LOOKING AHEAD: THE RIGHT OF PUBLICITY IN A WORLD WITH ARTIFICIAL INTELLIGENCE

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Executive Summary: A publicity right is a relatively new legal concept. Born out of tort law but developed into a property right, the concept's fraught nascency contributed to fundamental differences in its scope amongst the thirty-five states that now recognize a right of publicity. The mangled patchwork of state laws creates dangerous incentives for state legislatures to "race to the bottom" and increases transaction costs in the entertainment industry. These deficiencies have prompted support for Congress' codification of the right of publicity. Similarly, litigation has forced state courts to confront the right's intersection with the First Amendment, producing a multitude of inconsistent constitutional analyses. For this reason, many believe a federal law should clearly delineate the scope of publicity rights via a commercial use requirement. Finally, in recent years, the rise of artificial intelligence ("AI") has prompted states to consider legislation addressing "digital replication rights." These new bills threaten to further complicate the extant matrix of state law at a time when judges are struggling to apply existing publicity law to claims involving AI.

I. RIGHT OF PUBLICITY BACKGROUND

The right of publicity was born out of the right to privacy in the late 19th century.[1] Although several states recognized a common law right of publicity in the 1950s, California was the first to codify the right in 1972.[2] From there it was five years until the Supreme Court recognized the right in Zacchini v. Scripps-Howard Broadcasting Co.[3] Today, the right is recognized either by statute or in the common law in thirty-five states.[4]

The right of publicity is defined as the ability to control the use of one's own identity.[5] This generally encompasses a person's name, image, voice, signature, and likeness.[6] Although this concept appears straightforward on its face, in practice, it has resulted in a mangled patchwork of state statutes that create confusion and increase transaction costs for businesses in the entertainment industry.[7] Importantly, state laws differ in defining what aspects of identity are protected, who initially enjoys the right, whether the right is assignable or descendible, and what

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[1] Mark Roesler & Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, 13 LANDSLIDE (2020). The right to privacy was conceived in Samuel Warren and Louis Brandeis' 1890 Harvard Law Review article, "The Right to Privacy." *See id.* (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)).

[2] Roesler & Hutchinson, *supra* note 1.

[3] 433 U.S. 562, 564–65 (1977); *id.*

[4] *See* Roesler & Hutchinson, *supra* note 1 at n.6 (listing the thirty-five states that recognize the right, twenty-five by statute and twelve by common law).

[5] Roesler & Hutchinson, *supra* note 1.

[6] *Id.*

[7] *Id.*

damages are available when the right is infringed.[8] The right's development sheds some light on these divergences.[9]

Publicity rights were derived from the "misappropriation" prong of the invasion of privacy tort penned by William Prosser and adopted by the Restatement (Second) of Torts.[10] Because of the right's genesis in tort law, for many years, the cause of action focused on harms that caused pain and mental anguish to a person, until the Second Circuit's decision in Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.[11] shifted the focus to economic injuries caused by lost opportunities or the inability to fully exploit one's own persona for commercial gain.[12] Although conceptualizing the right of publicity as a property right is now the majority approach, several states still approach the cause of action as a tort.[13]

This ideological split accounts for most of the differences among state laws.[14] In states where the right of publicity is viewed as vindicating a personal wrong, the right will generally protect both commercially valuable and non-commercially valuable personas, the right will not be assignable or descendible, and damages will be limited to general damages.[15] Alternatively, in states where the right is viewed as a property or economic right, only commercially valuable personas enjoy the right, the right may be assignable and descendible, and damages will include the commercial value of the misappropriation.[16] Ultimately, this muddled patchwork of state publicity laws has caused many to advocate for the passage of a preemptive federal law.[17]

II. THE FEDERAL DEBATE

Scholars often cite two justifications for a preemptive federal right of publicity: eliminating the prohibitive transaction costs associated with the current state law patchwork and incentivizing and protecting the development of commercially exploitable personas.[18] When a business wants to exploit a persona they do not own, they must first determine where the individual associated with the persona is domiciled.[19] Where the individual is domiciled will dictate which, if any, state law governs the scope of the right.[20] However, determining how a court will decide domicile is notoriously difficult.[21] Without knowledge of which state's common

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[8] *Id.*
[9] *Id.*
[10] Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, 28 COMMS. LAW. 14, 14 (2011).
[11] 202 F.2d 866 (2d Cir. 1953).
[12] Vick & Jassy, *supra* note 10.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] Mark Roesler & Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, 13 LANDSLIDE (2020).
[19] *Id.*
[20] *Id.*
[21] *Id.* The inquiry rests on the individual associated with the persona's intent to remain in a state, and intent to remain is a nebulous, multi-factorial inquiry. *Id.*

or statutory law will be applied by a court, businesses must choose between taking on excessive risk or unnecessary cost: they may exploit the persona in the ways permitted by the state law they deem controlling (risking litigation if a court determines a different state law applies) or they may seek a costly license to use the persona (which may be unnecessary if the business only exploits the persona within the bounds of the controlling state law).[22] This unfortunate choice chills the exploitation of persona rights and creates a dangerous race to the bottom for state legislatures that encourages forum shopping.[23] In this vein too, courts are issuing nationwide injunctions for publicity cases brought under state law.[24] This exacerbates the race to the bottom problem and makes the stakes much higher for businesses seeking to exploit persona rights without a license.[25]

On the other hand, those who denounce a federal publicity right largely also decry the right's existence at the state level.[26] These critics take issue with several justifications proffered for publicity rights, including the labor, personal autonomy, incentive, and efficiency justifications.[27] Those who condemn the labor justification believe that fame is the result of fortuity rather than the expenditure of effort, and that the law should not protect an interest if it is not the result of labor.[28] These critics add that even *if* celebrity *were* the result of labor, it would be the result of the *public or entertainment industry's labor* rather than the celebrity's.[29] Similarly, critics of the personal autonomy justification point to the survivability and assignability features of the right to argue that if personal autonomy were truly something publicity law sought to protect, the right could not logically extend beyond the control of the person with whom the right was conceived.[30] Next, the argument that the law needs to incentivize individuals to pursue fame is usually countered by empirical evidence that celebrity is sought just as voraciously by those in countries without publicity rights as it is by those in countries where publicity rights are

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[22] *Id.* Businesses must also consider that some federal courts have retroactively applied a right of publicity in cases where the court concludes the state *would have found* a publicity right. *See id.* at n.29 and accompanying text (citing Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989)).
[23] Roesler & Hutchinson, *supra* note 18. Legislatures who prioritize the development of commercially exploitable personas in their state draft broad publicity laws (some so broad they may trample on free speech rights), with each successive state passing a law broader than the last. *Id.* Indiana has the most persona-friendly law in the country while New York has the least. Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, 28 COMMS. LAW. 14, 15 (2011). Two provisions that substantially increase the Indiana law's breadth when compared to other states' publicity laws are: the Indiana law protects publicity rights for 100 years after the death of the associated person and it applies to all acts or events that occur within the state's boarders regardless of the personality's domicile. *Id.*
[24] *See* Vick & Jassy, *supra* note 23 at 17 (citing Carson v. Here's Johnny Portable Toilets, Inc., 810 F.2d 104 (6th Cir. 1987), affirming an injunction barring Here's Johnny from infringing nationwide despite the suit being brought under Michigan law).
[25] *Id.* at 16.
[26] Usha Rodrigues, *Race to the Stars: A Federalism Argument for Leaving the Right of Publicity in the Hands of the States*, 87 VA. L. REV. 1201, 1212 (2001).
[27] *Id.*
[28] *Id.* at 1213.
[29] *Id.* at 1214.
[30] *Id.* at 1215.

protected.[31] Scholars believe this indicates that protection of publicity rights is not a primary factor in an individual's decision to pursue fame, often adding that it would be "ludicrous to imagine that entertainers [would] be dissuaded from pursuing their artistic aspirations because of the potential of a loss of control over the marketing of that small area of persona that the right of publicity, but not the Copyright Act or Lanham Act, covers."[32] Lastly, the efficiency justification posits that granting exclusive property rights in scarce resources ensures their allocation to the most efficient owner. However, critics point out that publicity rights are not "scarce" because widespread use does not deplete the resource. The owner may still exploit their persona for the same value despite others exploiting the persona as well, and if they cannot, a dilution claim can be brought in remedy.[33] Although the arguments against a federal right of publicity are persuasive, principles of federalism dictate that adoption of a publicity right by thirty-five states is a critical mass, and therefore, Congress should seriously contemplate its federalization.[34]

III. THE COMMERCIAL USE REQUIREMENT

Some scholars opine that the right of publicity allows for the censorship of popular culture contravening the First Amendment's free speech protections.[35] To date, courts' attempts to reconcile the interests of rights-holders with free speech have produced an unnavigable hodgepodge of constitutional doctrine.[36] The confusion surrounding the First Amendment's intersection with the right of publicity is largely borne out of the Court's decision in Zacchini.[37] In Zacchini, the Court rejected a First Amendment defense when a performance was exploited by a non-owner for news purposes.[38] Soon, despite Zacchini's limited application to a replicated *performance*, an issue not typically litigated in publicity claims, the case became frequently "cited for the broad proposition that '[t]here is no First Amendment privilege with respect to the appropriation of another's name or likeness for commercial purposes.'"[39] In applying Zacchini's "entire act" test to other publicity contexts, courts have struggled to create supplementary doctrines to guide the Constitutional analysis.[40] This "confusing morass of inconsistent, incomplete, or mutually exclusive approaches, tests, and standards" has resulted in a chilling of

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[31] *Id.* at 1215–16.
[32] *Id.* at 1216.
[33] *Id.* at 1216–17.
[34] *See* Mark Roesler & Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law,* 13 LANDSLIDE nn.25–26 and accompanying text (2020) (highlighting law review articles from 2001–2013 advocating for a federal right of publicity and noting a 1998 draft of a federal bill penned by the American Bar Association on behalf of the International Trademark Association).
[35] Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, 28 COMMS. LAW. 14, 15 (Aug. 2011).
[36] *Id.*
[37] *See* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Privacy*, 130 YALE L.J. 86, 125 (2020) (citing Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 565 (1977)).
[38] *Id.* at 126 n.158.
[39] *Id.* at 126.
[40] *Id.* at 127.

speech and forum shopping.[41] Those who advocate for a federal publicity law cite clarification of the boundary between First Amendment-protected speech and publicity rights as an additional compelling justification.[42]

IV. THE IMPACT OF AI AND DEEP FAKES

As technology develops, the justifications for a federal publicity law arguably become more compelling.[43] According to the U.S. Government Accountability Office, a deepfake is "a video, photo, or audio recording that seems real but has been manipulated with AI. The underlying technology can replace faces, manipulate facial expressions, synthesize faces, and synthesize speech. Deepfakes can depict someone appearing to say or do something that they in fact never said or did."[44] These AI-generated effigies pose serious threats to those with persona rights by allowing non-owners to faultlessly exploit the personas of others and associate them in ways that cause reputational harm to and damage the commercial value of the persona.[45] Deepfake replications also highlight the inadequacies of state laws that restrict protection to famous personas and that do not recognize a postmortem right of publicity by leaving the non-famous and dead vulnerable to AI exploitation.[46]

In attempts to bridge these statutory gaps, states are haphazardly drafting and passing AI-specific right of publicity legislation.[47] However, these bills threaten only to add to or amend state laws in ways that further muddy the already murky compliance waters.[48] For example, Tennessee's Ensuring Likeness, Voice, and Image Security ("ELVIS") Act[49] extends existing publicity law to vocal likenesses and eliminates the requirement that infringing conduct be both

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[41] *Id.*
[42] *See generally id.*
[43] Mark Roesler & Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, 13 LANDSLIDE (2020).
[44] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-20-379SP, SCIENCE & TECH SPOTLIGHT: DEEPFAKES 1 (2020).
[45] Roesler & Hutchinson, *supra* note 42.
[46] Eliana Torres, *From Deepfakes to Deepfame: The Complexities of the Right of Publicity in an AI World*, 16 LANDSLIDE (2024). *See generally* Greyson Cohen, Note, *Digital Purgatory and the Rights of the Dead: Protecting Against Digital Disinterment in the Age of Artificial Intelligence*, 2023 CARDOZO L. REV. 121 (providing an in-depth discussion of postmortem rights of publicity and advocating for federalization under certain conditions).
[47] Myriah V. Jaworski & Chirag H. Patel, *ROP on the Rise: Right of Publicity Claims Will Rise as States Address AI Generated Deepfakes and Voice Cloning,* CLARK HILL (Apr. 15, 2024), https://www.clarkhill.com/news-events/news/rop-on-the-rise-right-of-publicity-claims-will-rise-as-states-address-ai-generated-deepfakes-and-voice-cloning/. Currently California, Illinois, Kentucky, and Louisiana have drafted legislation to address AI-generated violations of publicity rights in addition to Tennessee's Ensuring Likeness, Voice, and Image Security (ELVIS) Act which was the first and only to become effective on July 1, 2024. *Id.*
[48] *Id.*
[49] Ensuring Likeness, Voice, and Image Security (ELVIS) Act, H.B. 2091, 2024 Leg., Reg. Sess. (Tenn. 2024).

"knowing" and "commercial."[50] At their most catastrophic, these alterations could force interactive computer services posting third-party content to impose strict content moderation schemes or ban third-party content altogether.[51] More succinctly, the ELVIS Act could spell the end of social media platforms as they exist now nationwide by broadening protection to include unknowingly infringing, non-commercial speech online.[52]

Deepfake technology has also spurred the federal legislative hand to action producing three bills; the most notable being the Nurture Originals, Foster Art, and Keep Entertainment Safe ("NO FAKES") Act[53] and the No Artificial Intelligence Fake Replicas and Unauthorized Duplications ("No AI FRAUD") Act.[54] Aside from a federal law's ability to mend the muddled patchwork of state publicity laws, there are pros and cons to the specific provisions of each.[55]

The NO FAKES Act would create a new property right protecting artists from unauthorized digital replication of their likenesses.[56] The right would be exclusive to the rights holder, freely descendible and licensable, and would continue to apply for seventy years after the associated person's death.[57] These provisions strike a meaningful balance between the interests of persona-holders and the public domain by ensuring the rights' transferability while imposing a strict chronological limit.[58] However, because the Act frames publicity rights as intellectual property rights, interactive computer services would likely face liability for violative third-party content posted to their sites.[59] Lastly, in an attempt to protect First Amendment interests, the NO FAKES Act exempts use as a part of "(i) news, public affairs, or sports broadcast; (ii) documentary, historical, or biographical works; (iii) criticism, satire, parody, or comment; and (iv) advertisements regarding the above-listed uses" from liability.[60]

The greatest dissimilarity between the NO FAKES Act and the No AI FRAUD Act is that the No AI FRAUD Act only guarantees protection of publicity rights for ten years following the

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[50] Jaworski & Patel, *supra* note 46. "[The EVLIS Act] imposes civil liability on those who publish, perform, or make available to the public an individual's voice or likeness without authorization. Specifically addressing generative AI, the ELVIS Act also imposes civil liability on those who distribute, transmit, or otherwise make available an algorithm, software, tool, or other technology, service, or device where the primary purpose is to produce an unauthorized reproduction of an individual's photograph, voice, or likeness." *Id.* The ELVIS Act also extends standing to licensees of persona rights meaning litigation will likely become more frequent. *Id.*

[51] *Id.*

[52] *Id.*

[53] S. 4875, 118th Cong. (2024).

[54] H.R. 6943, 118th Cong. (2024); Jaworski & Patel, *supra* note 46.

[55] Jaworski & Patel, *supra* note 46.

[56] Katie Wright Morrone & Sata Talebian, *AI Deepfake Bill: Senators Contemplate the First Federal Right of Publicity*, VENABLE LLP (Oct. 19, 2023), https://www.venable.com/insights/publications/2023/10/ai-deepfakes-bill-senators-contemplate-the-first.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

death of the associated individual.[61] After ten years, whether persona rights have been commercially exploited is evaluated every two years.[62] If there is no commercial exploitation within the two-year period, the rights can be terminated.[63] For how long a "digital replica right" should extend is the topic of hot debate amongst scholars.[64] Jennifer E. Rothman, professor of law at the University of Pennsylvania, urges that the longer a "digital replication right" extends beyond the original rights-owner's death, the wider open the door swings for entertainment conglomerates to exploit AI performances from deceased entertainers in lieu of investing in costly performances from living entertainers.[65] This could prove financially devastating to living entertainers.[66]

Three recent suits may also shed light on how courts view AI's impact on the right of publicity.[67] First, a Complaint filed in the Eastern District of Illinois that alleged facial recognition technology company, Clearview AI, violated plaintiff's publicity rights *survived a motion to dismiss*.[68] Specifically, the court held that plaintiffs met the state laws' commercial use requirements by alleging that their online likenesses were scraped and collected into a database.[69] This ruling demonstrates that some courts may skirt a commercial use requirement designed to protect free speech rights in AI-involved cases by broadening the definition of "commercial use" to questionable lengths.[70] Second, in 2023, a judge in the U.S. District Court for the Northern District of California dismissed right of publicity claims in a case brought by artists whose *style*

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[61] Daniel Tencer, *The US No AI FRAUD Act and Tennessee's ELVIS Act Have Caused a Buzz in Music's Legal Circles. What Do They Hope to Achieve, And What Are the Potential Pitfalls?*, MUSIC BUS. WORLDWIDE (Apr. 17, 2024), https://www.musicbusinessworldwide.com/the-us-no-ai-fraud-act-and-tennessees-elvis-act-have-the-music-biz-buzzing/.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] See *id.* (citing Jennifer E. Rothman, *Draft Digital Replica Bill Risks Living Performers' Rights Over AI-Generated Replacements,* RIGHT OF PUBLICITY ROADMAP (Oct. 20, 2023), https://rightofpublicityroadmap.com/news_commentary/draft-digital-replica-bill-risks-living-performers-rights-over-ai-generated-replacements/).

[66] *Id.*

[67] Eliana Torres, *From Deepfakes to Deepfame: The Complexities of the Right of Publicity in an AI World*, 16 LANDSLIDE (2024).

[68] Myriah V. Jaworski & Chirag H. Patel, *ROP on the Rise: Right of Publicity Claims Will Rise as States Address AI Generated Deepfakes and Voice Cloning,* CLARK HILL (Apr. 15, 2024), https://www.clarkhill.com/news-events/news/rop-on-the-rise-right-of-publicity-claims-will-rise-as-states-address-ai-generated-deepfakes-and-voice-cloning/; Second Amended Complaint at 2 *In re Clearview AI, Inc.,* 585 F. Supp. 3d 1111 (N.D. Ill. 2022) (No. 21-cv-0135), ECF No. 428; Memorandum Opinion and Order at 1127, 1129–30 *In re Clearview AI, Inc.,* 585 F. Supp. 3d 1111 (N.D. Ill. 2022) (No. 21-cv-0135), ECF No. 279.

[69] Memorandum Opinion and Order at 1127, 1129–30, *In re Clearview AI, Inc.,* 585 F. Supp. 3d 1111 (N.D. Ill. 2022) (No. 21-cv-0135), ECF No. 279.

[70] Jaworski & Patel, *supra* note 67.

had been replicated in new AI-generated works.[71] The judge reasoned that the right of publicity was conceived to prevent misleading *endorsements* and that when a person views a work that appears in the recognizable style of an artist but is not actually authored by that artist the viewer is not inclined to believe that the artist *endorsed* the stylistically similar work.[72] This ruling sheds light on how judges may perceive the extent of publicity rights in the AI context; specifically, where they may draw a line between *similar* and *exact* AI replications of likenesses.[73] Last, in the U.S. District Court for the Central District of California, plaintiff Kyland Young's right of publicity claim against AI software developer NeoCortex survived a motion to dismiss with the court expressly denying NeoCoretex's claim that Young's suit was barred by the First Amendment.[74] The survival of this right of publicity claim may signal judge's distaste for fair-use-like defenses to right of publicity claims in instances where AI is involved in the generation of content.[75]

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[71] Eliana Torres, *From Deepfakes to Deepfame: The Complexities of the Right of Publicity in an AI World*, 16 LANDSLIDE (2024); Memorandum Opinion and Order at 19–20, *Andersen v. Stability AI Ltd.*, No. 3:23-cv-00201 (N.D. Cal. 2023), ECF No. 117.
[72] Eliana Torres, *From Deepfakes to Deepfame: The Complexities of the Right of Publicity in an AI World*, 16 LANDSLIDE (2024); Memorandum Opinion and Order at 19–20, *Andersen v. Stability AI Ltd.*, No. 3:23-cv-00201 (N.D. Cal. 2023), ECF No. 117.
[73] Eliana Torres, *From Deepfakes to Deepfame: The Complexities of the Right of Publicity in an AI World*, 16 LANDSLIDE (2024); Memorandum Opinion and Order at 19–20, *Andersen v. Stability AI Ltd.*, No. 3:23-cv-00201 (N.D. Cal. 2023), ECF No. 117.
[74] Eliana Torres, *From Deepfakes to Deepfame: The Complexities of the Right of Publicity in an AI World*, 16 LANDSLIDE (2024); Order re Defendant's Motion to Strike and Motion to Dismiss at 13–16 Young v. NeoCortex, Inc., No. 2:23-cv-2496 (C.D. Cal. 2023), ECF No. 50.
[75] Eliana Torres, *From Deepfakes to Deepfame: The Complexities of the Right of Publicity in an AI World*, 16 LANDSLIDE (2024).