citing RESTATEMENT (SECOND) OF TORTS § 652A, cmt. b (Am. L. Inst. 1977)) (stating that “equity may impose obligations of confidentiality even though there is no imparting of information in circumstances of trust and confidence. And the principle of good faith upon which equity acts to protect information imparted in confidence may also be invoked to ‘restrain the publication of confidential information improperly or surreptitiously obtained’. The nature of the information must be such that it is capable of being regarded as confidential. A photographic image, illegally or improperly or surreptitiously obtained, where what is depicted is private, may constitute confidential information”). See also AUSTRALIAN LAW REFORM COMMISSION, *Serious Invasion of Privacy in the Digital Era*, at 265 (Report No. 123, June 2014).

<sup>192</sup> See Georgiades, *Ignoring the Call for Law Reform*, *supra* note 184, at 174.

<sup>193</sup> See, e.g., Georgiades, *The Limitation of Copyright*, *supra* note 88, at n.149.

<sup>194</sup> See *id.* at 240. See generally Aaron Schwabach, *Reclaiming Copyright from the Outside in: What the Downfall Hitler Meme Means for Transformative Works, Fair Use, and Parody*, 8 BUFF. INTEL. PROP. L.J. 1 (2012) (discussing the use of memes).

bring an action for breach of attribution of authorship is the photographer.<sup>195</sup>

As noted previously, breach of confidence may offer protection for personal images that are captured by a third party; however, that protection is limited by the fact that any rights a subject has in an image will end when the image is placed in the public domain. This is the case even if the image is private or personal. Unlike in the United States, there are no image rights in Australia on which people may rely when they are photographed.<sup>196</sup> One of the ramifications of this is that a person cannot prevent a third party from photographing them in a public or even a private place. Another ramification of not having any image rights is that a subject cannot control the use of their image or the information captured in the image after their photograph is taken.

## **VII. EXISTING SCHOLARSHIP ON SOCIAL NETWORKS, IMAGE RIGHTS, AND THE LAW**

While there has been a lot written on the legal status of social networks,<sup>197</sup> there is an important gap in the literature regarding the legal standing of personal images on social networks in Australia. There is limited scholarship that explores how personal images are protected within a

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<sup>195</sup> See Georgiades, *The Limitation of Copyright*, *supra* note 88, at 240.

<sup>196</sup> See generally Georgiades, *Protecting the Image*, *supra* note 58, at 38–39.

<sup>197</sup> E.g., Mary W. S. Wong, *User-Generated Content & the Open Source/Creative Common Movements: Has the Time Come for Users' Rights?*, in PROCEEDINGS OF THE FIFTH WORKSHOP ON OPEN SOURCE SOFTWARE ENGINEERING 1; Gervais, *supra* note 1; Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at Copyright Management in Cyberspace*, 28 CONN. L. REV. 981 (1996); Elkin-Koren, *supra* note 1; Carlisle George & Jackie Scerri, *Web 2.0 and User Generated Content: Legal Challenges in the New Frontier*, J. INFO. L. & TECH., no. 2, 2007.

social network that exists outside of third-party copyright. While there has been scholarship that has considered commercial copyright infringement by people within a social network, it has not examined a person-to-person infringement of amateur copyright.<sup>198</sup>

When reflecting upon the role played by the law of confidence in protecting personal images that are shared online, the existing scholarship tends to focus on images that reveal confidential or private information.<sup>199</sup> The law of confidence has a limited application when images are shared on social networks.<sup>200</sup> While the law of confidence may protect personal images in some situations, the protection is limited.<sup>201</sup>

There is also little literature that examines the way that Australian privacy law protects personal images that are

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<sup>198</sup> For example, YouTube and Viacom third-party copyright infringement where people upload and reshare third-party copyright content. For more information, see generally Cohen, *supra* note 197; Wong, *supra* note 197; Gervais, *supra* note 1, at 843, 852 (stating that “the right to make private use of copyrighted material is considered fundamental in several European copyright statutes, and may have a constitutional basis in a number of other legal systems.”).

<sup>199</sup> See, e.g., TANYA APLIN ET AL., GURRY ON BREACH OF CONFIDENCE: THE PROTECTION OF CONFIDENTIAL INFORMATION 13 (2d ed. 2012); Leo Tsaknis, *The Jurisdictional Basis, Elements and Remedies in the Action for Breach of Confidence: Uncertainty Abounds*, 5 BOND L. REV. 18 (1993); see also *Coco v A.N. Clark (Eng'rs) Ltd.* [1969] RPC 41 (Eng.) (discussing the disclosure of confidential information relating to a moped engine).

<sup>200</sup> See Greg Taylor, *Why is There No Common Law Right of Privacy?*, 26 MONASH U.L. REV. 235, 246 (2000) (stating that if there is no “communication in confidence,” (which there is not in the case of images shared on social networks) then the publication may not qualify as a breach of confidence).

<sup>201</sup> See generally Gavin Phillipson, *Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act*, 66 MOD. L. REV. 726 (2003).

shared on social networks.<sup>202</sup> The sharing and exchanging of people’s images on social networks pose challenges for privacy law to prevent the misuse of personal images.<sup>203</sup> Consequently, the sharing of personal images on social networks has also highlighted concerns over the use and control of the use of the personal image.

There is also limited scholarship in relation to the impact that social network contracts have on the use of personal images.<sup>204</sup> In particular, existing scholarship has focused on the way that social networks use people’s information.<sup>205</sup> Because the focus is on personal information, this scholarship has overlooked the protection of the use of personal images on social networks.

The scholarship looking at intellectual property and social networks has tended to focus on the use of third-party copyright on social networking sites.<sup>206</sup> For example, Elkin-Koren argues that amateur copyright is the fundamental ingredient of the means of producing and communicating content to the masses that enabled individual users to connect with each other.<sup>207</sup> This primarily stemmed from the interactivity of digital networks as a result of the Internet,

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<sup>202</sup> For an example of a work that does address this, see generally Georgiades, *Ignoring the Call for Law Reform*, *supra* note 184.

<sup>203</sup> See generally Georgiades, *Blind Hope, Magnificent Delusions*, *supra* note 190.

<sup>204</sup> For examples of works that address the contracts of service of social networks, see generally Georgiades, *Reusing Images*, *supra* note 54; Van Alsenoy et al., *From Social Media Service to Advertising Network: A Critical Analysis of Facebook’s Revised Policies and Terms* (Ku Leuven Ctr. for Info. Tech. & Intell. Prop. L., Working Paper Mar. 31, 2015), <http://www.law.kuleuven.be/citip/en/news/item/facebook-revised-policies-and-terms-v1-2.pdf> [<https://perma.cc/95RE-9AK5>].

<sup>205</sup> Elkin-Koren, *supra* note 1, at 11.

<sup>206</sup> *Id.* at 3–5, 7 (suggesting that when people create content it is “often associated with the buzzword *Web 2.0*, which refers to social networks, social media sites, collaborative initiatives, and a variety of works created, remixed, and exchanged by individual users”).

<sup>207</sup> *Id.*

subsequently enabling a revamping of the production and distribution of creative works.<sup>208</sup> Third party content was present before the internet or the phenomenon of digital networks as people were creating content in various forms, including taking family pictures (or pictures more generally), telling stories, playing music, and recording (family) events.<sup>209</sup> But disseminating this content was restricted.<sup>210</sup>

The scholarship in the United States is more extensive. Legal scholars became concerned that the development of cameras was intruding into people's privacy.<sup>211</sup> The legal scholars Warren and Brandeis were concerned with the protection of people's privacy as photography and photographic equipment evolved.<sup>212</sup> Arguably, Warren and Brandeis attempted to protect image rights under the tort of privacy with the first landmark case to explore the right to privacy: *Marion Manola v. Stevens & Myers*.<sup>213</sup> Miss Manola was a theatre actor who objected to a photographer taking secret pictures of her in tights from his box for advertisements.<sup>214</sup> The question in this case, ignited scholars to consider "the right of circulating portraits."<sup>215</sup> This concept played a pivotal role when questioning whether the law would recognize and protect the right to privacy.<sup>216</sup>

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 3–5; *See also* *Marion Manola v. Stevens & Myers*, N.Y. Supreme Court, N.Y. TIMES, June 15, 18, 21, 1890.

<sup>210</sup> Elkin-Koren, *supra* note 1, at 3–5.

<sup>211</sup> *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–96 (1890).

<sup>212</sup> *Id.*

<sup>213</sup> *Marion Manola v. Stevens & Myers*, N.Y. Supreme Court.

<sup>214</sup> *Id.*

<sup>215</sup> Warren & Brandeis, *supra* note 211, at 195–96.

<sup>216</sup> *Id.*; *see also* Dorothy J. Glancy, *Privacy and the Other Miss M*, 10 N. ILL. U.L. REV. 401 (1990); J. Thomas McCarthy, *The Spring 1995 Horace S Manges, Lecture – The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUMBIA-VLA J. L. & ARTS 129, 130–32 (1995).

However, it was subsequent scholars who ended up playing the pivotal role in establishing four different torts for protecting privacy in the United States.<sup>217</sup> These torts are as follows: intrusion upon the plaintiff's seclusion, public disclosure of embarrassing private facts about the plaintiff, publicity which places the plaintiff in a false light, and appropriation (for the defendant's advantage) of the plaintiff's name or likeness.<sup>218</sup> It protects four aspects of personality, which relate to a person's name, history, and image (likeness), and a common law protection of personal diaries, letters and eavesdropping.<sup>219</sup> Despite the extensive scholarship centering on image rights in the United States,<sup>220</sup> there is little clarity when it comes to how image rights are protected when used, shared, and exchanged on social networks in Australia. This is because there are no known image rights upon which people can rely to protect their image, or subsequent use or misuse, when those images are shared online in Australia. The lack of image rights in Australia reflects limitations of Australian law to provide adequate protection for the use of personal images when those images are misused.

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<sup>217</sup> Warren & Brandeis, *supra* note 211, at 195–96; W.A.C., *The Right of Privacy in News Photographs*, 44 VA. L.REV. 1303–05 (1958).

<sup>218</sup> W.A.C., *supra* note 217, at 1303–04, 1313.

<sup>219</sup> *Id.* at 1303.

<sup>220</sup> See, e.g., Warren & Brandeis, *supra* note 211; Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J., 123, 149 (2007); W.A.C., *supra* note 217, at 1303 (suggesting that Prosser's adaptation of Brandeis and Warren's right to privacy protects four aspects of personality, which relate to a person's name, a person's history, a person's image (likeness) and a common law protection of personal diaries, letters and eavesdropping. As a result, the law of torts in the United States protects image rights broadly because legal protection is afforded under the broad banner of tort of a right to privacy). See generally Dorothy J. Glancy, *Privacy and the Other Miss M*, 10 N. ILL. U.L. REV. 401 (1990); Georgiades, *Protecting the Image*, *supra* note 58.



## VIII. MOVING FORWARD

This paper has considered the different interests in relation to image rights that arise in two situations; when a creator takes and uploads their image and when a third party takes and uploads an image of someone else on a social network. It has shown that while Australian law provides some protection in these two situations, this protection is limited and fragmented. The current law in Australia illustrates that people whose images are uploaded and shared online are unable to control the use of their images. This has serious ramifications for many people. This paper highlighted that the limitations of the current legal protection in Australia allow for the misuse of personal images on social networks to continue. In particular, it has highlighted that people in Australia do not have a right *not* to be photographed, and thus are unable to prevent the misuse of their image. Despite having an initial framework for such a right to be incorporated into the legal framework via existing legislation such as the Commonwealth Privacy Act, perhaps the most viable solution to the current legal framework is to incorporate and adopt image rights and a right to be forgotten. There have been recent developments in Australia that may provide some protection for the misuse of personal images, namely the proposed “revenge porn” laws<sup>221</sup> which

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<sup>221</sup> The Australian Labor Party has introduced a proposed Bill against revenge porn; however, there has been no movement to pass the Bill. New South Wales is the third state in Australia to introduce revenge porn legislation. This is in line with the United Kingdom, which has made revenge porn illegal. *See* HL Deb (21 July 2014) col. 968 (UK) (“the term ‘revenge pornography’ refers to the publication, usually but not always, on the internet, of intimate images of former lovers without their consent . . . . Obtaining such images has become more common and much easier with the prevalence, popularity and sophistication of smartphones, with their ability to take or record high quality images, still and video, instantly and simply, with accompanying sound in the case of video. . . . The widespread publication of such images causes, and is

respond to the growing problem of so-called revenge porn.<sup>222</sup> Because of the proliferation of sharing sexual images online, some states in Australia have attempted to criminalize the misuse of sexual images.<sup>223</sup> In effect, these provide that a person would have a right for a specific type of use of their image—for example, when a person is photographed partially nude. It is uncertain whether attempts to criminalize the use of sexual images online will resolve the problems that arise once people share images on social networks. Moving forward, the potential criminalization of capturing images of people that are of a sexual nature without their consent is a step in the right direction. This is because the proposed reforms potentially create an image right for a particular use of a person’s image. While criminalising the uploading and sharing of sexual images is an important development, it creates a disparity of protection for personal images that fall outside the scope of protection. Even though some Australian states have initiated reforms to criminalise the uploading and sharing of sexual images on social networks, the law remains uncertain.

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generally intended to cause, distress, humiliation and embarrassment for the victim. . .”); Criminal Justice and Courts Act, (2015) § 33 (UK).

<sup>222</sup> As of June 2017, only Victoria and South Australia have revenge porn laws, with New South Wales thinking about introducing new laws for revenge porn. See Press Release, Gabrielle Upton, Attorney General, New South Wales, Moving Ahead on New Law to Stop Revenge Porn (Sept. 5, 2016), <https://www.justice.nsw.gov.au/Documents/Media%20Releases/2016/Moving-ahead-on-new-law-to-stop-revenge-porn.pdf> [https://perma.cc/2SS9-ZZ4G].

<sup>223</sup> See South Australia’s prohibition of “invasive images”: *Summary Offences Act 1953* (SA) s 26C (Austl.). See also *Summary Offences Act 1966* (Vic) ss 41DA, 41DB (Austl.). Currently, New South Wales has some criminal provisions for the publication of sexual images – for example, *Crimes Act 1900* (NSW) s 578C(2) (Austl.). See generally TOM GOTSIS, REVENGE PORNOGRAPHY, PRIVACY AND THE LAW (2015), <https://www.parliament.nsw.gov.au/researchpapers/Documents/revenge-pornography-privacy-and-the-law/revenge%20pornography%20privacy%20and%20the%20law.pdf> [https://perma.cc/79CU-4F46].

It is important to note that there are many practical issues that will potentially impact upon the effectiveness of these potential reforms. As socio-legal studies teaches us, these factors are often integral to the effectiveness of legal policy.

Of the many issues that arise two stand out. The first relates to the problems of group photographs. The problem here is that, since a photograph may contain images of a number of different people, there may be a series of different rights that need to be negotiated if one person wanted to protect the use of their image. As occurred with performer rights, a problem may arise where one member of the group does not agree with another group member's wishes.<sup>224</sup> In the absence of specific considerations, there are two options: one is that an individual is able to hold the group "hostage," or, second, the wishes of the group override the interests of the individual.<sup>225</sup> While there may be some solutions (such as redacting a person's image), this is be an issue that needs to be taken into account when creating new legal arrangements.

A second more practical problem relates to the removal of images from the internet. The problem here is that when people share and exchange personal images on social networks, the images are stored on the network's information systems. As one scholar says, even if "notice and take down procedures might take content out of the

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<sup>224</sup> See generally *Garcia v. Google Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc); JAMES GRIMMELMANN, COPYRIGHT 44 (2015), james.grimmelman.net/courses/ip2016F/chapter4.pdf [<https://perma.cc/Q7TB-7JK6>].

<sup>225</sup> Group interests in a photograph would be similar to in films with large casts. See *Garcia*, 786 F.3d at 742–43 ("films with a large cast—the proverbial 'cast of thousands'—such as *Ben-Hur* or *Lord of the Rings*. The silent epic *Ben-Hur* advertised a cast of 125,000 people. In the *Lord of the Rings* trilogy, 20,000 extras tramped around Middle-Earth alongside Frodo Baggins (played by Elijah Wood). Treating every acting performance as an independent work would not only be a logistical and financial nightmare, it would turn cast of thousands into a new mantra: copyright of thousands.").

(public) sight,” it does not result in the removal of the images from the data user’s servers.<sup>226</sup> Similarly, it may be difficult for a person to remove their image when it is captured and uploaded online by a third party.<sup>227</sup> Even if a person chooses to remove their images from their own profile page, the image may still be available if the image has been shared and reshared. These problems are exacerbated by the global nature of the internet, which may place images in jurisdictions with little or no protection: there is little use in demanding an image be removed in Australia if users in Australia can simply obtain the image from another country.

These practical problems highlight the difficulties of controlling the spread of images after they have been published online. Clearly it would be much better to prevent the uploading of images before it happens than attempt to remove images once they have been uploaded and shared. (Although, this will necessarily occur where the removal of the image is demanded because of a change in circumstances, as with the right to be forgotten.)<sup>228</sup> Ideally, the solution would be to change the way people deal with and think about private images to prevent problems arising in the first place rather than dealing with the problems after

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<sup>226</sup> Jef Ausloos, *The Right to be Forgotten – Worth Remembering?*, 28 COMPUT. L. & SEC. REV. 143, 148, 148 n.57 (2012) (stating that “European citizens can request Facebook to send them all personal data in Facebook’s possession . . . In these reports it becomes clear that Facebook keeps track of all your ‘removed’ data as well.”).

<sup>227</sup> See Ausloos, *supra* note 224 (“But in an ever-increasing personalised web (where every piece of personal data can be considered as ‘useful’), the value of [the purpose limitation] principle has become questionable too. A ‘right to be forgotten’ could bring back effective control over what happens to an individual’s data.”); see also Bert Jaap Kooops, *Forgetting Footprints, Shunning Shadows. A Critical Analysis of the “Right to Be Forgotten” In Big Data Practice*, 8 SCRIPTED 229, 237–39 (2011).

<sup>228</sup> See Georgiades, *Down the Rabbit Hole*, *supra* note 119, at 1124–25 (discussing the various situations in which the right to be forgotten arises).

the event. A range of measures have been suggested to prevent (potentially harmful) information being shared in the first place including “awareness raising, transparency, clearer privacy notices, data-minimization, stricter control on the purpose limitation principle, ‘anonymization,’ transparency, encryption, etc.”<sup>229</sup> While we wait for these solutions, the potential harm to the fundamental human rights of dignity, autonomy, and private life caused by the misuse of personal images on-line demands that Australian law be modified to provide more effective protection. This is also important to protect the economic and property rights that (some) people have in their image. While such legal changes will not provide a complete solution, they will help to counter some of the problems that have been created by that have arisen around social media in recent years.

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<sup>229</sup> Ausloos, *supra* note 226, at 147.