

The Right of Publicity in the AI Age

Their defense was essentially that this is not big deal. Instead of being a fly on their forehead, it is now a bee in their ear. I feel like maybe we've made the path easier for others to follow. Now I have a fence around my larynxization.¹

I. Overview

In April 2023, social media platforms were abuzz about a new song that had been anonymously posted to Tik Tok.² “Heart on My Sleeve,” which apparently reflected a collaboration between Drake and The Weeknd (two of music’s biggest stars), soon became one of the most streamed singles in the country, garnering tens of millions of plays. All the details seemed right—the vocal timbre and inflection, the delivery, the production. But, as the poster disclosed, neither artist had anything to do with the track, which was an original composition and sound recording that used copycat vocals generated by artificial intelligence (“AI”). Like Tom Waits, who once sued to defend his unique “larynxization” from a sound-alike, lawyers affiliated with Universal Music Group were able to quickly convince streaming services to remove the track. In addition to copyright (which arguably did not apply), counsel for Drake and The Weeknd wielded an important weapon that Waits had previously employed as a “bee in the ear”: the right of publicity.

The right of publicity, a common-law or statutory tort available in most states, is a relatively recent addition to plaintiffs’ arsenals. Designed to protect against the misappropriation of one’s name, likeness, or identity for a commercial purpose, the right is now evolving beyond its celebrity-centric origins to serve as a commodity potentially held by anyone connected to or threatened by the internet. Technology-inspired shifts have caused companies to recognize that everyone’s identity has value (not just celebrities, artists, or influencers) while the explosive growth of generative AI has produced works that echo—with near-complete precision—established styles, characteristics, and personas. Thus, what once had been a consideration pertinent to only a select few whose public identities required safeguarding from human threats is now an urgent matter relevant to all persons who require protection from machine-based models and applications.

Given the tectonic changes currently underway, this note first explores how the right of publicity initially developed; in doing so, it touches on several decisions in the pre-digital age that established important principles affecting current jurisprudence. Next, we discuss how certain types of cases prevalent in the pre-internet era have reappeared in recent years, albeit in slightly altered form. We then analyze how today’s landscape has been radically altered by new technologies and practices, such as deepfakes, style transfers, web scraping, and the sale of Personally Identifiable Information (“PII”), and then review the latest cases involving the right to publicity in these areas. Finally, we conclude by looking at how the contours of the right of publicity might change in the near future, such as through the passage of a preemptive federal right or the clarification of the right’s scope of liability.

¹ Quotation by Tom Waits, referring to the decision by a federal jury to award him over \$2 million in damages from Frito-Lay Inc. and its advertising agency following their commercial use of a raspy singer who mimicked Waits. *See Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993); *see also* Paul Feldman, *Tom Waits Wins \$2 ½ Million in Voice-Theft Suit*, THE LOS ANGELES TIMES (May 9, 1990).

² *See, e.g.*, Chloe Veltman, “When You Realize Your Favorite New Song Was Written and Performed by . . . AI,” NPR (Apr. 21, 2023), *available at* <https://www.npr.org/2023/04/21/1171032649/ai-music-heart-on-my-sleeve-drake-the-weeknd>.

II. The Development of the Right of Publicity

The right of publicity in the United States “is meant to protect the *value* of an individual’s name, likeness, or other indicia of identity, by preventing it from being commercially exploited by another.”³ Originally intertwined with the right to privacy, following the Second Circuit’s 1953 decision in *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*,⁴ courts and legislatures “came to recognize a distinction between the personal right to be left alone and the business right to control use of one’s identity in commerce.”⁵ The right to privacy protects a person’s “dignity and peace of mind,” prevents him from being exposed to “the public eye” without permission, and compensates him for “injury to feelings.”⁶ In contrast, the right of publicity is “property-like in nature”; it serves a “‘commercial, rather than a personal tort,’ with damages calibrated in terms of commercial harm.”⁷

The right of publicity is currently a creature of state law, and approximately 36 states recognize the tort of a violation of one’s right of publicity, either by common law, statute, or both.⁸ The minority of states that do not recognize the right of publicity tend to recognize a similar invasion of privacy tort.⁹ A claim for violation of the right of publicity generally requires that the plaintiff show: (1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.¹⁰ The plaintiff may also be required to establish “a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.”¹¹

The contours of the right of publicity vary by state. In general, the right encompasses product advertisements but does not extend to news, entertainment, creative works, or other First Amendment-protected depictions.¹² While some jurisdictions specifically prohibit the commercial appropriation of an individual’s “name, voice, signature, photograph, or likeness,”¹³ others more broadly prohibit the use of “the indicia of identity of a person.”¹⁴ In some states, use of a plaintiff’s likeness is sufficient to trigger liability,

³ *In re Heart Commc’ns State Right of Publicity Statute Cases*, 632 F. Supp. 3d 616, 621 (S.D.N.Y. Dec. 19, 2022) (emphasis in original).

⁴ 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

⁵ *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 967 (10th Cir. 1996).

⁶ *Souza v. Exotic Island Enters., Inc.*, 68 F.4th 99, 121 (2d Cir. 2023) (citations omitted).

⁷ *Id.*

⁸ See Chang H. Chae, *Understanding Right of Publicity or Name, Image, Likeness (NIL)*, ACTEC Trust and Estate Talk Podcast Ep. 196 (Apr. 2022), available at <https://actecfoundation.org/podcasts/understanding-rights-of-publicity-name-image-likeness-nil/#:~:text=In%20my%20research%2C%20at%20last,Ohio%2C%20Oklahoma%2C%20Rhode%20Island%2C>.

⁹ See, e.g., Murhammer Colon, Madison J., *How Can Iowans Effectively Prevent the Commercial Misappropriation of Their Identities? Why Iowa Needs a Right of Publicity Statute*, 106 IOWA L. REV. 411, (NOV. 2020) (“In contrast to the majority of states, Iowa has not yet recognized a statutory or common law right of publicity. . . . While not the same, Iowa does recognize a common law right of privacy and the invasion of privacy tort.”); see also *Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995, 1002 (Colo. 2001) (noting that Colorado does not recognize the right of publicity but does recognize a claim for invasion of privacy by appropriation); *Ratermann v. Pierre Fabre USA, Inc.*, -- F. Supp.3d ----, 2023 WL 199533, at *5 (S.D.N.Y. Jan. 17, 2023) (noting that “New York does not recognize the common law right of publicity” but “[i]nstead, the right of publicity is encompassed under the Civil Rights Law *as an aspect of the right of privacy*”) (internal quotations and citations omitted).

¹⁰ See *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001); see also *Souza*, 68 F.4th at 121 (noting that New York Civil Rights Law §§ 50-51 requires “(i) use of plaintiff’s name, portrait, picture, or voice, (ii) within the state of New York, (iii) for purposes of advertising or trade, (v) without plaintiff’s written consent”).

¹¹ *Downing*, 265 F.3d at 1001 (citation omitted) (distinguishing between common-law claim under California state law and statutory claim for misappropriation under Cal. Civ. Code § 3344).

¹² See Restatement (Third) of Unfair Competition § 47, cmt. c.

¹³ Cal. Civ. Code § 3344.

¹⁴ Ala. Code § 6-5-772.

while others impose liability “only for use of a plaintiff’s likeness in connection with an advertisement or solicitation.”¹⁵ Whether the right of publicity continues post-mortem is also highly variable, with approximately 25 states recognizing some form of a right of publicity that continues after death—including, notably, California and New York.¹⁶

In the states that favor the more liberal application of the right of publicity, what initially began as a man’s limited “right in the publicity value of his photography, *i.e.*, the right to grant the exclusive privilege of publishing his picture,”¹⁷ soon grew well beyond a person’s portrait or picture following a series of “impersonator” cases—notably, *Onassis v. Christian Dior-N.Y., Inc.*,¹⁸ which involved a print advertising campaign by Christian Dior based around a model who “bore a striking resemblance” to Jacqueline Kennedy Onassis; *Midler v. Ford Motor Co.*,¹⁹ which involved Ford’s use in a television advertisement of a sound-alike singer to match the intonation and styling of Bette Midler; *Waits v. Frito-Lay, Inc.*,²⁰ which involved SalsaRio Doritos’ use in a radio advertisement of sound-alike singer to match the gravelly voice of Tom Waits; and *White v. Samsung Elec. Am., Inc.*,²¹ which involved Samsung’s use in a print advertisement of a robot whose wig, gown, and jewelry matched the style of “Wheel of Fortune” hostess Vanna White.

Collectively, these and similar cases²² from the more liberal jurisdictions stand for two important propositions:

First, the right of publicity protects against more than mere appropriation of one’s name or likeness. Instead, the right of publicity also extends to one’s “persona.” This is a broad and flexible concept for which bright-line rules and exact parameters generally do not exist, but which ensures that liability is more likely to attach where a relevant segment of the public can connect the plaintiff to the commercial work. Accordingly, the right of publicity can be said to protect more than just direct duplications of an original; it safeguards phrases, mannerisms, and the total sum of elements that result in an “unequivocal association the public could make with the individuals involved.”²³ Because “[t]hese elements are ‘different in kind’ from those in a copyright infringement case,” which is concerned with the unauthorized use of a fixed work in a tangible medium of expression,²⁴ a claim seeking redress under the right of publicity may be able to avoid federal copyright law preemption.

Second, the right of publicity does not require that actionable appropriations of identity be accomplished through any particular means. “It is not important *how* the defendant has appropriated the plaintiff’s identity, but *whether* the defendant has done so.”²⁵ Significantly, courts have kept the means of appropriation open-ended. In doing so, they have recognized “the impossibility of treating the right of publicity as guarding only against a laundry list of specific means of appropriating identity,” reasoning that to

¹⁵ *Davis v. Elec. Arts, Inc.*, 2017 WL 8948081, at *2 (N.D. Cal. Feb. 2, 2017).

¹⁶ *Chae*, *supra* n.8.

¹⁷ *Haelan Labs.*, 202 F.2d at 868.

¹⁸ 472 N.Y.S.2d 254, 257 (Sup. Ct. 1984), *aff’d*, 110 A.D.2d 1095 (1985).

¹⁹ 849 F.2d 460 (9th Cir. 1988).

²⁰ 978 F.2d 1093 (9th Cir. 1992).

²¹ 971 F.2d 1395 (9th Cir. 1992).

²² See, e.g., *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835-37 (6th Cir. 1983) (concluding that Johnny Carson had stated an actionable right of publicity claim under Michigan law against toiler manufacturer for appropriating his signature catchphrase, “Here’s Johnny,” even though it did not use his name or likeness); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, (9th Cir. 1974) (concluding that professional race car driver could state right of publicity claim where race car used in television commercial contained several distinctive decorations that matched his race car).

²³ *An Abridged History of the Right of Publicity*, available at <https://rightofpublicity.com/brief-history-of-rop>.

²⁴ *Waits*, 978 F.2d at 1100.

²⁵ *White*, 971 F.2d at 1398 (emphasis in original).

limit in advance the specific means would invite “the clever advertising strategist” to create work-around solutions.²⁶

III. The Right of Publicity in the Digital Era

A. More of the Same?

In the pre-digital age, right of publicity claims were “most frequently invoked by public figures or celebrities.”²⁷ This made sense given the pleading requirement that “the plaintiff must generally have developed a property interest with financial value in order to prove that he suffered damages”²⁸ and, during that era, those who intentionally placed themselves “in the public eye” were those who possessed cognizable “commercial value that attaches to their identities by virtue of their celebrity.”²⁹

The strong link between celebrity and the right of publicity has continued into the current digital era, with many of the same types of cases reappearing in slightly modified form. For example, like Vanna White seeking redress for the use of a look-alike robot in an advertisement, actress Lindsay Lohan brought a lawsuit in 2014 against the makers of the video game “Grand Theft Auto V” in which she alleged that the game’s use of a digital avatar that resembled aspects of her persona violated her right of publicity.³⁰ And, like Bette Midler and Tom Waits before him, singer Rick Astley recently filed a right of publicity claim against the rapper Yung Gravy for using an “indistinguishable imitation of Mr. Astley’s voice throughout the song ‘Betty (Get Money).’”³¹ Astley’s case is particularly interesting given that Yung Gravy acquired a license to use the composition copyright of Astley’s oft-memed 1987 hit “Never Gonna Give You Up” but failed to secure separate rights to copy the sound recording, thereby raising complex issues under copyright, fair use, and—due to parody and potentially transformative use—the First Amendment.

B. The New Landscape

However, the digital era’s impact on right of publicity litigation goes well beyond mere mimicry of past precedents. Multiple factors are at play:

As an initial matter, the previous “distinctions between public and private figures make little sense today as so-called private figures increasingly live public or quasi-public lives on Instagram, Twitter, Facebook, Pinterest, Periscope, and other online fora,” all of which are evolving rapidly.³² Users have formed emotional, reputational, and occasionally economic ties to their online profiles. Some have also purposefully (or accidentally) “gone viral,” thereby achieving a level of fame heretofore experienced only by celebrities. The social media profiles of these users, whether widely or narrowly disseminated, all have some economic value.

In addition to their intentionally crafted personas, users of interactive digital technologies and new media are also leaving an inadvertent digital footprint with virtually every click of the mouse. Indeed,

²⁶ *Id.*

²⁷ *Lerman v. Fhnt Distrib. Co.*, 745 F.2d 123, 124 (2d Cir. 1984).

²⁸ *Id.*

²⁹ *Jim Henson prods., Inc. v. John T. Brade & Assocs., Inc.*, 867 F. Supp. 175, 188 (S.D.N.Y. 1994).

³⁰ See *Lohan v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 111 (2018). The New York Court of Appeals ultimately concluded that a digital avatar could constitute an actionable “portrait” within New York’s Civil Rights Law §§ 50-51 but that avatar at issue was too “generic” to be “recognizable” as Lohan. *Id.* at 122-23.

³¹ *Astley v. Hauri*, Case No. 23SMCV00351, compl. (L.A. Sup. Ct. Jan. 26, 2023); see also Kyle Jahner, *‘Never Gonna Give You Up’ Voice Suit Rolls Many IP Issues*, BLOOMBERG LAW (Feb. 21, 2023), available at <https://news.bloomberglaw.com/ip-law/never-gonna-give-you-up-voice-suit-rolls-across-many-ip-issues>.

³² Jennifer Rothman, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 181 (2018).

commentators have dubbed social networks “a science fiction nightmare due to their capacity to gather and misuse the data on their users.”³³ This level of data tracking and gathering will only expand in the coming years. For instance, Extended Reality (XR) headsets and their associated peripherals used for experiencing the metaverse now capture optical and inertial tracking of head, body, and limb movements; sensing of facial expressions, auditory sensing of speech, and non-speech activity; context data such as location tracking, simultaneous localization, and mapping; and physiological data such as eye and gaze tracking.³⁴ In contrast to the pre-digital era in which only the persona of a celebrity had value, all the identity data generated by this system of surveillance capitalism has at least some level of economic significance.

Finally, advancements in technology have greatly expanded the ways one’s persona can be captured and utilized. For example, generative AI is a type of machine learning in which a program scrapes publicly available data and uses it to produce derivative works. Popular applications of generative AI include “deepfakes,” which are a type of synthetic media in which images or videos of a person have been swapped with another’s likeness, and software such as ChatGPT, a language model that can “converse” with human users and respond to a broad variety of queries. Generative AI is often trained by or targets aspects of an individual’s identity, such as facial images or voice recordings.

When combined with the two important propositions established by right of publicity litigation in the pre-digital era (*i.e.*, protection can often extend to one’s identity/persona and the means of wrongful appropriation remain unfixed), these elements have produced recent litigation and/or legislation that has pushed the envelope vis-à-vis the right of publicity. As outlined below, new developments with respect to the right of publicity in at least four key areas merit scrutiny: (1) deepfake technologies; (2) style transfers; (3) web scraping; and (4) the sale of PII.

1. Deepfake Technologies

Deepfakes, a portmanteau of “deep learning” and “fakes,” are “highly realistic and difficult-to-detect digital manipulations of audio or video.”³⁵ The speed, believability, and scalability of deepfake technology has grown exponentially in recent years, rendering it extremely difficult to detect or stop. But the regulation of deepfakes has proven challenging. Thus far, only a few states have passed laws targeted at deepfakes, and those that have done so have generally focused on its pornographic implications. For instance, in Hawaii, Texas, Virginia, and Wyoming, nonconsensual pornographic deepfakes are a criminal violation, whereas New York and California have created only a private right of action that allows victims to bring civil suits (Minnesota provides for both criminal and civil penalties).³⁶

But the use of deepfakes has wider implications. Given that the technology could lead to the replacement or manipulation of human actors (alive or dead), Screen Actors Guild-American Federation of Television and Radio Artists (“SAG-AFTRA”), a major entertainment industry union, has called on states to update laws to account for unauthorized deepfakes and digital avatars. In response, New York amended its Civil Rights Laws to: (1) extend the right of publicity for 40 years after death for any resident whose general likeness “has commercial value at the time of his or her death, or because his or her death,” regardless of

³³ Margaret Ryzar, Blog Post, “I Quit Facebook, But What About Those Who Remain?”, Prawfsblawg (Sept. 26, 2018), available at <https://prawfsblawg.blogs.com/prawfsblawg/2018/09/i-quit-facebook-but-what-about-those-who-remain-.html>.

³⁴ Mark McGill, *The IEEE Global Initiative on Ethics of Extended Reality (XR) Report – Extended Reality (XR) and the Erosion of Anonymity and Privacy*, in EXTENDED REALITY (XR) AND THE EROSION OF ANONYMITY AND PRIVACY – WHITE PAPER 7 (2021).

³⁵ Robert Chesney & Danielle Citron, *Deepfakes and the New Disinformation War: The Coming Age of Post-Truth Geopolitics*, FOREIGN AFFS., Jan./Feb. 2019, at 147-48.

³⁶ Isaiah Poritz, *States Are Rushing to Regulate Deepfakes as AI Goes Mainstream*, BLOOMBERG LAW (June 20, 2023), available at <https://www.bloomberg.com/news/articles/2023-06-20/deepfake-porn-political-ads-push-states-to-curb-rampant-ai-use>.

whether that person used his or her likeness for commercial purposes during life, and (2) bar the use of “a deceased performer’s *digital replica* in a scripted audiovisual work as a fictional character or for the live performance of a musical work” if that use “is likely to deceive the public into thinking it was authorized” by the rights holder.³⁷

One of the more noteworthy cases to involve the right of publicity in the context of a deepfake technology is a putative class action filed in federal court in April 2023 against NeoCortext, Inc., the developer of the “Reface” smartphone application, by Kyland Young, a cast member of several reality television shows, including the CBS show *Big Brother*.³⁸ Reface allows users to swap their faces with actors, musicians, athletes, celebrities, and other well-known individuals. The app contains images and videos of those figures, which it compiled from a variety of websites and has stored in a searchable catalogue. While available in a free version with image watermarking, the subscription version of Reface (“Reface PRO”) gives users complete access to the catalogue with no such watermarking. Young sued after discovering that Reface was using images and videos of him without his permission and without compensation. Young has asserted a single cause of action against NeoCortext for violation of his right of publicity under California Civil Code section 3344 based on the theory that watermarked images of him were used as “teaser” advertisements for the full subscription version of the app.

NeoCortext moved to dismiss and brought a contemporaneous special motion to strike under California’s anti-SLAPP statute, arguing that Young’s claim was preempted by the Copyright Act, barred by the First Amendment, and failed to make a *prima facie* showing that NeoCortext violated his right of publicity. The district court denied each motion in an opinion issued on September 5, 2023.³⁹ It concluded that “Young’s right of publicity claim does not fall within the subject matter of copyright” because it did not challenge the ownership or control of the images available on Reface, but was instead focused on Reface’s use of “his likeness on advertising and merchandising when it allows users to create a product containing his image.”⁴⁰ With respect to the First Amendment, the court held that the app’s use of Young’s images were not sufficiently “transformative” to be protected as speech as a matter of law because “the end photograph still depicts the rest of Young’s body in the setting in which he became a celebrity.”⁴¹ Finally, the court determined that Young had met the pleading requirement that the appropriation be “knowingly” effectuated by alleging that the app was programed to scrape and index clips and images of him.⁴² NeoCortext appealed the district court’s decision on September 8, 2023, and the case has been stayed pending the Ninth Circuit’s resolution of the appeal.

2. Style Transfers

In addition to targeting deepfake technologies, plaintiffs are now attempting to assert right of publicity claims arising from generative AI even when the technology does not depict their actual image or employ their genuine voice. Some generative AI programs allow for “style transfers.” In image generation, style transfer occurs when a generative AI program is requested to “draw [X] in the style of [Y].” In music generation, it occurs in response to requests to “sing [X] in the style of [Y].” Because the algorithms behind such programs are trained on the actual work of the artists in question, plaintiffs typically bring direct and

³⁷ N.Y. Civ. Rights Law §§ 50-f(1)(b), 50-f(2)(b) (as amended by S5959D).

³⁸ See *Young v. NeoCortext, Inc.*, Civ. A. No. 2:23-cv-02496-WLH(PVCx), compl. (N.D. Cal. Apr. 3, 2023).

³⁹ See *Young v. NeoCortext, Inc.*, Civ. A. No. 2:23-cv-02496-WLH(PVCx), slip op. (N.D. Cal. Sept. 5, 2023).

⁴⁰ *Id.* at 11.

⁴¹ *Id.* at 14.

⁴² *Id.* at 15.

vicarious copyright infringement claims, as well as related causes of action for violation of the Digital Millennium Copyright Act, unjust enrichment, conversion, and unfair competition.⁴³

However, because these programs also produce “clones” that resemble an artist’s actual work, some plaintiffs are beginning to include common-law and/or statutory right of publicity claims—as did the named plaintiffs in *Andersen v. Stability AI Ltd.*, a putative class action against the creators, sellers, markers, and/or distributors of the AI image-generation programs Stable Diffusion, the Midjourney Product, DreamStudio, and DreamUp.⁴⁴ Like Vanna White, these plaintiffs contend that their “names and artistic identities are not limited to a specific copyrighted image or work,” but extend to their “entire corpus of work” that allows “consumers and the public to identify work ‘in the style’” in which they operate.⁴⁵ According to plaintiffs, the “knock-off” images based on the plaintiffs’ “distinct artistic styles” and produced by these style-transfer programs dilute the market, confuse consumers, deprive artists of commissions, and cannot be considered “transformative” because they “merely capitalize[] on Defendants’ theft of Plaintiffs’ artistic work and the associated value of Plaintiffs’ names and identities.”⁴⁶

Defendants have separately moved to dismiss all claims, including those focused on the right of publicity. Defendants insist that plaintiffs’ right of publicity claims are preempted by the Copyright Act, contending that: (1) plaintiffs are attempting to recast a copyright claim (the reproduction or counterfeiting of copyrighted works by the plaintiffs) as a “persona” claim; (2) the “ideas implicit in a work” (*i.e.*, one’s artistic style) falls within the subject matter of copyright for the purposes of preemption analysis; (3) plaintiffs have failed to allege that their identities were commercially exploited via advertising or in merchandise; and (4) the injuries of which plaintiffs complain—harm from a market flooded with knock-off images—place their claims within copyright’s realm.⁴⁷ Defendants have also argued that plaintiffs cannot make out a *prima facie* claim for a right of publicity violation because defendants do not actually use plaintiffs’ names (instead, users enter the names via a text prompt, like a Google search), “style” is not equivalent to “identity,” neither the plaintiffs’ names nor their identities are used to sell any products (such as knock-off art), and the indiscriminate web-crawling used to harvest plaintiffs’ images does not constitute a “knowing use” of plaintiffs’ identities.⁴⁸

On July 19, 2023, the district court heard argument on defendants’ motions and then orally issued a tentative ruling. While the court indicated it was inclined to dismiss virtually all claims with leave to amend, it has yet to issue a final written decision as of this writing.⁴⁹ Given that the court’s oral tentative was focused mainly on the lack of specificity of various allegations and potential pleading defects in plaintiffs’ copyright claims, little can be gleaned at the moment about the fate of plaintiffs’ right of publicity causes of action, which may need to wait until an amended complaint and a second round of case-dispositive briefing to be fully adjudicated.

However, given the current lack of evidence directly connecting defendants’ use of plaintiffs’ names, likenesses, or persona to the promotion of the AI tools at issue (or use some other overly commercial way),

⁴³ See, e.g., *Chabon v. OpenAI*, Civ. A. No. 3:23-cv-04625, compl. (Sept. 8, 2023); *Silverman v. OpenAI*, Civ. A. No. 3:23-cv-03416, compl. (N.D. Cal. July 7, 2023); *Kadrey v. Meta Platforms, Inc.*, Civ. A. No. 3:23-cv-03417, compl. (N.D. Cal. July 7, 2023).

⁴⁴ *Andersen v. Stability AI Ltd.*, Civ. A. No. 3:23-cv-00201, compl. ¶¶ 201-222 (N.D. Cal. Jan. 13, 2023) (asserting both statutory and common-law right of publicity claims under California law).

⁴⁵ *Id.* ¶ 215.

⁴⁶ *Id.* ¶¶ 221-222.

⁴⁷ *Andersen v. Stability AI Ltd.*, Civ. A. No. 3:23-cv-00201, Stability AI Ltd.’s mot. to dismiss at 13-17 (N.D. Cal. Apr. 18, 2023).

⁴⁸ *Id.* at 17-23.

⁴⁹ See Copyright Lately, Blog Post, “AI Art Copyright Class Action Hearing Update,” LinkedIn (July 19, 2023), available at https://www.linkedin.com/posts/copyrightlately_ai-art-copyright-class-action-hearing-update-activity-7087567869890220032-ytSv/.

plaintiffs may have a difficult time sustaining their right of publicity claims. Absent such a link, the court will more likely see those claims as a backdoor attempt to control the artistic works used in training sets, rendering the case more like a typical action for copyright infringement. Regardless, given that “style transfers” play an important role in many generative AI programs, the court’s ultimate resolution of the parties’ dispute will be closely watched, as it will prove an important precedent in this space for visual artists, musicians, and authors.

3. Web Scraping

“Web scraping”—the process of using bots to sift through and extract content, data, and HTML code from websites—represents another important intersection between developing digital technologies and the expanding right of publicity.

Early cases involving the right to publicity and scraping technologies arose out of practices by social networking sites, which often aggregated their users’ PII to create targeted advertisements and endorsements promoting the fact that a “friend” within one’s “network” actually liked or purchased a product.⁵⁰ Although previous right of publicity plaintiffs had usually been celebrities or “models, entertainers, or other professionals who have cultivated some commercially exploitable value through their own endeavors,” courts analyzing social media PII claims generally concluded that “nothing requiring that a plaintiff’s commercially exploitable value be a result of his own talents or efforts to state a claim for damages” under a right of publicity cause of action.⁵¹ In other words, all individuals have a right of publicity irrespective of their renown or talents. Indeed, as marketers are aware, the most commercially valuable recommendations usually come from one’s own friends—not distant celebrities.⁵²

Over time, these cases proved sufficiently costly or threatening (especially in the instance of *Fraleigh v. Facebook*, a putative class action which survived a motion to dismiss and ultimately settled) that social networking sites soon turned a new solution to avoid right of publicity claims: consent, which acts as a complete defense.⁵³ Social networks have generally added or modified exculpatory provisions to the terms of their service agreements that grant themselves a license to scrape and use PII in this manner in exchange for the users’ access to their platforms, thereby heading off at the pass potential right of publicity causes of action.

Obtaining such consent is not currently a viable option for most generative AI, however. Accordingly, plaintiffs have begun asserting claims against generative AI programs in which they contend that the act of scraping data that contains aspects of an individual’s identity—by itself—constitutes actionable misappropriation under the right of publicity. The first major decision to address this issue, *In re Clearview AI, Inc., Consumer Privacy Litigation*, shows a potential path forward for such claims.⁵⁴ In that case, a class of consumers filed suit against the makers of Clearview AI, a facial recognition software designed for both law enforcement and private use that was trained on more than three billion facial images sourced from the internet. In conjunction with various common-law tort and privacy-based claims, the named plaintiffs also alleged that use of their facial images to train the software contravened their right of publicity under Virginia, New York, or California law, respectively.⁵⁵

⁵⁰ See, e.g., *Parker v. Hey, Inc.*, 2017 Cal. Super. LEXIS 609 (Cal. Sup. Ct., S.F. Cnty., Apr. 14, 2017); *Fraleigh v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011); *Cohen v. Facebook, Inc.*, 2011 WL 5117164 (N.D. Cal. Oct. 27, 2011); *Cohen v. Facebook, Inc.*, 798 F. Supp. 2d 1090 (N.D. Cal. 2011).

⁵¹ *Fraleigh*, 830 F. Supp. 2d at 808.

⁵² *Id.* (quoting Facebook’s COO).

⁵³ See Cydney Tune & Lori Levine, *The Right of Publicity and Social Media: A Challenging Collision*, LICENSING J., at 16 (June/July 2015).

⁵⁴ 585 F. Supp. 3d 1111 (N.D. Ill. 2022).

⁵⁵ See *id.* at 1119, 1127-30.

In an opinion issued in February 2022, the district court denied defendants’ motion to dismiss with respect to virtually every claim, and dismissed only plaintiffs’ cause of action under California’s Unfair Competition Law.⁵⁶ With respect to plaintiffs’ right of publicity claims, the court concluded that plaintiffs had: (1) “sufficiently alleged that the Clearview defendants profited from the unconsented use of their likenesses under ‘for purposes of trade’” under Virginia law and could not show a sufficient “connection to public affairs” to merit First Amendment protection, (2) adequately alleged injury under California law because “defendants did not compensate them for use of their likenesses, identities, and photographs” and successfully established defendants’ “knowing use” by pleading that defendants purposefully “access[ed] the Clearview database for a profit,” and (3) met New York’s “for the purposes of trade” requirement by alleging that defendants developed “technology to invade the privacy of the American public for their own profit.”⁵⁷ As detailed in periodic joint status reports that the parties have been submitting,⁵⁸ the *Clearview AI* case appears on track to settle. Although this means that further legal developments in the web scraping area will transpire only through other cases, the *Clearview AI* decision affords plaintiffs a potentially viable pathway for right to publicity claims against web scrapers—thereby setting the stage for additional litigation aimed at redressing this growing practice.

4. Sale of Personally Identifiable Information (PII)

Finally, companies that sell either publications (such as magazine publishers) or goods and services (such as online retailers or app makers) necessarily gain access to basic PII of their customers, including subscribers’ names, demographic information, and subscription preferences. These companies typically maintain this PII in digital databases and often sell, license, rent, exchange, or otherwise disclose it to third parties, including data miners, data aggregators, data appenders, data cooperatives, list rental recipients, list exchange recipients, and list brokers. The value of this PII continues to increase as the world moves increasingly online and it serves as an important source of revenue for companies who possess this transferable information.

Approximately 13 states have passed comprehensive data privacy laws that address the collection and sale of such PII.⁵⁹ In addition to potential privacy-based claims, aggressive class action plaintiff lawyers have recently filed a series of lawsuits in which they allege that the commercial use of this PII separately contravenes the affected class members’ right of publicity.⁶⁰

However, efforts to expand the right of publicity in this area have thus far borne a meager harvest. Even if “publicity is not explicitly stated as an element *per se*” in a state-law misappropriation statute, courts have generally limited the scope of protection to “the right to protect against commercial use of a person’s identity through disclosure to the *general public*, without the person’s consent.”⁶¹ Because the sale or exchange of PII in this context involves a “limited, private disclosure only to the third parties who purchase the Subscriber Lists” and not the general public, it falls outside of the “rationale for an anti-publicity statute in the first instance.”⁶²

⁵⁶ *See id.*

⁵⁷ *Id.* at 1127-30.

⁵⁸ *See, e.g., In re Clearview AI Inc., Consumer Priv. Litig.*, Civ. A. No. 1:21-cv-00135, joint status report and request to set status hearing on settlement (N.D. Ill. Sept. 6, 2023).

⁵⁹ *See* Andrew Folks, *US State Privacy Legislation Tracker*, INTERNATIONAL ASSOCIATION OF PRIVACY PROFESSIONALS, available at <https://iapp.org/resources/article/us-state-privacy-legislation-tracker/>.

⁶⁰ *See, e.g., Bohnak v. Trusted Media Brands, Inc.*, 2023 WL 2691620, at *3-4 (S.D.N.Y. Mar. 29, 2023); *In re Heart Commc’ns State Right of Publicity Statute Cases*, 2022 WL 17770152, at *4 (S.D.N.Y. Dec. 19, 2022); *Dodd v. Advance Mag. Publishers, Inc.*, 2022 WL 17764815, at *1 (S.D.N.Y. Dec. 19, 2022); *Wallen v. Consumer Reports, Inc.*, 2022 WL 17555723 (S.D.N.Y. Dec. 9, 2022); *Farris v. Orris Co.*, 2022 WL 10477051, at *1 (D. Vt. Oct. 18, 2022).

⁶¹ *Wallen*, 2022 WL 17555723, at *5 (emphasis added).

⁶² *Id.* at *6.

In addition, courts have determined that there is no right of publicity claim “where the plaintiff’s identity is the product being sold”; rather, to meet the “commercial use” prong, “the plaintiffs’ identity must be used to promote the sale of *another* product.”⁶³ Finally, courts have been wary about employing the right of publicity as an amorphous and “sweeping data privacy law,” especially because, “upon codification,” the right “was not contemplated to encompass any unconsented sale or rental of personal information in the data industry.”⁶⁴ For these reasons (and given the sheer prevalence of the practice), it is unlikely that a transaction involving the pure sale of PII will support a right of publicity cause of action.

IV. What’s Next?

A. Federalizing the Right of Publicity?

As noted above, the right of publicity is presently a creature of state law. Those wishing to act in accordance with its contours or wield it as a litigation cudgel must consult a patchwork of conflicting statutes and common-law decisions across the majority of states that recognize the right. Given that the parameters of the right can fluctuate wildly between jurisdictions, it is often challenging to advise companies on the best practices to undertake and difficult to predict how courts will rule in a potential dispute. For this reason, many commentators have begun calling for new legislation to establish a preemptive federal right of publicity or federal anti-impersonation right. Somewhat unexpectedly, this topic was the primary focus of the Senate Judiciary Subcommittee’s July 12, 2023 hearing on AI and intellectual property.⁶⁵ The apparent momentum towards codification of a preemptive federal right of publicity warrants close attention.

Upon initial blush, establishing clarity through a preemptive federal right of publicity in this copyright-adjacent area makes a great deal of sense, especially because the advancements in generative AI and other digital technologies outlined above have increasingly had right of publicity implications and affect large numbers of people. Indeed, at the Subcommittee’s recent hearing, there was “a consensus” among the participants that a preemptive federal right “could provide greater predictability, consistency, and protection.”⁶⁶ Senator Christopher Coons suggested a federal right of publicity in his remarks, as did Senators Marsha Blackburn and Amy Klobuchar, who are normally on opposite sides of the aisle on most issues.⁶⁷ Jeffrey Harleston, General Counsel for Universal Music Group, similarly advocated for such a federal right, as did concept artist Karla Ortiz, law professor Matthew Sag, and Dana Rao, the Executive Vice President and General Counsel of Adobe.⁶⁸

Others, however, have cautioned against such a drastic step. Some worry that—based on the remarks before the Subcommittee—an expansive federal approach would be adopted, which could hamper new technologies and lead to a great deal of litigation uncertainty because preventing “anyone from building or using a tool to generate something in a person’s ‘style’ would be far broader and more nebulous” than a “limited right to prevent others from using your name or face to falsely endorse a product.”⁶⁹ Moreover, as these commentators reason, “[a] vague obligation not to ‘appropriate’ anyone’s ‘style’ would also make it difficult to identify the universe of people whose rights are potentially implicated in order to negotiate with

⁶³ *Bohnak*, 2023 WL 2691620, at *4 (emphasis added).

⁶⁴ *Wallen*, 2022 WL 17555723, at *6; *Bohnak*, 2023 WL 2691620, at *3.

⁶⁵ See Jennifer Rothman, Blog Post, “Federal Right of Publicity Takes Center Stage in Senate Hearings on AI,” Authors Alliance (July 28, 2023), *available at* <https://www.authorsalliance.org/2023/07/28/federal-right-of-publicity-takes-center-stage-in-senate-hearing-on-ai/>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Corynne McSherry, Blog Post, “A Broad Federal Publicity Right Is a Risky Answer to Generative AI Problems,” Electronic Frontier Foundation (July 18, 2023), *available at* <https://www.eff.org/deeplinks/2023/07/broad-federal-publicity-right-risky-answer-generative-ai-problems>.

them,” or—even worse—could reduce long-term creativity if new artists are overly cautious about invoking an established artist’s “style.”⁷⁰

Another concern is that standardization and codification of the right could make it more easily “transferable away from the underlying identity-holders,” which might negatively impact the very people the right of publicity was meant to protect.⁷¹ This concern has been at the heart of the recent SAG-AFTRA strike, as many performers are worried that savvy commercial operators such as movie studios or record labels will exploit their leverage over young actors or musicians to obtain the artists’ publicity rights or “build waivers into standard contracts, taking advantage of workers who lack bargaining power,” thereby “leaving the right to linger as a trap only for unwary or small-time creators.”⁷² Finally, a preemptive federal right may not benefit plaintiffs. “If there are clear and preemptive exemptions to liability this will be a win for many repeat defendants in right of publicity cases.”⁷³

B. Clarifying the Scope of Liability?

On the other hand, a federal preemptive right could solve another vexing issue that remains unsettled—the scope of liability under the right of publicity. This topic is especially fraught given the proliferation of social media and the dynamic growth of generative AI. For example, if an anonymous user or untraceable foreign company posts advertisements that include deepfake endorsements on a social media site, would the infringed party have any recourse?

Under federal law, section 230 of the Communications Decency Act (“CDA”) generally shields tech platforms from liability for tortious acts committed by their users.⁷⁴ Similarly, in its recent amendments to its Civil Rights Law bearing on the right of publicity, New York: (1) explicitly exempted from liability advertisers who carry advertisements that violate its right of publicity law unless such advertisers had “actual knowledge by prior notification of the unauthorized use,”⁷⁵ and (2) further specified that its law does not alter the immunities conferred by section 230 of the CDA.⁷⁶

Nevertheless, determining the underlying nature of the right of publicity is critical to whether CDA protection is afforded to tech platforms—namely, is the right of publicity more akin to a privacy right or an intellectual property right? Certain exceptions fall outside of the CDA’s shield, including for the infringement of intellectual property rights.⁷⁷ In 2007, the Ninth Circuit held that Section 230(e)(2)’s intellectual property exception applied only to federal claims, and that the right of publicity did not fall under the exception.⁷⁸ Other notable jurisdictions, including the United States District Court for the Southern District of New York, have agreed that right of publicity claims “do not fall within the intellectual property exception to Section 230” and thus advertisers and social media platforms are immune from liability for right of publicity claims that stem from user-prepared content.⁷⁹ But other courts, including the Third Circuit and the United States District Court for the District of New Hampshire, have disagreed and have instead concluded that “the right

⁷⁰ *Id.*

⁷¹ Rothman, *supra* n.65; *see also* Benjamin Rodrigues, Blog Post, “Navigating Actors’ Publicity Rights in the Age of Deepfakes and A.I.,” *Fordham Intellectual Prop., Media & Entm’t L. J.* (Mar. 30, 2023), *available at* <http://www.fordhamiplj.org/2023/03/30/navigating-actors-publicity-rights-in-the-age-of-deepfakes-and-a-i/>.

⁷² McSherry, *supra* n.69.

⁷³ Rothman, *supra* n.65.

⁷⁴ *See* 47 U.S.C. § 230.

⁷⁵ N.Y. Civ. Rights Law § 50-f(9) (as amended by S5959D).

⁷⁶ *Id.* § 50-f(12) (as amended by S5959D).

⁷⁷ *See* 47 U.S.C. § 230(e)(2) (“Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.”).

⁷⁸ *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007) (“In the absence of a definition from Congress, we construe the term ‘intellectual property’ to mean ‘federal intellectual property.’”).

⁷⁹ *Ratermann*, 2023 WL 199533, at *6.

of publicity is a widely recognized intellectual property right,” “the section 230(e)(2) limitation applies to state intellectual property law,” and—as a result—advertisers and social media platforms may not be immune from liability for right of publicity claims that stem from user-prepared content.⁸⁰

Given this jurisdictional split, the issue of whether social media companies and other tech platforms may be liable when their users or advertisers violate an individual’s right of publicity remains an unsettled question that would benefit from a global resolution. Interestingly, a bipartisan pair of U.S. senators—Senators Josh Hawley and Richard Blumenthal—have proposed a bill (the “No Section 230 Immunity for AI Act”) that would amend the CDA to strip immunity from AI companies in civil claims or criminal prosecutions involving the use or provision of generative AI and pave the way for harmed consumers to sue over the dissemination of deepfakes and other harmful misuse.⁸¹ While this bill may ultimately have important implications for generative AI companies in defending against right of publicity claims (by eliminating a typically pleaded defense), at present it does not explicitly address or resolve the section 230 quandary facing social media and other tech platforms.

However these statutory and common-law principles play out, developments in the new digital era generally—and with respect to generative AI in particular—are reinvigorating interest in the right of publicity. These changes have transformed the right of publicity from an overlooked tort available to only a select few into an important tool for protecting the identities of all persons in our increasingly online world. Accordingly, one should expect even more right of publicity litigation in the years to come as the contours of the tort become better defined, thereby rendering the need for experienced counsel even more critical should disputes in this area arise.

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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⁸⁰ *Hepp v. Facebook*, 14 F.4th 204, 210-14 (3d Cir. 2021); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 298-303 (D.N.H. 2008).

⁸¹ Allison Grande, “Bipartisan Senate Bill Aims to Strip Liability Shield for AI,” *Law360* (June 14, 2023), *available at* <https://www.law360.com/articles/1689163/bipartisan-senate-bill-aims-to-strip-liability-shield-for-ai>.

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