Articles

Misappropriation of personality: A case for common law identity protection

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There is a gap in the law in Australia and New Zealand. Australia, while ahead in many jurisprudential fields, is lagging behind in privacy law protection. New Zealand, although adopting two common law privacy torts, recently refused to develop a third privacy tort based on the American tort of misappropriation of personality. In light of global technological advances, and in the age of social media, there is a need to develop the tort of misappropriation of personality to protect an individual's right to identity privacy. This article addresses the merits of adopting the privacy tort of misappropriation of personality in the context of other common law actions and their shortfalls — and, in particular, why the tort of passing off is inadequate at protecting an individual's right to identity privacy.

I Introduction

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection.
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> — Warren and Brandeis[1]

You are the 'reasonable person'.[2] You are not famous, and you do not actively court publicity. You meet a friend at a small and intimate public setting. You implicitly consent that others attending the small and intimate public setting have permission to know your identity. However, while there, you inadvertently engage in embarrassing behaviour, and someone you do not know takes your photograph and then posts it on social media. You have not consented to the use of your image on social media. The person posting the image has a large social media following but does not receive any commercial

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1 Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4(5) *Harvard Law Review* 193, 193.

2 The reasonable person is described as:

> not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct.

Arland v Taylor [1955] OR 131 cited by Stephen Todd, 'Negligence: Breach of Duty' in Stephen Todd et al (eds), *Todd on Torts* (Lawbook, 8th ed, 2019) 427, 428.

gain from the post or social media. You become the subject of a viral meme.[3] There are over 5 million views of your image on social media. You are now the target of jokes and known as 'that' person in your community. The post causes you severe mental anguish, stress and embarrassment.

Unfortunately, in society today, 'virtual kidnapping'[4] is not uncommon.[5] In the digital age where smartphones can take photographs and videos anytime and anywhere, defining the boundaries of an individual's privacy rights over the use of his or her image by others is increasingly important. This is particularly so when the image is of an individual who does not actively court publicity or any publicity sought is limited in nature. In this situation, subject to appropriate constraints, an individual should be able to control the use of his or her image by determining when, to whom, and to what extent his or her image is available for broad public consumption. However, what legal recourse is available to an individual in the situation above? Does the law currently provide an adequate remedy?

Put simply, the answer is 'no'. Existing legal protections for the unauthorised use of an individual's image and, more broadly speaking, an individual's likeness or personality, are inadequate in Australia and New Zealand. It is trite law that an individual has a proprietary right in the use of his or her image for commercial gain which is protected by the common law tort of passing off. However, this article contends that an individual also has a personal right to privacy over the use of his or her image in certain situations regardless of whether that image is used for commercial gain.[6] The measure of damages should be based on the harm suffered which, of course, can be

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3 *Merriam-Webster* <https://www.merriam-webster.com> defines 'viral' as 'quickly and widely spread or popularized especially by means of social media' and 'meme' as 'an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media'.

4 The use of a person's likeness or image on the internet without their permission. Term coined by Alice Haemmerli, 'Whose Who? The Case for a Kantian Right of Publicity' (1999) 49(2) *Duke Law Journal* 383, 389 n 21.

5 Eg, on Instagram, there is an account named 'thefatjewish' with 10.8 million followers as at 22 July 2020. 'thefatjewish' has posted the same video of a man sweating and dancing at an event on three occasions: 8 October 2018, 26 December 2018 and 27 March 2020. The caption from 8 October 2018 states 'IF YOU WERE LOOKING TO TAKE MOLLY IN THE NEAR FUTURE, I REGRET TO INFORM YOU THAT THIS SWEATY EUROPEAN F**KLORD HAS TAKEN IT ALL AND THERE IS LITERALLY NONE LEFT ON EARTH.' The caption from 26 December 2018 states 'I get countless DM's demanding that I repost the video of the unrealistically sweaty Eurocreep in Croatia on 80 pills of molly pelvic thrusting to David Guetta. His lawyer has emailed me threatening legal action if I post it again. But, you know what? Today is Christmas, and there's no better gift than this EDM-loving maniac and his terrifying drug face. Yeah, I'm a f**king giver.' The caption from 27 March 2020 states 'IN OUR TIME OF QUARANTINE LET US ALL THINK OF BETTER DAYS TO COME, WHEN WE CAN TAKE 40 PILLS OF MOLLY AND DANCE IN CROATIA TO THROBBING EDM MUSIC LIKE THE UPSETTINGLY SWEATY EUROCREEP (he threatened to sue me if I posted this again, but we're in a global pandemic so WHATEVER)': thefatjewish (Instagram).

6 These situations include the fact pattern outlined in the Introduction of this article, the fact pattern mentioned at n 5 of this article and the fact pattern in *X v AG [No 2]* [2017] NZAR 1365, discussed in depth in Part II(B)(4) of this article. In addition, arguably, a misappropriation of personality cause of action would have been more appropriate than those used in cases which concern a plaintiff's right to control the use of his or her image as discussed in Part III(A)(2) of this article.

financial in nature, but also can be personal in nature, such as harm to mental wellbeing. Mental harms, while challenging, can be quantified. The law should not shy away from doing so in appropriate circumstances and, indeed, has not in other areas.[7] It is time to adopt privacy protection for the unauthorised use of an individual's image if its use would be highly offensive to the reasonable person regardless of whether that image is used for a defendant's commercial gain.

Part II of this article addresses preliminary jurisprudential and jurisdictional concepts relating to the recognition of privacy as a right and, specifically, privacy rights in the use of images. Part III discusses a recent case that held, in the author's opinion, prematurely, that the tort of misappropriation of personality is not available in New Zealand. Part IV covers why current causes of action available in Australia and New Zealand are inadequate at addressing privacy rights in the unauthorised use of an individual's image. Part V outlines the proposed elements of the tort for misappropriation of personality. Part VI concludes by arguing that, without legislative intervention, it is necessary to adopt the tort of misappropriation of personality in Australia and New Zealand against the backdrop of arguments for and against it.

II Preliminary considerations

There are a number of preliminary considerations to canvas before assessing the merits of adopting a tort for the misappropriation of personality. Each consideration merits an article in its own right. However, for current purposes, these issues will be addressed briefly to provide context for the view that Australia and New Zealand, absent specific legislation, should adopt the common law tort of misappropriation of personality.

A Jurisprudential considerations: Defining and valuing privacy

There are two preliminary issues to consider. The first is to define what privacy is as a concept, and the second is to determine the legal value to attribute to privacy concerns, that is, whether privacy is a right, a value or merely an interest. Both issues have attracted a significant amount of academic and judicial comment.[8]

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7 Two examples are the intentional infliction of emotional distress (provided it is a psychiatric injury) and negligence cases (pure mental injury cases): see *M v Roper* [2018] NZHC 2330. Further, in defamation claims, awards of general damages are intended to compensate for a mix of injury to a victim's reputation and to their feelings: 'Defamation' in Justice IL McKay, *Laws of New Zealand* (online at 1 August 2020) [15]. See also: Eric Descheemaeker, 'Rationalising Recovery for Emotional Harm in Tort Law' (2018) 134(4) *Law Quarterly Review* 602, 613, 623.

8 Some of these comments are referred to in Parts II(A)(1)–(2) below. See Stephen Penk, 'The Concept of Privacy' in Rosemary Tobin and Stephen Penk (eds), *Privacy Law in New Zealand* (Lawbook, 2nd ed, 2016) 1, and, in particular, ch 1.4 'The Status of Privacy: A Wrong in Search of a Right'.

1 Defining privacy

Privacy is an elusive concept.[9] There is no universally agreed definition of privacy and what it covers. In fact, some consider that privacy cannot be defined.[10] Against this, some attempt to define privacy either in general terms or, alternatively, specifically in relation to the interests it protects. In 1888, Judge Cooley famously described the concept of privacy as the right 'to be let alone'.[11] His definition is often criticised as being too wide as it encompasses other tortious actions, such as assault and defamation.[12] It also does not specifically identify the many interests that privacy protects, such as physical or bodily, spatial, territorial, informational, associational and decisional privacy.[13]

The difficulty in defining privacy in a single definition has led to the development of different common law privacy torts to protect different privacy interests in some jurisdictions.[14] In 1960, Prosser, an academic from the United States, famously stated:

> The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by a common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, 'to be let alone.'[15]

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9 William A Parent, 'Privacy: A Brief Survey of the Conceptual Landscape' (1995) 11(1) *Santa Clara Computer and High Technology Law Journal* 21, 21.

10 Wacks states that privacy is 'a nebulous' concept. Raymond Wacks, 'The Poverty of Privacy' (1980) 96(1) *Law Quarterly Review* 73, 88. William M Beaney, 'The Right to Privacy and American Law' (1966) 31(2) *Law and Contemporary Problems* 253, 255 states: 'even the most strenuous advocate of a right to privacy must confess there are serious problems of defining the essence and scope of this right'. Robert C Post, 'Three Concepts of Privacy' (2001) 89(6) *Georgetown Law Journal* 2087, 2087 regards privacy as 'a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all'.

11 Thomas M Cooley, *A Treatise on the Law of Torts* (Callaghan, 2nd ed ,1888), cited in William L Prosser, 'Privacy' (1960) 48(3) *California Law Review* 383, 389.

12 Ursula Cheer, 'Defamation' in Stephen Todd et al (eds), *Todd on Torts* (Lawbook, 8th ed, 2019) 843, 976. Wacks (n 10) 78 states that 'the right to be let alone' is 'as comprehensive as it is vague'. As Penk states, 'no single account or definition of privacy is in itself complete or satisfactory', and Waldo, Lin and Millet state that 'taken as a whole, the privacy literature is a cacophony, suggesting that trying to define privacy in the abstract is not likely to be a fruitful exercise'. See Penk, 'The Concept of Privacy' (n 8) 2 and National Research Council, *Engaging Privacy and Information Technology in a Digital Age*, ed James Waldo, Herbert Lin and Lynette Millet (National Academies Press, 2007) 84.

13 Solove believes that the 'horde of different conceptions of privacy' can be addressed under six headings: the right to be let alone, limited access to the self, secrecy, control of personal information, personhood and intimacy. See Daniel J Solove, 'Conceptualizing Privacy' (2002) 90(4) *California Law Review* 1087, 1094, as cited in Penk, 'The Concept of Privacy' (n 8) 8 n 59.

14 Prosser (n 11) 389. Eg, the United States and New Zealand have adopted different common law privacy torts to protect different privacy interests. See my discussion on 'Jurisdictional Considerations' at Part II(B) of this article. In this respect, commentators suggest that any attempt to consolidate multiple privacy concerns into a single tort is likely to be futile and would create a lengthy legal test that is confusing and over-generalised: Penk, 'The Concept of Privacy' (n 8) 12, 15.

15 Prosser (n 11) 389.

He considered that, '[w]ithout any attempt to [an] exact definition', the four privacy interests are as follows:

1 Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
2 Public disclosure of embarrassing private facts about the plaintiff;
3 Publicity which places the plaintiff in a false light in the public eye;
4 Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[16]

This article does not attempt to provide an exact definition of privacy other than to agree with Prosser that privacy, as a concept, includes the interest he lists above at (4), being the (mis)appropriation of an individual's name or likeness (or, personality, as labelled in the article).

Why is an individual's interest in the use of his or her image worthy of privacy protection? As Warren and Brandeis opined in 1890 an 'intrusion-free sphere is considered to be an aspect of human dignity worthy of legal protection, as an aspect of "involatile personality".'[17] Human dignity is a fundamental principle of natural law. It is the ability for self-determination in one's private sphere, which 'necessitates rights in the appropriation of personal indicia'.[18] In this respect, privacy involves 'a dignitary interest rather than a proprietary interest'.[19] Zapparoni states:

> In essence, it is widely accepted that the right of privacy in the US developed in the early 1900s so as to protect private individuals from unwanted media publicity. With time, celebrity plaintiffs sought to use the 'misappropriation of name or likeness' branch of privacy law to obtain compensation not for injured feelings but for damage to their *economic* interests in not being paid for the publicity use of their image or name. Yet privacy law was inadequate as a cause of action due to its concern with compensating injured feelings and protecting personal, dignitary interests rather than pecuniary interests. Thus, a separate right of publicity was developed, largely in response to the needs of celebrity plaintiffs and the perceived limitations of privacy law.[20]

Westin describes an individual's situational privacy interest as:

> [This] state of privacy, anonymity, occurs when the individual is in public places or performing public acts but still seeks, and finds, freedom from identification and surveillance. He may be riding a subway, attending a ball game or walking the streets; he is among people and knows that he is being observed; but unless he is a well-known celebrity, he does not expect to be personally identified and held to the full rules of behaviour that would operate if he were known to those observing him. In this state the individual is able to merge into the 'situational landscape'. Knowledge or fear that one is under systematic observation in public places destroys the sense of relaxation and freedom that men seek in open space and public arenas.[21]

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16 Ibid.
17 Warren and Brandeis (n 1) 220.
18 Olaf Weber, 'Human Dignity and the Commercial Appropriation of Personality: Towards a Cosmopolitan Consensus in Publicity Rights' (2004) 1(1) *SCRIPT-ed* 160, 167.
19 Penk, 'The Concept of Privacy' (n 8) 4.
20 Rosina Zapparoni, 'Propertising Identity: Understanding the United States Right of Publicity and Its Implications: Some Lessons for Australia' (2004) 28(3) *Melbourne University Law Review* 690, 706 (citations omitted).
21 Alan F Westin, *Privacy and Freedom* (Atheneum, 1967) as cited in Daniel J Solove and Marc Rotenberg, *Information Privacy Law* (Aspen Publishers, 2006) 37.

Moreham concurs that '[p]eople have "a greater expectation of privacy in places where only a few people can see or hear them ... [they] adapt their self-presentation efforts according to their assessment of who can observe them".'[22] This is because:

> we act differently when we know we are 'on the record.' Mass privacy is the freedom to act without being watched and thus, in a sense, to be who we really are — not who we want others to think we are.[23]

The misappropriation tort specifically protects a 'privacy interest against unwanted exposure, an autonomy interest in controlling the presentation of one's image to others'.[24] In other words, at the heart of the tort of misappropriation of personality is control over the use of one's identity and the right to control the public's perception of one's self. The interests protected include an individual's autonomy, dignity and peace of mind. The harm resulting from an interference with this interest correspondingly can include humiliation, degradation and emotional distress in addition to pecuniary loss.[25]

Most would agree that a person has an interest over how their image is used. However, where the debate becomes contentious is in determining the legal value to ascribe to this privacy interest and the boundaries of that interest.

2 The value of privacy

Warren and Brandeis' well-known article[26] from 1890 first considered privacy as a legal right:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by bodily injury.[27]

Following this line of thinking, Warren and Brandeis consider there is a coherent basis for establishing specific privacy causes of action as distinct from other tortious causes of actions which are not intended to protect privacy interests.[28] In contrast, others view privacy as merely an interest (rather than

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22 NA Moreham, 'Privacy in Public Spaces' (2006) 65(3) *Cambridge Law Journal* 606, 622, as cited by Zahra Takhshid, 'Retrievable Images on Social Media Platforms: A Call for a New Privacy Tort' (2020) 68(1) *Buffalo Law Review* 139, 183 n 214.

23 Tim Wu, 'How Capitalism Betrayed Privacy', *The New York Times* (online, 10 April 2019) <www.nytimes.com/2019/04/10/opinion/sunday/privacy-capitalism.html>.

24 John CP Goldberg and Benjamin C Zipursky, *The Oxford Introductions to US Law: Torts* (Oxford University Press, 2010) 336 as summarised by Takhshid (n 22) 154.

25 Stephen Penk and Rosemary Tobin, 'The New Zealand Tort of Invasion of Privacy: Future Directions' (2011) 19(3) *Torts Law Journal* 191, 209.

26 Dean Roscoe Pound stated that the article 'did nothing less than add a chapter to our law' and Harry Kalven stated it is the 'most influential law review article of all time'. See Alpheus Thomas Mason, *Brandeis: A Free Man's Life* (Viking Press, 1946) 70; and Harry Kalven Jr, *Privacy in Tort Law: Were Warren and Brandeis Wrong?* (1966) 31(2) *Law and Contemporary Problems* 326, 327 as cited in Solove and Rotenberg (n 21) 3.

27 Warren and Brandeis (n 1) 196.

28 These theorists are referred to as coherentists: Penk, 'The Concept of Privacy' (n 8) 13.

a right) to be weighed against other interests and rights. This school of thought considers that existing causes of action are sufficient to protect privacy interests.[29]

Privacy is a protected right under art 17 of the *International Covenant on Civil and Political Rights* ('*ICCPR*') which states, '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'[30] Australia ratified the *ICCPR* in 1980 and New Zealand ratified it in 1978. Both countries have subsequently imported the *ICCPR* into domestic law, though to varying degree. The *Australian Human Rights Commission Act 1986* (Cth) specifically refers to art 17 in sch 2.[31] In New Zealand, the preamble of the *New Zealand Bill of Rights Act 1990* states that its purpose is to 'affirm New Zealand's commitment to the International Covenant on Civil and Political Rights' without specific mention of art 17.[32]

Despite these references, human rights legislation in Australia and New Zealand fails to include a right to image privacy specifically. This is unsurprising given that the relevant statutes were enacted well before the advent of social media.[33] Despite this, human rights legislation does protect some privacy rights that are essential to human dignity. For example, some Australian States recognise privacy in state-specific human rights legislation.[34] The *New Zealand Bill of Rights Act 1990* protects individuals from unreasonable search and seizure.[35] Regardless, not all rights which require legal protection are encapsulated by human rights legislation.

This article considers that privacy is a right, as opposed to merely an interest. However, as a consequence of the tension between the view of privacy as a right, versus privacy as merely an interest, different jurisdictions have developed privacy protections in different ways.

B Jurisdictional considerations: Recognition of privacy as a right

1 United States of America

The jurisdiction with the greatest level of protection for privacy as a right is the United States. The United States has four distinct tortious cause of actions

29 These theorists are referred to as reductionists: ibid and Wacks (n 10).

30 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.

31 *Australian Human Rights Commission Act 1986* (Cth) sch 2 art 17.

32 *New Zealand Bill of Rights Act 1990* (NZ) Preamble.

33 Founding social media websites, MySpace and Facebook, only came into existence in 2003 and 2006 respectively.

34 *Human Rights Act 2004* (ACT) s 12; and *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13, both referred to in Australian Law Reform Commission ('ALRC'), *For Your Information: Australian Privacy Law and Practice* (Report No 108, May 2008) vol 3, 2539 [74.15]; see also New South Wales Law Reform Commission, *Invasion of Privacy* (Consultation Paper No 1, May 2007) 14 [1.31].

35 *New Zealand Bill of Rights Act* (n 32) s 21. Section 28 provides that other rights not included in that Act are not restricted. This acknowledges that other rights exist outside of the scope of that Act.

based on Prosser's article from 1960.[36] The United States also has state-specific[37] and federal statutes,[38] which aim to protect different facets of privacy rights. Control over the use of one's image is one of the oldest torts in the United States.[39] Ironically, the impetus for Warren and Brandeis' ground-breaking article from 1890, which is aptly titled 'The Right to Privacy', was the invention of 'instantaneous photography'[40] and their concern about how this new technology would be used by the 'sensationalistic press'.[41]

The American Law Institute's *Restatement (Second) of Torts* ('*Restatement*') adopts Prosser's four privacy torts in § 652A.[42] The *Restatement* discusses the misappropriation of likeness tort in § 652C:

> One who appropriates to his own benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.
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> Comment:
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> a The interest protected by the rule stated in this Section is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others. Although the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect it.
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> b *How invaded*. The common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose. Apart from statute, however, the rule is not limited to commercial appropriation. *It applies also when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one*. Statutes in some states have, however, limited the liability to commercial uses of the name or likeness.[43]

Specifically, Takhshid states that only 4 out of 50 states[44] have statutes which

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36 Prosser (n 11) 389.

37 For instance, California: California Consumer Privacy Act of 2018, Senate Bill 1121 (24 August 2018); Ohio: Data Protection Act, 2018 Senate Bill 220 (2 November 2018).

38 Eg, the Federal Trade Commission Act, 15 USC §§ 41–58 (1914) (as amended).

39 Stephen Penk, 'Common Law Privacy Protection in Other Jurisdictions' in Rosemary Tobin and Stephen Penk (eds), *Privacy Law in New Zealand* (Lawbook, 2nd ed, 2016) 144.

40 'In 1884, the Eastman Kodak Company introduced the "snap camera", a hand-held camera that was small enough and cheap enough for use by the general public.' See Solove and Rotenberg (n 21) 4.

41 Ibid.

42 American Law Institute, *Restatement (Second) of Torts* (1977), cited in ibid 172 n 118.

43 American Law Institute, *Restatement (Second) of Torts* (n 42) (emphasis added).

44 Takhshid (n 22) 156.

require that the misappropriation be for economic gain: New York,[45] Oklahoma,[46] Utah[47] and Virginia.[48] However, the rest do not have this requirement.

For example, in Michigan, a plaintiff, who was 23 years old and suffered a medical condition, posted a picture of himself on his public Instagram account.[49] The defendant, a famous former basketball player, posted one of the plaintiff's pictures with his own face next to it mocking the plaintiff on his personal Instagram account. The defendant had 8 million followers on Instagram. The plaintiff sued the defendant for the tort of misappropriation of likeness. The defendant applied for a motion to dismiss. The Michigan court rejected the defendant's argument that the tort of misappropriation of likeness did not apply because the plaintiff lacks 'a significant pecuniary or commercial interest in his identity'. The court held in favour of the plaintiff as the tort of misappropriation of likeness does not require the defendant to make commercial use of an image for the tort to be successful. The case was later resolved at mediation,[50] however, the interlocutory decision is a 'victory for a non-celebrity to make a valid appropriation of likeness claim'.[51]

Nevertheless, the different approaches taken by different states mean that some academic commentators argue for the adoption of a new tort of 'unwanted broadcasting'.[52] From Australia and New Zealand's perspective, and for the reasons discussed below in this article, it is logical and, indeed preferable, to follow the jurisprudence from 46 out of 50 states and the *Restatement* itself which specifically states that the misappropriation does not need to be for commercial gain.

2 United Kingdom

Unlike the United States, the United Kingdom does not have torts which specifically aim to protect privacy interests. Instead, the judiciary has primarily focused on extending the equitable cause of action of breach of confidence to cover situations where there are unwanted public disclosures of private information (referred to as 'misuse of private information').[53] This action correlates with the second privacy interest that Prosser recognised, being public disclosure of embarrassing private facts about the plaintiff.[54]

Historically, the equitable cause of action for breach of confidence required a relationship of confidence between the plaintiff and defendant.[55] These relationships were often characterised as fiduciary and included doctor/patient, lawyer/client, etc. However, in *Douglas v Hello! Ltd [No 3]*, the House of Lords adopted an expanded form of breach of confidence which

45 NY Civ Rights Law § 51 (McKinney 2019).
46 Okla Stat tit 12 § 1449 (West 2019).
47 See *Cox v Hatch*, 761 P 2d 556, 565 (Utah, 1988) on Utah Code Ann § 45-3-3 (1999).
48 Va Code Ann § 8.01-40 (2019).
49 *Binion v O'Neal* (SD Fla, No 15-60869-CIV-COHN/SELTZER, 11 January 2016) [4].
50 *Binion v O'Neal* (*vacated*); (SD Fla, No 15-60869-CIV, 18 March 2016) (mediation was ordered before the case was dismissed).
51 Takhshid (n 22) 157.
52 Ibid 182.
53 Penk, 'Common Law Privacy Protection in Other Jurisdictions' (n 39) 136.
54 See Part II(A)(1) above.
55 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.

no longer required that the plaintiff and the defendant have a relationship imposing an obligation of confidence.[56] The expanded test focuses on the nature of the information disclosed, as opposed to the nature of the relationship in which the information is disclosed.[57]

Many commentators have criticised the United Kingdom's approach in expanding breach of confidence to cover situations that it was never intended to, conceptually or practically.[58] Lord Hoffmann stated in *Campbell v MGN Ltd* that '[t]he continuing use of the phrase "duty of confidence" and the description of information as "confidential" is not altogether comfortable.'[59] The European court has been reluctant to endorse the United Kingdom's approach of relying on a modified form of breach of confidence to protect privacy.[60] The New Zealand Court of Appeal expressly rejected the United Kingdom's approach and has kept the concepts of confidentiality and privacy separate.[61] Gault and Blanchard JJ considered that:

> Privacy and confidence are different concepts. To press every case calling for a remedy for unwanted exposure of information about the private lives of individuals into a cause of action having as its foundation trust and confidence will be to confuse those concepts.[62]

Tipping J further stated that:

> As Gault P has demonstrated, the jurisprudence of the United Kingdom Courts has so far declined to recognise a free standing tort of invasion for breach of privacy. The same can be said of Australia at Superior Court level. In the United Kingdom the Courts have chosen incrementally to develop the equitable remedy of breach of confidence. But, in doing so, it has been necessary for the Courts to strain the boundaries of that remedy to the point where the concept of confidence has become somewhat artificial.[63]

Suffice to say, the United Kingdom has not adopted any other privacy-based torts, including the tort of misappropriation of personality.

3 Australia

Australia's superior courts have not adopted common law torts specifically aimed at protecting privacy interests. In *Australian Broadcasting*

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56 [2008] AC 1, 50 [126], 57 [164].

57 Ibid.

58 For instance, Chris DL Hunt, 'Rethinking Surreptitious Takings in the Law of Confidence' [2011] (1) *Intellectual Property Quarterly* 66; Jillian Caldwell, 'Protecting Privacy Post Lenah: Should the Courts Establish a New Tort or Develop Breach of Confidence?' (2003) 26(1) *University of New South Wales Law Journal* 90; Des Butler, 'A Tort of Invasion of Privacy in Australia?' (2005) 29(2) *Melbourne University Law Review* 339; Ayre Schreiber, 'Confidence Crises, Privacy Phobia: Why Invasions of Privacy Should Be Independently Recognised in English Law' [2006] (2) *Intellectual Property Quarterly* 160, as cited in Chris DL Hunt, 'From Right to Wrong: Grounding a "Right" to Privacy in the "Wrongs" of a Tort' (2015) 52(3) *Alberta Law Review* 635, 636 n 6.

59 [2004] 2 AC 457, 464–5 [14].

60 *Peck v United Kingdom* (2003) 36 EHRR 41 (Section IV, ECHR); *Earl Spencer v UK* (1998) 25 EHRR CD 105 (ECHR), cited in Penk, 'Common Law Privacy Protection in Other Jurisdictions' (n 39) 128.

61 *Hosking v Runting* [2005] 1 NZLR 1, 16 [48]–[50], 59 [245]–[246].

62 Ibid 16 [48].

63 Ibid 59 [245].

Corporation v Lenah Game Meats Pty Ltd ('*Lenah Game*'), the High Court of Australia considered whether Australia should adopt a privacy tort.[64] Gleeson CJ commented that he preferred the English approach of using an expanded form of breach of confidence. He cautioned against finding a new privacy tort:

> [T]he tension that exists between interests in privacy and interests in free speech. I say 'interests', because talk of 'rights' may be question-begging, especially in a legal system which has no counterpart to the First Amendment to the United States Constitution or to the Human Rights Act 1998 of the United Kingdom ... there is no bright line which can be drawn between what is private and what is not.[65]

Callinan J stated:

> It may be that the time is approaching ... for the recognition of a form of property in a spectacle. There is no reason why the law should not, as they emerge, or their value becomes evident, recognise new forms of property.[66]

However, he preferred a breach of confidence action where there is a misuse of a relationship.[67] Kirby J commented that it was a difficult question whether 'it would be appropriate for this Court to declare the existence of an actionable wrong of invasion of privacy'.[68] Gummow and Hayne JJ, with whom Gaudron J agreed, stated that they did not consider that the Court's previous decision from 1937 in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[69] prevents a future court from concluding that a right to privacy exists in Australian law.[70]

In 2020, the High Court of Australia again opined on the adoption of a common law privacy tort in *Smethurst v Commissioner of Police*.[71] In considering the arguments, the Court queried whether the plaintiff was essentially asking the Court to 'create a new rule, a new legal right [of invasion of privacy]'[72] and that counsel could have submitted that there should be 'a new or developed' privacy tort to support the application by the plaintiff.[73] The Court stated '[w]ithout determining whether the common law of tort may recognise a tort of privacy, it cannot be said that there is no prospect of a remedy.'[74]

The High Court of Australia's comments are obiter dicta in both judgments.

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64 (2001) 208 CLR 199 ('*Lenah Game*').
65 Ibid 225–6 [41].
66 Ibid 297–8 [316].
67 Ibid 320 [311].
68 Ibid 278 [189].
69 (1937) 58 CLR 479.
70 Ibid 246 (Gummow and Hayne JJ, Gaudron J agreeing at 225). Kirby J also noted that '[i]t may be that more was read into the decision in Victoria Park than the actual holding required': at 262.
71 Transcript of Proceedings, *Smethurst v Commissioner of Police* [2019] HCATrans 216; Transcript of Proceedings, *Smethurst v Commissioner of Police* [2019] HCA Trans 223.
72 Transcript of Proceedings, *Smethurst v Commissioner of Police* [2019] HCA Trans 223 (n 71).
73 *Smethurst v Commissioner of Police* (2020) 376 ALR 575, 628 [205].
74 Ibid 597 [90].

In this respect, it is unclear if superior courts will adopt common law torts specifically aimed at protecting privacy interests in the future. However, common law privacy torts have been recognised in two lower-level cases: *Grosse v Purvis*[75] and *Doe v Australian Broadcasting Corporation*.[76] In *Grosse v Purvis*, the court stated that 'certain critical propositions can be identified ... to found the existence of a common law cause of action for invasion of privacy'.[77] Acknowledging that 'it is a bold step to take ... the first step in this country to hold that there can be a civil action for damages based on the actionable right of an individual person to privacy', Senior Judge Skoien nevertheless viewed that step 'logical and desirable'.[78] The court adopted a form of the American tort of intrusion into seclusion.[79] In *Doe v Australian Broadcasting Corporation*, the court found the *Lenah Game* dicta sufficient to support adopting a privacy tort, and noted that the case before it was appropriate 'to respond, although cautiously, to the invitation held out by the High Court ... to hold that the invasion, or breach of privacy ... is an actionable wrong'.[80] Hampel J noted the lack of existing privacy jurisprudence should not be a bar to its recognition as otherwise 'the capacity of the common law to develop new causes of action, or to adapt existing ones to contemporary values is stultified'.[81] The Court adopted a form of the American tort of public disclosure of private facts.[82]

The Australian Law Reform Commission ('ALRC') in 2014 supported the creation of a tort of invasion of privacy by intrusion into seclusion,[83] but only if there is a threshold of agreed seriousness,[84] and where there is intent or recklessness.[85] The privacy interest must outweigh any countervailing public interest.[86] It also supported the tort encompassing misuse of private information.[87] The Australian Competition and Consumer Commission reasserted that the ALRC recommendation should be adopted in 2019.[88]

Various reform commissions have also discussed whether, in the absence of common law privacy protections, the Australian legislature should enact statutory protection for privacy interests.[89] The ALRC (in 2008), the New South Wales Law Reform Commission (in 2009) and the Victorian Law Reform Commission (in 2010) all issued reports which state the current

75 (2003) Aust Torts Reports 81-706, [2003] QDC 151, [423], [442].
76 [2007] VCC 281, [157], [161].
77 *Grosse v Purvis* (n 75) [423].
78 Ibid [442].
79 Ibid [444].
80 *Doe v Australian Broadcasting Corporation* (n 76) [157].
81 Ibid [161]. See also Penk, 'Common Law Privacy Protection in Other Jurisdictions' (n 39) 117.
82 *Doe v Australian Broadcasting Corporation* (n 76) [115].
83 ALRC, *Serious Invasions of Privacy in the Digital Era* (Final Report No 123, June 2014) 76 [5.17].
84 Ibid 77 [5.20].
85 Ibid 77 [5.21].
86 Ibid.
87 Ibid 81 [5.36].
88 Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, 26 July 2019) 493.
89 Peter Bartlett, 'Privacy Down Under' (2010) 3(1) *Journal of International Media and Entertainment Law* 145, 166–7.

common law privacy protections in Australia are inadequate and that the deficiency 'would be most appropriately addressed through a statutory cause of action for invasion of privacy'.[90]

Despite these reports, as at the date of writing this article, there are still no statutory privacy protections based on common law torts (other than informational privacy)[91] and superior courts have not adopted common law privacy torts. In fact, in 2019, the ALRC published a report titled *The Future of Law Reform: A Suggested Program of Work for 2020–25*. The report notes that the ALRC 'does not suggest a further ALRC review targeted at privacy at this stage'.[92] There is also no sign that further statutory privacy protection is on the legislative agenda.[93]

4 New Zealand

New Zealand has maintained the traditional form of breach of confidence, as well as adopting two of Prosser's privacy torts, being the tort for public disclosure of private facts (by the Court of Appeal)[94] and the tort for intrusion into seclusion (by the High Court).[95]

New Zealand has not adopted the tort of misappropriation of personality, although there has been judicial comment that it may be appropriate to do so in the future.[96] The question of whether the tort of misappropriation of personality is available in New Zealand was recently considered by the High Court in *X v Attorney General [No 2]*.[97] In that case, the defendant successfully applied to strike-out the plaintiff's causes of action against it, including an action based on the tort of misappropriation of personality. However, in my respectful opinion, the interlocutory judgment is concerning in a number of respects.

By way of background, the plaintiff, X, was in the Royal New Zealand Navy ('RNZN'). For a period of time, she was seconded to the Royal Navy in the United Kingdom. While there, she claims that she was sexually assaulted twice and the subject of numerous acts of sexual harassment in her employment. Initially, X did not report the incidents to the RNZN. In 2011, after returning to New Zealand, the RNZN asked to interview and photograph X for promotional recruitment material. X agreed.

RNZN did not use the photographs immediately. In the interim, X made a number of complaints about the assaults to Senior Officers in the RNZN. On the advice of one of these officers, X wrote an article titled 'My Story' where

90 Normann Witzleb, 'A Statutory Cause of Action for Privacy? A Critical Appraisal of Three Recent Australian Law Reform Proposals' (2011) 19(2) *Torts Law Journal* 104.

91 There is statutory protection solely for information privacy under the *Privacy Act 1988* (Cth).

92 ALRC, *The Future of Law Reform: A Suggested Program of Work 2020*–25 (Report, December 2019) 25 [2.12].

93 There is no indication on the ALRC website that the matter is being considered further at present: ALRC, 'Where Next for Law Reform?' (Web Page, 8 May 2019) <www.alrc.gov.au/inquiry/where-next-for-law-reform/>.

94 *Hosking v Runting* (n 61).

95 *C v Holland* [2012] 3 NZLR 672.

96 Fisher J acknowledged that New Zealand law may contemplate for real persons the North American causes of action for appropriation of personality. See *Tot Toys Ltd v Mitchell* [1993] 1 NZLR 325, 363.

97 *X v AG [No 2]* (n 6).

she outlined the sexual assaults and her perception of an unsafe working environment at the RNZN. She commented on the extreme stress the incidents caused her. The article was then, without X's permission, circulated to a number of RNZN personnel. X left the RNZN at the end of 2012.

Despite the history of events which culminated in X leaving the RNZN, in May 2014 the RNZN used X's photographs taken in 2011 for a promotional recruitment poster and other promotional materials. The poster conveys key moments of a navy officer's career looking back from 2037. X's photograph was described to be a fictional character named 'Kate Millar'. The poster was used on Facebook promotional brochures and displayed for a period of time at the RNZN headquarters. X, distressed that her photograph was used to promote employment at the RNZN, commenced proceedings against RNZN alleging defamation, breach of the *Fair Trading Act 1986* (NZ), the tort of false light and, importantly, the tort of misappropriation of personality. The RNZN filed an interlocutory application to strike-out all the causes of action and were successful on all grounds.

For the purposes of this article, the judicial comments on the tort of misappropriation of personality are narrow and concerning. The Judge failed to emphasise that the tort of misappropriation of personality is not merely to protect a plaintiff's commercial interest in their image, but also to control how the plaintiff presents herself publicly regardless if it is for commercial gain. The Judge stated:

> The defendant submits that the tort [misappropriation of personality] plainly has a commercial overlay which is not present here. *The tort's purpose is to protect a plaintiff's commercial rights in their image*. The poster in the present case was not used in a commercial context, and *X does not claim any financial loss arising from the allegedly unauthorised use of her image*. Accordingly, the claim is untenable and should be struck out.
>
> ...
>
> In relation to misappropriation of personality, *there is in my view limited prospect that this tort will be recognised in New Zealand at this time. Given its probable commercial focus, I have not heard argument as to what gap it might fill ... Nor ... do the present facts cry out for some remedy that might encourage a court to recognise this new cause of action ...*[98]

With respect, on the face of the judgment, these comments are concerning for several reasons:

(1) *Premature Determination of Elements*: This judgment derives from an interlocutory application and, as a result, the Judge did not have the advantage of hearing full arguments or evidence relating to the cause of action for misappropriation of personality. In this respect, arguably, it was premature to conclude that the tort of misappropriation of personality is not 'reasonably arguable' in the circumstances ('reasonably arguable' being the legal test for a strike-out application).[99]

(2) *Misunderstanding of Elements*: The judgment fails to grasp the ambit of

98 Ibid 1373 [26], 1374 [32] (emphasis added).

99 *High Court Rules 2016* (NZ) r 15.1.

the tort for misappropriation of personality as adopted in the United States (where it is referred to as misappropriation of likeness):

(a) The judgment fails to appreciate that the tort of misappropriation of personality protects a person's sense of autonomy, dignity and sovereignty or control over oneself and one's image.[100] X has a right to control and choose how she presents herself and her image to the public. It is arguable that X's express consent to the RNZN to use her image was implicitly withdrawn when she voiced her complaints and resigned from the RNZN by reason of the workplace sexual assaults.[101] In this vein, it is arguable that the reasonable person would find RNZN's publication of X's image in their employment campaign highly objectionable.

(b) The legal test does not always require a commercial gain:

(i) The *Restatement (Second) on Torts* expressly states that not all States in the United States require misappropriation of an image be for commercial gain.[102] Takhshid states that only 4 out of 50 states require by statute that misappropriation be for commercial gain. In my opinion, doctrinally, financial gain or harm should not be a required element for vindicating a right. Instead, assessments of gains or harms, including financial, should only be considered in determining appropriate remedies or damages.

(ii) Most entities receive a commercial gain from recruitment processes in any event, including advertisements to attract new employees. From a micro-economics perspective, recruitment processes leads to hiring new employees which plays a function in an entity's revenue earning capabilities. From a macro-economics perspective, recruitment processes lead to hiring new employees which helps the national economy by enhancing the tax base.

(3) *Gap in the Law*: The Judge stated that he did not hear arguments as to what gap in the law the tort of misappropriation of personality would fill. He also stated that the facts of the case do not cry out for a remedy.[103] From the facts as written in the judgment, it is arguable that X has suffered a wrong in need of a remedy that is not provided for by existing causes of action pleaded in the proceeding, being defamation or breach of the *Fair Trading Act 1986* (NZ). Further, and in general, there is a gap in the law — one that is becoming more acute against a backdrop of growing recognition of privacy as a right[104] and the

100 *X v AG [No 2]* (n 6) 1374 [32].

101 This can be compared to the withdrawal of consent in criminal law: '[T]he obligation to withdraw arises whenever the defendant ceases to believe on reasonable grounds that the other person is consenting': Jeremy Finn and Simon France (eds), Lawbook, *Adams on Criminal Law* (online at 1 August 2020) [CA128.04].

102 American Law Institute, *Restatement (Second) of Torts* (n 42) § 652C.

103 *X v AG [No 2]* (n 6) 1374 [32].

104 See Part II(A)(2) above.

proliferation of social media and technological advancements.

III Inadequacies in Australian and New Zealand causes of action

There is clearly disparity between common law jurisdictions in the protection of privacy interests. In the absence of statutory protection, the common law must step in as it has traditionally done to fill the gaps — and there is a gap. Australia and New Zealand do not have the tort of misappropriation of personality or, as discussed below, any other legal protection for an individual whose image is used in a highly offensive manner without his or her consent and for no commercial gain. Put another way, existing causes of action are inadequate at protecting an individual's privacy, control and use of their personality. Misappropriation of personality is 'filling a lacuna left vacant by the older nominate torts, yet not to be regarded as a mere extension of any of them'.[105]

A Australia and New Zealand common law

There are a number of existing common law causes of action that courts may attempt to rely upon to protect an individual's privacy interest in circumstances involving the use of his or her personality. However, these causes of action were not originally, and are not specifically, intended to protect privacy interests. Expansion of these current causes of action will distort their jurisprudential underpinnings, strain their boundaries and confuse legal concepts.[106] They are not adequate substitutes for a tort of misappropriation of personality.

1 Breach of confidence

The traditional legal test for the equitable cause of action of breach of confidence requires, first, that information has the necessary quality of confidence about it, second, that the information has been imparted in circumstances imposing an obligation of confidence and, third, there is an unauthorised use of that information to the detriment of the plaintiff.[107]

There are inherent limitations to the traditional form of breach of confidence which make it an uncomfortable remedy for misappropriation of personality (including likeness or image). The second element of the legal test requires that the information in issue (for example, an image) be disclosed in circumstances imposing an obligation of confidence akin to a fiduciary relationship between the parties. There are a number of situations where there could be a privacy breach between parties who are not in a confidential relationship.[108] As the United Kingdom has done, to amend this second element so that a confidential relationship is no longer required is a 'radical distortion that divorces confidence from its central policy rationale — namely

105 Dale Gibson, *Aspects of Privacy Law* (Butterworths, 1980) 215.
106 *Hosking v Runting* (n 61) 16 [48].
107 *Coco v AN Clark (Engineers) Ltd* (n 55) 47.
108 For one example, see the Introduction above.

that of preserving the 'trust like' character of confidential relationships'.[109] Privacy interests are best protected 'by laws crafted to achieve that objective, rather than by the extension of existing causes of action aimed at protecting other economic interests and social values'.[110] In other words, by merging the two causes of action it takes away the efficacy of both.

There are also inherent limitations in the first element of the breach of confidence cause of action because it requires that the disclosed information be confidential. It is uncomfortable to label a person's image or personality as 'confidential' as opposed to 'private'. To extend breach of confidence to remedy misappropriation claims distorts its equitable origin and the resulting legal concept.

2 Public disclosure of private facts or intrusion into seclusion (New Zealand)

The New Zealand Court of Appeal has adopted the American privacy tort of public disclosure of private facts and the New Zealand High Court has adopted the American privacy tort of intrusion into seclusion. Australia does not have any common law privacy torts other than as recognised in *Doe v Australian Broadcasting Corporation*[111] and *Grosse v Purvis*.[112]

There are two arguments in favour of utilising existing privacy torts in New Zealand to remedy misappropriation of likeness claims. First, New Zealand should have one unitary privacy tort as opposed to separate privacy torts. Second, the existing torts of public disclosure of private facts or intrusion into seclusion can be used to remedy wrongs caused by misappropriation of personality.

In relation to the first issue, a unitary privacy tort, although ideal, is not practical because of the many interests that privacy protects. As Penk and Tobin opine:

> in the absence of a universally-agreed definition of privacy, attempts to consolidate multiple privacy-related concerns in a single tort are likely to be futile: the formulation will be either lengthy and potentially confusing, or so generalised as to beg questions in its application.[113]

In relation to the second issue, public disclosure of private facts or breach of confidence has been argued in cases where a misappropriation of likeness claim may have been more appropriate because they deal with the use of a plaintiff's image. For example, in the United Kingdom, the following cases relate to (mis)use of a plaintiff's image: *Kaye v Robertson*,[114] *Douglas v Hello!*

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109 Gavin Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66(5) *Modern Law Review* 726, 746 as quoted in Hunt, 'From Right to Wrong' (n 58) 636.

110 David Lindsay, 'Playing Possum? Privacy, Freedom of Speech and the Media following *ABC v Lenah Game Meats Pty Ltd*: Part II: The Future of Australian Privacy and Free Speech Law, and the Implications for the Media' (2002) 7(3) *Media and Arts Law Review* 161, cited in Zapparoni (n 20) 698 n 44.

111 *Doe v Australian Broadcasting Corporation* (n 76).

112 *Grosse v Purvis* (n 75).

113 Penk and Tobin, 'The New Zealand Tort of Invasion of Privacy' (n 25) 212.

114 (1990) 19 IPR 147.

Ltd [No 3],[115] *Campbell v MGN Ltd*,[116] *Murray v Express Newspapers plc*[117] and *Mosley v News Group Newspapers Ltd*.[118] In New Zealand, the relevant cases are *Hosking v Runting*,[119] *Brown v Attorney-General*,[120] *L v G*,[121] *Andrews v Television New Zealand Ltd*[122] and *Television New Zealand Ltd v Rogers*.[123] Because these cases were argued as breach of confidence and/or public disclosure of private facts causes of action, there is scant judicial consideration given to the use of an appropriation tort on these fact patterns.[124]

It is an uncomfortable stretch to use public disclosure of private facts or breach of confidence to provide a remedy for appropriation wrongs on certain fact patterns such as those identified in the Introduction of this article or in *X v Attorney General [No 2]*.[125] Public disclosure of private facts requires that there is a public disclosure of a private fact that is highly offensive to the objective reasonable person.[126] To encapsulate misappropriation of an individual's image, one would need to prove that his or her image is private. In many situations, a court would be unlikely to find that a person's image or personality is private if it is captured in public, albeit with a limited audience.[127]

The tort of intrusion into seclusion is a problematic alternative because it focusses on intrusion rather than disclosure. It is debatable whether taking a photograph of someone without their express consent in a public place is an intrusion. In any event, the subsequent disclosure or publication of the image without consent is the highly offensive aspect of the misappropriation tort, as opposed to the intrusion itself which is the focus of the legal test in *C v Holland*.[128]

3 Passing off

The common law tort of passing off is available in Australia and New Zealand. Passing off requires that a plaintiff trader prove that a misrepresentation is made by a defendant trader in the course of trade to prospective customers or ultimate consumers of goods supplied by him or her that is calculated to injure

115 *Douglas v Hello! Ltd [No 3]* (n 56).
116 *Campbell v MGN Ltd* (n 59).
117 [2009] Ch 481.
118 [2008] All ER (D) 322 (Jul).
119 *Hosking v Runting* (n 61).
120 [2005] 2 NZLR 405.
121 [2002] NZAR 495.
122 (High Court of New Zealand, CIV 2004-404-3536, Allan J, 15 December 2006).
123 [2008] 2 NZLR 277.
124 Penk and Tobin, 'The New Zealand Tort of Invasion of Privacy' (n 25) 210.
125 *X v AG [No 2]* (n 6).
126 *Hosking v Runting* (n 61).
127 Eg, in ibid, the New Zealand Court of Appeal held that pictures of media personality, Mike Hosking's, twins were not a private fact. Interestingly, on the formulation of the misappropriation tort contained in Part III below, the Hoskings would not have this issue with a misappropriation cause of action although they would still be unsuccessful as it is unlikely that the publication would be seen as highly offensive to the objective, reasonable person — the twins are not doing anything objectionable in the photograph.
128 *C v Holland* (n 95) 698–9 [94].

the business good will of the plaintiff in trade (in the sense that the injury is a reasonably foreseeable consequence) and causes actual damage to the plaintiff.[129]

Some would argue that passing off provides an adequate remedy against the misappropriation of personality, image or likeness — and they would be correct if the misappropriation is in trade and for commercial gain. An ALRC report briefly discussed this in 2014:

> the misappropriation and unauthorised *commercial use* of an individual's image is protected by the tort of passing off, where that individual *has a trading reputation*, and other aspects of intellectual property law ... [r]emedying the *commercial consequences* of unauthorised publication of private information may be better pursued through the development of the tort of passing off.[130]

In the same vein, a 2008 ALRC report cites Gummow and Hayne JJ in *Lenah Game*:

> *Whilst objection possibly may be taken [to using the tort of passing off] on non-commercial grounds to the appropriation of the plaintiff's name or likeness*, the plaintiff's complaint is likely to be that the defendant has taken the steps complained of for a *commercial gain*.[131]

The report further states:

> It has also been suggested that the appropriation tort is a form of intellectual property, in that it protects *a property right as distinct from the privacy of a person*. Alternatively, an extension of the tort of 'passing off', or the development of a 'right of publicity', may be a better way to deal with the perceived problem ... It is undesirable for the cause of action to be used as an intellectual property style personality right *to protect commercial value*.[132]

Indeed, passing off is often referred to as a 'famous person' tort because only those with established or presumable promotional goodwill can bring an action for the unauthorised use of their image.[133] Furthermore, passing off requires that both the plaintiff and the defendant be 'in trade'. It protects a commercial proprietary interest as opposed to a personal dignitary privacy interest.[134] In Australia, passing off has been extended to meet 'new circumstances involving the deceptive or confusing use of names, descriptive terms or other indicia'[135] such as character merchandising rights.[136] In

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129 *Erven Warnink Besloten Vennootschap v J Townend & Sons (Hull) Ltd* [1979] AC 731, 742.

130 ALRC, *Serious Invasions of Privacy in the Digital Era* (n 83) 241 [12.117] (emphasis added) (citations omitted).

131 ALRC, *For Your Information* (n 34) vol 3, 2566 [74.121] (emphasis added), citing *Lenah Game* (n 64) 256 [125].

132 ALRC, *For Your Information* (n 34) vol 3, 2566 [74.122]–[74.123] (emphasis added).

133 Sandra King, 'Can Passing off in New Zealand Expand to Accommodate Protection for Personal Images?' (1998) 8(3) *Auckland University Law Review* 857, 878; and Weber (n 18) 189.

134 Weber (n 18) 189:

> Passing off is an instrument for commercial purposes. It lacks dignitary aspects. In its traditional mode of application, the instrument was useless for the protection commercial personality rights. In its recent version, however, it can deal quite adequately with these cases, at least as long as they involve famous people. Plaintiffs outside the traditional sphere of passing off, however, must still rely on a confusing

Henderson v Radio Corporation Pty Ltd an appropriation of reputation was described as 'an injury in itself, no less, in our opinion, than the appropriation of goods or money'.[137] However, in this case, again, the tort of passing off was used in the context of a commercial dispute where the harmful conduct was 'in trade'.

In contrast, a tort of misappropriation of personality would extend personal privacy protection to all persons — not just those in trade and with goodwill associated with their image because of fame or the like. It also provides a remedy for harms which are purely dignitary in nature. In this respect, the doctrinal underpinnings of passing off is best left for remedying commercial harms while a privacy tort should be adopted to remedy dignitary harms that do not occur 'in trade' such as those mentioned in this article.[138]

4 Intentional infliction of emotional distress

The tort of intentional infliction of emotional distress ('IIED') is also not an appropriate cause of action to remedy a misappropriation of personality. IIED requires a defendant to intentionally do an act which is calculated to cause harm to a foreseeable plaintiff, and that plaintiff then suffers a fright or shock in which the natural and direct consequence is loss.[139] In New Zealand, the loss needs to have physical manifestations that are more than merely transient,[140] meaning it can be bodily harm and/or recognised psychiatric harm.[141] In Australia, the loss needs to be a recognised psychiatric illness.[142]

IIED is not appropriate to remedy a misappropriation of personality claim because, first, it requires that a defendant calculates to cause harm. The intentionality for the misappropriation tort should be focused on the defendant's act of intentionally taking and then using someone's unauthorised image rather than whether that action was intended to cause harm. This is congruent with all other common law intentional torts which require that the act which causes the harm be intentional — not that the harm itself be intentional. Second, IIED requires the loss to be, at a minimum, a recognised psychiatric injury. Arguably, loss, even if it is hurt, degradation, humiliation or serious worry, should be compensated if the other elements of the tort are met, regardless if it is accompanied by recognised psychiatric injury.

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number of analogies and neighboring doctrines.
See also Robert G Howell, 'Publicity Rights in the Common Law Provinces of Canada' (1998) 18(3) *Loyola of Los Angeles Entertainment Law Journal* 487, 490.

135 *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414, 414.

136 *Hogan v Koala Dundee Pty Ltd* (1988) 20 FCR 314.

137 (1960) SR (NSW) 576, 594, cited in Weber (n 18) 189.

138 See above n 6.

139 Principle first stated in *Wilkinson v Downton* [1897] 2 QB 57 — test stated in *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415.

140 *Bradley v Wingnut Films* (n 139) 421.

141 Stephen Todd et al (eds), *The Law of Torts in New Zealand* (Lawbook, 7th ed, 2016).

142 *Tame v New South Wales* (2002) 211 CLR 317, 329 (Gleeson CJ). Note the recent decision of *O (a child) v Rhodes* [2016] AC 219 where a majority held that physical harm or psychiatric illness is needed; however, Lord Neuberger's dissent considered that severe mental distress should suffice and can include despair, misery, terror, fear or even serious worry.

5 Defamation and malicious falsehood

The torts of defamation and malicious falsehood both require that the statement or image conveyed and, at issue, be false. Harm to reputation is at the heart of these torts. In contrast, misappropriation of personality (likeness or image) is not concerned with whether the personality conveyed is true or false, but rather that the personality is conveyed to others without consent (and, that the publication is highly offensive to the ordinary reasonable person). Often the image conveyed is a true and accurate reflection of the subject and, in this respect, is not a falsehood as required by these torts.

B Australia and New Zealand statutes

1 *Privacy Act 1988* (Australia), *Privacy Act 1993* (New Zealand) and *Privacy Act 2020* (New Zealand)

Australia has the *Privacy Act 1988* (Cth). New Zealand has the *Privacy Act 1993* (NZ) and the recently enacted *Privacy Act 2020* (NZ) which repeals and replaces the *Privacy Act 1993* (NZ) on 1 December 2020. The privacy harms suffered as a result of misappropriation of personality are outside the ambit of these Acts. These Acts solely focus on data protection (for example, the collection, storage and release of data). All other privacy harms are left to the common law to remedy.

2 *Enhancing Online Safety Act 2015* (Australia) and *Harmful Digital Communications Act 2015* (New Zealand)

The *Enhancing Online Safety Act 2015* (Cth) in Australia and the *Harmful Digital Communications Act 2015* (NZ) ('*HDCA*') in New Zealand provide a quasi-criminal framework to obtain remedies for harm caused by digital communications, including injunctions, declarations, fines or, in severe cases, imprisonment. In Australia, the eSafety Commissioner can engage enforcement mechanisms if someone posts, or threatens to post, intimate images of others online without their consent.[143] Individuals can be subject to civil penalties of up to AU$75,400 and corporations up to AU$525,000.[144]

In New Zealand, an individual can issue proceedings for breach of the *HDCA*, however, he or she must initially make a complaint to an 'approved agency' (being Netsafe in New Zealand)[145] and await their determination before seeking judicial redress. The *HDCA* states that a person commits an offence if a person posts a digital communication with the intention that it cause harm to a victim, posting the communication would cause harm to an ordinary reasonable person in the position of the victim, and posting the communication causes harm to the victim.[146] Interestingly, 'harm' is defined as 'serious emotional distress'.[147] The maximum fine that can be awarded against an individual is NZ$50,000 and against a corporation is NZ$200,000.[148]

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143 *Enhancing Online Safety Act 2015* (Cth) s 44B.
144 Ibid s 46.
145 Netsafe, 'Netsafe's HDCA Process' (Web Page, 4 April 2018) <www.netsafe.org.nz/>.
146 *Harmful Digital Communications Act 2015* (NZ) s 22(3)(a) ('*HDCA*').
147 Ibid s 2.
148 Ibid s 22(3)(b).

Importantly, the Acts do not have a mechanism to provide victims with civil compensation, meaning that the victim has to pursue other common law remedies for compensatory redress.

3 *Competition and Consumer Act 2010* (Australia) and *Fair Trading Act 1986* (New Zealand)

The *Competition and Consumer Act 2010* (Cth) in Australia and the *Fair Trading Act 1986* (NZ) in New Zealand address misleading and deceptive conduct in trade.[149] These Acts are consumer protection legislation which aim to provide remedies to consumers. As a consequence, the use of the Acts to remedy misappropriation of personality claims is inappropriate because the Acts are focused on protecting and compensating consumers of goods and services as opposed to protecting and compensating the victim of a misappropriation claim. In addition, misappropriation of personality can occur in situations not 'in trade' (for example, on social media) and, in this respect, the ambit of the Acts are not fit for privacy protection purposes.

4 *Copyright Act 1968* (Australia) and *Copyright Act 1994* (New Zealand)

Lastly, some may argue that the *Copyright Act 1968* (Cth) in Australia and the *Copyright Act 1994* (NZ) in New Zealand could be used to remedy misappropriation of personality claims. However, these Acts protect products produced by personality (such as ideas and artistic creation) as opposed to the personality or likeness itself.[150] The Copyright Acts are not an appropriate answer to a privacy claim based on misappropriation of personality.

IV Elements of the tort of misappropriation of personality

Established causes of action should not be manipulated to meet novel privacy protection claims. Australia and New Zealand should adopt, in the absence of specific legislation, the tort of misappropriation of personality. This tort should have four elements as derived from jurisprudence in the United States.[151] The elements are:

(a) a plaintiff must prove that the defendant has *appropriated* an aspect of the plaintiff's personality (identity, image, name or likeness);

(b) the defendant's appropriation must be *without the consent* of the plaintiff;

(c) the defendant must have appropriated the plaintiff's personality (identity, image, name or likeness) for *his or her own advantage*; and

(d) the *appropriation* (publication or use) must be *highly offensive to the objective reasonable person*.

149 Misleading and deceptive conduct in trade is addressed in the *Competition and Consumer Act 2010* (Cth) s 56BN, and the *Fair Trading Act 1986* (NZ) s 9 respectively.

150 Gibson (n 105) 167.

151 See the American Law Institute, *Restatement (Second) of Torts* (n 42) § 652C.

Various issues will need to be worked out to ensure that the parameters of the tort are appropriate. For example, in relation to the first element, a person's personality cannot be literally appropriated.[152] It can only be reproduced through the use of an image, characterisation, voice or name in the likeness of the person. The degree of likeness is at issue. As Flagg states 'personality, image, and identity are among the most ephemeral concepts known to humanity' and 'there is no widely accepted meaning of those terms'.[153] The most straightforward misappropriation occurs when a defendant uses a photograph containing the plaintiff's actual image without their consent.

In relation to the second element, the appropriation must be without the plaintiff's consent. The boundaries of consent come into question: Does consent need to be expressed or implied given the circumstances in which the image is taken? Can consent be withdrawn? Does withdrawal need to be express or can it be implied?

In relation to the third element, the issue is what qualifies as an advantage to the defendant. Is it merely pecuniary or can 'advantage' include non-pecuniary advantages (for example, the number of 'likes' or increase of popularity on a social media). For the reasons already canvassed, I consider that it should cover both pecuniary and non-pecuniary advantages.

In relation to the last element, the appropriation (publication or use) of the personality needs to be highly offensive to the objective reasonable person. The New Zealand court has adopted the same legal test in determining whether the torts of public disclosure of private facts[154] and intrusion into seclusion[155] are successful. This criterion limits frivolous claims. However, the issue is determining what the 'highly offensive' threshold means. Clearly, the more embarrassing or offensive a person's conduct is in the image, the more likely its publication will be offensive.

The defences for the tort of misappropriation of personality include if the plaintiff consented for the defendant to use his or her image (and has not expressly or impliedly withdrawn consent) or if the disclosure was in the public interest or concern. The ambit of the latter defence will need to be carefully considered so as to not unduly restrict freedom of speech and to allow for reporting for news purposes.

V Advantages and disadvantages for adopting the tort of misappropriation of personality

Australia and New Zealand should adopt the tort of misappropriation of personality. The unconsented use of images is on the rise given technological advances in the digital age. Warren and Brandeis' concern of 'instantaneous photography' from 1890 is merited now more than ever through the proliferation of smartphone cameras and the ease in which images can be distributed to a mass audience on social media. Social media is 'instantaneous, readily accessible by both recipient and onlookers ... cumulative, persistent,

152 Gibson (n 105) 166.

153 MA Flagg, 'Star Crazy: Keeping the Right of Publicity Out of Canadian Law' (1999) 13 *Intellectual Property Journal* 179, 180.

154 *Hosking v Runting* (n 61) 32 [117].

155 *C v Holland* (n 95) 698–9 [94].

viral, potentially global in reach, continuous, and unless arrested, permanent.'[156] An individual has a personal privacy right in preventing his or her image being exploited. Legal rights need legal protections. There should be a legal remedy where an individual's image is used without consent and its use is highly objectionable to the reasonable person even if there is no commercial gain from its use.

There are a number of criticisms against the adoption of a tort for misappropriation of personality. However, in my view, these criticisms should not mean that the tort be rejected altogether but rather that appropriate limits should be placed on its use. The first criticism is that the floodgates will open and there will be numerous frivolous and vexatious litigation claims. In this respect, one commentator notes that:

> [t]here should be continued freedom of citizens to photograph, tape-record, mimic or otherwise 'appropriate' the outward features of their fellow citizens so long as (a) they do not do so by inherently illegal means and (b) they do no harm to their subjects' substantial (as opposed to merely fastidious) interests.[157]

In response, first, litigation is costly and most people do not bring claims unless they are particularly aggrieved or the harm to them has been great. Second, and importantly, any floodgate concern can be addressed by limiting the tort through requiring that use (publication) of the person's image be highly offensive to the objective reasonable person. In this respect, incidental use of the plaintiff's personality, name or likeness or 'reference to the plaintiff's name in connection with a legitimate mention of his or her public activities, or in a news story', will not be an offensive appropriation.[158]

This dovetails into the second criticism which is that adopting a tort of misappropriation of personality unnecessarily limits an individual's right to freedom of speech and the ability to disseminate information.[159] However, these concerns do not limit the operation of, and important protection provided by, other torts such as defamation or breach of confidence because appropriate defences limit the ambit of their infringement on freedom of expression. The defence of public interest is available for public disclosure of private facts[160] and intrusion into seclusion[161] in New Zealand. This defence can also be used for misappropriation of personality, meaning that if the publication is in the public interest or concern (for example, because it is of a public figure who actively courts publicity), or is used for news purposes,[162] then the claim will be unsuccessful. Admittedly, the courts will need to grapple with this tension on a case-by-case basis.

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156 NA Moreham and Sir Mark Warby ed, *Tugendhat and Christie: The Law of Privacy and the Media* (Oxford University Press, 3rd ed, 2016) 760.

157 Gibson (n 105) 173.

158 Penk, 'Common Law Privacy Protection in Other Jurisdictions' (n 39) 144.

159 *Australian Human Rights Commission Act* (n 31) sch 2 art 19; and in the *New Zealand Bill of Rights Act* (n 32) s 14.

160 *Hosking v Runting* (n 61) 35 [129].

161 *C v Holland* (n 95) 699 [96].

162 Eg, in New York, the right of media to use one's name or likeness for news purposes is not absolute. There must exist a 'legitimate connection between the use of plaintiff's name and picture and the matter of public interest sought to be portrayed': Solove and Rotenberg (n 21) 169.

Third, some commentators argue that it is too difficult to quantify pure mental and emotional loss and that the courts should only provide a remedy where actual material damage occurs.[163] To this end, one commentator states:

> there are many instances where the law declines to grant compensation for the most wilful annoyance. I may insult a person to his face in the most scurrilous fashion, yet so long as I am unheard by any third person, I have nothing to fear from the law of torts. One may with impunity cast the foulest of aspersions upon the dead, to the greatest distress of their families, but to the indifference of tort law.[164] ...
>
> Left out in the cold will be those situations of mere embarrassment or annoyance, occasioned by the unwelcome use of our name, likeness or our voice, which are neither defamatory nor suggestive of material loss. These are just part of the price we pay for declining to be hermits; and we should acknowledge, to that circumscribed extent, the residual privilege of other members of society to derive what incidental benefits they can from us, just so long as they neither defame us nor threaten tangible harm by so doing.[165]

In response, just because it is difficult to assess damages for distress does not mean that it is not a valid harm that requires a remedy.[166] We already quantify a remedy for pure mental or emotional distress in other tortious areas, such as in negligence,[167] IIED[168] and defamation.[169] We can do so here. There is judicial comment in favour of allowing recovery for pure mental injury in misappropriation of personality cases in the United States. In *Fairfield v American Photocopy Equipment Co*, the court held 'special damages need not be charged or proven, and if the proof discloses a wrongful invasion of the right of privacy, substantial damages for mental anguish alone may be recovered'.[170] The *HDCA* defines 'harm' justifying a remedy as 'serious emotional distress'[171] and, in this respect, there is parity in enforcing the same threshold in cases for misappropriation of personality.

Lastly, the misappropriation of personality tort is often dismissed as not being concerned with privacy but rather with protecting a commercial proprietary right. In some jurisdictions, both interests are covered by misappropriation of personality.[172] In others, there is another tort that is solely concerned with an individual's commercial property right in their image called

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163 Descheemaeker (n 7) 604–10.
164 Gibson (n 105) 211.
165 Ibid 215–16.
166 Descheemaeker (n 7) 613, 623–6.
167 In *M v Roper* (n 7), the plaintiff claimed for a pure mental injury arising out of negligence and intentional infliction of emotional distress ('IIED').
168 There does need to be a psychiatric diagnosis. See ibid.
169 In defamation claims, awards of general damages are presumed to compensate both the harm to the reputation and the hurt to feelings that result. See 'Defamation' (n 7) [15].
170 158 Cal App 2d 53 (1958), cited in Bradley Kay, 'Expanding Tort Liability to Creators of Fake Profiles on Social Networking Websites' (2010) 10(1) *Chicago-Kent Journal of Intellectual Property* 1, 7.
171 *HDCA* (n 146) s 4.
172 American Law Institute, *Restatement (Second) of Torts* (n 42) § 652A.

the right to publicity.[173] The distinction between the right of publicity and misappropriation of personality is described as follows:

> The privacy-based action designed for individuals who have not placed themselves in the public eye. It shields such people from the embarrassment of having their faces plastered on billboards and cereal boxes without their permission. The interests protected are dignity and peace of mind and damages are measured in terms of emotional distress. By contrast, a right of publicity action is designed for individuals who have placed themselves in the public eye. It secures for them the exclusive right to exploit the commercial value that attaches to their identities by virtue of their celebrity. The right to publicity protects that value as property, and its infringement is commercial, rather than a personal tort. Damages stem not from embarrassment but from the unauthorised use of the plaintiff's property.[174]

The distinction between these two torts is also discussed in the leading privacy law textbook in New Zealand, *Privacy Law in New Zealand*. Penk states:

> The appropriation tort is often readily dismissed as having little to do with privacy. That may be true of the right to publicity as it extends to those whose careers depend on publicity and public recognition. However, if a private person is denied the ability to decide how others use his or her identity, by the appropriation of his or her image, he or she loses some sense of self along with the freedom to decide how his or her image is portrayed to the public. The concern is thus with one's ability to control one's public persona, and the interest is truly a dignitary one.[175]

VI Conclusion

It is time for Australia and New Zealand to adopt the common law tort of misappropriation of personality when a suitable fact scenario presents itself. The rise of social media means that now, more than ever before, a person's image can be captured and posted online to a large audience in ways that can cause great harm to him or her. However, appropriate limits will need to be placed on the tort to ensure that competing interests, such as freedom of speech, are appropriately protected. The common law has developed legal avenues for redress through precedent for centuries. There is no reason it cannot and indeed, should not, continue to do so to protect an individual's dignitary right in the use of their personality or image.

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173 As at 2010, 19 states in the United States recognised a right to publicity by statute and 11 by common law. Brittany A Adkins, 'Crying out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection through a Uniform Right of Publicity Act' (2010) 40(2) *Cumberland Law Review* 499, 501. See also American Law Institute, *Restatement (Third) of the Law of Unfair Competition* (1995) § 46: 'Appropriation of the Commercial Value of a Peron's Identity: The Right to Publicity'.

174 *Jim Henson Productions Inc v John T Brady & Associates Inc*, 687 F Supp 185, 188–9 (SDNY, 1994), cited in Solove and Rotenberg (n 21) 162–3.

175 Penk, 'Common Law Privacy Protection in Other Jurisdictions' (n 39) 144.