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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

STEVEN RENDEROS, VALERIA THAIS SUÁREZ ROJAS, REYNA MALDONADO, LISA KNOX, MIJENTE SUPPORT COMMITTEE, and NORCAL RESIST FUND,

Plaintiffs,

v.

CLEARVIEW AI, INC., ALAMEDA COUNTY DISTRICT ATTORNEY, ALAMEDA POLICE DEPARTMENT, EL SEGUNDO POLICE DEPARTMENT, ANTIOCH POLICE DEPARTMENT, and DOES 1-10,

Defendants.

Case No.: RG21096898

APPLICATION TO FILE AMICI CURIAE BRIEF OF SCIENCE, LEGAL, AND TECHNOLOGY SCHOLARS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO SPECIAL MOTION TO STRIKE PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE § 425.16; AMICI CURIAE BRIEF OF SCIENCE, LEGAL, AND TECHNOLOGY SCHOLARS

Judge:	Honorable Evelio Grillo
Date:	October 18, 2022
Time:	10:00 a.m.
Dept.:	21
Reservation:	300937855727

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

Amici Curiae Science, Legal, and Technology Scholars respectfully submit this Application, seeking leave to file the attached Amici Curiae Brief in Support of Plaintiffs' Opposition to Special Motion to Strike Pursuant to California Code of Civil Procedure § 425.16 (Anti-SLAPP Motion) filed by Defendant Clearview AI, Inc. to strike Plaintiffs' Complaint without leave to amend pursuant to California Code of Civil Procedure § 425.16, set to be heard on October 18, 2022, at 10:00 a.m. in Department 21 of the above-entitled court.

California's anti-SLAPP statute allows courts to strike causes of action that abuse the judicial process by chilling participation in matters of public significance. § 425.16. It is not enough to simply claim a complaint targets speech connected with a public issue; to grant the motion, a court must also find the complaint legally insufficient. *Navellier v. Sletten*, 29 Cal. 4th 82, 88–89 (2002); *id.* at 89 ("Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken").

Clearview moves to strike Plaintiffs' complaint, characterizing its non-consensual commercial mass appropriation of billions of individual images and identities as First Amendment-protected speech that concerns a public issue under §§ 425.16(e)(2) and (4). Def's Mot. in Supp. of Special Mot. to Strike at 7–9. Yet it also claims to purposefully keep its appropriation, identification, and matching activities inside of a "black "box" that is entirely proprietary, secret, and as far away from any public debate as possible. On the merits of Plaintiffs' right of publicity (ROP) claim, Clearview avoids all relevant California court precedent, opting instead to cite a single non-precedential federal district court order based on inapposite facts.

Amici seek leave of the Court to submit the attached brief to ameliorate Clearview's lacking analysis, explaining how the ROP clearly applies to Clearview's conduct in this case and applying the ROP elements to Clearview's facial recognition app. As scholars in the sciences, law, and technology, *Amici* are well-positioned provide additional background,

history, and context on the technology and legal doctrines at issue. Specifically, *Amici* seek to aid the Court in understanding how the ROP has evolved over time to incorporate new appropriation methods and business models, especially those—like Clearview's—that utilize new technologies at mass scale.

THE PROPOSED *AMICI* BRIEF WOULD ASSIST THE COURT IN DECIDING THIS MATTER

Amici respectfully content that this brief would assist the Court in deciding this matter. (*Cf.* Calif. Rule of Court 8.200(c)(2) (rule for amicus briefs in the Courts of Appeal).) While such a brief at this stage may be unusual, it is not unprecedented. *See Califonia Attorneys v. Schwarzenegger*, 174 Cal. App. 4th 424, 431 (2009) ("Attorney General . . . filed an amicus curiae brief in the trial court"); *Union Bank of California v. Superior Court*, 130 Cal. App. 4th 378, 386 (2005) ("The OCC subsequently filed an amicus curiae brief in the trial court in support of Union Bank's request for reconsideration.").

Amici are scholars and experts in intellectual property law, privacy, science and technology studies, critical data studies, new media technologies, the criminal legal system, and racial justice, among other fields. Several *amici* have participated as *amicus* in cases involving intellectual property rights in digital technologies or challenging digital surveillance technologies. Most *amici* engage in research, writing, and teaching concerning similar issues to those raised in this case: balancing protected speech and unlawful surveillance, the impacts of surveillance technologies on marginalized communities and political activism, the accumulation and construction of data used to train machine-learning algorithms such as those utilized by Clearview's app, so-called "black box" machine-learning processes, issues of consent in new media technologies, and the ways in which intellectual property rights protect individuals from exploitation ushered in by emergent technologies, especially surveillance and biometric technologies.

No party or counsel for a party in the pending matter authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief.

(*Cf.* Calif. Rule of Court 8.200(c)(2)) (rule for amicus brief in the Court of Appeal). *Amici* respectfully contend that submission of this brief would not prejudice any of the parties. This brief is being filed in advance of Clearview's Reply to Plaintiffs' Opposition. As a result, Clearview will have ample opportunity to respond to the arguments in this amicus brief.

INTEREST OF AMICI CURIAE

Amici science, legal, and technology scholars are affiliated with a variety of institutions, including non-profit institutions for higher education. Several *amici* hail from nationally-recognized graduate school programs in law, communication and media studies, and science and technology studies. As experts in a bevy of areas impacted by this case, *amici* have a professional interest in cultivating informed public discourse on issues relating to surveillance and biometric technologies, including legal limitations on certain applications like facial recognition. *Amici* hope to bring their expertise to bear on the unique legal issues involved in this case.

Dated: September 19, 2022

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I. INTRODUCTION[1]

For over a century, the right of publicity (ROP) has protected individuals from unwanted commercial exploitation of their identities. Originating around the turn of the twentieth century in response to the newest image-appropriation technologies of the time, including portrait photography, mass-production packaging, and a ubiquitous printing press, the ROP has continued to evolve to cover each new wave of technologies enabling companies to exploit peoples' identities as part of their business models.

The latest example of such a technology is Clearview AI's facial recognition (FR) application. Clearview boasts that the primary economic value of its app stems from commercially exploiting its massive facial image database, filled with millions of individual likenesses and identities that it appropriated without sufficient consent. Clearview's uses of likeness and identity go beyond amassing a database, extending to training its algorithm, matching identities to new images, and displaying results to customers. Without the capacity to appropriate and commercially exploit millions of likenesses and identities, Clearview's system would fail to function as a commercial product.

Despite this, Clearview attempts to avoid ROP liability by arguing (1) that it cannot be liable because humans rarely witness its acts of misappropriation and (2) that its app and business strategy are forms of protected speech. Both arguments are misplaced.

First, Plaintiffs' ROP claim is consistent with those upheld by the courts for over a century. As new visual appropriation technologies have evolved, the ROP has responded by imposing liability on each new capacity to commercially exploit individuals' identities and by requiring informed consent. Clearview does not deny that it commercially exploits Plaintiffs' images or identities with its new technology. Nor does it deny that it failed to gain Plaintiffs' consent. Instead, it argues it does not violate the ROP because most of its appropriating acts

[1] *Amici* Counsel wish to thank NYU Technology Law and Policy Clinic alumnae Rupali Srivastava and Elly Brinkley, and Research Assistants Chanique Vassell, Claire Ewing-Nelson, and Rodrigo Canalli for their contributions to this brief.

occur within a technological "black box" hidden from its customers. California courts, however, analyze the validity of ROP claims based on the evidence of defendant's alleged acts of appropriation, regardless of who witnesses them. *See, e.g.*, *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 402 (Ct. App. 2011) (finding appropriation based on both internal proprietary production and public distribution stages of defendant's musical video game); *see also* Restatement (Third) of Unfair Competition § 47 (Am. L. Inst. 1995) (defining misappropriation to include "use[ ] in connection with services rendered by the user").

Second, Clearview's app and business model do not appropriate images and identities as a form of speech in connection with a public issue. Clearview is not a news publisher, investigative body, or search engine provider. It is a visual surveillance company that appropriates facial images for the precise and exclusive purpose of creating and operating its commercial surveillance services, using proprietary software that it attempts to keep as far from public scrutiny as possible. Moreover, even if some downstream users of Clearview's product could claim a protected speech interest, such protection would apply only to those users and would not excuse any of Clearview's predicate ROP violations.

II. FACTUAL BACKGROUND

Plaintiffs challenge the development and use of a facial recognition application by Defendant Clearview AI, Inc. Among other things, they claim Clearview violated their common law right against appropriation of likeness, or ROP, and seek to enjoin Clearview from trading in their likenesses. *See* Compl. ¶¶ 1, 76–81.

On June 21, 2022, Clearview filed a Special Motion to Strike Pursuant to California Civil Code of Procedure § 425.16 (anti-SLAPP Motion) and an accompanying Memorandum. Clearview argues this suit seeks to silence its protected speech by targeting the proprietary FR app it developed. Clearview contends that selective downstream uses of its app by law enforcement customers converts its entire app and business model, including all predicate acts of scraping, training, and developing the app, into speech concerning a public issue. Mem. in Supp. of Special Mot. to Strike at 7–9. Later, in an underdeveloped section, Clearview concludes the ROP claim is legally insufficient because no human personally witnesses its acts of

appropriation, and that its private commercial surveillance tools are somehow akin to public search engines like Google. *Id.* at 12–13. On June 27, 2022, Clearview also filed a Demurrer.

III. ARGUMENT

A. CALIFORNIA'S RIGHT OF PUBLICITY PROTECTS INDIVIDUALS FROM CLEARVIEW'S NONCONSENSUAL COMMERCIAL APPROPRIATION OF THEIR IMAGES AND IDENTITIES

From its earliest days, the ROP has sought to protect individuals from novel technologies used to commercially exploit their images and identities. *See, e.g.*, *Roberson v. Rochester Golding Box Co.*, 64 N.E. 442 (N.Y. 1902) (rejecting liability for 25,000 lithographic print advertisements depicting plaintiff's image without consent, subsequently spurring enactment of New York's ROP statute in light of the concerning modern capacities for such violations); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190 (1905) (imposing liability for use of plaintiff's portrait photo in new "mass market" newspaper distribution advertisements); *Melvin v. Reid*, 297 P.91 (Cal. Ct. App. 1931) (imposing liabity for misappropriation of plaintiff's life story in a movie released under the new "Hollywood" system of nationwide film distribution). As technological advances at the turn of the twentieth century cleared the way for new forms of mass appropriation over the next century, courts came to understand the ROP as enshrining a right "to control and protect one's public image" in a society where "images were being manipulated—reproduced, miscontextualized, misrepresented, and distorted—by distant, powerful, seemingly unassailable forces of mass commerce and communication." Samantha Barbas, Laws of Image: Privacy and Publicity in America 80 (Stanford Univ. Press 2015); *see also* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 Yale L.J. 86 (2020) (identifying four distinct ROP interests: the right of performance, the right of commercial value, the right of control, and the right of dignity).

This right of control applied not only to personal photographs used in advertising and life stories incorporated into films, but also to misappropriations by new technologies evoking different elements of identity, including in television, tabloids, baseball cards, animatronic robots, websites, and video game avatars. *See, e.g.*, *James v. Screen Gems, Inc.*, 174 Cal. App. 2d 651 (1959) (television); *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983)

(tabloid); *Haelan Labs, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953) (baseball cards); *Wendt v. Host Intern'l*, 125 F.3d 806 (9th Cir. 1997) (animatronic robots); *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400 (2001) (website); *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397 (Ct. App. 2011) (musical video game avatars); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (sports video game avatars). Importantly, the ROP covered the nonconsensual use of images and identities in both the development and subsequent distribution of appropriating products and services. *See, e.g.*, *No Doubt*, 122 Cal Rptr. 3d at 402.

These evolutionary moments for the ROP made sense in light of these new technologies and their capacity to enable mass appropriation of images and identities. For example, in the 1890s, advances in printing and photochemical technologies led publishers to inundate modern society with mass-circulation magazines and newspapers, increasingly adorned with images of people in advertisements and photographs accompanying stories. Barbas, *supra*, at 10, 48. As the demand for more and more images grew, supply remained stagnant; popular mass photography and a commercial modeling industry were still decades away. *Id.* at 49. At the same time, ordinary people were flocking to portrait photography studios for personal memories and keepsakes. As photographers soon realized, their archives of portrait negatives and prints had subsequent commercial value. Soon, a tremendous black market emerged for these images, with photographers regularly supplying images without the consent of their subjects, most of whom were ordinary people "whose images were fungible and ubiquitous and who would be unlikely . . . to take action against [appropriators]." *Id.* at 50. But these developments inspired a "feeling of entitlement to [their] image[s]," and people began to assert their right to control those images under the ROP. *Id.* at 101. This may sound familiar because it is. These historic cases involved ordinary people's "physiognom[ies] . . . pirated to tout another person's business[.]" *Id.* at 56. The present case against Clearview involves the same type of appropriation, taken from internet websites instead of portrait photographers' studios.

The elements of California's common law ROP track this approach, requiring a showing that: (1) a defendant used the person's image or identity; (2) the appropriated image or identity was used to the violator's advantage, "commercially or otherwise"; (3) a lack of consent; and (4)

injury. *Stewart v. Rolling Stone LLC*, 105 Cal. Rptr. 3d 98, 111 (Ct. App. 2010), *as modified on denial of reh'g* (Feb. 24, 2010) (quoting *Eastwood v. Sup. Ct.*, 198 Cal. Rptr. 342, 347 (Ct. App. 1983)). As noted below, Clearview's development and deployment of its facial recognition (FR) app satisfy all four elements.

1. According to its own description, Clearview directly uses individuals' images and identities to build and operate its facial recognition (FR) app.

To determine whether an alleged violator "uses" an image or identity under the ROP, a court simply looks to whether the defendant was responsible for the alleged use. *See Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911, 1918 (1996) (citing Restatement (Third) of Unfair Competition § 46 (Am. L. Inst. 1995)). "Use" is often obvious where a defendant took the direct action that violated the ROP.

In California, the ROP "does not require that appropriations of identity be accomplished through particular means to be actionable." *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1997); *see also Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983); *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397 (Ct. App. 2011). Courts apply the ROP to appropriations based on characteristics that have some clearly recognizable association with a particular person, even in the absence of their name or image. *See White*, *id.*

Part of California's broad ROP protections is the idea that an identity can be appropriated no matter how it is used. In several cases, courts applied the ROP to appropriations of identity where the identity itself was or was a part of the product, rather than in an advertisement for a separate product. *See, e.g.*, *Comedy III Prods. v. Saderup*, 25 Cal. 4th 387, 395 (2001) (ROP applied to drawings of the Three Stooges sold on t-shirts and prints); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (ROP applied to broadcast of daredevil's act); *Lugosi v. Universal Pictures*, 25 Cal.3d 813, 823 (1979) (ROP applied to film and merchandise

using actor's name and likeness); *James v. Screen Gems, Inc.*, 174 Cal. App. 2d 651 (1959) (ROP applied to TV show portraying the life and likeness of a celebrity).[2]

Clearview uses the actual images of individuals, their likenesses, and their identities throughout the FR process. To understand how thoroughly Clearview does so, it helps to understand how FR works generally. FR is a type of machine learning application that enables computers to recognize unknown faces. Machine learning is the process through which a computer learns how to identify a novel input by analyzing large amounts of prior data and extracting relevant patterns from it. *See generally* Rene Y. Choi et al., *Introduction to Machine Learning, Neural Networks, and Deep Learning*, 9 Translational Vision Sci. & Tech. 14 (Feb. 27, 2020). That glut of data, called training data, allows the machine to "learn" what the desired result is; the more training data a system contains, the more likely it will produce meaningful patterns and correct results. FR products and services utilize this approach for visual information, attempting to train computers to "see" images, including images of people and their faces. *See* Junyi Chai, Hao Zeng, Anming Li, & Eric W.T. Ngai, *Deep Learning in Computer Vision: A Critical Review of Emerging Techniques and Application Scenarios*, 6 Machine Learning with Applications (Dec. 15, 2021). FR systems learn to "see" a face by scanning input images and drawing patterns from certain features, such as the distance between one's eyes or the configuration of one's cheek bones.

[2] Clearview bases the entirety of its misappropriation argument on a single federal district court decision. *See* Def.'s Demurrer, at 11–12. In that decision, which is neither persuasive nor binding authority here, the court wrongly concluded that the ROP requires an appropriation to advertise a separate product, based solely on the Restatement (Second) of Torts' definition of "appropriation." *See Brooks v. Thomson Reuters Corp.*, No. 21-cv-01418-EMC, at *5–6, 7–8 (N.D. Cal. Aug. 16, 2021). But this has never been a requirement under California law, which recognizes that any unauthorized appropriation of identity for someone else's advantage is actionable, without more. *See Comedy III Prods. v. Saderup*, 25 Cal. 4th 387, 394–96 (2001) (finding misappropriation where identity was used directly in the product and not to advertise a separate product); *see also* Restatement (Third) of Unfair Competition § 47 (Am. L. Inst. 1995) ("The name, likeness, and other indicia of a person's identity are used [for appropriation of commercial value of identity] if they are used in advertising the user's goods or services, or are placed on merchandise marketed by the user, *or are used in connection with services rendered by the user*.") (emphasis added).

In building its FR system, Clearview first scraped billions of images of peoples' faces from the internet without consent, a clear and intentional use of those images. Second, it then purposefully used those images to train its FR system, which "create[d] facial vectors . . . consist[ing] of a numerical coordinate generated from a given face as it appears in a particular photograph." Decl. of Thomas Mulcaire in Supp. of Special Mot. to Strike ¶ 34. These facial vectors are the training data that teach the system what to look for in new "probe" images that Clearview's customers upload. When customers upload probe images, Clearview's app then combs through the database of facial vectors to find a match. *See id.* ¶ 37; *see also* Kashmir Hill, *The Secretive Company that Might End Privacy as We Know It*, N.Y. Times (Jan. 18, 2020), https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html (describing Clearview's "vast directory that cluster[s] all the photos with similar vectors into 'neighborhoods'" and enables the FR algorithm to "convert[] the face into a vector and then show[] all the scraped photos stored in that vector's neighborhood") [hereinafter "Hill, *End Privacy*"]. Finally, if successful, the app displays any matching images associated with those facial vectors—a third use. Mulcaire Decl. ¶ 38. Thus, Clearview uses individuals' images in at least three ways for ROP purposes: to construct and enhance its massive database via scraping, to train its FR system for improved accuracy, to match with new probe images, and to output in response to a successful match.

i. Clearview uses individuals' images to construct and enhance its massive facial image database.

The basis of Clearview's app and its richest resource is the massive database of faces, built from images harvested from across the internet. Clearview holds over 20 billion images of people's faces in its database, which it hopes to grow to 100 billion images by 2023—equal to about 14 photos for each person on Earth. *See* Drew Harwell, *Facial Recognition Firm Clearview AI Tells Investors It's Seeking Massive Expansion Beyond Law Enforcement*, Wash. Post (Feb. 16, 2022), https://www.washingtonpost.com/technology/2022/02/16/clearview-expansion-facial-recognition/ [hereinafter, Harwell, *Massive Expansion*]. Soon, "almost everyone in the world will be identifiable" by Clearview's FR system. *Id.* This vast database

powers Clearview's app and separates it from competitors. "With the largest dataset," Clearview recognizes it "will always have an advantage in training an accurate algorithm." *Id.*

ii. Clearview uses individuals' images to create facial vectors that train its FR algorithm to accurately identify individuals and that enable the algorithm to identify individuals from a probe image.

In the same way that nineteenth-century mass technologies created a new market of appropriated images for human audiences, machine learning technologies like FR have created a new market of appropriated images for both machine and human audiences. Clearview uses the scraped images in its database to train its FR algorithm with likenesses and facial vectors drawn from those images, increasing its accuracy and commercial viability. Without prior images that have been labeled with unique identities, Clearview's app would have no way to compare and recognize novel inputs.

Clearview's FR system also uses the millions of identities contained in the database each time it peruses through various facial vector neighborhoods, searching for a specific face. Even if the app only outputs a single positive identity match in response to a probe image, Clearview uses every individual image and identity each time its algorithm crunches a probe image into a facial vector and compares it to the sea of facial vectors in the database.

Without denying these uses, Clearview argues that any alleged ROP violations occur in a "black box," shielding its appropriation of images and identities from human observation. *See* Def.'s MPA in Supp. of Mot. to Strike at 12; *see also* Mulcaire Decl. ¶¶ 30–42. But the lack of a "human in the loop" does not negate Clearview's use of images and identities to perfect its FR algorithm. Today's emergent mass technologies increasingly rely on machine learning, and FR is a primary example of how the decades-old field of computer vision has advanced to the point where computers—not humans—are the primary audiences for our images. While most people assume that humans look at images, "and that the relationship between human viewers and images is the most important moment to analyze," computer vision enables an algorithm to "see" digital images without human intervention, facilitating "the automation of vision on an enormous scale." Trevor Paglen, *Invisible Images (Your Pictures Are Looking at You)*, The New Inquiry

(Dec. 8, 2016), https://thenewinquiry.com/invisible-images-your-pictures-are-looking-at-you/. Today, the "majority of images are now made by machines for other machines [to see]." A primary example of this shift is "the trillions of images that humans share on digital platforms." When people upload their images online, they "feed[] an array of immensely powerful artificial intelligence systems information about how to identify people." *Id.* Thus, whether the audience is ultimately a machine or a human or both makes no difference for this Court's ROP analysis: use for commercial gain is the key test of Clearview's conduct.

iii. Clearview uses individuals' images to display a facial recognition match to the end user of its app.

Finally, and most obviously, Clearview uses individuals' identities when it produces a match. When the app identifies an individual, it provides a gallery of images that align with the facial vectors in the input photo. The result page also includes links to where those photos appeared originally, meaning the sites from which Clearview scraped the image. *See* Hill, *End Privacy*, *supra*. The result is the individual's identity—that is the point of the product. Its use of identity in this way is far from incidental. *Cf.* Def.'s Demurrer at 11 n.4. It is the intended outcome of Clearview's FR app and the app's main selling point.

2. Clearview appropriates individuals' identities by capturing incorporating, and commercially exploiting their unique facial attributes and identities from their facial images.

Clearview not only appropriated the images of peoples' faces which comprise its massive face database, but it also appropriated their identities by constructing facial vectors that can uniquely identify a particular individual. The ROP allows broad liability for the appropriation of any characteristic that has a clearly recognizable association with an individual. *See, e.g.*, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (unauthorized television broadcast of plaintiff's unique human-cannonball performance); *In re NCAA Student-Athlete Name & Likeness Litig.*, 724 F.3d 1268 (9th Cir. 2012) (unauthorized use of college football players' traits in video game avatars); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397–99 (9th Cir. 1993) (unauthorized use of a robot possessing traits uniquely and recognizably associated with Vanna White in an advertisement); *Wendt v. Host Intern'l*, 125 F.3d 806 (9th

Cir. 1997) (unauthorized use of animatronic look-a-likes in airport bars); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (unauthorized use of a "sound-alike" of Bette Midler's unique voice in an advertisement); *Motschenbacher v. R.J. Reynolds Tobacco*, 498 F.2d 821, 827 (9th Cir. 1974) (unauthorized use of a photograph in a TV commercial of the plaintiff driving a red race car uniquely associated with him); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (unauthorized use in marketing of a portable toilet with Johnny Carson's recognizable *Tonight Show* introduction); *Brophy v.* Almanzar, No. SAC 17-01885-CJC(JPRx), 2019 U.S. Dist. LEXIS 233894, at *23–24 (C.D. Cal. Aug. 22, 2019) (unauthorized display of plaintiff's "unique and recognizable" back tattoo); *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397 (Ct. App. 2011) (unauthorized avatar depiction of rock band used to play others' songs).

Clearview's FR algorithm constructs recognizable associations based on the facial vector of everyone in its vast system—the facial vectors must map onto an individual's unique identity accurately for the app to have any value. More faces mean more accuracy, more accuracy means more value provided to customers, more value entices more customers, and more customers mean more profit overall. Clearview's entire business strategy is to profit off its mass appropriation of identities, and those identities are the lifeblood of its commercial success.

Clearview attempts to sidestep its liability for violating Plaintiffs' ROP by arguing that it has not itself appropriated or used any images or identities, but rather like a search engine, merely points to third-party uses, citing *Perfect 10, Inc. v. Google, Inc.*, No. CV 04-9484 AHM (SHx), 2010 WL 9479060, at *13 (C.D. Cal. July 30, 2010) (finding Google's hosting of third-party websites that displayed plaintiffs' names and likenesses did not constitute "use" for ROP purposes). *See* Def.'s Mem. in Supp. of Special Mot. to Strike at 12 ("Clearview's app operates like a typical search engine such as Google"); Def.'s Demurrer at 10–11. Even if the Perfect 10 decision were binding precedent (which it is not), it is inapposite. Clearview offers a comprehensive app that packages its own data, scraped and manipulated into machine-readable shorthand via facial vectors, into a profitable product—an accurate FR technology. Clearview's app does not incidentally return personal images or identities. It was specifically designed to

identify an individual from a new image. That Clearview may have designed its app to appear like a search engine to its customers does not magically convert its powerful FR technology into a search engine. Clearview openly promotes its FR product as a FR product—not a search engine that thrives on others' content, but a massive, closed universe of identities that only Clearview customers can access by paying. And Clearview admits that it has purposefully scrapped and ingested billions of individuals' images and identities into its database, used those images and identities to train its FR algorithm, to perform "matches," and as outputs to its customers. Such uses are hardly the work of third parties.

3. Placing one's images on the internet is not consent for Clearview to commercially appropriate such images or identities into its FR app.

Clearview does not attempt to argue it had consent from the millions of individuals whose images and identities it exploits in its FR app, and it would be extremely difficult to do so. Consent must be knowing and use-specific. *See, e.g.*, *Cohen v. Facebook, Inc.*, 798 F. Supp. 2d 1090, 1095 (N.D. Cal. 2011) (holding users did not consent to commercial use of their identities by using a Facebook service whose terms of use were too ambiguous to find consent); *see also Pratt v. Everalbum, Inc.*, 283 F. Supp. 3d 664, 667 (N.D. Ill. 2017) ("[O]ne can consent to the use of his or her identity for one purpose but not another."); *No Doubt v. Activision Publ'g, Inc.*, 192 Cal. App. 4th 1018 (2011) (holding plaintiff band members' consent to have look-a-like avatars play their songs in a video game did not establish consent to have those avatars play songs by other bands). Consent cannot be implied from users' conduct of uploading images to various websites in accordance with those sites' terms of use where Clearview later scraped those images without seeking their consent. *See, e.g.*, Mem. Op. and Order, *ACLU v. Clearview AI, Inc.*, No. 20 CH 4353, at *11 (Ill. Cir. Ct. Cook Cty 2021) ("We must distinguish between the publicly-available photos Clearview harvested and what Clearview does with them. . . . The fact that something had been made public does not mean anyone can do with it as they please.").

While courts recognize implied consent in ROP claims, Clearview's actions stretch implied consent to its breaking point. Clearview all but admits its prior appropriations were nonconsensual, and this Court should not find otherwise. *See* Clearview AI, *Clearview AI*

Launches Clearview Consent Company's First Consent Based Product for Commercial Use (May 25, 2022), https://www.clearview.ai/clearview-ai-launches-clearview-consent-companys-first-consent-based-product-for-commercial-use (announcing the company's "first consent based product" that is "separate and apart from the company's database of 20+ billion facial images, the largest such database in the world").

4. The ROP uniquely addresses the harms suffered by every individual whose identity Clearview harvested and misappropriated for profit.

Clearview's actions reach the heart of the ROP's purpose—to preserve control over the use of a person's identity from commercial exploitation, especially by purveyors of mass technologies. *See* Post & Rothman, *supra*, at 116–21 (discussing the right of control). The ROP enshrines autonomy over how one's unique identity is used and perceived by others, and commercial exploitation of that identity undermines the ability to define oneself freely. The ROP's emphasis on the inherent value of identity prevents the unjust enrichment of others who might otherwise appropriate that value. This "theft of good will" is exploitative because it steals the individual's opportunity to reap the reward of their own self-value. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 563, 576 (1977). It further robs them of the ability to determine who can use their identity, and for which purposes.

Clearview trades in identity and has profited immensely by misappropriating scores of peoples' identities for commercial gain. *See* Kashmir Hill, *Clearview AI Raises $30 Million from Investors Despite Legal Troubles*, N.Y. Times (July 21, 2021), https://www.nytimes.com/2021/07/21/technology/clearview-ai-valuation.html (noting Clearview had raised over $38 million and was valued at $130 million). Despite the fallout from its conduct, Clearview has indicated its desire to expand its FR capabilities beyond law enforcement in a recently leaked presentation intended for its investors, signaling a function creep that could further erode peoples' control over their identities. Harwell, *Massive Expansion*, *supra*; s*ee* Bert-Jaap Koops, *The Concept of Function Creep*, 13 L., Innovation & Tech. 1, 29–56 (2021).

As one court has already determined, the ROP may be one way to ensure Clearview compensates people for the economic value of their identities. *See In re Clearview AI, Inc.*

Consumer Privacy Litig., No. 21-cv-0135, 2022 WL 444135, at *10 (N.D. Ill. Feb. 14, 2022) (finding plaintiffs plausibly alleged common law California ROP claim). In addition to unjustly enriching Clearview, the company's ongoing ROP violations undermine individuals' autonomy and their right to decide whether their images and identities should be used to build a mass surveillance technology, one to which many people object. *See, e.g.*, Fight for the Future, *Ban Facial Recognition: Interactive Map* (2022), https://www.banfacialrecognition.com/map (gathering FR bans); Facial Recognition and Biometric Technology Moratorium Act of 2021, H.R. 3907, 117th Cong. § 1 (2021); Ethical Use of Facial Recognition Act, S. 3284, 116th Cong. § 2 (2020); National Biometric Information Privacy Act of 2020, S. 4400, 116th Cong. § 2 (2020); Fourth Amendment Is Not For Sale Act, S. 1265, 117th Cong. § 1 (2021).

By upholding a viable ROP claim, this Court protects the same autonomy interests the right has historically covered: control over the use of one's identity by another for profit. Clearview's app exacts a mass harm on an immense population of people affected by its harvesting of their images without consent. Clearview provides a quintessential example of the "theft of good will" that attends the use of something for nothing.

B. CALIFORNIA'S ANTI-SLAPP STATUTE DOES NOT PERMIT CLEARVIEW TO AVOID A VALID ROP CLAIM

The anti-SLAPP statute applies only to legal claims "that arise[] from protected speech . . . *and* lack[] even minimal merit." *Navellier v. Sletten*, 29 Cal. 4th 82, 89 (2002) (emphasis in original). Courts must avoid the "fallacy that the anti-SLAPP statute allows a defendant to escape the consequences of wrongful conduct by asserting a spurious First Amendment defense." *Id.* at 93. As discussed above, this case raises an ROP claim with far more than minimal merit. Moreover, Clearview's portrayal of its proprietary FR product as protected speech fails as well. Clearview cannot hide behind its customers' downstream choices of how to use its app to excuse the misappropriations of image and identity that occur throughout the app's operation.

Clearview argues that its FR app is speech "identifying potential criminals" that is "squarely in the public interest." Def.'s Mem. in Supp. of Special Mot. at 8. In support of this,

however, Clearview only cites a few examples of ways that a few of its customers choose to use its app. *See id.* at 8 (describing uses of app to identify perpetrators of the January 6th U.S. Capitol attack, child sex traffickers and terrorists, and Russian occupiers of Ukraine). But how its customers choose to use its FR app cannot overcome Clearview's misappropriation of images and identities in its creation, design, and operation. For one thing, almost all commercial FR companies, like Clearview, train their FR algorithms completely under the veil of corporate secrecy and as far away from public discussion as possible. The only part of the process that is shared are the outputs of matched faces to customers; those matches are the commercial products that customers purchase in the first place—such "speech" is worlds away from expressive activities of protest or petition traditionally shielded under § 425.16. Clearview's argument allows *potential* public-interest uses to swallow its overall premise, which is appropriating images and identities belonging to millions of people who never consented to that use. Not even news publishers, who traditionally enjoy broad speech protections, have license "to invade the rights and liberties of others." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991).

Further, Clearview does not provide even its law enforcement customers with any services during the early stages of the FR process. Clearview cherry-picks specific instances of police uses of its app to identify individuals involved in certain investigations. But even if those instances were protected by statute, the development and production of the app itself remains unprotected. When Clearview initially scraped billions of facial images from the internet, and when Clearview uses these images to construct facial vectors and train its algorithm on those constructions, it runs afoul of the ROP. The company's subsequent interactions with law enforcement customers, even if they are somehow public-interest oriented, cannot excuse these violations of law that predicated the app's success. Even if some downstream uses of Clearview's app are protected speech, Clearview's prior conduct cannot be so neatly excused.

At most, Clearview engages in conduct that "may conceivably have indirect consequences for an issue of public concern," depending on who uses its product and how. *Rand Res., LLC v. City of Carson*, 6 Cal. 5th 610, 625 (2019). And yet, Clearview's speech is ostensibly performed

in a "black box" that obscures the very substance of the speech at issue. It can only assume protected speech from its customers' identities generally. This is not enough to garner anti-SLAPP immunity. *See id.* ("At a sufficiently high level of generalization, any conduct can appear rationally related to a broader issue of public importance.").

If § 425.16 insulates this case from review, the ROP will no longer apply to the autonomy harms it was crafted to prevent. A company can appropriate billions of individuals' images and identities without consent, enmesh those identities in its product, license that product widely, profit lavishly, and continue with business as usual. As new products emerge that similarly undermine one's ability to control who can use their identity and how, individuals will have less legal recourse than their ancestors had a century ago. Courts must avoid this dangerous outcome by preserving valid ROP claims against technologies, like Clearview's, that are increasingly intricate, intrusive, and inescapable.

IV. CONCLUSION

Faced with these facts, this Court should reject the anti-SLAPP Motion and find Plaintiffs have alleged a legally valid ROP claim at this early stage.

Dated this 19th of September, 2022.

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