


Who Cares About the Modern Creator?

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WHO CARES ABOUT THE MODERN CREATOR?

I. INTRODUCTION

Imagine putting hard work and energy into creating quality content, spending hours editing to make the perfect piece, and sharing it with your audience in hopes that they like it. Things seem to be going great and your hard work is paying off – until you stumble across your work being used by someone else! No, this is not a story of finding pirated movies on Torrent; this is not a story of seeing a YouTube video stealing your music. In fact, it is quite the opposite. YouTube is no longer just a place where you can find free versions of copyrighted works. It is now home to thousands upon thousands of quality content creators – artists who create their own copyrightable works and post them to YouTube.

Unlike major production companies, though, many YouTubers work as sole proprietorships, with maybe one or two people helping with editing, but without a full legal team that is the benefit of working for an established corporation. This makes YouTube content creators prime targets for misappropriation of their works – because they lack the sophistication to know what to do when they catch someone in the act.

While there are many instances and opportunities for websites to take the content of others and use it without the creator's permission, such as marketplaces recreating original products from Etsy store owners, companies repurposing an individual's social media posts, or taking an individual's photos to create internet memes, for simplicity, this paper will focus on a specific scenario: a YouTube content creator's work being used by online

marketplaces such as Wish.com. Wish, incorporated in 2010,¹ is an online marketplace that offers products for much lower than retail price by connecting the buyer directly with factory-merchants and eliminating the retailer middleman.² As great as Wish may be for consumers, many YouTube creators and other artists have found their works utilized by Wish merchants to advertise products. In the case of a YouTube artist, it usually appears in the form of a screengrab (taking a screenshot of a single still image from the video) or thumbnail (the photo that appears as a preview for the video before clicking to watch it) from one of the YouTuber's videos discussing the same or similar product to that being advertised on Wish.

Here is a model example: Tina Yong, a YouTuber, is considered a "beauty guru." She records reviews of unique beauty products on her series "Tina Tries It."³ Each video on YouTube shows up as a thumbnail along with the title and short description of the video. On April 23, 2018, Ms. Yong posted a video titled "NEW MICROBLADING EYEBROW TATTOO PEN – TINA TRIES IT" where she tested out and reviewed the new product by Maybelline.⁴ On December 17, 2018, after searching "eyebrow tattoo pen" on Wish, one of the first results is for a "PHOERA

¹ *Company Overview of ContextLogic Inc.*, BLOOMBERG, <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=127912549> (last visited Dec. 19, 2018).

² Katy Medium, *Is the Wish App Legit or a Scam: The Real Reasons Why It's so Cheap*, ToughNickel (Aug. 17, 2018), <https://toughnickel.com/frugal-living/Is-Wish-App-Legit-Heres-How-the-Prices-are-so-Low>.

³ Tina Yong, Playlist of "Tina Tries It" Series, YOUTUBE, <https://www.youtube.com/watch?v=2ZxIU6dUiY8&list=PL8U8CbIJnNKpsvMWjEtK5AtrulXmqL386>.

⁴ Tina Yong, *NEW MICROBLADING EYEBROW TATTOO PEN – TINA TRIES IT*, YOUTUBE (Apr. 23, 2018), https://www.youtube.com/watch?v=hxt_Z_NND4Y.

Tattoo Brow ink pen.”⁵ One of the photos used to advertise the product is the photo from Ms. Yong’s thumbnail on YouTube.⁶ Never mind that this is clearly advertising a knock-off product with a picture of the Maybelline product, but the Wish merchant presumably used this photo of Ms. Yong without her permission.

What are Tina Yong’s rights? Does she have any standing to go up against Wish (or the individual merchants on Wish) and reprimand them for using her photo? Even if she does have standing, would she know that? Are there enough protections for Tina Yong and many others like her? Who cares about the modern creator? YouTubers and other creators in Europe are concerned that a new European Union directive will threaten their online viability.⁷ Does the United States care for the modern creator? This paper argues that while there may be some protections for situations such as this, they are not strong enough, nor do they provide the proper market incentives to discourage misappropriation.

Part II of this paper will go through in detail each of the possible rights Ms. Yong and her peers may have in bringing actions against misappropriators. These include copyright infringement, false advertising and false endorsement under the Lanham Act, state publicity rights, FTC enforcement of false endorsements, and other miscellaneous causes of action. Part III will suggest that these protections are inadequate for these modern artists who lack

⁵ Ad for “PHOERA Automatic Matte Eyebrow Pencil Waterproof Eyebrow Tattoo With Brush Long-lasting Cosmetics Eye Brow Pen 3 Colors”, WISH, <https://www.wish.com/search/eyebrow%20tattoo%20pen/product/5b178144505a2124c7c665f9?&source=search>.

⁶ See *infra* Appendix A.

⁷ Matt Reynolds, *What is Article 13? The EU’s divisive new copyright plan explained*, WIRED (Dec. 7, 2018), <https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban>; see also, e.g., Nick Zammeti, *No more videos from me due to Article 13!*, YOUTUBE (Dec. 19, 2018), <https://www.youtube.com/watch?v=iLDgygbSCSw&t=315s>.

corporate sophistication and will include proposals of necessary policy changes, including a uniform publicity right and increased FTC enforcement, in order to protect both creators and consumers.

II. PROTECTIONS

A. Copyright Infringement

Copyright is the most obvious protection available for YouTubers facing this sort of appropriation. This section begins by establishing the YouTuber's valid copyright and demonstrates that infringement has occurred, and how the infringers probably do not have certain defenses. Next, this section discusses what sorts of damages are available to YouTubers and shows that the calculation of damages is very difficult. Finally, this section points out the protections certain websites like Wish might take advantage of, such as DMCA takedown procedures, which would insulate them from liability and make recovery even more difficult and impractical for small creators whose content has been stolen.

YouTube creators generally have their content protected in two different copyrights. First is the video itself, which is protectable as a "motion picture."⁸ They also have a copyright in the capture that is used in the thumbnail for each video as a photograph.⁹ This distinction between the two copyrights may be important in determining whether infringement has occurred. So long as their videos and thumbnails are "original works of authorship"¹⁰ and not

⁸ Copyright Act of 1976, 17 U.S.C. § 102(a)(6) (2012).

⁹ *Id.* § 101 (2012) (defining "pictorial, graphic, and sculptural works"); 17 U.S.C. § 102(a)(5). While it used to be the case that many YouTubers chose a screengrab from their videos to serve as the thumbnail, many YouTubers now choose to upload a separate photograph to make up the thumbnail.

¹⁰ *Id.* § 102(b) (2012).

simply an “idea, procedure, process, system, method of operation, concept, principle, or discovery,” they have copyrights that are valid for the life of the author plus seventy years.¹¹ YouTube also acknowledges the rights of its creators and offers educational content on how they can protect their rights from misuse within the YouTube platform.¹²

At first glance, it seems clear that YouTubers finding their content used in some way on websites like Wish have had their rights infringed. Not only is there a literal copy of their work on these sites, they are also being displayed to the public at the direction of someone other than the owner.¹³ However, there are some defenses available to the purported infringer that could block liability for their use of the content. These come from fair use and *de minimis* infringement.

The fair use defense is codified in the Copyright Act and provides that:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright. In determining whether the use made of a work in any particular

¹¹ *Id.* § 302(a) (2012); I will assume for simplicity’s sake that each video is created by a single author and that author is a natural person.

¹² *Copyright on YouTube*, YOUTUBE, <https://www.youtube.com/yt/about/copyright/#support-and-troubleshooting> (last visited Dec. 19, 2018).

¹³ 17 U.S.C. § 106 (2012) (“[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; . . . (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly. . .”).

case is a fair use the factors to be considered shall include –

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the market for or value of the copyrighted work.¹⁴

Over time, courts have tried to interpret how to use and balance these four fair use factors, culminating in several Supreme Court cases. The first of its sort was *Harper & Row v. Nation* in 1985.¹⁵ In *Harper*, *The Nation Magazine* published part of President Gerald Ford’s soon-to-be-published memoir ahead of its release, despite copyright owners’ agreement with *Time Magazine* to give them first serialization.¹⁶ Another landmark case is *Campbell v. Acuff-Rose* where the Court had to analyze whether a parody song could be considered a fair use.¹⁷

In analyzing the first factor of fair use in *Harper*, the Court found that on the purpose of use, “[t]he fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.”¹⁸ Justice O’Connor went on to state that “[t]he crux of the profit/nonprofit distinction is not

¹⁴ *Id.* § 107 (2012).

¹⁵ *Harper & Row, Publishers. v. Nation Enters.*, 471 U.S. 539 (1985).

¹⁶ *Id.* at 542.

¹⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 571-72 (1994).

¹⁸ *Harper*, 471 U.S. at 562.

whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”¹⁹ The character of the use as far as the “propriety of the defendant’s conduct” is also important for this first factor.²⁰

In *Campbell*, the Court focused on whether or not the use of the copyrighted work was “transformative.”²¹ The Court found that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”²²

Applying these parameters of the first factor to our scenario, it seems to lead to a finding against fair use. First of all, the use by Wish merchants and their cohorts is clearly commercial. These are e-commerce websites looking to make a profit. The primary motive is clearly commercial advantage. Merchants use these photos particularly for their clear depiction of the subject product. Furthermore, it would be hard to find that there is fair dealing in using these photos without the owner’s permission. Ripping them straight off of YouTube is unlikely to reflect the good character or propriety of the defendant. Furthermore, under the *Campbell* standard, it would be tenuous of the defendant to claim that its use was transformative in any real way, for they generally do not actually transform the actual screenshot (unless it is to blur out a watermark or inverse the image to avoid being caught by automatic copyright scanners). Additionally, the use in the copyrighted work is generally to depict the subject product and show how it is used; this is the same use that is generally demonstrated by the infringers

¹⁹ *Id.* at 562 (citing *Roy Export Co. Establishment v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 686, 690 (S.D.N.Y. 1974)).

²⁰ *Id.* (citing 3 NIMMER ON COPYRIGHT § 13.05).

²¹ *Campbell*, 510 U.S. at 579.

²² *Id.*

when taking these images. A court would be hard-pressed to find that there has been any transformative use.

On the second factor relating to the nature of the copyrighted work, the Court in *Harper* puts emphasis on whether the work is fiction or non-fiction, stating that there is generally a “greater need to disseminate factual works than works of fiction or fantasy” in order to disseminate facts.²³ The *Campbell* Court does not further elaborate on this second factor analysis.²⁴ Although Tina Yong’s make-up review videos are opinion pieces based on her experiences with the products and not fictional works, the infringing use of the copyrighted work does nothing to spread that opinion (in fact, they often imply endorsements for products the YouTuber expressly disapproves), and so it is unlikely the defendant in this case would get any special treatment for it being a non-fiction copyrighted work.

The next fair use factor, the amount and substantiality of the portion used, is crucial for this fair use finding.²⁵ In *Harper*, the Court saw that the portion of the text from the memoir published in the magazine, while only 13% of the infringing work, was “essentially the heart of the book.”²⁶ In contrast, the Court points out that “a taking may not be excused merely because it is insubstantial with respect to the *infringing* work,” explicitly noting that the content used must be judged with a view to the plaintiff’s original work.²⁷ As Judge Learned Hand remarked, “no plagiarist

²³ *Harper*, 471 U.S. at 563.

²⁴ *Campbell*, 510 U.S. at 586.

²⁵ Note that the *Campbell* Court’s analysis of the third and fourth factors are irrelevant to this situation because they were addressing specifically how they would apply to parody uses of copyrighted material. See *Campbell* at 586-94.

²⁶ *Harper*, 471 U.S. at 564-65.

²⁷ *Id.* at 565.

can excuse the wrong by showing how much of his work he did not pirate.”²⁸

Here it might matter whether or not the infringer took a screengrab from a YouTuber’s video itself or reproduced the thumbnail photograph. If the infringer took the thumbnail, then the entire copyrighted piece was used. If they used a screengrab, a court might ask whether it was the heart of the video. However, it is also important to recall that the display right that copyright owners have explicitly applies to the “individual images of a motion picture.”²⁹ Because of this explicit language, YouTubers have a greater argument against fair use.

In analyzing the fourth factor in *Harper*, the Court had an easy time of finding that Nation completely destroyed the market intended to Time because Nation “scooped” the first serialization of the memoir.³⁰ In our scenario, however, it is unclear that the use by Wish or the like will actually affect the market for the YouTuber’s product (their video content). If anything, creators may make a tenuous argument that if consumers see their photo connected with the Wish products, and those products turn out to be lower quality than they anticipate from seeing the YouTuber on the advertisement, it may lower that YouTuber’s reputation among viewers and decrease traffic to their channels, and so decrease their ad revenues.

When interpreting the Supreme Court’s fair use analyses in *Harper* and *Campbell*, the Eleventh Circuit notes that the four factors cannot be “treated in isolation” and in any case “a given factor may be more or less important in determining whether a particular use should be considered fair,” such that “some of the

²⁸ *Id.* (citing *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936)).

²⁹ 17 U.S.C. § 106(5) (2012).

³⁰ *Harper*, 471 U.S. at 565-69.

factors weigh more heavily on the fair use determination than others” depending on the circumstances of such case.³¹ Therefore, the court will have to determine how much weight to give each factor in Ms. Yong’s suit against her infringers. Because of the entirely commercial use of the copyrighted content on Wish, this author believes that the greatest weight will be given to the first factor and little to no weight on the fourth. Consequently, there would be no finding of fair use.

A quick note on the subject of *de minimis* copying is worthwhile. Because the thumbnail of a YouTube video is separately protected as a photograph, the *de minimis* analysis can only possibly apply when the defendant takes a still from the video itself. In addition to being a consideration in the third factor of the fair use analysis,³² there is possibly a “more than *de minimis*” requirement to establish a *prima facie* case of copying.³³ However, as undeveloped as this doctrine may be, it seems that its most practical application is in analyzing whether the infringing work has a substantial similarity to the original, in which case a *de minimis* inquiry would be irrelevant in situations as are the subject of this paper that consist of direct, literal copying.³⁴ Furthermore, in respect to the display right, as noted above, the individual images of a motion picture or audiovisual work are protected and exclusively reserved to the owner of the copyright of the whole work.³⁵ Therefore, because the statute explicitly gives protection to these

³¹ Cambridge U. Press v. Patton, 769 F.3d 1232, 1260 (11th Cir. 2014) (internal citations omitted).

³² 17 U.S.C. § 107(3) (2012) (“the amount and substantiality of the portion used in relation to the copyrighted work as a whole”).

³³ See 4 William F. Patry, PATRY ON COPYRIGHT § 10:10 (2018).

³⁴ See *id.* at §§ 9:59, 9:60, 9:65; 4 NIMMER ON COPYRIGHT § 8.01(G) (2018). See also *On Davis v. The Gap, Inc.*, 246 F.3d 152, 173 (2d Cir. 2001).

³⁵ 17 U.S.C. § 106(5) (2012).

individual parts of the video, it would not be proper to find taking one still from the video to be nonactionable as a *de minimis* use.

Supposing that Tina Yong's claim does survive the fair use and *de minimis* defenses, the next difficult hurdle she would need to surpass is the calculation of damages. In addition to an injunction stopping Wish's merchants from utilizing her content,³⁶ she may be entitled to damages, profits, and attorney's fees.³⁷ An infringer can be liable for either "the copyright owner's actual damages and any additional profits" or statutory damages.³⁸

Actual damages and profits may be very difficult for Ms. Yong to prove. In terms of actual damages, because the infringing uses are not competitive with the original use, there may not be any tangible damages that are not related to her reputation. However, a YouTuber may be able to claim that the reputational damage lessened the number of views and therefore the amount of ad revenue the YouTuber received. This is probably unhelpful, though, because these are entirely speculative damages. Whether a YouTuber may be able to recover these sorts of damages depends on the information available to them on how much revenue they lost and proof that the infringement is directly related to those losses.

Recovering lost profits will also prove a challenge. In order to collect "any profits of the infringer that are attributable to the infringement," the copyright owner must present proof of the infringer's gross revenues.³⁹ Such profits do not need to be directly from selling the copyrighted work (which is generally not at issue in these scenarios),⁴⁰ but may be indirectly attributable to the

³⁶ 17 U.S.C. § 502 (2012).

³⁷ 17 U.S.C. §§ 504, 505 (2012).

³⁸ 17 U.S.C. § 504(a) (2012).

³⁹ 17 U.S.C. § 504(b) (2012).

⁴⁰ However, there are similar claims from Etsy store owners seeing their products advertised on Wish. See *I Wish You Wouldn't*, THE MONARCH MOMMY (Oct. 21, 2016), <https://themonarchmommy.com/2016/10/21/wish-you-wouldnt>; Brittany

infringing use.⁴¹ For example, if the use of the picture in their advertisement increased traffic to the ad and thus increased sales, those profits would be recoverable by the copyright owner.⁴² It is then the burden of the defendant to prove deductible expenses and any portion of the profit not attributable to the copyrighted work.⁴³ The reason it may be difficult for the plaintiff to plead the proper damages is because websites that infringe on YouTuber's rights are generally run by service providers and so do not necessarily have records of the profits for each individual user. If the merchant using the YouTuber's content is a small manufacturer in China, as is typically the case with Wish,⁴⁴ it could be impracticable for the unsophisticated creator to obtain information on gross revenue unless the service provider can and does cooperate in revealing that information.

It is thus more desirable to try to recover statutory damages for infringement. However, § 412 of the Copyright Act disallows recovery of statutory damages or attorneys' fees if the infringed work had not been registered prior to the infringement.⁴⁵ While there is no clear data on how many YouTubers actually register their copyrighted materials with the Library of Congress, YouTube's own copyright guidance does not generally direct creators to do so

Sicard, *Petition to Stop Wish.com from stealing images from handmade artists*, CHANGE.ORG, <https://www.change.org/p/wish-com-wish-com-steals-from-etsy-artists> (last visited Dec. 19, 2018). In such a scenario, actual damages would indeed be relevant.

⁴¹ Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 886 F.2d 1545, 1550 (9th Cir. 1989).

⁴² *See id.*

⁴³ *Id.*

⁴⁴ Medium, *supra* note 2.

⁴⁵ 17 U.S.C. § 412 (2012).

or alert them to the benefits of statutory damages.⁴⁶ Unsophisticated, small YouTubers may not know that they need to register their content in order to secure certain protections unless they did more research on the matter. Furthermore, there are creators who upload content five days per week or more, and registering each and every video prior to publication may not be practicable, especially given the quick turnaround that often occurs between filming and posting.⁴⁷

Finally, even if a YouTuber can prove infringement, get past defenses, and establish a proper calculation of damages, there is the further challenge of finding the proper defendant. In our motivating example, the most obvious defendant would be Wish: an established, San Francisco-based corporation.⁴⁸ However, Wish will likely be able to avoid liability as a service provider that complies with the DMCA Notice and Takedown procedures.⁴⁹ This would mean that instead the copyright owner must bring suit against the individual infringing merchants. The difficulty with websites like Wish is that their merchants are often small factories and manufacturers in China.⁵⁰ While international service and process and other aspects of civil procedure are outside the scope of this paper, due to the fact that Wish's business model is to eliminate the middle-man in commercial transactions, who would normally serve as quality control and a presumably more local and established

⁴⁶ *Lesson: Protect your content with copyright*, YOUTUBE, (Mar. 26, 2019), <https://creatoracademy.youtube.com/page/lesson/copyright-protection#strategies-zippy-link-1>.

⁴⁷ See, e.g., Tati (@GlamLifeGuru), YOUTUBE, <https://www.youtube.com/user/GlamLifeGuru>.

⁴⁸ *Company Overview*, *supra* note 1.

⁴⁹ 17 U.S.C. § 512(c) (2012); *Wish Copyright Dispute Policy*, WISH FOR MERCHANTS (Mar. 8, 2016), <https://merchant.wish.com/copyright-dispute-policy>.

⁵⁰ *Medium*, *supra* note 2.

defendant,⁵¹ successfully filing and trying a suit against a small, international manufacturer would be largely impossible. Even if it were possible, recovery would be unlikely and would accomplish little in the way of deterrence. In fact, Tati Westbrook, a popular beauty YouTuber whose voice was recently used in an ad by a knockoff make-up company⁵² said, “these guys today are small potatoe [sic] fraudsters. They are without ethics and do not work within the confines of the law, so threat of action or even an injunction accomplishes nothing, they just change their logos and open a new company.”⁵³

While protection for copyright infringement seemed at first the obvious solution to the YouTuber’s problem, there are certainly sizable hurdles. Even if an action is sustainable and a content creator were able to survive on the merits, recovery poses yet another problem, as well as whether such a suit would even serve the proper incentives to halt further infringements. As the rest of this discussion will reveal, there is not necessarily a better alternative for recovery available to these modern-day creators.

B. The Lanham Act §43(a)

The Lanham Act was enacted in 1946 to codify federal common law on trademark protection.⁵⁴ It was an arduous process

⁵¹ *Id.*

⁵² Tati (@GlamLifeGuru), *ADS THAT USE ME ... WITHOUT PERMISSION*, YOUTUBE (Nov. 28, 2018), <https://www.youtube.com/watch?v=KhyaoGN1iYM&lc=z233tp3idzemchapr04t1aokgmpx5p1qwraov5lm4vglrk0h00410.1543452747280153>.

⁵³ Email from Tati Westbrook, YouTube Beauty Expert, to author (Nov. 28, 2018, 7:32 PM EST) (on file with author).

⁵⁴ 1 J. Thomas McCarthy, *MCCARTHY ON TRADEMARK AND UNFAIR COMPETITION* § 5:4 (5th ed. 2018) (hereinafter *MCCARTHY ON TRADEMARK*) (citing S. Res. No. 1333, 79th Cong. 2d Sess. (1946), U.S.C.C.A.N. 1274).

that began with the introduction of the bill in 1938 and took eight years to codify.⁵⁵ Trademark law is unique in that Congress's intent in passing the law is actually embedded into the code:

The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations.⁵⁶

Protecting persons engaged in commerce from unfair competition, fraud, and deception, makes the Lanham Act particularly attractive for the scenario at hand.

Specifically relevant is section 43 of the Lanham Act which protects false designations of origin, false description, or false representation.⁵⁷ Section 43(a) states in relevant part that:

(1) Any person who, on or in connection with any goods or services . . . uses in commerce any [mark], or any false designation of origin, false or misleading

⁵⁵ *Id.*

⁵⁶ 15 U.S.C. § 1127 (2012).

⁵⁷ 15 U.S.C. § 1125 (2012).

description of fact, or false or misleading representation of fact, which

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.⁵⁸

Subsection (A) is generally considered to be a claim for false association while subsection (B) is reserved for false advertising.⁵⁹ These two prongs of § 43 may at first glance be relevant to Tina Yong and her peers, but upon closer inspection and a review of judicial interpretation, it becomes clear that YouTubers would likely only be able to bring suit under § 43(a)(1)(A).

The type of claim a creator would probably bring is a sort of false endorsement, with the idea being that the improper use of their work will falsely imply that the artist endorses the product being advertised. While it may be true that the Wish merchant is falsely advertising the “PHOERA” product with an image of Tina Yong using the Maybelline product, and misappropriating Ms. Yong’s

⁵⁸ 15 U.S.C. § 1125(a)(1) (2012).

⁵⁹ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 188, 122 (2014).

copyrighted material, the elements of a § 43(a)(1)(B) false advertising claim as interpreted by courts is not promising for Ms. Yong. In order to adequately plead false advertising, the plaintiff must allege:

- (1) The defendant has made false or misleading statements as to his own product or another's;
- (2) There is actual deception or at least a tendency to deceive a substantial portion of the intended audience;
- (3) The deception is material in that it is likely to influence purchasing decisions;
- (4) The advertised goods traveled in interstate commerce; and
- (5) There is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, etc.⁶⁰

In the past, courts have required that plaintiff be in direct or indirect competition with the defendant in order to recover under this section.⁶¹ However, in 2014, the Supreme Court handed down its decision in *Lexmark v. Static Control*, in which it outlined the new test for standing under false advertising § 43(a) claims.⁶²

The new test under *Lexmark* is three-pronged. First and foremost, the plaintiff must show an injury in fact under Article III standing.⁶³ Once this has been satisfied, a more specific inquiry is conducted to determine whether the claim falls within the “zone of

⁶⁰ Peek v. Whittaker, 2014 U.S. Dist. LEXIS 70461 (W.D.P.A. 2014) (citing Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc., 653 F.3d 241, 248 (3d Cir. 2011)).

⁶¹ Waits v. Frito-Lay, Inc. 978 F.2d 1093, 1108 (9th Cir. 1992).

⁶² *Lexmark*, 572 U.S. 188.

⁶³ *Id.*; Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

interest” meant to be protected by Congress in enacting the statute.⁶⁴ As mentioned earlier, Congress specifically delineated the zone of interest of the Lanham Act;⁶⁵ therefore, the plaintiff in a false advertising case must allege an injury to a commercial interest in reputation or sales.⁶⁶ Finally, the plaintiff must satisfy the proximate cause requirement and show whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.⁶⁷ While it may seem that Ms. Yong may be able to claim injury to reputation and that the harm was proximately caused by the unfair advertising, the Court did not entirely do away with the competitor requirement. Although there is no longer a bright line rule, the Court noted that a plaintiff who is not in direct competition with the defendant will often have a harder time establishing proximate causation.⁶⁸ Perhaps this is why the general consensus among courts is to try false endorsement claims under § 43(a)(1)(A) instead.⁶⁹

To prove a claim of false endorsement under § 43(a)(1)(A), the plaintiff must allege “(1) it has a valid and legally protectable mark; (2) it owns the mark; and (3) the defendant’s use of the mark to identify goods or services causes a likelihood of confusion.”⁷⁰ The crucial difference between this prong and false advertising is that this requires the plaintiff have a trademark in the alleged misuse in order to have standing to sue. Most courts have held that a

⁶⁴ *Lexmark*, 572 U.S. 188.

⁶⁵ 15 U.S.C. § 1127 (2012).

⁶⁶ *Lexmark*, 572 U.S. 188.

⁶⁷ *Id.*

⁶⁸ *Id.* at 136

⁶⁹ 1 MCCARTHY ON TRADEMARK, *supra* note 54 at § 27:88

⁷⁰ Bd. of Dirs. of Sapphire Bay Condos. W. v. Simpson, 641 Fed. Appx. 113, 114 (3d Cir. 2015) (citing *A&H Sportswear, Inc. v. Victoria’s Secret Stores, Inc.*, 237 F.3d 198, 201 (3d Cir. 2000)).

celebrity's persona can serve as a trademark, allowing a false endorsement claim to be brought under § 43(a)(1)(A).⁷¹

Because of its basis in trademark, courts tend to focus on the confusion aspect of the statute in determining liability. Mark owners may recover for trademark infringement when the alleged use is “likely to cause confusion, or to cause mistake, or to deceive.”⁷² Therefore, in the false endorsement context, the use of the trademark must have a likelihood to “cause confusion, or to cause mistake, or to deceive” in regards to the association of the person (by way of their personal trademark) with the product being advertised.

The Ninth Circuit developed an eight-factor balancing test for determining confusion in *Downing v. Abercrombie & Fitch*.⁷³ The eight-factors have been adopted by other circuits as well.⁷⁴ These factors are:

- (1) the level of recognition that the plaintiff has among the segment of the society for whom the defendant's product is intended;
- (2) the relatedness of the fame or success of the plaintiff to the defendant's product;
- (3) the similarity of the likeness used by the defendant to the actual plaintiff;
- (4) evidence of actual confusion;
- (5) marketing channels used;
- (6) likely degree of purchaser care;

⁷¹ 1 J. Thomas McCarthy, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 5:31, fn. 6 (2d ed. 2018) (hereinafter *RIGHTS OF PUBLICITY*).

⁷² 15 U.S.C. § 1114(1)(a) (2012).

⁷³ *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1007-08 (9th Cir. 2001).

⁷⁴ *See, e.g., Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007 (3d Cir. 2008); *Ji v. Bose Corp.*, 538 F. Supp. 2d 349 (D. Mass. 2008).

- (7) defendant's intent on selecting the plaintiff; and
- (8) likelihood of expansion of the product lines.⁷⁵

If we were to apply these factors to Ms. Yong's specific scenario, she would probably have a difficult time surviving summary judgment for several reasons. She would need to prove that the use of her picture was for the purpose of using her identity (and not just because she is a generic person using the product) and was related to the success of the product in that her identity would actually cause shoppers to believe that she endorsed the product and cared about such when purchasing the product. This would be difficult to prove, because unless the typical viewer had the thumbnail from her YouTube video and the Wish advertisement up side by side, it is unlikely that they would recognize Ms. Yong from the ad immediately. As a close-up photo of her eyes, it would be tenuous to say this the company chose this photo to use Ms. Yong's identity to promote their product.

This issue of identification (the first *Downing* factor) is particularly salient in false endorsement cases brought by non-celebrities. While celebrity status is not a legally defined term, and is not per se required in order to bring a false endorsement claim, there is a need for some sort of recognition in order for the false endorsement to carry any weight. Even if the plaintiff is recognizable by comparing photographs to the advertisement, if the plaintiff is not known by anybody other than their close friends and family, there is no likelihood that the general population of consumers will put any weight on whether they endorse the product or be confused by their presence in the advertisement.⁷⁶

⁷⁵ *Downing*, 265 F.3d at 1007-08.

⁷⁶ *Bondar v. LAsplash Cosmetics*, 2012 U.S. Dist. LEXIS 175873, *27 (S.D.N.Y. 2012) ("It does not require celebrity, only a likelihood of consumer confusion. Of course, the misappropriation of a completely anonymous face could not form the

National or worldwide fame is not required by courts to prove recognition and confusion in false endorsement claims. A niche celebrity may be someone with a high level of recognition in their specific profession or line of business.⁷⁷ Some courts recognize false endorsement claims for plaintiffs short of celebrities.⁷⁸ For example, in *Bondar v. LASplash*, a fashion model was able to survive a motion to dismiss for her false endorsement case because, although she was not nationally recognized, her recognition within the fashion industry made it reasonably likely that the public could recognize her face on a beauty ad and think she endorsed the product.⁷⁹

The level of celebrity a YouTuber has and the YouTuber's recognition within his or her specific industry will dictate whether they can succeed in a false endorsement claim. Tati “GlamLifeGuru” Westbrook, with over 5 million subscribers to her beauty tutorial and review channel⁸⁰ will have a stronger claim to fame in the beauty community than Susan Yara with 70,000 subscribers,⁸¹ who has had clips of her son used to endorse products

basis for a false endorsement claim, because consumers would not infer than an unknown model was ‘endorsing’ a product, as opposed to lending her image to a company for a fee.”). See also, *Ji*, 538 F. Supp. 2d 349 (finding that plaintiff was had no recognition to consumers and therefore could not survive a claim for false endorsement).

⁷⁷ 1 RIGHTS OF PUBLICITY, *supra* note 71 at § 4:2.

⁷⁸ See, e.g., *Bondar*, 2012 U.S. Dist. at *27 (“However, there is a level of consumer recognition short of celebrity – as the term is usually understood – capable of causing consumer confusion.”); *Rubio v. Barnes and Noble*, 2014 U.S. Dist. LEXIS 169147, *9 (S.D.N.Y. 2014); *Passelaigue v. Getty*, 2019 U.S. Dist. LEXIS 34004 (S.D.N.Y. 2018).

⁷⁹ *Bondar*, 2012 U.S. Dist. at *27-*29

⁸⁰ Tati (@GlamLifeGuru), *supra* note 47.

⁸¹ Susan Yara (@SusanYara), YOUTUBE, <https://www.youtube.com/user/Susanyara> (last visited Dec. 19, 2018).

she did not buy⁸² or Chelsey Bowen with 170,000 subscribers in the crafting community⁸³ who has had her crafts and projects falsely advertised by others.⁸⁴ However, are these lesser-known creators any less deserving of protection? Perhaps they will find solace in other rights of action, but it does not seem right that creators who are victim to the same misappropriation are subject to different levels of protection.

Even more disconcerting, where does Tina Yong fall in this balancing? With more than 2.5 million subscribers,⁸⁵ she has many more than smaller creators, but only half the visibility of Tati Westbrook. Where do we draw the line for recognition and celebrity status? If she had four times as many subscribers, would using a close-up photo of her eyes be more likely to cause recognition and confusion? Or is her current standing at 2.5 million subscribers enough? At what point does she gain Lanham Act protection? The unpredictability of application of the Lanham Act makes it less than ideal for reliance by unsophisticated YouTube creators.

⁸² Susan Yara (@SusanYara), Comment to *ADS THAT USE ME ... WITHOUT PERMISSION*, YOUTUBE (Nov. 28, 2018), <https://www.youtube.com/watch?v=KhyaoGN1iYM&lc=z233tp3idzemchapr04t1aokgmpx5p1qwraov5lm4vglrk0h00410.1543452747280153>.

⁸³ Chelsey Bowen (@ChelseyDIY), YOUTUBE, <https://www.youtube.com/channel/UCEC9pCgh1o7IVQ4BmzxFlaA> (last visited Dec. 19, 2018).

⁸⁴ Chelsey Bowen (@ChelseyDIY), Comment to *ADS THAT USE ME ... WITHOUT PERMISSION*, YOUTUBE (Nov. 28, 2018), <https://www.youtube.com/watch?v=KhyaoGN1iYM&lc=z233tp3idzemchapr04t1aokgmpx5p1qwraov5lm4vglrk0h00410.1543452747280153>.

⁸⁵ Tina Yong (@makeupbytinayong), YOUTUBE, <https://www.youtube.com/user/makeupbytinayong> (last visited Dec. 19, 2018).

C. Publicity Rights

Born out of common law and the notion of the right to privacy, many states have adopted what are deemed “publicity rights” laws, protecting the nonconsensual use of a person’s identity in commerce. Publicity rights are similar to the false endorsement action under the Lanham act in that both require the use of a person’s identity without their permission. However, publicity rights are more accessible in that no trademark is required and is generally more available to non-celebrities. On the other hand, publicity rights are less accessible because the specific protections are protected on a state-by-state basis and so are restricted by jurisdiction, choice of law, and the language of each state’s particular protections, whereas the Lanham Act is federal law and generally has equal protections across the country.

This being said, questions of jurisdiction, choice of law, and the complexities of every state’s protections are beyond the scope of this paper. Instead, this section focuses mostly on the general stipulation of publicity rights as provided by the Restatement (Third) of Unfair Competition.

According to the Restatement, “One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules state in §§ 48 and 49.”⁸⁶ This is fairly typical of a bare-bones protection for publicity rights, and at least thirteen states have adopted some version of this provision (some giving even stronger rights and protections).⁸⁷

Most of the tension in publicity rights cases revolves around identifying the commercial value of a person’s identity, namely *who*

⁸⁶ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (2018).

⁸⁷ *Id. See, e.g.*, NY Civ. Rights L. §§ 50-51; Cal. Civ. C. §§990, 3344.

has a commercial value and how it is ascertained. It is important to note that while the majority consensus is that publicity rights protect celebrities and non-celebrities alike, there is some case law that suggest certain jurisdictions will only extend protections to celebrities.⁸⁸ Modern case law and statutes tend to extend protection to non-celebrities.⁸⁹

Once we accept that celebrity status is not necessary to establish a publicity right, we then turn to how identifiable the plaintiff must be – how recognizable must the appropriation be – for them to survive a motion to dismiss. The leading case on this question comes from the New York Court of Appeals in *Cohen v. Herbal Concepts, Inc.*⁹⁰ In *Cohen*, the plaintiffs, Susan Cohen and her four-year-old daughter, while on vacation were photographed from behind, without their consent, while bathing in a stream located on their friends' private property.⁹¹ The photographer then sold the photograph to Herbal Concepts, who in turn used the photograph in several ads for their product "Au Naturel," which was "designed to help women eliminate body cellulite, those 'fatty lumps and bumps that won't go away.'"⁹² The ads appeared in two editions of *House and Garden* and one edition each of *House Beautiful* and *Cosmopolitan*.⁹³ Susan's husband Ira recognized his wife and daughter while reading one of these magazines.⁹⁴

⁸⁸ See, e.g., *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527 (9th Cir. 1984); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978); *Martin Luther King, Jr., Center for Social Change, Inc. v. Am. Heritage Products, Inc.*, 250 Ga. 135 (1982); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (2018).

⁸⁹ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d; 1 RIGHTS OF PUBLICITY, *supra* note 71 at § 4:16.

⁹⁰ *Cohen v. Herbal Concepts, Inc.*, 472 N.E.2d 307 (N.Y. 1984).

⁹¹ *Id.* at 382.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

While defendants argued that because their faces were not visible in the photograph, plaintiffs were thus not recognizable, the court found otherwise.⁹⁵ Interpreting the New York publicity right, the court stated:

The statute is designed to protect a person's identity, not merely a property interest in his or her "name", "portrait" or "picture", and thus it implicitly requires that plaintiff be capable of identification from the objectionable material itself. . . . That is not to say that the action may only be maintained when plaintiff's face is visible in the advertising copy.⁹⁶

In order to survive a motion to dismiss, according to the highest court in New York, the plaintiff "must satisfy the court that the person in the photograph is capable of being identified from the advertisement alone."⁹⁷ The court relies on "the extent to which identifying features are visible, and the distinctiveness of those features."⁹⁸ In this case of the two women bathing, the court looked at the plaintiffs' "hair, bone structure, body contours and stature and their posture."⁹⁹ In addition, the court found that the fact that the plaintiff's husband testified to recognizing his wife and daughter in the magazine was *prima facie* sufficient to prove identifiability.¹⁰⁰

If we were to apply the standard in *Cohen* to Tina Yong's case, the fact that this author was able to identify her could potentially be *prima facie* sufficient to prove recognition, allowing

⁹⁵ *Id.* at 385.

⁹⁶ *Id.* at 384.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 309.

¹⁰⁰ *Id.* at 309-10. (see also footnote suggesting that plaintiff's ability to identify self might also be sufficient).

her action to proceed. However, without testimony of actual recognition, the court would have to look at the identifying qualities of the photo used, and it might be unlikely that a photograph of just her eyes would be sufficient. Would eyes and nose be enough? While the court said that the full face does not need to be present, what is enough to satisfy identifiability absent actual recognition?

While we may be satisfied that celebrity status is not required to determine recognition of the plaintiff's identity, it might still be relevant in ascertaining damages.¹⁰¹ One of the elements of the publicity right is that the defendant must use the plaintiff's identity for commercial advantage. While a celebrity image would likely give commercial advantage in the form of an endorsement and familiarity, a non-celebrity does not produce that effect. Instead, oftentimes the commercial advantage from use of a non-celebrity identity comes from the fact that the person looks aesthetically pleasing, or is a "typical" person consumers can relate to.¹⁰²

The publicity rights protections might be more forgiving than, say, the Lanham Act; however, they do not come without their challenges. As mentioned earlier, publicity rights are available on a state-by-state basis and there are variations across statutes, common law, and application. Where the YouTuber can attain jurisdiction could very well dictate the strength of their protections; this provides little predictability. Furthermore, when close-up images of YouTubers are used in these advertisements, it is unclear how well they can be identified to the point of surviving a movement for summary judgment. Finally, the measure of damages for a non-celebrity is unclear and so is an inadequate deterrent to those who misappropriate in the first place.

¹⁰¹ 1 RIGHTS OF PUBLICITY, *supra* note 71 at § 3:12.

¹⁰² *Id.* at § 3:13.

D. FTC Enforcement

Congress has granted the Federal Trade Commission (FTC) the power to prevent the use of “unfair methods of competition in or affecting commerce and unfair or deceptive acts or practice in or affecting commerce.”¹⁰³ In response to this power, the FTC released its Endorsement Guide in 1975,¹⁰⁴ most recently updated in 2009.¹⁰⁵ While the Guides are not on their own statutory or regulatory authority, they give a good outline of the FTC’s position on endorsements and provide guidance for what would be considered good practice.¹⁰⁶

The FTC defines an endorsement as:

[A]ny advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.¹⁰⁷

The Commission continues to dictate what would be a proper endorsement and what it must contain in order to be good practice and avoid adverse action against their use. An endorsement must

¹⁰³ FTC Act § 5, 15 U.S.C. § 45(a)(2) (2012).

¹⁰⁴ Consuelo Lauda Kertz & Roobina Ohanian, *Recent Trends in the Law of Endorsement Advertising: Infomercials, Celebrity Endorsers and Nontraditional Defendants in Deceptive Advertising Cases*, 19 HOFSTRA L. REV. 603, 607 (1991).

¹⁰⁵ 16 C.F.R. § 255.0 (2009).

¹⁰⁶ 16 C.F.R. § 255.0(a) (2009); Kertz & Ohanian, *supra* note 104 at 607-08.

¹⁰⁷ 16 C.F.R. § 255.0(b) (2009).

“reflect the honest opinions, findings, beliefs, or experience of the endorser”¹⁰⁸ and must “not be presented out of context or reworded so as to distort in any way the endorser’s opinion or experience with the product.”¹⁰⁹

The FTC uses a three-step inquiry when determining whether an advertisement is deceptive: “(i) what claims are conveyed in the ad, (ii) whether those claims are false, misleading, or unsubstantiated, and (iii) whether the claims are material to prospective consumers.”¹¹⁰ In considering the first step of the inquiry, the Commission “will deem an advertisement to convey a claim if consumers acting reasonably under the circumstances would interpret the advertisement to contain that message”¹¹¹ from the perspective of the likelihood of “at least a significant minority of reasonable consumers” to believe such a claim asserted.¹¹²

This author was unable to find any claims that have been tried or are currently pending that are similar to the situation at hand in this paper. However, applying the same analysis as in false endorsement under the Lanham Act requires the conclusion that some YouTubers would have a hard time meeting this threshold. Using Ms. Yong as our example, if she is arguing that the Wish merchant falsely claims that she endorsed the product being advertised, that would need to be ascertainable by at least a significant minority of reasonable consumers. Most reasonable consumers would be likely to believe that the girl in the photo was just a paid model used to advertise the product, and not some famous influencer expressing her endorsement of it.

¹⁰⁸ 16 C.F.R. § 255.1(a) (2009).

¹⁰⁹ 16 C.F.R. § 255.1(b) (2009).

¹¹⁰ POM Wonderful, LLC v. F.T.C., 777 F.3d 478, 490 (D.C. Cir. 2015).

¹¹¹ *Id.* (citing Kraft, Inc. v. F.T.C., 970 F.2d 311, 314 (7th Cir. 1992)).

¹¹² *Id.* (citing Telebrands Corp., 140 FTC 278, 291 (2005), *aff’d*, 457 F.3d 354 (4th Cir. 2006)).

However, this is another instance where the popularity (or celebrity status) of a YouTuber is relevant. For example, Tati Westbrook’s voice was taken from several of her videos and used in an advertisement for an eyeshadow product.¹¹³ By the sound of the advertisement, Ms. Westbrook’s distinctive voice (among others) is clearly heard supposedly exclaiming her praise of the product.¹¹⁴ With over 5 million subscribers, her popularity being within the beauty community and this being a beauty product, it is possible that a court or the Commission would find that a “significant minority” would believe this claim.

For argument’s sake, we will continue with the presumption that at least some YouTubers would be able to find protection under an FTC action. Do Ms. Westbrook or her peers have standing to sue under the statute? The general consensus on this question is a resounding no, they do not.¹¹⁵ In response to this, many states have adopted “little FTC” statutes which provide for a private right of action to individuals injured by the types of actions restricted by the federal statute.¹¹⁶ However, there is a lack of consistency among these state statutes. Some, for example, protect only consumers, which would exclude Tati Westbrook, Tina Yong, and other YouTubers since they do not purchase products from the defendant.¹¹⁷ Other states require there be an effect on the public

¹¹³ Tati (@GlamLifeGuru), *supra* note 52.

¹¹⁴ *Id.*

¹¹⁵ Kertz & Ohanian, *supra* note 104 at 629 (referencing *Freedman v. Meldy’s, Inc.*, 587 F. Supp. 658 (E.D. Pa. 1984); *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973); *Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232 (2d Cir. 1974)); 1 MCCARTHY ON TRADEMARK, *supra* note 54 at § 27:119.

¹¹⁶ Neil A. Helfman, *Proof of Statutory Unfair Business Practices*, 36 AM. JUR. PROOF OF FACTS 3d 221, §§ 4, 5 (2018); Kertz & Ohanian, *supra* note 104 at 631-635.

¹¹⁷ Helfman, *supra* note 116 at § 4. *See, e.g.*, HAWAII REV. STAT. § 480-2(D); W. VA. CODE § 46A-6-106.

interest before accepting the private claims.¹¹⁸ The particular state-by-state considerations are outside the scope of the paper; however, it is obvious that there are inconsistencies across jurisdictions that adds to the level of uncertainty of protections for YouTubers.

The FTC does not monitor every single advertisement in the country; instead, it conducts investigations “based on letters from consumers or businesses, Congressional inquiries, and advice from consumer protection advocates.”¹¹⁹ Further, the FTC will only initiate an action “after a substantial number of complaints about a particular activity bring it to the FTC’s attention.”¹²⁰ This implies that either the offended YouTuber knows to report to the FTC every instance of false endorsement he or she comes across or enough of their subscribers must report to the FTC an instance of false endorsement for the FTC’s attention to be caught. This puts an extremely heavy and unrealistic burden on the creators to monitor the internet for misappropriation of their content and/or to make a call to action to their subscribers to come to their aid in addition to the requirement that they be knowledgeable enough to know to do so.

Furthermore, it has been argued that the FTC is not doing enough to protect the market from false and deceptive advertising.¹²¹ Since at least the 1990s there has been inadequate FTC enforcement, as they often only take action after “public outcry and Congressional inquiry.”¹²² The FTC posts on its website certain data and reports of recent developments.¹²³ Recently, the most

¹¹⁸ Helfman, *supra* note 116 at § 5 (2018). *See, e.g.*, LaMotte v. Punch Line of Columbia, Inc., 370 S.E. 711 (S.C. 1988).

¹¹⁹ Kertz & Ohanian, *supra* note 104 at 605.

¹²⁰ *Id.* at 629

¹²¹ *Id.* at 655.

¹²² *Id.*

¹²³ FEDERAL TRADE COMMISSION, www.ftc.gov (last visited Dec. 18, 2019).

important undertakings by the FTC involve phone scams¹²⁴ and social media influencers who do not properly disclose their connections to sponsors (the complete opposite problem at issue here).¹²⁵ A search of all FTC cases and proceedings for anything containing the term “endorsement” came up with only two results, both related to collusion and not a false endorsement of the sort contemplated in this paper.¹²⁶

Based on the lack of action by the FTC, the uncertainty of whether YouTubers could satisfy the FTC’s inquiry of whether the use would be considered an endorsement, and the variation among states’ private rights of action, protection under this doctrine is not ideal for Tina Yong and her colleagues.

E. Miscellaneous Misrepresentation Claims

In addition to the four previously discussed possible actions available to YouTube creators, it is worth briefly noting that there are potentially other types of viable claims for misrepresentation. Suits alleging consumer misrepresentation can come from common

¹²⁴ Consumer Sentinel Network Data Book 2017: Executive Summary, FTC <https://www.ftc.gov/policy/reports/policy-reports/commission-staff-reports/consumer-sentinel-network-data-book-2017/executive-summary> (last visited Dec. 18, 2019) (“Telephone was the method of contact for 70% of fraud reports with a contact method identified.”).

¹²⁵ CSGO Lotto Owners Settle FTC’s First-Ever complaint Against Individual Social Media Influencers, FTC (Sept. 7, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against>; PR Firm and Publisher Settle FTC Allegations They Misrepresented Product Endorsements as Independent Opinions, Commercial Advertising as Editorial Content, FTC (Nov. 13, 2018), <https://www.ftc.gov/news-events/press-releases/2018/11/pr-firm-publisher-settle-ftc-allegations-they-misrepresented>.

¹²⁶ Cases and Proceedings, FTC, <https://www.ftc.gov/enforcement/cases-proceedings> (search keyword: endorsement) (last visited Dec. 20, 2018).

law fraud, or negligent misrepresentation, breach of warranty under the Uniform Commercial Code, state Unfair and Deceptive Acts and Practices laws, and the Federal Racketeer Influenced and Corrupt Organizations Act.¹²⁷ However, a crucial aspect of these claims is the necessity of reliance.¹²⁸

To survive in any of these actions, the YouTuber would not only have to buy the product from the company inappropriately using their likenesses, but would somehow have to prove they relied on their own (false) endorsement in purchasing the product. While the law is full of legal fictions, certainly this would not suffice in any jurisdiction. Because other consumers are not likely to know of the misrepresentation in an advertisement using a non-celebrity YouTuber's face, they would not think to make a misrepresentation claim on their behalf. Therefore, by restricting recovery only to consumers who rely, there is an "under-deterrence of fraudulent and negligent misrepresentations."¹²⁹

There may be other forms of common law torts or other state laws that provide better protection for these creators; however, because they rely on jurisdictional precedent and cannot be widely applied in general, they fall outside the scope of this paper.

III. PROPOSAL

From the preceding analysis of the several routes a YouTube creator may go about seeking protection from nonconsensual use of their work, it is clear that there is no perfect remedy currently available. While some protections exist, the extent and application

¹²⁷ Alon Klement, Zvika Neeman & Yuval Procaccia, *Consumer Fraud, Misrepresentation and Reliance*, 54 INT'L REV. L. & ECON. 95, 97 (2018).

¹²⁸ *Id.* at 95 ("Indeed, under extant doctrine, recovery for misrepresentation requires a showing of *reliance*.").

¹²⁹ *Id.*

of any are unclear or do not apply to the same extent to every YouTuber.¹³⁰ As a result, there is little predictability or consistency among the options. Some rely on where jurisdiction may be obtained, others depend on the popularity of the specific creator whose work has been misappropriated, and nearly all rely on how recognizable the nonconsensual use is.

The best places to look for strong protection are most likely publicity rights and FTC false advertising enforcement. However, publicity rights are jurisdictional and FTC cooperation has been minimal, if it exists at all. Further, the proper deterrent effect is clearly not currently present. Therefore, I propose that a major overhaul of the publicity rights doctrine is necessary. There needs to be a push toward adopting either a uniform publicity right across the fifty states or a federal publicity right. This would provide more predictability and even application to original content creators.

Furthermore, the FTC needs to be alerted to this growing phenomenon and take action to enforce false advertisements and false endorsements. Creating a federal private right of action for false endorsements is not likely to be satisfactory because it puts too heavy a burden on individual, unsophisticated creators. Instead, the FTC needs to take up the cause and shift its attention from attacking social media influencers to protecting them.

Neither of these solutions are perfect, though. As noted above, there are still gaps in publicity and FTC protections, specifically in regards to identifiability and strength of endorsement. It is my hope that where these may be deficient, other protections such as copyright may be able make up some of the difference. However, this paper is not meant to produce an absolutely perfect solution. Rather, the goal is to alert others to this issue and spark a wider conversation on the topic in order to find that best solution.

¹³⁰ As of the time of publication there are no guiding judgements on the matter.

IV. CONCLUSION

By the simple fact that today's creators and content owners are not able to stop others from using their content and likeness without their permission,¹³¹ there is a problem with the current system of protections available when someone misappropriates content.

In order to encourage creativity and discourage false advertising, better disincentives are in order. Copyright does not provide the proper deterrent damages, trademark does not protect everyone, publicity rights are neither predictable nor uniform, the FTC is not involved, and other protections are also unpredictable.

The internet is not going anywhere and seemingly neither are those who abuse its accessibility. Someone needs to care about the modern creator and put an end to the exploitation of their creativity.

*Jacqueline Malzone**

¹³¹ See, e.g., Tati (@GlamLifeGuru), *supra* note 52.

* J.D. Candidate (2019), University of Virginia Law School; BA. (2016), Rutgers University. I would like to thank Professor Dotan Oliar for his guidance and feedback while writing this piece. I would also like to thank my friends at UVA who encouraged me to pursue this research project. Finally, I want to thank my mother, without whose constant support and advice this would not be possible.

Appendix A

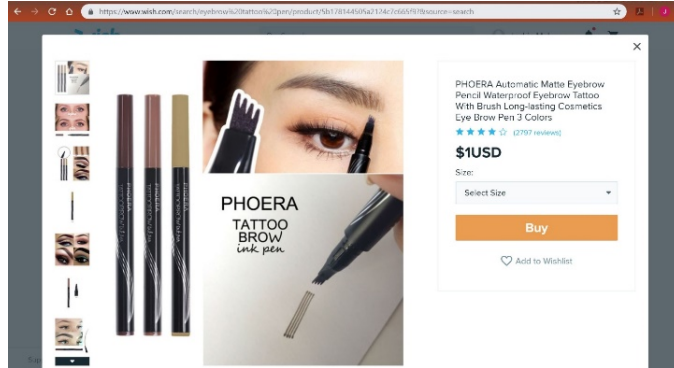


Figure 1 - Search Result from Wish using Tina Yong's video thumbnail.
Source: <https://www.wish.com/search/eyebrow%20tattoo%20pen/product/5b178144505a2124c7c665f9?&source=search>

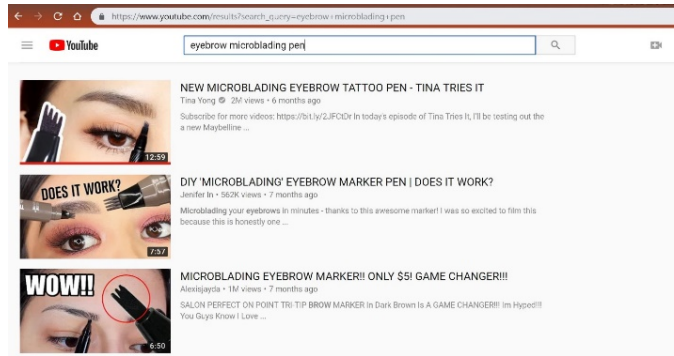


Figure 2 - YouTube thumbnails
Source: https://www.youtube.com/results?search_query=eyebrow+microblading+pen