

Who owns your face? Social media mobs raise new privacy concerns

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In this Friday, Jan. 18, 2019, image made from video provided by the Survival Media Agency, a teenager wearing a "Make America Great Again" hat, center left, stands in front of an elderly Native American singing and playing a drum ... [more >](#)

By [Ethan Epstein](#) - The Washington Times - Wednesday, January 23, 2019

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ANALYSIS/OPINION:

You might own your car, your house, your pet and your 401(k). But you don't own your own photographic image.

That's one of the lessons of Rashomon on the Potomac, the bizarre fracas that occurred over the weekend on the National Mall involving Omaha elder Nathan Phillips, the Black Hebrew Israelites and a group of boys from Covington Catholic High School in Kentucky.

The matter shot to national attention after a short video was posted on Twitter depicting (part of) the incident. The focal point of the video was the image of a drumming Mr. Phillips standing

up close to one of the students, who was donning a “Make America Great Again” cap.

The boy, it was widely said, was “smirking” throughout the encounter. That smirk was blasted across the globe. Eminences such as Reza Aslan, a creative writing professor who plays a religious historian on television, deemed the boy’s face “punchable” to his nearly 300,000 Twitter followers.

You’re not allowed to plaster a (punchable) photograph of Kanye West on a cereal box without his permission. That’s because “U.S. law has for many years recognized a right of [legal] action if a person’s image is used for commercial gain,” explains Peter Swire, a law professor at Georgia Tech and a longtime expert on privacy issues.

You can’t monetize somebody’s image without his permission or use his photo to even imply that the person supports a product. This is dubbed the “right of publicity.”

But absent blatant commercial use, you can distribute a person’s image. The First Amendment applies broadly here. It’s what allows, for instance, the tabloid media to operate — as Amazon honcho Jeff Bezos has unhappily learned recently.

And unlike libel law, which applies different legal standards to public and private figures, the First Amendment guarantees a right to distribute imagery without making any such distinction.

I’m allowed to photograph a celebrity and post it online as I am a random stranger. That’s why appalling websites such as “People of Walmart,” which holds up lower-middle class Americans for ridicule, are allowed.

Where the law does take exception is if one were to post a fake or doctored image. That behavior is legally actionable. So is distributing imagery that portrays events in a “false light” — where the image is true but presented in a dishonest or manipulative manner.

It’s said that certain cultures believe taking a photograph steals one’s soul. We don’t need to go that far without recognizing that there’s something unsettling about the notion that we don’t control the distribution of our own image.

Indeed, even within the framework of the First Amendment, exceptions have been carved out that recognize this fact, like the aforementioned right of publicity.

The criminalization of “revenge porn” — the online posting of prurient images of one’s former lovers — is another point of complication. Revenge porn has been banned in more than half of the states.

Yet, like the images shot on the National Mall, revenge porn is “true,” suggesting that First Amendment rights apply.

Danielle Citron, a law professor at the University of Maryland and leading proponent of revenge porn laws, argues that this is not so, noting in a paper that “certain categories of speech can be regulated due to their propensity to bring about serious harms and only slight contributions to First Amendment values.” That standard, of course, would seem to allow the criminalization of any manner of photographic distribution beyond revenge porn.

The Covington students, for instance, have faced death threats as a result of their images being distributed. This certainly qualifies as “serious harms.”

The First Amendment was crafted long before every American became an amateur photographer and broadcaster, walking around every day with a personal television studio in his pocket and, thanks to social media, a film distribution company, too. Privacy scholars should think of ways to give people more control over the distribution of their own image — whether it’s “punchable” or not.