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11
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13
14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN FRANCISCO DIVISION**

17 JASON PARKER, individually and on
behalf of all others similarly situated,

18 *Plaintiff,*

19 v.

20 HEY, INC., a Delaware corporation, and
21 TWITTER, INC., a Delaware corporation.

22 *Defendants.*

Case No. 3:16-cv-4884-WHA

**PLAINTIFF’S RESPONSE IN
OPPOSITION TO TWITTER’S
MOTION TO DISMISS**

Date: December 8, 2016
Time: 8:00 a.m.
Location: Courtroom 8

Hon. William Alsup

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INTRODUCTION

1
2 Plaintiff Jason Parker sued Defendants Hey, Inc. and Twitter, Inc. for unlawfully using
3 his name and likeness in a game that allows players to “buy” and “own” strangers’ online
4 profiles. The game is run by Hey, but it depends entirely on data knowingly provided by Twitter.
5 Parker alleges that Defendants, working together, violated Parker’s rights under Alabama’s Right
6 of Publicity Act (ARPA), Ala. Code 1975 § 6-5-770 *et seq.*, which prohibits the unauthorized
7 use of a person’s name and likeness in commercial products. Twitter has moved for dismissal,
8 advancing a scattershot of arguments, from Parker’s lack of standing, to Twitter’s immunity
9 under the Communications Decency Act, 47 U.S.C. § 230 (the “CDA”), that Plaintiff consented
10 to the challenged conduct, and even that the ARPA is unconstitutional. As explained below, each
11 of Twitter’s arguments relies on either a misreading of the law or the facts of this case (and
12 sometimes both) and none of them warrant dismissal.

13 To start, relying on the Supreme Court’s recent decision in *Spokeo, Inc. v. Robins*, 136 S.
14 Ct. 1540 (2016), Twitter suggests that the Court lacks subject-matter jurisdiction because Parker
15 has not suffered an injury in fact. That’s not true. Parker has Article III standing because Twitter
16 invaded both his property interest in his likeness and his intangible privacy interest in controlling
17 the commercial use of his name and photograph. Under *Spokeo*, both forms of injury more than
18 suffice to support Article III standing.

19 Next, Twitter attempts to claim immunity under the CDA, a statute that was designed to
20 immunize online message boards from defamation lawsuits based on content posted by their
21 users. But Twitter does not get such immunity here, because Parker doesn’t seek to hold it liable
22 for third-party content posted on Twitter. Rather, Twitter’s liability stems from its active role in
23 creating content that infringes his right to publicity. The CDA simply does not immunize
24 websites that repurpose content in ways not anticipated by the user who originally provided it,
25 especially when the new purpose is commercial in nature.

26 Third, Twitter claims that because Parker consented to its disclosure of his information to
27 Hey by virtue of being a Twitter user, Parker has pleaded himself out of court. This argument is a
28

1 red herring. The lawsuit is not about whether Twitter was right to disclose information about
2 Parker to Hey. It's about Twitter's and Hey's improper *use* of Parker's likeness, which Twitter's
3 terms of service do not provide for and Parker never consented to.

4 Finally, Twitter argues that its unauthorized use of Parker's name and likeness are
5 Constitutionally-protected speech. That is incorrect too. Simply put, Twitter has no First
6 Amendment right to use the names and likenesses of other people in a non-expressive work for
7 commercial gain without permission. Moreover, Twitter may not challenge the constitutionality
8 of the ARPA "as applied to Plaintiff's claim," because it has no standing to raise the First
9 Amendment rights of individuals not before the Court. (Twitter Mot. at 15, Dkt. 30.) The motion
10 to dismiss should be denied.

11 12 **FACTUAL BACKGROUND**

13 Defendant Hey owns and operates a controversial online trading game, now called
14 Famous, which allows players to collect the profiles of real-life people as if they were baseball
15 cards. (Complaint ¶ 1.) Famous is a slightly rebranded version of Hey's original game, Stolen,
16 which had the same premise. (*Id.* ¶ 36.) When playing these games, players are presented with
17 the profiles of an array of individuals—including the individuals' real name and photograph—
18 who can be bought for a price. (*Id.* ¶ 25.) To "buy" a person, players spend virtual currency,
19 which Hey sells for real money. (*Id.* ¶ 26.) Once a player purchases a targeted person, the target
20 is added to their "collection." (*Id.* ¶ 27.) However, the first buyer doesn't get to keep the target
21 forever. Other players can come and "buy" that profile card if they're willing to spend more
22 money than the original buyer. (*Id.* ¶ 28.) Notably, the vast majority of the individuals listed for
23 sale never registered to play the game and never consented to (or even had knowledge that) their
24 names, photographs, and likenesses were displayed in the game and available for purchase by
25 strangers. (*Id.* ¶ 25.)¹

26
27 ¹ Hey's new game, Famous, has exactly the same premise as Stolen, just with different
28 words. Instead of "buying" people with virtual currency, players "invest" in people with

1 All of the data used to create the profiles that Famous players buy and sell comes from a
2 single source: Defendant Twitter. (*Id.* ¶ 24.) Twitter is a popular social media website with
3 millions of users, most of whom are ordinary, private individuals. Twitter provides developers
4 like Hey with an application programming interface, or API, that allows the developers to pull
5 data from Twitter’s website, subject to a license agreement. (*Id.* ¶¶ 1, 2.) Among the terms of
6 that agreement is a requirement that developers get Twitter users’ permission before using their
7 Twitter profile information in commercial products. *See* Twitter Developer Documentation,
8 *Developer Policy*, <https://dev.twitter.com/overview/terms/policy> (modified Sept. 30, 2016), a
9 true and accurate copy of the Developer Policy is attached to the Declaration of Stewart R.
10 Pollock as Exhibit A-1.² Hey never sought nor received such permission from the people who
11 appeared as profile cards in its game. (Complaint ¶ 2.)

12 As the game became more well-known, media outlets started raising concerns about the
13 prospect of a game that allows strangers to “own” other people. (*Id.* ¶ 30.) In January 2016, U.S.
14 Representative Katherine Clark of Massachusetts wrote a letter to Twitter’s CEO expressing her
15 concerns about Hey’s conduct and urging it to shut down the game. (*Id.* ¶ 33.) While the game
16 went offline briefly after Twitter received this letter, it was back up in less than a month. (*Id.*
17 ¶¶ 34-35.) At all times, Twitter had the ability to shut down Famous by revoking Hey’s access to
18 Twitter’s API. (*Id.* ¶¶ 38, 67.) Instead, Twitter continued to supply Hey with data and continued

19
20 “hearts.” (Complaint ¶ 37.)

² Twitter has filed a request for judicial notice that includes Twitter’s Terms of Use, which
21 Parker takes no position on. (*See* Twitter Request for Judicial Notice, Dkt. 31.) The Terms of
22 Use refer to the Developer Policy. If the Court takes judicial notice of the Terms of Use, then it
23 should also take judicial notice of the Developer Policy. *See* Fed. R. Evid. 201(b) (Judicial notice
24 is appropriate for facts “not subject to reasonable dispute” that are either generally known within
25 the jurisdiction of the trial court or “can be accurately and readily determined from sources
26 whose accuracy cannot reasonably be questioned.”); *see also Caldwell v. Caldwell*, No. C 05-
27 4166 PJH, 2006 WL 618511, at *4 (N.D. Cal. Mar. 13, 2006) (explaining that “as a general
28 matter, websites and their contents may be proper subjects for judicial notice” where the
document that is requested to be noticed is provided); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d
1190, 1204-06 (N.D. Cal. 2014) (explaining that publicly accessible websites are “proper
subjects of judicial notice when ruling on a motion to dismiss” and taking judicial notice of
various publicly accessible websites and documents).

1 to benefit from Hey’s game. (*Id.* ¶¶ 38, 68-69.)

2 Plaintiff Jason Parker, a citizen of Alabama, has been a Twitter user since 2008. (*Id.* ¶¶
3 8, 43.) In 2016, he discovered that his Twitter profile—including his name and photograph—was
4 available on Hey’s game for strangers to buy and collect. (*Id.* ¶ 44.) Parker never registered to
5 use any of Hey’s games and has never given Hey consent to use his name or likeness in
6 connection with its product. (*Id.* ¶ 45.)

7 Parker’s home state of Alabama protects its citizens’ right to privacy and to control the
8 commercial use of their own likeness. Expanding the common-law right to publicity, the
9 Alabama Right of Publicity Act (“ARPA”) prohibits “the use of the indicia of identity of a
10 person, on or in products, goods, merchandise, or services ... without consent[.]” Ala. Code § 6-
11 5-772. Parker brings this suit to obtain redress under the laws of his state for Hey’s and Twitter’s
12 misappropriation of his name and likeness.

13 14 LEGAL STANDARD

15 A complaint must contain “a short and plain statement of the claim showing that the
16 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). It need not contain “detailed factual
17 allegations,” but rather need only include sufficient facts to “state a claim to relief that is
18 plausible on its face.” *Ashcoft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*
19 *Twombly*, 550 U.S. 544, 555, 570 (2007)). This “plausibility” standard “does not impose a
20 probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable
21 expectation that discovery will reveal evidence” to prove that claim. *Twombly*, 550 U.S. at 556.
22 A facial challenge to Article III standing, as is raised here, receives the same protections as a
23 motion to dismiss for failure to state a claim. *See Chandler v. State Farm Mut. Auto. Ins. Co.*,
24 598 F.3d 1115, 1121 (9th Cir. 2010).

ARGUMENT**I. Parker Has Article III Standing.**

Article III of the Constitution extends the judicial power of federal courts to “Cases” and “Controversies,” U.S. Const. art. III, § 2, and requires the litigant invoking the federal courts’ jurisdiction to have “standing,” the first element of which being that the litigant has suffered a concrete and particularized “injury in fact.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Tangible injuries, such as violation of a property right, are concrete injuries. *See Covington v. Jefferson Cty.*, 358 F.3d 626, 641 (9th Cir. 2004). The Court also confirmed that intangible injuries, such as a violation of the right to privacy can be concrete. *Hawkins v. S2Verify*, No. C 15-03502 WHA, 2016 WL 3999458, at *5 (N.D. Cal. July 26, 2016) (Alsup, J.) (citing *Spokeo*, 136 S. Ct. at 1550). Here, Parker has suffered both a tangible injury to his property interest in his likeness, as well as an intangible privacy injury. Both of these injuries are concrete, and this Court has jurisdiction.

A. Parker Suffered a Tangible Injury to His State Law Property Interest.

It is well settled that a tangible injury such as the “loss of enjoyment of property” is “enough for injury in fact.” *Covington*, 358 F.3d at 641; *see also Spokeo*, 136 S. Ct. at 1553 (Thomas, J., concurring) (“[S]tanding can exist where ‘the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.’”) (quoting *Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939)); *Sprint Commc’ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008) (noting that whether something “confers a property right” is an “important distinction” in a standing inquiry). “Property interests are created and defined by state law[.]” *Stern v. Marshall*, 564 U.S. 462, 495 (2011). An invasion of a state-created property interest is an Article III injury in fact.

The Alabama legislature unambiguously recognized the property right “of every person, whether or not famous” in his or her identity, defining the “right of publicity” in the ARPA as “freely transferable and descendible” and underscoring that the right “shall be considered

1 property of the estate” when the person dies. Ala. Code. 1975 § 6-5-771(3). Alabama courts, too,
2 have recognized that individuals have a property right in their likenesses. *Minnifield v. Ashcraft*,
3 903 So. 2d 818, 826 (Ala. Civ. App. 2004). Accordingly, when Twitter and Hey misappropriated
4 Parker’s identity and likeness in violation of the statute, they invaded this property right and
5 caused him a tangible injury in fact. This Court’s standing inquiry can end here.

6
7 **B. Parker Suffered an Intangible Injury to His Privacy Interests.**

8 In addition to a tangible injury to his property, an intangible “injury to a plaintiff’s
9 privacy interest” also permits a plaintiff to establish Article III standing. *Hawkins*, 2016 WL
10 3999458, at *5; *see also Cour v. Life360, Inc.*, No. 16-CV-00805-TEH, 2016 WL 4039279, at *2
11 (N.D. Cal. July 28, 2016); *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 272–73 (3d
12 Cir. 2016) (“[W]hen it comes to laws that protect privacy, a focus on economic loss is
13 misplaced.”) (internal quotations omitted). When considering whether an intangible injury is
14 concrete, *Spokeo* instructs courts to pay particular attention to two factors to determine whether
15 the violation of a statutory right constitutes injury in fact: (1) whether the statutory violation
16 bears a “close relationship to a harm that has traditionally been regarded as providing a basis for
17 a lawsuit in English or American courts,” and (2) the legislature’s judgment in “elevat[ing] to the
18 status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in
19 law.” *Spokeo*, 136 S. Ct. at 1549.

20 Here, both factors are undeniably met. First, the ARPA bears a close relationship to a
21 traditionally recognized basis for suit because it exists specifically to codify a common-law tort.
22 The Alabama Law Institute’s comments to the act make clear that the Act was designed to
23 “repeal[] prior inconsistent common law on the unauthorized commercial use of a [p]erson’s
24 [i]ndicia of [i]dentity.” Alabama Law Institute, *Right of Publicity Act* (2015), available at
25 <http://ali.state.al.us/documents/ROPbooklet.pdf> (the “ALI Commentary”). American courts have
26 long recognized that allegations of invasions of privacy are a type of case that they have
27 jurisdiction to hear. True, the common law right to privacy in controlling the use of one’s own

1 likeness does not come from the dusty annals of 18th century English jurisprudence. Rather, it is
2 a uniquely American “doctrine [that] was first formulated in an article written in 1890 by Samuel
3 D. Warren and Louis D. Brandeis—later Mr. Justice Brandeis—entitled ‘The Right of Privacy’.
4 4 Harvard Law Rev. 193[.]” *Smith v. Doss*, 37 So. 2d 118, 120 (Ala. 1948). Even after the
5 decision in *Spokeo* was handed down, courts have continued to re-iterate that “[t]he common law
6 has long recognized a right to personal privacy, and ‘both the common law and the literal
7 understandings of privacy encompass the individual’s control of information concerning his or
8 her person.’” *Thomas v. FTS USA, LLC*, No. 3:13-CV-825, 2016 WL 3653878, at *10 (E.D. Va.
9 June 30, 2016) (quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489
10 U.S. 749, 763 (1989) (emphasis added)).

11 Not only does the ARPA follow directly from the common law, but the Alabama
12 legislature has also acted here to create a concrete private interest, the invasion of which confers
13 standing. “The judiciary clause of the Constitution . . . did not crystallize into changeless form
14 the procedure of 1789 as the only possible means for presenting a case or controversy otherwise
15 cognizable by the federal courts.” *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 264
16 (1933). Indeed, even the common law itself is only in force in Alabama by an act of the
17 Legislature, *Beddingfield v. Linam*, 127 So. 3d 1178, 1194 (Ala. 2013) (Parker, J., concurring
18 specially) (citing Ala. Code 1975 § 1-3-1), and the Legislature can modify the common law,
19 including by creating a new legal right, as long as it does not abolish a previously existing
20 common law right in violation of the Alabama Constitution. *Scott v. Dunn*, 419 So. 2d 1340
21 (Ala. 1982). A legislative body therefore can create “new rights of action that do not have clear
22 analogs in our common law tradition.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992)
23 (Kennedy, J., concurring in part and concurring in the judgment). To do so, the legislature must
24 “identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to
25 bring suit.” *Id.*

26 The Alabama Legislature did just that here. Indeed, the legislative history indicates that
27 the ARPA was designed to “statutorily define” the right of publicity, which, until the passing of
28

1 this law, was “part of the tort of invasion of privacy.” ALI Commentary Preface. The legislature
2 recognized that Alabama citizens have a right to control the use of their name and likeness, and it
3 passed the ARPA to protect that right. *See* Ala. Code § 6-5-772. The legislature codified this
4 common law right in order to “provide[] for liability for persons who wrongfully use another
5 person’s indicia of identity.” ALI Commentary Preface. The Alabama legislature thus identified
6 a concrete privacy interest in its citizens’ right to exercise control over their name or likeness,
7 and related it to the class of people entitled to bring suit: those who have their name or likeness
8 misappropriated, whether or not for profit. Because Twitter and Hey invaded that concrete
9 interest by using Parker’s name and likeness in a game without his consent, Parker has suffered
10 an injury in fact.

11 In sum, regardless of whether Parker’s injury is cast as a tangible one (injury to his
12 property right) or an intangible one (violation of his privacy rights), he has suffered a concrete
13 and particularized injury that confers Article III standing. The Court therefore has subject-matter
14 jurisdiction, and Twitter’s 12(b)(1) motion should be denied.

15 **II. The Communications Decency Act Does Not Shield Twitter From Its Active Misuse** 16 **of Parker’s Information.**

17 Next, Twitter argues that the Communications Decency Act, 47 U.S.C. § 230, shields it
18 from liability in this action. But the CDA simply doesn’t fit this case. The CDA exists to “protect
19 websites against the evil of liability for failure to remove offensive content” and does not “create
20 a lawless no-man’s-land on the internet.” *Fair Hous. Council of San Fernando Valley v.*
21 *Roommates.com, LLC*, 521 F.3d 1157, 1174, 1164 (9th Cir. 2008); *see also Doe v. Internet*
22 *Brands, Inc.*, 824 F.3d 846, 852 (9th Cir. 2016) (noting that “the CDA does not declare a general
23 immunity from liability deriving from third-party content”). That’s why “[t]he prototypical
24 service qualifying for [CDA] immunity” involves an online message board’s liability for
25 defamatory content posted by users. *See FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1195 (10th Cir.
26 2009).

27 Thus the CDA “only protects from liability (1) a provider or user of an interactive
28

1 computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a
2 publisher or speaker (3) of information provided by another information content provider.”
3 *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009) (footnote omitted). The CDA
4 does *not* allow websites to claim immunity for creating their own tortious content.

5 Twitter can’t claim immunity here for two reasons. First, the information at issue in this
6 case is not user-generated content that Parker seeks to hold Twitter liable for hosting. It’s content
7 that Hey created with Twitter’s help. Second, Parker does not seek to treat Twitter as a
8 “publisher” or “speaker” of third-party content hosted on its website. Rather, he seeks to hold
9 Twitter liable for its active role in creating content that infringes his right of publicity.

10
11 **A. The CDA Does Not Immunize Twitter From Liability Because Parker Does
Not Seek to Hold it Liable for Hosting Third-Party Content.**

12 An information content provider is a “person or entity that is responsible, in whole *or in*
13 *part*, for the creation or development of information provided through the Internet or any other
14 interactive computer service.” *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802 (N.D. Cal.
15 2011) (citing 47 U.S.C. § 230(f)(3)) (emphasis in original). Where a website operator “passively
16 displays content that is created entirely by third parties, it is only a service provider with respect
17 to that content.” *Fair Housing Council of San Fernando Valley v. Roomates.com, LLC*, 521 F.3d
18 1157, 1162 (9th Cir. 2008). This immunity allows websites to monitor what their users post
19 without becoming liable for everything their users say.

20 But the CDA is designed to “immunize the *removal* of user-generated content, not the
21 *creation* of content.” *Id.* at 1164. It therefore does *not* grant immunity in cases where a website is
22 “responsible, in whole or in part, for the creation or development of the offending content. *Id.*
23 (internal quotations omitted). This is particularly true where the website operator “transform[s]
24 the character of [users’] words, photographs, and actions into a commercial endorsement.”
25 *Fraley*, 830 F. Supp. 2d at 802.

26 Judge Koh’s decision in *Fraley v. Facebook* illustrates the distinction well. In that case,
27 plaintiffs alleged that Facebook had “deceptively mistranslate[ed]” their actions by transforming
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1 members' clicking the "Like" button on a company's page into the words "Plaintiff Likes
2 [Brand]," and combining that text with plaintiffs' photographs alongside a picture of the
3 company's logo and the label "Sponsor Story." *Id.* at 802. Because plaintiffs alleged that
4 Facebook "maintain[ed] sole control over whether to post a Sponsored Story at all," the court
5 found that Facebook could, under these allegations, "also [be] an information content provider."
6 *Id.* The court thus refused to dismiss plaintiffs' claims on CDA immunity grounds. *Id.* This
7 decision reflects the motivation behind Section 230.

8 Here, Twitter might have immunity for posting Parker's name and likeness—as inputted
9 by Parker—on its own website. But that immunity does not give Twitter and developers that
10 work with Twitter carte blanche to do as they please with content Parker created. Here, Hey
11 repurposed that content to turn it into a purchasable profile card—a use that Parker had no part in
12 creating and did not consent to. While that sort of commercial use in violation of an individual's
13 privacy rights does not rise to the level of expressive speech protected by the First Amendment,
14 it's also not a passive display of the original content that was provided by Parker. Thus when
15 Hey, with Twitter's active assistance, repurposed content originally created by Parker to make
16 the profile cards on Famous, Parker was no longer the "information content provider." Twitter
17 and Hey were. Twitter cannot claim CDA immunity by arguing it was merely passively hosting
18 Parker's content.

19
20 **B. The CDA Does Not Immunize Twitter From Liability Because Parker Does
Not Treat Twitter as a "Publisher."**

21 There is a second, independent reason that Twitter cannot claim CDA immunity here:
22 Parker's claims do not require treating it as a "publisher." Section 230 provides immunity where
23 plaintiffs' claims "inherently require the court to treat the defendant as the publisher or speaker
24 of content provided by another." *Barnes*, 570 F.3d at 1101–02. Thus, website operators can
25 claim immunity where plaintiffs seek to hold them liable for engaging in "traditional editorial
26 functions, such as deciding whether to publish, withdraw, postpone or alter content." *Fraleley*, 830
27 F. Supp. 2d at 802; *see also Internet Brands*, 824 F.3d at 851 (holding that the CDA prevents
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1 plaintiffs from bringing claims regarding the way website operators “remove,” “monitor,” or
2 “publish” content on their sites).

3 But that’s not what’s going on here. In claiming that Parker seeks to treat it as a
4 publisher, Twitter “ignores the nature of [P]laintiff[s] allegations, which accuse [it] not of
5 publishing tortious content, but rather of creating and developing commercial content that
6 violates [his] statutory right of publicity.” *Fraleley*, 830 F. Supp. 2d at 801. He alleges that Twitter
7 and Hey have taken his “name[], photograph[], and likeness[]” without consent and used them to
8 “create new content that [they] publishe[d] as endorsements of third-party products or
9 services[.]” *Id.* Twitter simply doesn’t get CDA immunity for that. Parker isn’t asking Twitter to
10 change the way that it edits, alters, monitors, or removes its users’ content. Instead, as in *Fraleley*,
11 Parker takes issue with the repurposing and rearranging of his information for a commercial
12 purpose he did not consent to. Twitter’s liability arises not from its editorial interaction with
13 content that third parties posted on its own website, but instead, from content that Hey created
14 with Twitter’s active assistance.

15 Ignoring both *Fraleley* and *Internet Brands*, however, Twitter cites three cases where
16 plaintiffs alleged that defendants had failed to “implement basic safety measures,” *see Doe v.*
17 *MySpace, Inc.*, 528 F.3d 413, 416 (5th Cir. 2008), “use[] different privacy settings,” *see Doe II v.*
18 *MySpace, Inc.*, 175 Cal. App. 4th 561, 565 (Cal. Ct. App. 2009), and prevent criminals from
19 accessing plaintiff’s account content. *See Beckman v. Match.com*, No 2:13-CV-97 JCM NJK,
20 2013 WL 2355512, at *4 (D. Nev. May 29, 2013). But in each of these cases, the plaintiffs
21 attempted to impose an affirmative duty on the defendant to change the way it monitored user
22 content, implicating the defendants’ editorial functions as a publisher. Indeed, the defendants in
23 *Internet Brands* attempted to analogize to *Doe* and *Doe II*. 824 F.3d at 853. The Ninth Circuit
24 rejected this argument, holding those cases inapt where, as here, plaintiffs’ claims did not “arise
25 from an alleged failure to adequately regulate access to user content or to monitor internal
26 communications.” *Id.*

27 Because Parker’s claims do not implicate Twitter’s role as a publisher, the cases cited by
28

1 Twitter are irrelevant here. Parker doesn't allege that Twitter failed to protect his profile from
2 access by other users, but that Twitter actively cooperated with Hey even after a U.S.
3 Congressperson alerted Twitter to the impropriety of Hey's use of Twitter users' names and
4 photographs. This business decision—which is the core role Parker assigns Twitter in his
5 claims—has nothing to do with the way that Twitter edits, alters, or removes third-party content
6 on its site (or broadcasts it to others) or the way that Twitter monitors its users' access to other
7 users' information. Thus, Parker's claims do not “inherently require” the Court to treat Twitter as
8 a publisher under the CDA, and Twitter cannot claim immunity.

9 10 **III. Twitter's Consent Defense Does Not Bar Parker's Claim Against Twitter.**

11 Twitter next contends that Parker has effectively pleaded himself out of court because he
12 “consented to Twitter's disclosure of his user profile information . . . to third-party app
13 developers via Twitter's APIs” by virtue of being a Twitter user. (Twitter's Mot. at 14, Dkt 30.)
14 But this argument is a red herring. The ARPA doesn't prohibit disclosure of information, and
15 Parker isn't suing Twitter for unlawful disclosure. Although Twitter's conduct involves
16 disclosure of information to Hey, Parker sued Twitter for “causing Plaintiff's and the Class's
17 identities to be misappropriated and their rights of publicity to be violated” in violation of
18 Alabama law. (Complaint ¶ 68.)

19 The relevant consent inquiry here is thus not whether Parker consented to have Twitter
20 disclose his information to Famous, but whether Parker consented to have his likeness and name
21 used on Famous. He didn't. The consent that Parker gave to Twitter to disclose and use his
22 information was expressly limited: Parker only allowed Twitter to make Parker's information
23 available to Hey and other developers “*subject to our terms and conditions for such Content*
24 *use.*” (Twitter Mot. at 14, Dkt. 30) (emphasis added). Those terms and conditions required Hey
25 and others who accessed Parker's information through the API to “[g]et the user's express
26 consent before . . . Us[ing] a user's Content to promote a commercial product or service.” (Ex.
27 A-1.) That never happened here. Instead, Hey used Parker's name and likeness in Famous, its
28

1 commercial service, without seeking or obtaining Parker’s express consent. (Complaint ¶ 45.)

2 As far as Twitter’s liability is concerned, Parker’s complaint straightforwardly put
3 Twitter on notice that Parker is seeking to hold Twitter liable for its role in Hey’s misuse of his
4 information on Famous. (Complaint ¶¶ 62, 68.) That’s the “short, plain statement” required by
5 Rule 8(a). *See Fontana v. Haskin*, 262 F.3d 871, 877 (9th Cir. 2001) (“Specific legal theories
6 need not be pleaded so long as sufficient factual averments show that the claimant may be
7 entitled to some relief.”) However, Twitter chose not to raise the issue of whether it is
8 vicariously or contributorily liable for Hey’s conduct in its motion, so the Court need not address
9 it. *See Anderson v. Am. Airlines, Inc.*, No. C 08-04195 WHA, 2010 WL 335719, at *2 (N.D. Cal.
10 Jan. 22, 2010) (Alsup, J.) (“[T]hese arguments are inadmissible now because they were not
11 raised in defendant’s own motion to dismiss.”)

12

13 **IV. The First Amendment Does Not Bar Parker’s Right of Publicity Claim.**

14 While free expression is of paramount importance to society, the First Amendment
15 clearly does not grant a blanket license to engage in any form of speech without legal
16 consequence. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). Twitter knows
17 this well, as it has taken legal action to prevent others from speaking in a way that infringed upon
18 its claimed exclusive rights to the word “tweet.” *See Twitter, Inc. v. Twittad, LLC*, No. 11-CV-
19 4480 (N.D. Cal. Sept. 8, 2011), Complaint, Dkt. 1. Nevertheless, in this action, Twitter has taken
20 the position that the First Amendment permits it and Hey to use Parker’s and others’ likenesses
21 for commercial purposes without limitation.

22 That is not the case. First, in this as-applied challenge, Twitter cannot raise the First
23 Amendment rights of Hey’s users, who are not parties to this litigation and whose speech is not
24 at issue in this case. Second, considering only Twitter and Hey’s speech, the First Amendment
25 does not give them a pass to misuse Parker’s name and likeness, nor does it prevent Alabama
26 from regulating that area, especially where there is no creative value added.

1
2 **A. Twitter Does Not Have Standing to Raise the First Amendment Rights of**
3 **Hey’s Users.**

4 “An as-applied challenge contends that [a] law is unconstitutional as applied to *the*
5 *litigant’s* particular speech activity, even though the law may be capable of valid application to
6 others. An as-applied challenge does not implicate the enforcement of the law against third
7 parties.” *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (emphasis added)
8 (internal citations omitted). A litigant who does not raise a facial challenge to a statute and
9 “cannot demonstrate that, as applied to *it*, the statute is unconstitutional” may not “allege that, as
10 applied to others, the statute might be unconstitutional.” *Sec’y of State of Md. v. Joseph H.*
Munson Co., 467 U.S. 947, 959 (1984) (emphasis added).

11 In its Motion, Twitter attempts to justify the unlawful use of Parker’s likeness by
12 invoking the expressive rights of people who used the Famous platform. It argues that the ARPA
13 is unconstitutional because “Famous users . . . engaged in protected speech through gameplay”
14 by expressing their affinity for a certain profile or posting comments. (Twitter Mot. at 15, Dkt.
15 30.) However, because Twitter only challenges the ARPA’s constitutionality “[a]s applied to
16 Plaintiff’s claim,” (*id.*), and not on its face, it has no standing to raise the First Amendment rights
17 of individuals not before the court. *See Hilton v. Hallmark Cards*, 599 F.3d 894, 904 n.6 (9th Cir.
18 2010) (questioning a defendant’s ability to raise a First Amendment defense where “*its* First
19 Amendment rights are not at issue”) (emphasis in original).

20
21 **B. States Are Permitted to Regulate Speech that Threatens Individuals’ Privacy**
22 **and Publicity Rights.**

23 Because Twitter cannot invoke the speech rights of Famous users, it must rely solely on
24 its own rights in this as-applied challenge. Simply put, Twitter and Hey do not have a First
25 Amendment right to use Parker’s name and likeness for their profit in a non-transformational
26 manner.

27 This Court must evaluate Twitter’s First Amendment challenge in light of “the careful
28 balance that courts have gradually constructed between the right of publicity and the First

1 Amendment and federal intellectual property laws.” *Hoffman v. Capital Cities/ABC, Inc.*, 255
2 F.3d 1180, 1183-84 (9th Cir. 2001). This balance turns on a “transformative use” test, which
3 “aims to balance the interest protected by the right of publicity against those interests preserved
4 by the First Amendment.” *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 163 (3d Cir. 2013); *accord In re*
5 *NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1278 (9th Cir. 2013).
6 In the Ninth Circuit, this test has generally been applied in the context of California’s right of
7 publicity cause of action, which specifically protects celebrities. The inquiry in those cases is
8 whether the allegedly unlawful use of the person’s likeness “adds significant creative elements
9 so as to be transformed into something more than a mere celebrity likeness or imitation.” *NCAA*,
10 724 F.3d at 1273. If not, then no First Amendment protection is afforded.

11 There is, of course, no reason to limit this general principle to celebrity cases. To the
12 contrary, the fact that the test applies to speech about public figures counsels strongly in favor of
13 applying it here too. Courts have consistently recognized that in the First Amendment context,
14 speech regarding non-public figures receives less protection than speech regarding public
15 figures, especially where the privacy rights of those private persons are implicated. *See*
16 *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986). If use of a public figure’s
17 likeness without transformational use is not protected by the First Amendment, then it stands to
18 reason that similar speech about private individuals also should not be protected.

19 While Twitter correctly points out that video games can constitute protected speech, it
20 fails to acknowledge that in the very case it relies on for that proposition, the Ninth Circuit held
21 that a video game producer did not have a First Amendment right to use individuals’ likenesses
22 for its own pecuniary gain. *See NCAA*, 724 F.3d at 128 (“EA’s use of the likenesses of college
23 athletes . . . in its video games is not, as a matter of law, protected by the First Amendment.”).
24 Indeed, if speech serves no informative or cultural function “but merely exploits the individual
25 portrayed,” it does not receive protection under the First Amendment. *Midler v. Ford Motor Co.*,
26 849 F.2d 460, 462 (9th Cir. 1988). Thus the use of a person’s identity for purely commercial
27 purposes—like advertising goods or services or the use of a person’s name or likeness on
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1 merchandise—is rarely protected. *See, e.g., Downing v. Abercrombie & Fitch*, 265 F.3d 994,
2 1002 (9th Cir. 2001); *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395, 1397–99 (9th Cir. 1992);
3 *Midler*, 849 F.2d at 462–64; *see also Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 518 (7th
4 Cir. 2014). (“The notion that an advertisement counts as ‘commercial’ only if it makes an appeal
5 to purchase a particular product makes no sense today, and we doubt that it ever did.”). And
6 where a video game “replicates [individuals’] physical characteristics and allows users to
7 manipulate them in the performance of the same activity for which they are known in real life,”
8 the First Amendment does not bar states from regulating that speech. *See Davis v. Elec. Arts Inc.*,
9 775 F.3d 1172, 1178 (9th Cir. 2015).

10 That’s exactly what Twitter is doing here. Parker and other Twitter users are only in the
11 Famous game by virtue of being on a social media platform. Famous takes their likenesses,
12 without their permission, and puts it in *another social media platform*. Hey’s predominant
13 purpose for using peoples’ identities is not to inform its users about the person or even to make
14 any expressive statement about the person, but to exploit the person’s identity in such a way that
15 enables it to generate revenue, like any other commodity. *Cf. Sarver v. Chariter*, 813 F.3d 891,
16 905 (9th Cir. 2016) (holding that a film was protected speech because the First Amendment
17 “safeguards the storytellers and artists who take the raw materials of life—including the stories
18 of real individuals, ordinary or extraordinary—and transform them into art.”) Any of the
19 “expressive” features that Twitter claims are purely incidental to the primarily commercial
20 function for which Hey utilizes peoples’ identities—Famous offers little more than a forum for
21 trading commodities, where the commercial value of each commodity is inextricably linked the
22 particular identity that has been appropriated and not any creative actions taken by Hey. *See*
23 *Hart*, 717 F.3d at 169 (rejecting defendant’s reliance on other creative elements of its football
24 game which do not affect plaintiff’s identity, holding that courts only look to “how the
25 celebrity’s identity is used in or is altered by other aspects of a work. Wholly unrelated elements
26 do not bear on this inquiry.”).

27 Twitter also suggests that the First Amendment protects its unlawful use of Parker’s
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1 image because Parker “does not allege that there is any economic value in his name and
2 likeness[.]” (Twitter Mot. at 17, Dkt. 30.) But, unlike the California statute at issue in *Sarver v.*
3 *Chariter*, the ARPA doesn’t focus solely on the economic harm and loss of commercial
4 opportunity resulting from misuse of a person’s likeness. Indeed, the common-law tort upon
5 which this statute is derived is based on the right to privacy. *See* ALI Commentary Preface; *see*
6 *also Minnifield*, 903 So. 2d at 824, 826 (holding that the tort of right of publicity “represent[s]
7 the same interests and address[es] the same harms” as the commercial appropriation privacy
8 right, which does not “base[] its liability solely on commercial rather than psychological
9 interests”). By explicitly guaranteeing the right of publicity “whether or not the person
10 commercially exploits the right during his or her lifetime,” Ala. Code § 6-5-771(3), the ARPA
11 implicates not only the commercial right to one’s likeness, but also the *privacy* right in
12 controlling how one’s likeness is used in a commercial context. That interest—an individual’s
13 privacy in his portrayal in a commercial context—is unquestionably the type of interest that
14 states are allowed to protect. *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 541 (2001) (Breyer, J.,
15 concurring) (“[T]he Constitution permits legislatures to respond flexibly to the challenges future
16 technology may pose to the individual’s interest in basic personal privacy.”); *Mainstream Mktg.*
17 *Services, Inc. v. FTC*, 358 F.3d 1228, 1237 (10th Cir. 2004) (holding the Federal Do Not Call
18 List did not violate First Amendment because of the government’s substantial interest in
19 protecting citizens’ privacy).

20 In the end, the First Amendment does not give Twitter and Hey license to display
21 Parker’s name and likeness in the context of a commercial product without obtaining his consent.
22 Rather, Alabama’s interest in protecting its citizens’ privacy and use of their likeness allows this
23 reasonable regulation on commercial speech.

CONCLUSION

Because the Court has subject-matter jurisdiction and Twitter cannot establish that Parker failed to state a claim, the motion to dismiss should be denied.

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Respectfully Submitted,

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