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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 BARBARA KNAPKE,

11 Plaintiff,

12 v.

13 PEOPLECONNECT INC,

14 Defendant.

CASE NO. C21-262 MJP

ORDER DENYING MOTION TO
DISMISS

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16 This matter comes before the Court on the Defendant's Motion to Dismiss. (Dkt. No. 13.)
17 Having reviewed the Motion, Plaintiff Barbara Knapke's Opposition (Dkt. No. 18), the Reply
18 (Dkt. No. 19), the notices of supplemental authority (Dkt. Nos. 23, 24), and all supporting
19 materials, the Court DENIES the Motion.

20 **BACKGROUND**

21 PeopleConnect owns and operates Classmates.com, a website that offers visitors access
22 to Classmates' digital records database that contains "information from school yearbooks,
23 including names, photographs, schools attended, and other biographical information."
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1 (Complaint ¶¶ 2-3.) (Note: the Court refers to Defendant as Classmates.) “Classmates provides
2 free access to some of the personal information in its database to drive users to purchase its two
3 paid products – reprinted yearbooks that retail for up to \$99.95, and a monthly subscription to
4 Classmates.com that retails for approximately \$3 per month – and to get page views from non-
5 paying users, from which Classmates profits by selling ad space on its website.” (Id. ¶ 2.)
6 Classmates allows internet visitors to search for their school from Classmates’ database for free,
7 which may return a result corresponding to a school of which Classmates sells their yearbook
8 services. (Id. ¶ 4-6.) The search results provide a free preview of the services and products with a
9 photo and name of an individual to entice the user to purchase Classmates’ services and
10 products. (Id. ¶¶ 6-8.)

11 Knapke alleges she “discovered that Classmates uses her name and photo in
12 advertisements on the Classmates website to advertise and/or actually sell Defendant’s products
13 and services.” (Compl. ¶ 20.) Knapke identified herself from the image and believes that others
14 could reasonably do so, as well. (Id. ¶ 21.) She has not consented to the use. (Id. ¶ 23.) Knapke is
15 not a customer of Classmates and has no relationship to Classmates. (Id. ¶ 24.) Knapke alleges
16 that her image and identity have commercial value to Classmates to sell its online services. (Id. ¶
17 25.) Yet Knapke has not been compensated by Classmates for the use of her identity. (Id. ¶ 26.)
18 Knapke, a resident of Ohio, seeks to represent a class of similarly-situated Ohio residents who
19 have appeared in an advertisement preview on Classmates. (Id. ¶¶ 15, 27.) She pursues a single
20 claim under the Ohio Right of Publicity Law, Ohio Rev. Code Ann. § 2741.02 (West).

21 ANALYSIS

22 Classmates presents seven arguments in favor of dismissal, as follows: (A) Knapke
23 agreed to arbitrate her claim; (B) Knapke’s claim is barred by the Communications Decency Act;

1 (C) Knapke’s claim is preempted by the Copyright Act; (D) Knapke has not alleged a viable
2 claim under the Ohio Right of Publicity Law; (E) Knapke’s claims fall within an exemption
3 under the Ohio Right of Publicity law; (F) the First Amendment protects Classmates from
4 Knapke’s claims; and (G) the “dormant” Commerce Clause renders Knapke’s claims subject to
5 dismissal. The Court reviews these arguments, none of which convinces the Court dismissal is
6 proper.

7 **A. Legal Standard**

8 The Court may dismiss a complaint for “failure to state a claim upon which relief can be
9 granted.” Fed. R. Civ. P. 12(b)(6). “A complaint may fail to show a right of relief either by
10 lacking a cognizable legal theory or by lacking sufficient facts alleged under a cognizable legal
11 theory.” Woods v. U.S. Bank N.A., 831 F.3d 1159, 1162 (9th Cir. 2016). In ruling on a Rule
12 12(b)(6) motion, the Court must accept all material allegations as true and construe the complaint
13 in the light most favorable to the non-movant. Wyler Summit P’Ship v. Turner Broad. Sys., Inc.,
14 135 F.3d 658, 661 (9th Cir. 1998). The complaint “must contain sufficient factual matter,
15 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556
16 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

17 **B. Arbitration**

18 Classmates argues that while acting as Knapke’s agent, Knapke’s counsel assented to
19 Classmates’ terms of service which require arbitration of the present claims. This argument lacks
20 merit.

21 Though neither party provides adequate briefing on what state’s law should apply to
22 resolve this argument, the Court finds Ohio law applies. The Court so concludes because Knapke
23 resides in Ohio and Ohio law should apply to interpreting any attorney-client relationship that
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1 she entered into from her domicile. Classmates suggests that Washington law applies because
2 that is the location of its headquarters. (Mot. at 2 n.2.) But Washington law only applies to
3 interpreting the terms of service, not the question of whether Knapke’s attorney was acting as her
4 agent when he assented to the terms of service.

5 Under Ohio law “for a principal to be bound by the acts of his agent under the theory of
6 apparent agency, evidence must affirmatively show: (1) [t]hat the principal held the agent out to
7 the public as possessing sufficient authority to embrace the particular act in question, or
8 knowingly permitted him to act as having such authority, and (2) that the person dealing with the
9 agent knew of the facts and acting in good faith had reason to believe and did believe that the
10 agent possessed the necessary authority.” Master Consol. Corp. v. BancOhio Natl. Bank, 61
11 Ohio St. 3d 570, 576, 575 N.E.2d 817, 822 (1991) (citation and quotation omitted). “The
12 apparent power of an agent is to be determined by the act of the principal and not by the acts of
13 the agent; a principal is responsible for the acts of an agent within his apparent authority only
14 where the principal himself by his acts or conduct has clothed the agent with the appearance of
15 the authority and not where the agent’s own conduct has created the apparent authority.” Id. at
16 576-77.

17 There is no evidence that Knapke gave her counsel any authority to bind her to
18 Classmates’ terms of service. Knapke alleges she has never used Classmates’ services and there
19 is no evidence she agreed to the terms of service. Nor is there any evidence that her counsel
20 acted at her direction. Knapke’s Opposition to the Motion states that Knapke did not discuss with
21 counsel creating an account on Classmates. (Opp. at 24 (Dkt. No. 18 at 30).) And Classmates has
22 failed to provide any evidence that Classmates viewed counsel’s creation of an account to have
23 been undertaken on Knapke’s behalf. As Knapke points out, the terms of service themselves
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1 forbid the creation of accounts on the behalf of others. Moreover, as counsel notes, his use of the
2 Classmates account was done to satisfy his obligations to the Court under Rule 11 to ensure an
3 adequate investigation of the claim presented. In sum, Classmates has not carried its burden to
4 show counsel bound his client when he agreed to the terms of service.

5 This outcome finds support from a similar case brought against Classmates that rejected a
6 nearly identical argument under California law. See Callahan v. PeopleConnect, Inc., 2021 WL
7 1979161, at *6-*7 (N.D. Cal. May 18, 2021). In Callahan, the court found that an attorney
8 cannot act on implied authority to impair his client’s “substantial rights,” which includes waiving
9 judicial review and agreeing to arbitration merely by performing some pre-suit investigation. See
10 id. at *5. The court explained that “absent client consent or ratification, a lawyer cannot bind a
11 client to an arbitration agreement by virtue of the attorney-client relationship alone.” Id. at *6-*7.
12 The same is true here applying Ohio law given the lack of evidence that Knapke gave any
13 authority to counsel to create an account for her or that Classmates knew counsel was acting on
14 her behalf. See Master, 61 Ohio St. 3d at 576; (Opp. at 24 (Dkt. No. 18 at 30)).

15 Classmates misplaces its reliance on Independent Living Resource Center San Francisco
16 v. Uber Technologies, Inc., No. 18-cv-06503, 2019 WL 3430656 (N.D. Cal. July 30, 2019). In
17 that case, the central factual predicate for the claims stemmed from a paralegal’s research on
18 behalf of the client using defendant’s “app” that compelled arbitration of the claims. But here
19 neither Knapke nor her counsel needed to create an account to understand the basis of her claim.
20 Knapke’s claim stems instead from the fact she “discovered that Classmates uses her name and
21 photo in advertisements on the Classmates website to advertise and/or actually sell Defendant’s
22 products and services.” (Compl. ¶ 20.) This aligns with the outcome in Callahan where
23 arbitration could not be compelled in part because counsel’s investigation did “not serve as the
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1 basis of Plaintiffs’ claims – i.e., counsel’s use of the Classmates.com website is not the factual
2 predicate for Plaintiffs’ claims.” 2021 WL 1979161, at *6. Nor is there any evidence backing
3 Classmates’ speculation that counsel alone encountered Knapke’s image and that “Counsel
4 created an account so his client would not have to create one herself.” (Reply at 2.) The
5 Complaint plainly contradicts this guesswork. (Compl. ¶¶ 1, 20.)

6 Lastly, the Court rejects Classmates’ request for discovery on this issue. In a footnote,
7 Classmates suggests that it should be entitled to discovery to learn about Knapke’s knowledge
8 and acquiescence to counsel’s use of the account and the identity of who took the screenshots
9 included in the Complaint. (Mot. at 5 n.3.) That information has already been provided in the
10 Opposition, rendering the requested discovery a nullity. (See Dkt. Nos. 18, 18-1.) The Court thus
11 rejects Classmates’ argument that Knapke must arbitrate her claim.

12 C. Communications Decency Act

13 Classmates unsuccessfully argues that it is entitled to immunity under the
14 Communications Decency Act, 47 U.S.C. § 230(c)(1).

15 To be entitled to dismissal based on this affirmative defense, Classmates must show that
16 the Complaint’s allegations demonstrate that Classmates is: (1) an interactive computer service
17 provider; (2) publishing information “provided by another information content provider.” 47
18 U.S.C. § 230(c)(1). The CDA defines “information content provider” as “any person or entity
19 that is responsible, in whole or in part, for the creation or development of information provided
20 through the Internet or any other interactive computer service.” 47 U.S.C. § 230(c)(1). As to the
21 first element, the Ninth Circuit interprets the term “interactive computer service provider”
22 expansively. See Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1097 (9th Cir. 2019),
23 cert. denied, 140 S. Ct. 2761, 206 L. Ed. 2d 936 (2020). And as to the second element, “what
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1 matters is whether the claims ‘inherently require[] the court to treat the defendant as the
2 ‘publisher or speaker’ of content provided by another.’” Id. at 1098 (quoting Barnes v. Yahoo!,
3 Inc., 570 F.3d 1096, (9th Cir. 2009)).

4 “The prototypical service qualifying for [CDA] immunity is an online messaging board
5 (or bulletin board) on which Internet subscribers post comments and respond to comments
6 posted by others.” Kimzey v. Yelp! Inc., 836 F.3d 1263, 1266 (9th Cir. 2016) (internal
7 quotations omitted). “Taking the relevant statutory definitions and case law in account, it
8 becomes clear that, in general, Section 230(c)(1) ‘protects websites from liability [under state or
9 local law] for material posted on the[ir] website[s] by someone else.’” Dyroff, 934 F.3d at 1097
10 (quoting Doe v. Internet Brands, Inc., 824 F.3d 846, 850 (9th Cir. 2016)). When the interactive
11 computer service provider creates the content itself it “is also a content provider” and not entitled
12 to protection under the CDA. See Fair Hous. Council of San Fernando Valley v.
13 Roommates.Com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008). In other words, the CDA’s “grant
14 of immunity applies only if the interactive computer service provider is not also an information
15 content provider, which is defined as someone who is responsible, in whole or in part, for the
16 creation or development of the offending content.” Id. (internal citations omitted).

17 Based on the Court’s review of the Complaint, Classmates is not entitled to protection
18 under the CDA. The sole issue in this case is whether Classmates’ decision to create
19 advertisements using Knapke’s identity violates Ohio law. (Compl. ¶¶ 1-10.) The offending
20 content is generated by Classmates and the advertisement is not merely some passive display of
21 content created by another entity, even if it contains a picture from a school yearbook. In this
22 context, Classmates is the content creator and not entitled to immunity under the CDA. See
23 Roommates.Com, 521 F.3d at 1162.

1 Classmates misplaces reliance on Callahan v. Ancestry.com, Inc., No. 20-CV-08437-LB,
2 2021 WL 783524, at *5 (N.D. Cal. Mar. 1, 2021) to argue that posting yearbooks online is
3 protected by the CDA. (Mot. at 6) The case is factually distinguishable because the court focused
4 on defendant’s online display of yearbooks created by third parties. See Callahan, 2021 WL
5 783524, at *5. Here, the focus is on Classmates’ use of a yearbook photo in stand-alone
6 advertisements it uses to lure in potential customers. That form of customized advertisement is
7 not protected under the CDA. As the Ninth Circuit recently explained “[w]hat matters . . . is
8 ‘whether the cause of action inherently requires the court to treat the defendant as the ‘publisher
9 or speaker’ of content provided by another.’” Gonzalez v. Google LLC, 2 F.4th 871, 891 (9th
10 Cir. 2021) (quoting Barnes, 570 F.3d at 1102). That cannot be said of the present matter. As
11 alleged, Classmates is the publisher of its own content, which is unprotected by the CDA.

12 The Court rejects application of the CDA as a basis to dismiss the Complaint.

13 **D. Copyright Act**

14 The Copyright Act provides that “the owner of copyright ... has the exclusive rights to do
15 and to authorize” others to display, perform, reproduce or distribute copies of the work and to
16 prepare derivative works. 17 U.S.C. § 106. “Section 301 of the Act provides for exclusive
17 jurisdiction over rights that are equivalent to any of the exclusive rights within the general scope
18 of copyright as specified in the Act.” Jules Jordan Video, Inc. v. 144942 Canada Inc., 617 F.3d
19 1146, 1152 (9th Cir. 2010). The Ninth Circuit employs a two-part test to measure preemption:
20 (1) does the subject matter of the state law claim fall within the subject matter of copyright as
21 described in 17 U.S.C. §§ 102 and 103; and (2) if so, are the rights asserted under state law are
22 equivalent to the rights contained in 17 U.S.C. § 106? See id. at 1153 (quoting Laws v. Sony
23 Music Entm’t, Inc., 448 F.3d 1134, 1137-38 (9th Cir. 2006)).

1 As set forth in Section 102, “[c]opyright protection subsists . . . in original works of
2 authorship fixed in any tangible medium of expression, now known or later developed, from
3 which they can be perceived, reproduced, or otherwise communicated, either directly or with the
4 aid of a machine or device [and w]orks of authorship include . . . pictorial, graphic, and
5 sculptural works.” 17 U.S.C. § 102. “Section 103 provides that the subject matter specified in §
6 102 also includes compilations and derivative works, ‘but the copyright in a compilation or
7 derivative work extends only to the material contributed by the author of such works as
8 distinguished from the preexisting material employed in the work.’” *Id.* at 1003 (quoting 17
9 U.S.C. § 103).

10 A “person’s name or likeness is not a work of authorship within the meaning of 17
11 U.S.C. § 102.” *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1004 (9th Cir. 2001). This is
12 true even if the plaintiff’s “names and likenesses are embodied in a copyrightable photograph.”
13 *Id.* Thus, “a publicity-right claim is not preempted when it targets non-consensual use of one’s
14 name or likeness on merchandise or in advertising.” *Maloney v. T3Media, Inc.*, 853 F.3d 1004,
15 1010 (9th Cir. 2017). “But when a likeness has been captured in a copyrighted artistic visual
16 work and the work itself is being distributed for personal use, a publicity-right claim interferes
17 with the exclusive rights of the copyright holder, and is preempted by section 301 of the
18 Copyright Act.” *Id.*

19 Classmates has failed to satisfy the first step of the inquiry under Copyright Act
20 preemption. The non-consensual use of Knapke’s name and likeness for advertising causes the
21 claim to fall outside of the Copyright Act’s preemption. Knapke alleges that Classmates has
22 misused her likeness for advertisements, which are not works or authorship under Section 102 of
23 the Copyright Act. *See Downing*, 265 F.3d at 1004. Moreover, Knapke’s Right to Publicity Law
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1 claim seeks to prevent the commercial exploitation of her identity for a commercial purpose
2 through advertisements, which is not subject to the Copyright Act’s preemption. See Maloney,
3 853 F.3d at 1010. The Court rejects this as a basis for dismissal of the Complaint.

4 **E. Ohio Right of Publicity Law**

5 Under Ohio’s Right of Publicity Law, “a person shall not use any aspect of an
6 individual’s persona for a commercial purpose.” Ohio Rev. Code Ann. § 2741.02 (West).
7 “Persona” is defined as “an individual’s name, voice, signature, photograph, image, likeness, or
8 distinctive appearance, if any of these aspects have commercial value.” Ohio Rev. Code Ann. §
9 2741.01(A) (West). “‘Commercial purpose’ means the use of or reference to an aspect of an
10 individual's persona . . . [f]or advertising or soliciting the purchase of products . . . services, or
11 other commercial activities.” Ohio Rev. Code Ann. § 2741.01(B). The law grants a private right
12 of action to “individual[s] whose right of publicity is at issue” absent consent. Ohio Rev. Code
13 Ann. § 2741.06(A). “The right of publicity in the persona of an individual whose domicile or
14 residence is in this state.” Ohio Rev. Code Ann. § 2741.03.

15 Knapke has stated a claim under the Right of Publicity Law. She has alleged that
16 Classmates has used her persona—name and photograph—for a commercial purpose—selling
17 Classmates’ products and services. The Complaint’s allegations more than satisfy these
18 elements. (See Compl. ¶¶ 1, 6-10, 20-22, 36-37.)

19 Notwithstanding the adequacy of the Complaint, Classmates makes several arguments in
20 favor of dismissal, none of which has merit. First, Classmates argues that Knapke has not alleged
21 a “use” of her persona in violation of the Law because she has not alleged that anyone else has
22 seen this same image. Classmates relies on common law claims that require some allegation that
23 members of the public saw the offending image. (See Mot. at 11 (Dkt. No. 13 at 20) (citing
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1 Jackson v. Playboy Enters., Inc., 574 F. Supp. 10, 13 (S.D. Ohio 1983); Fox v. Nationwide Mut.
2 Ins. Co., 117 N.E.3d 121, 145 (Ohio Ct. App. 2018)).) Classmates fails to explain why this
3 element from common law false light claims should be imputed into the Right of Publicity Law.
4 While courts may look to common law claims to help understand the Right of Publicity Law,
5 none has imputed a new element into the Law from common law tort. (See Reply at 6-7 (citing
6 cases).) The Court finds no valid basis to write a new provision into the Right of Publicity Law.
7 And accepting the allegations of the Complaint as true, Knapke has alleged a “use” of her
8 image—she alleges that she discovered Classmates using her image to market its products and
9 services on the internet, which is available to the public at large. (Compl. ¶¶ 6, 10, 20-26.) This
10 satisfies her burden under the Law.

11 Second, Classmates argues Knapke fails to plead that her persona has “commercial
12 value,” as required by the Right of Publicity Law. To satisfy this element, the plaintiff need only
13 plead that there is some value in associating a good or service with her identity. See Harvey v.
14 Systems Effect, LLC, 154 N.E. 3d. 293, 306 (Ohio App. 2020). “While plaintiffs need not be
15 national celebrities to assert a right of publicity claim, they must at least ‘demonstrate that there
16 is value in associating an item of commerce with [their] identity.’” Roe v. Amazon.com, 714 F.
17 App'x 565, 568 (6th Cir. 2017) (unpublished) (citing Landham v. Lewis Galoob Toys, Inc., 227
18 F.3d 619, 624 (6th Cir. 2000); McFarland v. Miller, 14 F.3d 912, 919-20 (3d Cir. 1994) (stating
19 that the right of publicity is worthless without association)). “The mere incidental use of a
20 person’s name or likeness is not actionable in an appropriation claim.” Id. (citing Vinci v. Am.
21 Can Co., 69 Ohio App.3d 727, 591 N.E.2d 793, 794 (1990) (per curiam)). Here, the use of
22 Knapke’s persona is not incidental to the advertisement. Her persona is used to make the
23 advertisement, which shows its commercial value. This differs from the use of a plaintiff’s
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1 | photograph as a book cover in Roe, which was incidental to the publication and sale of a book.
2 | The Court finds Knapke has alleged a commercial value to her persona.

3 | Third, Classmates argues that Knapke has not shown that the use of her persona was for
4 | anything other than an informational purpose, which it claims falls outside of the Law. This
5 | argument wholly ignores the allegations in the Complaint and asks the Court to consider a
6 | potential defense that relies on facts outside of the Complaint. The Court rejects this
7 | inappropriate attack to the Complaint

8 | Fourth, Classmates argues that Knapke has not pleaded conduct that occurred in Ohio and
9 | that the Right of Publicity Law can only apply in Ohio—i.e., it has no extraterritorial effect.

10 | (Mot. at 10. (citing Mitchell v. Abercrombie & Fitch, No. C2-04-306, 2005 WL 1159412, at *3
11 | (S.D. Ohio May 17, 2005)).) According to Classmates, this means Knapke must allege that the
12 | violation occurred in Ohio by alleging someone in Ohio saw her identity in an advertisement.

13 | (Id.) The Court disagrees. First, there is no express element that someone in Ohio view the
14 | misappropriated likeness. Rather, it only requires that the plaintiff be domiciled in Ohio, and
15 | Knapke has alleged she is an Ohio resident. See Ohio Rev. Code Ann. § 2741.03; Compl. ¶ 15.

16 | As alleged, there is no “extraterritorial” application of the law. Second, the Complaint alleges
17 | that Knapke herself discovered Classmates is using her likeness. (Compl. ¶ 20.) While the
18 | Complaint does not say precisely where this occurred, Knapke is a resident of Ohio and
19 | Classmates operates a website that is available to Ohioans generally. As such, the Court
20 | reasonably infers that the discovery occurred in Ohio. The Court rejects this argument.

1 **F. Exemptions to the Ohio Right of Publicity Law**

2 Classmates argues that its advertisement is exempted from the Ohio Right of Publicity
3 Law because is a “literary work” or a matter of “public affairs.” (Mot. at 15-17.) The Court is
4 only partially convinced.

5 **1. Literary Work**

6 First, Classmates argues that its advertisements are exempt because they advertise literary
7 works. The Court agrees in part, though this does not merit dismissal of the claim.

8 The Ohio Right of Publicity Law does not apply to “[a] literary work, dramatic work,
9 fictional work, historical work, audiovisual work, or musical work regardless of the media in
10 which the work appears or is transmitted, other than an advertisement or commercial
11 announcement” for such a work. Ohio Rev. Code § 2741.09(A)(1)(a), (d). Invoking the federal
12 Copyright Act, Classmates argues that its yearbook products and services are literary works,
13 which generally includes “works . . . expressed in words, numbers, or other verbal or numerical
14 symbols or indicia, regardless of the nature of the material objects, such as books, periodicals,
15 manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.” (See Mot.
16 at 16 (citing 17 U.S.C. § 101).)

17 Applying that definition, the Court agrees with Classmates that advertising yearbooks for
18 purchase is an advertisement of a literary work and exempt from the Law. Plaintiffs offer no
19 reasoning why the advertisements of a yearbook would not fall within this exemption, relying
20 instead on a case applying an Illinois law that is substantively different from the Ohio Right of
21 Publicity Law. (Opp. at 9 (citing Lukis v. Whitepages Inc., No. 19 C 4871, 2020 WL 6287369, at
22 *1 (N.D. Ill. Oct. 27, 2020)). The Court agrees with Classmates that the advertisement for the
23 sale of reprinted yearbooks is exempt. But Classmates also advertises a subscription service to
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1 “‘keep in touch’ with other classmates.” (Compl. ¶ 10.) That form of advertisement does not
2 advertise a literary work and is not exempt from the Law. As such, the Court finds that the claim
3 cannot be based on the advertisement of the sale of yearbooks, but it can attack the advertisement
4 of Classmates’ other subscription services. On that basis, the Court finds the claim falls outside
5 of this exemption and may move forward.

6 **2. Public Affairs**

7 Second, Classmates argues that its advertisements are exempt because they are matters of
8 public affairs. This argument fails.

9 The Right of Publicity Law exempts: (1) “use of an aspect of an individual’s persona in
10 connection with any news, public affairs, sports broadcast or account”; (2) “[m]aterial that has
11 political or newsworthy value”; and (3) “use of an aspect of an individual’s persona in
12 connection with the broadcast or reporting of an event or topic of general or public interest.”
13 Ohio Rev. Code §§ 2741.02(D)(1); 2741.09(A)(1)(b), (A)(3). Under these exemptions, the “use
14 of a person’s identity primarily for the purpose of communicating information . . . is not
15 generally actionable.” See Harvey, 154 N.E.3d at 308 (quotation and citation omitted)

16 This exemption does not apply to the allegations in the Complaint, which assert that the
17 use of Knapke’s persona to sell Classmates’ subscription service is for a commercial purpose and
18 not to communicate news. The Court finds no merit in Classmates argument on this point.

19 **G. First Amendment**

20 Classmates argues that “where a person’s name, image, or likeness is used in speech for
21 ‘informative or cultural’ purposes, the First Amendment renders the use ‘immune’ from
22 liability.” (Mot. at 18 (citing New Kids on the Block v. News Am. Publ’g, Inc., 745 F. Supp.
23 1540, 1546 (C.D. Cal. 1990), aff’d, 971 F.2d 302 (9th Cir. 1992)).) And, quoting a Sixth Circuit
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1 decision, Classmates also argues that a yearbook ““serves as a forum in which student editors
2 present pictures, captions, and other written material.”” (Id. (quoting Kincaid v. Gibson, 236 F.3d
3 342, 351 (6th Cir. 2001)).) The Court construes Classmates’ First Amendment challenge to be
4 limited to the specific claim Knapke makes, and not to the Right of Publicity Law generally. Had
5 Classmates sought that broader relief it would have had and has failed to provide notice to the
6 Ohio Attorney General under Rule 5.1.

7 The first question is whether the advertisement of Classmates’ subscription services is
8 core First Amendment speech or commercial speech. Commercial speech is “defined as speech
9 that does no more than propose a commercial transaction.” United States v. United Foods, Inc.,
10 533 U.S. 405, 409 (2001). The Supreme Court has noted that “advertising which ‘links a product
11 to a current public debate’ is not thereby entitled to the constitutional protection afforded
12 noncommercial speech.” Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67–68 (1983)
13 (holding that “information pamphlets are properly characterized as commercial speech.”).
14 “Where the facts present a close question, ‘strong support’ that the speech should be
15 characterized as commercial speech is found where the speech is an advertisement, the speech
16 refers to a particular product, and the speaker has an economic motivation.” Hunt v. City of Los
17 Angeles, 638 F.3d 703, 715 (9th Cir. 2011) (citing Bolger, 463 U.S. at 66–67). But
18 “[c]ommercial speech does not retain its commercial character ‘when it is inextricably
19 intertwined with otherwise fully protected speech.’” Id. (quoting Riley v. Nat’l Fed. of the Blind
20 of N. Car., Inc., 487 U.S. 781, 796 (1988)).

21 Classmates’ advertisement at issue is commercial speech. The use of Knapke’s image and
22 name is alleged to be done for the purpose of enticing viewers into buying or subscribing to
23 Classmates’ products and services. The challenged conduct is not the offer of access to
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1 yearbooks or even buying reprinted copies. In fact, Knapke expressly does not challenge the sale
2 of her information in the yearbooks. (Compl. ¶ 14.) Rather, she seeks to prevent the commercial
3 use of her images to sell access to yearbooks and other subscription services to connect old
4 classmates. That is commercial speech. And there is nothing showing that the Classmates-created
5 advertisement using a yearbook photo is intertwined with otherwise fully protected speech.

6 The second question is whether the Ohio Right of Public Law violates the First
7 Amendment’s protections on commercial speech. “Commercial speech that is not false or
8 deceptive and does not concern unlawful activities, however, may be restricted only in the
9 service of a substantial governmental interest, and only through means that directly advance that
10 interest.” Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio, 471 U.S. 626, 638
11 (1985). “The protection available for particular commercial expression turns on the nature both
12 of the expression and of the governmental interests served by its regulation.” Central Hudson
13 Gas & Electric Corp. v. Public Service Comm’n, 447 U.S. 557, 563 (1980). The Court engages in
14 a multi-step analysis. “First, we determine whether the expression is constitutionally protected.”
15 Bolger, 463 U.S. at 68. “For commercial speech to receive such protection, ‘it at least must
16 concern lawful activity and not be misleading.’” Id. (quoting Central Hudson, 447 U.S. at 566).
17 In the context of the claim presented here, at least one court has concluded, “the informational
18 function of advertising is impaired when one wrongfully appropriates another’s image for
19 commercial purposes.” Bosley v. Wildwett.com, 310 F. Supp. 2d 914, 926 (N.D. Ohio 2004).
20 “Second, we ask whether the governmental interest is substantial [and i]f so, we must then
21 determine whether the regulation directly advances the government interest asserted, and
22 whether it is not more extensive than necessary to serve that interest.” Id. at 68-69.

1 Here, Knapke has the better argument that the Ohio Right of Publicity Law comports
2 with the First Amendment. It is questionable that the commercial speech at issue here is entitled
3 to any protection, given that it misappropriates Knapke’s persona and potentially misleads the
4 public. See Zauderer, 471 U.S. at 638. But even if the advertisement is entitled to protection as
5 commercial speech, the Right of Publicity Law directly and appropriately advances Ohio’s
6 substantial interest in enabling its citizens to protect the non-consensual commercial exploitation
7 of their likeness without overbroadly prohibiting commercial speech. The court in Bosley
8 considered this same issue in the context of the Ohio Right of Publicity Law and explained:

9 Laws governing the right to publicity have a substantial interest in regulating commercial
10 speech. Individuals have a property right in their own identity. Allowing individuals the
11 exclusive right to capitalize on their persona, like copyright law, encourages them to
12 invest in developing their skills and talents. The right to publicity prevents others from
13 depleting the economic value of one's persona without internalizing the costs.
14 Furthermore, the right to publicity helps prevent deceptive commercial uses. In turn,
15 remedies under the law advance that governmental interest without being more extensive
16 than necessary.

17 Bosley, 310 F. Supp. 2d at 929. The Court adopts this reasoning and finds that the Right of
18 Publicity Law comports with First Amendment and Knapke’s claim does not infringe upon it.

19 **H. Dormant Commerce Clause**

20 Classmates argues that Knapke’s claim violates the “dormant” Commerce Clause. This
21 argument falls short.

22 Implicit in the Commerce Clause (U.S. Const. art. I, sec. 8, cl. 3) is the negative or
23 “dormant” Commerce Clause principle that the states impermissibly intrude on this federal
24 power when they enact laws that unduly burden interstate commerce. “Although the Commerce
Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign
commerce, the Clause has long been recognized as a self-executing limitation on the power of
the States to enact laws imposing substantial burdens on such commerce.” South–Central Timber

1 Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984). But the Supreme Court has recognized that
2 “under our constitutional scheme the States retain broad power to legislate protection for their
3 citizens in matters of local concern such as public health” and has held that “not every exercise
4 of local power is invalid merely because it affects in some way the flow of commerce between
5 the States.” Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976).

6 “Modern dormant Commerce Clause jurisprudence primarily ‘is driven by concern about
7 economic protectionism—that is, regulatory measures designed to benefit in-state economic
8 interests by burdening out-of-state competitors.’” Dep’t of Revenue v. Davis, 553 U.S. 328, 337-
9 38 (2008). “Given the purposes of the dormant Commerce Clause, it is not surprising that a state
10 regulation does not become vulnerable to invalidation under the dormant Commerce Clause
11 merely because it affects interstate commerce.” Nat’l Ass’n of Optometrists & Opticians v.
12 Harris, 682 F.3d 1144, 1148 (9th Cir. 2012). “A critical requirement for proving a violation of
13 the dormant Commerce Clause is that there must be a substantial burden on interstate
14 commerce.” Id. “Most regulations that run afoul of the dormant Commerce Clause do so because
15 of discrimination, but in a small number of dormant Commerce Clause cases courts also have
16 invalidated statutes that imposed other significant burdens on interstate commerce.” Id.

17 Though difficult to apply, courts still employ a balancing test enunciated by the Supreme
18 Court in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). “Where [a state] statute regulates
19 even-handedly to effectuate a legitimate local public interest, and its effects on interstate
20 commerce are only incidental, it will be upheld unless the burden imposed on such commerce is
21 clearly excessive in relation to the putative local benefits.” Pike, 397 U.S. at 142. “If a legitimate
22 local purpose is found, then the question becomes one of degree . . . [a]nd the extent of the
23 burden that will be tolerated will of course depend on the nature of the local interest involved,
24

1 and on whether it could be promoted as well with a lesser impact on interstate activities.” Id. “If
2 a regulation merely has an effect on interstate commerce, but does not impose a significant
3 burden on interstate commerce, it follows that there cannot be a burden on interstate commerce
4 that is ‘clearly excessive in relation to the putative local benefits’ under Pike.” Harris, 682 F.3d
5 at 1155.

6 Classmates fails to offer any convincing rationale why the burden imposed on its
7 interstate business is clearly excessive in light of Ohio’s desire to prevent non-consensual
8 commercial use of Ohioans’ personas. The burden on Classmates itself is incidental to the Right
9 of Publicity Law’s attempt to protect Ohioan’s property interest in their own persona. This
10 protective measure serves the core, individual rights of Ohioans and Classmates provides no
11 evidence the law was designed as an economic barrier to favor Ohio economic interests. Nor has
12 Classmates shown that there is some less burdensome approach that could satisfy Ohio’s
13 interests as to publicity rights. And it is worth noting that Classmates has availed itself of the
14 benefits of doing business in Ohio by acquiring Ohio yearbooks expressly for the purpose of
15 marketing access to them and related services to—by and large—Ohioans. And given the nature
16 of the offending advertisement at issue—which Classmates created—it would appear that
17 Classmates has the ability to simply alter the way in which it advertises its services to avoid the
18 nonconsensual use of Ohioans’ personas. There is no evidence of a significant burden and the
19 Court rejects this argument.

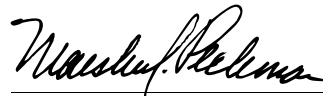
20 CONCLUSION

21 Classmates’ raises a substantial number of arguments in its efforts to obtain dismissal of
22 Knapke’s complaint. These arguments all fall short of the mark. Knapke has adequately pleaded
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24

1 her claim that Classmates' use of her persona to advertise its subscription services violates the
2 Ohio Right of Publicity Law. As such, the Court DENIES the Motion.

3 The clerk is ordered to provide copies of this order to all counsel.

4 Dated August 10, 2021.

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6 Marsha J. Pechman
7 United States Senior District Judge
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