

FAME, FAKES, AND THE FIRST AMENDMENT: A THREE- STATE ANALYSIS OF THE RIGHT OF PUBLICITY IN ADDRESSING DEEPFAKES

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INTRODUCTION

Celebrity images—and their sponsored content—are ubiquitous. Consumers can usually trust that the images are of an actual person or that the star of the content was involved in its creation. Yet, this trust has been muddled as artificial intelligence has become exponentially more accessible to the general public.¹ Greater accessibility

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¹ Jon M. Garon, *An AI's Picture Paints a Thousand Lies: Designating Responsibility for*

to AI increases the ability of people to mimic speech by others, or create speech that appears to be from another person altogether, stirring confusion about who is actually speaking and ultimately making the reputational risk to celebrities and public figures higher than ever before. The state right of publicity could provide an interim cause of action to address the reputation and commercial risks arising from the infinite uses of celebrity images. However, the current state of the right of publicity is an uneven patchwork of protections where the gaps overwhelm the coverage. A federal right of publicity would serve to better protect plaintiffs and create a clear path forward through the disarray of state actions for the right of publicity, federal copyright law, the Communications Decency Act, and the varied interpretations of the First Amendment's application to AI speech.

Part I of this Note will set the scene of current concerns with deepfakes² by those in media³ and pending changes in the right of publicity landscape. Part II discusses the standing of the right of publicity in three states. Parts III and IV address the current balancing tests for the First Amendment and intellectual property statutes. Part V examines the pathway for expansion of the right of publicity federally

Visual Libel, 3 J. FREE SPEECH L. 425, 427–28 (2023). Garon summarizes the technological changes of the last few years as follows:

The release of [new versions of AI programming] dramatically expanded the universe for synthetic imagery generated entirely by text prompts rather than by feeding the computer system preexisting pictures and videos. In the earlier AI training models, the deepfakes were created primarily by generative adversarial networks (GANs), a form of unsupervised machine learning in which a generator input competes with an “adversary, the discriminator network” to distinguish between real and artificial images. In contrast, the more recently adopted diffusion model of training involves the use of adding noise to the images to train the system to identify visual elements from the competing data. . . . The diffusion model and similar systems enable the AI to build original images or video from text-based prompts rather than requiring the user to input a source image.

Id.

² See U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-379SP, SCIENCE & TECH SPOTLIGHT: DEEPFAKES 1 (2020) (“A deepfake is a video, photo, or audio recording that seems real but has been manipulated with AI. . . . Deepfakes can depict someone appearing to say or do something that they in fact never said or did.”).

³ While a large number of deepfake cases and concerns arise out of deepfakes of pornographic material, this Note will focus on non-pornographic deepfakes, as pornographic deepfakes have a clear legal framework through the *Miller v. California* test, analyzing “[1] whether the average person, applying contemporary community standards would find that the work . . . appeals to the prurient interest; [2] whether the work depicts or describes sexual conduct, in a patently offensive way . . . ; [and] [3] whether the work . . . lacks serious literary, artistic, political, or scientific value.” Eric Kocsis, *Deepfakes, Shallowfakes, and the Need for a Private Right of Action*, 126 DICK. L. REV. 621, 648 (2022).

to combat the threat posed by deepfakes and Part VI analyzes the interplay with intellectual property doctrines and the First Amendment.

I. CONCEPTUALIZING AI SPEECH

How the public, and the courts, treat and conceptualize the content created by artificial intelligence will determine what remedies and causes of action are available for those who are digitally replicated. Deepfakes have pictured celebrities in social media advertisements for products with which they are not affiliated.⁴ In videos, a celebrity might appear to sing or dance to a viral song they never actually performed.⁵ Donald Trump posted an AI-generated image of Taylor Swift during the 2024 presidential election accepting an endorsement she never provided.⁶

While this AI-generated content is speech and has been treated as such when evaluated by the courts,⁷ the courts are also currently debating its eligibility for copyright protection.⁸ The categorization of deepfakes by the courts, as speech, art, or intellectual property, will be highly significant for the larger treatment and protections afforded as speech both for First Amendment grounds and intellectual property protections.⁹ Moreover, the jurisdiction where each claim is raised currently impacts the categorizations and potential protections.¹⁰ Some jurisdictions and categories also require evaluation of the commercial impact of the content; but deepfakes can tread on the influence and reputation a celebrity can hold or exert for alternative purposes, whether commercial or not.¹¹ For celebrities this raises additional concerns, as a

⁴ See Will Bedingfield, *Why Hollywood Really Fears Generative AI*, WIRED (June 2, 2023, 6:00 AM), <https://www.wired.com/story/hollywood-actors-artificial-intelligence-performance/> [https://perma.cc/9UTR-FX94] (describing a video in which a Deepfake Ryan Reynolds advertises a Tesla).

⁵ See CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., LSB11052, ARTIFICIAL INTELLIGENCE PROMPTS RENEWED CONSIDERATION OF A FEDERAL RIGHT OF PUBLICITY 3 (2024) [hereinafter CRS REPORT] (discussing an “AI-generated song called ‘Heart on My Sleeve,’ which sounded like it was sung by the artist Drake[,] was heard by millions of listeners,” and was ultimately removed from the site for reasons unrelated to the imitation of Drake’s voice).

⁶ Dan Merica & Ali Swenson, *Trump’s Post of Fake Taylor Swift Endorsement Is His Latest Embrace of AI-Generated Images*, APNEWS (Aug. 20, 2024, 4:48 PM), <https://apnews.com/article/trump-taylor-swift-fake-endorsement-ai-fec99c412d960932839e3eab8d49fd5f> [https://perma.cc/7U7L-CTNS].

⁷ See *Young v. NeoContext, Inc.*, 690 F. Supp. 3d 1091, 1098, 1100 (C.D. Cal. 2023).

⁸ *Thaler v. Perlmutter*, 687 F. Supp. 3d 140, 146 (D.D.C. 2023).

⁹ Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 134–35 (2020).

¹⁰ *Id.* at 129–32 (surveying different approaches taken by different jurisdictions).

¹¹ See Mark Roesler & Garrett Hutchinson, *What’s in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, ABA (Sept. 16, 2020), <https://www.americanbar>

celebrity's image is cultivated as a brand and the celebrity relies on controlling that brand's narrative both on- and off-screen.¹²

A. Media Concerns

The potential for AI to mimic voices and likenesses of popular figures has raised concerns from Hollywood to the White House.¹³ Addressing the use of artificial intelligence in writing and performing in movies and television was a key topic in the Writers Guild of America (WGA) and Screen Actors Guild–American Federation of Television and Radio Artists (SAG-AFTRA) union strikes.¹⁴ During negotiations before the actors' strike, one of the proposed agreements between studios and SAG-AFTRA included language on the use of actors' likenesses, which would have included minimum pay for digital replicas of background actors.¹⁵ The WGA specifically demanded that studios guarantee that ChatGPT would not be used to re-write scenes written by people and AI would not be used to write source material that is used to adapt into projects.¹⁶ Both unions successfully negotiated terms related to artificial intelligence in their respective fields.¹⁷ SAG-AFTRA reached a tentative deal that prohibits studios from creating digital replicas of talent without payment or approval.¹⁸ Similarly, the WGA negotiated a provision that grants union members a say on whether or not they use AI, and requires companies to disclose if AI was used or if AI-generated material was incorporated.¹⁹ However, the contracts did not fully meet the demands of the Screen Actors Guild, and the agreement contains provisions that may allow studios to replace people with AI-objects.²⁰

.org/groups/intellectual_property_law/publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/ [https://perma.cc/Q2AP-3NHV].

¹² *Id.*

¹³ CRS REPORT, *supra* note 5, at 1, 3.

¹⁴ Brooks Barnes et al., *Striking Actors and Hollywood Studios Agree to a Deal*, N.Y. TIMES (Nov. 8, 2023), <https://www.nytimes.com/2023/11/08/business/media/actors-strike-deal.html> [https://perma.cc/4ALK-NQD4].

¹⁵ Andrew Webster, *Actors Say Hollywood Studios Want Their AI Replicas—For Free, Forever*, THE VERGE (July 13, 2023, 4:35 PM), <https://www.theverge.com/2023/7/13/23794224/sag-aftra-actors-strike-ai-image-rights> [https://perma.cc/78U4-M7SS].

¹⁶ See Noam Scheiber & John Koblin, *Will a Chatbot Write the Next 'Succession'?*, N.Y. TIMES (May 2, 2023), <https://www.nytimes.com/2023/04/29/business/media/writers-guild-hollywood-ai-chatgpt.html> [https://perma.cc/G4DN-HZNB].

¹⁷ Barnes et al., *supra* note 14.

¹⁸ *See id.*

¹⁹ Rebecca Klar, *How Hollywood Writers Set a New Standard for AI Protection*, THE HILL (Oct. 4, 2023, 6:00 AM), <https://thehill.com/policy/technology/4235980-how-hollywood-writers-set-a-new-standard-for-ai-protections/> [https://perma.cc/ZL82-97FL].

²⁰ Natalie Jarvey & Joy Press, *Labor Pains and Gains: The Winners and Losers of the*

In the music industry, the concerns over AI-generated recordings²¹ contributed to Universal Music's move to pull all of its artists' music off of TikTok.²² Universal claimed that the app not only contained AI-generated recordings of their artists' music but also developed "tools to enable, promote and encourage AI music creation on the platform itself."²³ Videos previously using Universal artists' music were muted and the songs from popular artists, such as Taylor Swift and Ariana Grande, are no longer available on their profiles.²⁴ Universal Music is the largest music conglomerate of labels and has deals with thousands of artists, and its CEO has been vocal on the subject of the creation of standards for the use of AI in the industry.²⁵ Across traditional and new media, concerns around AI and deepfakes have driven calls for change both at the state and federal level.²⁶ However, clashes between technology companies, scholars, and politicians, coupled with the inability of governments to write legislation as fast as technology evolves, have thwarted efforts to respond to the challenge.²⁷

B. Section 230 Challenges

Another factor to consider when addressing the rising prevalence of AI-generated deepfakes is § 230 of the Communications Decency Act of 1996, which prevents liability for online providers for third-party content.²⁸ Section 230 expressly states that it is not a limit or expansion of intellectual property laws and that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."²⁹ As it stands, § 230 limits legal recourse against social media companies for user-generated content on their platforms,³⁰ including

Hollywood Strikes, VANITY FAIR (Nov. 16, 2023), <https://www.vanityfair.com/hollywood/2023/10/writers-strike-winners-and-losers> [<https://perma.cc/K5CD-UCBQ>].

²¹ *An Open Letter to the Artist and Songwriter Community: Why We Must Call Time Out on TikTok*, UNIVERSAL MUSIC GRP. (Jan. 30, 2024) [hereinafter UNIVERSAL MUSIC GROUP], <https://www.universalmusic.com/an-open-letter-to-the-artist-and-songwriter-community-why-we-must-call-time-out-on-tiktok/> [<https://perma.cc/65RV-CXXF>].

²² Ben Sisario, *Universal Music Group Pulls Songs from TikTok*, N.Y. TIMES (Feb. 1, 2024), <https://www.nytimes.com/2024/02/01/arts/music/universal-group-tiktok-music.html> [<https://perma.cc/PR8A-FK89>].

²³ UNIVERSAL MUSIC GROUP, *supra* note 21.

²⁴ Sisario, *supra* note 22.

²⁵ Ben Sisario, *TikTok Just Lost a Huge Catalog of Music. What Happened?*, N.Y. TIMES (Feb. 1, 2024), <https://www.nytimes.com/2024/02/01/arts/music/tiktok-universal-music-explained.html> [<https://perma.cc/K95R-KEDH>].

²⁶ Cecilia Kang, *California Governor Vetoes Sweeping A.I. Legislation*, N.Y. TIMES (Sept. 29, 2024), <https://www.nytimes.com/2024/09/29/technology/california-ai-bill.html> [<https://perma.cc/RC4Z-E5XX>].

²⁷ *See id.*

²⁸ 47 U.S.C. § 230(c); *see also* CRS REPORT, *supra* note 5, at 5.

²⁹ 47 U.S.C. § 230(e)(2)–(3).

³⁰ *See, e.g.,* Gonzalez v. Google, LLC, 598 U.S. 617, 622 (2023); *see also* Adam Liptak, *Supreme Court Won't Hold Tech Companies Liable for User Posts*, N.Y. TIMES (May 18,

deepfakes of celebrities posted on their sites that would tarnish the celebrity's reputation or cause other harm. However, the courts are still determining the balance between free-speech protections and the ability and liability of platforms to regulate content posted on their sites.³¹ Social media companies argue that the state laws at issue will limit the ability of social media companies to censor content on their platforms.³² Removal of lawful content on social media sites is generally up to the discretion of the social media site itself, and removing this barrier may open the gates for even more nonobscene deepfakes on social sites.³³ If the app or website on which the images are generated also hosts the image, such as the app at issue in *Young v. NeoCortext, Inc.*,³⁴ there are open questions on if § 230 would apply.³⁵

C. Federal Initiatives

The rise in deepfakes and the ability to create misleading content has gained attention across the political spectrum. In July 2023, the Biden-Harris Administration

2023), <https://www.nytimes.com/2023/05/18/us/politics/supreme-court-google-twitter-230.html> [https://perma.cc/RfV5-MBKT].

³¹ *NetChoice, LLC v. Paxton*, 49 F.4th 439, 444–45 (5th Cir. 2022), *vacated and remanded* *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024); *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022), *vacated and remanded Moody*, 603 U.S. 707. The cases were remanded back for the lower courts to “properly consider[] the facial nature of NetChoice’s challenge.” *Moody*, 603 U.S. at 717. While the cases are on remand, the injunctions prohibiting the state laws from taking effect remain in place. For a discussion of where the cases go from here, see Abbie VanSickle et al., *Supreme Court Declines to Rule on Tech Platforms’ Free Speech Rights*, N.Y. TIMES (July 1, 2024), <https://www.nytimes.com/2024/07/01/us/supreme-court-free-speech-social-media.html> [https://perma.cc/RQ7Q-KAK7].

³² Raul Arias, *Amicus Brief: Moody v. NetChoice & NetChoice v. Paxton*, KNIGHT FIRST AMEND. INST., <https://knightcolumbia.org/cases/netchoice-llc-v-paxton> [https://perma.cc/22HD-NLLM] (last visited Feb. 19, 2025); see also Adam Liptak, *Supreme Court Seems Wary of State Laws Regulating Social Media Platforms*, N.Y. TIMES (Feb. 26, 2024), <https://www.nytimes.com/2024/02/26/us/politics/supreme-court-social-media-texas-florida.html> [https://perma.cc/G7XC-P84S] (“A ruling that tech platforms have no editorial discretion to decide which posts to allow would expose users to a greater variety of viewpoints but almost certainly amplify the ugliest aspects of the digital age, including hate speech and disinformation.”).

³³ See Matt O’Brien, *Meta and X Questioned by Lawmakers Over Rules Against AI-Generated Political Deepfakes*, AP NEWS (Oct. 5, 2023, 5:23 PM), <https://apnews.com/article/election-deepfakes-ai-x-twitter-facebook-meta-instagram-d52e8703a9e47936061bf2c8bbc94bb5> [https://perma.cc/9CJU-MAJH] (discussing Google’s steps to add labels on AI-generated political advertisements, while Facebook, Instagram, and X have remained silent on a policy change).

³⁴ 690 F. Supp. 3d 1091 (C.D. Cal. 2023). NeoCortext is the developer of the app “Reface,” which “allows users to swap their faces with actors, musicians, athletes, celebrities, and other well-known individuals in scenes from popular shows, movies, and other short-form internet media.” *Id.* at 1095.

³⁵ See Isaiah Poritz, *AI Celebrity ‘Deepfakes’ Clash with Web of State Publicity Law*, BLOOMBERG L. (Apr. 14, 2023, 5:05 AM), <https://news.bloomberglaw.com/ip-law/ai-celebrity-deepfakes-clash-with-web-of-state-publicity-laws> [https://perma.cc/EPL3-MC4Y].

brokered a voluntary agreement with leading AI companies to develop mechanisms to make clear to the general public when content is AI-generated.³⁶ The agreement specified watermarks or other labeling for audio or visual content created by publicly available systems should be developed “for people to be able to understand when audio or visual content is AI-generated.”³⁷ There is an exemption from these voluntary requirements for “[a]udiovisual content that is readily distinguishable from reality or that is designed to be readily recognizable as generated by a company’s AI system.”³⁸ The agreement includes an indication that the Administration would take further executive action and pursue bipartisan legislation.³⁹ President Biden issued Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence on October 30, 2023, which authorized the Department of Commerce to develop a framework for authenticating content, labeling “synthetic content,” and detecting such content.⁴⁰ Additionally, the Executive Order authorized the creation of the U.S. AI Safety Institute Consortium within the Commerce Department.⁴¹ The Consortium will see to mitigating the risks and setting standards for the development of AI.⁴²

In the legislative branch, the Senate Committee on the Judiciary Subcommittee on Intellectual Property conducted a hearing on the “balance between creators’ rights and AI’s ability to enhance innovation and creativity.”⁴³ The hearing’s witnesses included legal scholars, music industry leaders, and AI policy experts.⁴⁴ Matthew Sag, an expert in AI law, stated: “I am deeply concerned that advances in deepfakes or synthetic media will be weaponized to harass, injure, and defame individuals . . . I believe a national right of publicity law is needed to replace the current hodgepodge of state laws . . .”⁴⁵ A bipartisan group of senators in October 2023 introduced a

³⁶ *Ensuring Safe, Secure, and Trustworthy AI*, WHITE HOUSE (July 21, 2023), <https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/07/Ensuring-Safe-Secure-and-Trustworthy-AI.pdf> [<https://perma.cc/AB3B-5RGU>].

³⁷ *Id.* at 3.

³⁸ *Id.*

³⁹ *Id.* at 1.

⁴⁰ Exec. Order No. 14110, 88 Fed. Reg. 75191, 75202 (Oct. 30, 2023); *see also id.* at 75196 (“The term ‘synthetic content’ means information, such as images, videos, audio clips, and text, that has been significantly modified or generated by algorithms, including by AI.”).

⁴¹ Press Release, Off. of Pub. Affs., U.S. Dep’t of Com., Biden-Harris Administration Announces First-Ever Consortium Dedicated to AI Safety (Feb. 8, 2024), <https://www.commerce.gov/news/press-releases/2024/02/biden-harris-administration-announces-first-ever-consortium-dedicated> [<https://perma.cc/9WTA-HHXC>].

⁴² *Id.*

⁴³ *Artificial Intelligence and Intellectual Property—Part II: Copyright, Hearing Before the Subcomm. on Intellectual Property Before the S. Comm. on the Judiciary*, 118th Cong. 3 (2023) [hereinafter *AI and IP Copyright Senate Committee Hearing*] (statement of Sen. Christopher A. Coons).

⁴⁴ *See generally id.*

⁴⁵ *Id.* at 78 (written testimony of Matthew Sag, Professor of Law, Artificial Intelligence, Machine Learning, and Data Science, Emory University School of Law).

draft bill that would hold producers—as well as the hosting platforms—of “unauthorized digital replicas of individuals in a performance” civilly liable.⁴⁶ The NO FAKES Act of 2023 would not contain a requirement that the persona have previous commercial value and would not limit damages to commercial value losses by the plaintiff or gains by the defendant.⁴⁷ The proposed bill was intended to protect artists and performers;⁴⁸ it also contained caveats for when a “digital replica is used as part of a news, public affairs, or sports broadcast or report.”⁴⁹ A similar bill, the No AI FRAUD Act, was formally introduced in the House of Representatives.⁵⁰ The No AI FRAUD Act establishes a claim for damages for publishing a replicated image or audio recording.⁵¹ The Act provides \$5,000 in damages for each violation and recovery of profits gained from use of the unauthorized content or actual damages plus recovery of profits.⁵² The Act establishes a First Amendment defense to a claim brought under private action, considering factors including commercial use, expressive purpose, and any adverse effect on the value of the work of the owner of the likeness rights.⁵³ Other bills have been released to try and address the issue;⁵⁴ however, none have yet made it to a vote.

II. RIGHT OF PUBLICITY

The right of publicity is a slippery provision available in some states that provides a cause of action for non-consensual use of likeness. The right is not a novel

⁴⁶ Rebecca Klar, *Bipartisan Bill Aims to Protect Actors, Singers from AI Recreations*, THE HILL (Oct. 12, 2023, 11:50 AM), <https://thehill.com/homenews/senate/4252277-bipartisan-bill-aims-to-protect-actors-singers-from-ai-recreations/> [https://perma.cc/C58K-UXNP].

⁴⁷ Jennifer A. Kenedy & Jorden Rutledge, *Locke Lord QuickStudy: The NO FAKES Act: With Proposed Bill, Congress Set to Protect Against Unauthorized Digital Replicas of Faces, Names and Voices*, TROUTMAN PEPPER LOCKE (Oct. 16, 2023), <https://www.troutman.com/insights/locke-lord-quickstudy-the-no-fakes-act-with-proposed-bill-congress-set-to-protect-against-unauthorized-digital-replicas-of-faces-names-and-voices.html> [https://perma.cc/W8KJ-CBPQ].

⁴⁸ Nicol Turner Lee & Jack Malamud, *How Congress Can Secure Biden’s AI Legacy*, BROOKINGS INST. (Jan. 25, 2024), <https://www.brookings.edu/articles/how-congress-can-secure-bidens-ai-legacy/> [https://perma.cc/CX89-NBP8].

⁴⁹ Senate Legislative Counsel, *Draft Copy of EHF23968 GFW*, SEN. CHRIS COONS 2 (Oct. 11, 2023, 4:49 PM) [hereinafter *NO FAKES Act Draft*], https://www.coons.senate.gov/imo/media/doc/no_fakes_act_draft_text.pdf [https://perma.cc/ZD32-Q48P].

⁵⁰ See generally No AI FRAUD Act, H.R. 6943, 118th Cong. (2024).

⁵¹ *Id.* § 3(c)(1).

⁵² *Id.* § 3(c)(2)(A)(ii).

⁵³ *Id.* § 3(d)(1)–(3).

⁵⁴ See Rebecca Klar, *Hawley, Blumenthal Unveil Bipartisan AI Framework*, THE HILL (Sept. 8, 2023, 11:21 AM), <https://thehill.com/policy/technology/4193967-hawley-blumenthal-unveil-bipartisan-ai-framework/> [https://perma.cc/PH6J-5V5S].

concept,⁵⁵ nor is its application to gossip.⁵⁶ As there is no federal right of publicity, these rights result from a state's statute or common law right of privacy.⁵⁷ Over thirty states have a right of publicity either by common law or by statute.⁵⁸ Historically, the rights developed either as a property right or privacy right.⁵⁹ How the right was developed greatly impacts the recovery, post-mortem rights, and economic impact requirements.⁶⁰ Crucially, this right is aimed at "protect[ing] the *celebrity*, not the *consumer*."⁶¹ The protections offered by each state vary and some states fold the right of publicity within the right of privacy.⁶² To examine the efficacy of the right of publicity in addressing non-consensual deepfakes, this Note will focus on three states that have distinct historical backgrounds and approaches to the right of publicity. These states are also the three largest states for movie and TV production: New York, California, and Georgia.⁶³

A. New York

New York's right of publicity is considered a part of the right of privacy⁶⁴ and makes the non-consensual use of a portrait or picture of any person for advertising

⁵⁵ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 213 (1890) ("The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.").

⁵⁶ *Id.* at 196 ("Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil.").

⁵⁷ 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *RIGHTS OF PUBLICITY AND PRIVACY* § 1:2 (2d ed. 2024).

⁵⁸ *Id.*

⁵⁹ *Id.*; see also Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMM'NS LAW. 14, 14 (2011).

⁶⁰ Vick & Jassy, *supra* note 59, at 14.

⁶¹ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1281 (9th Cir. 2013).

⁶² 2 JOSH BOSIN ET AL., *MEDIA, ADVERTISING & ENTERTAINMENT LAW THROUGHOUT THE WORLD* § 37:23 (2023).

⁶³ Anne Wurts & Philip Sokoloski, *2021–2022 Scripted Content Study*, FILMLA 7–8, 12–14 (Oct. 3, 2023), https://deadline.com/wp-content/uploads/2023/10/Distribution.FilmLA_Scripted_Content_Study_2021_2022.pdf [<https://perma.cc/KF4B-HCKG>] (finding that New York, California, and Georgia consistently rated as the top states for television and movie filming in the United States in 2022).

⁶⁴ N.Y. CIV. RIGHTS LAW § 50 (McKinney 2024); see also *Ratermann v. Pierre Fabre USA, Inc.*, 651 F. Supp. 3d 657, 668–69 (S.D.N.Y. 2023).

or other trade purposes a misdemeanor.⁶⁵ Thus, this right of publicity is granted as part of the New York Civil Rights Law and is not considered part of intellectual property rights.⁶⁶ After a 2020 lobbying push by SAG-AFTRA, New York expanded the right of publicity statute to protect against the deceptive use of “digital replicas” of celebrities, living or deceased, in expressive works.⁶⁷ The right extends for forty years after death.⁶⁸ The 2020 law also contains provisions for the transferability of the rights conferred, a hallmark of property rights.⁶⁹ Yet, the legislative intent indicates that the act is intended to “amend the civil rights law . . . to establish[] the right of publicity and to provid[e] a private right of action for unlawful dissemination.”⁷⁰

The right is waivable if an individual grants written permission to use their likeness for a specific purpose.⁷¹ However, once a violation is found, New York grants an absolute right to injunctive relief, regardless of a showing of irreparable injury or balance of equities.⁷² There are also damages available when a violation of the right of publicity is willful.⁷³ Defenses to the right of publicity in New York include newsworthiness and public interest.⁷⁴

Under this interpretation, New York courts held that claims under sections 50 and 51 do not fall within the intellectual property exception to § 230 of the

⁶⁵ § 50.

⁶⁶ *Ratermann*, 651 F. Supp. 3d. at 669.

⁶⁷ *SAG-AFTRA Applauds New York Gov. Cuomo for Signing Right to Publicity Protections*, SAG-AFTRA (Nov. 30, 2020), <https://www.sagaftra.org/sag-aftra-applauds-new-york-gov-cuomo-signing-right-publicity-protections> [<https://perma.cc/FG9E-XETD>]; *see also* § 50-f(2)(b). A “digital replica” is defined as:

[A] newly created, original, computer-generated . . . performance by an individual in a separate and newly created, original expressive sound recording or audiovisual work in which the individual did not actually perform, that is so realistic that a reasonable observer would believe it is a performance by the individual being portrayed and no other individual.

Id. § 50-f(1)(c).

⁶⁸ Jennifer E. Rothman, *New York*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY, UNIV. PENN. CAREY L. SCH. [hereinafter Rothman, *New York*], https://rightofpublicityroadmap.com/state_page/new-york/ [<https://perma.cc/XFV9-AQK5>] (last visited Feb. 19, 2025).

⁶⁹ 1 MCCARTHY & SCHECHTER, *supra* note 57, § 6:90.

⁷⁰ 2020 N.Y. LAWS 1076 (emphasis added); *see also* 1 MCCARTHY & SCHECHTER, *supra* note 57, § 6:90.

⁷¹ JENNIFER PHILBRICK MCARDLE & VANESSA C. HEW, 4F N.Y. PRAC., COM. LITIG. IN N.Y. STATE CTS. § 135:13 (5th ed. 2023).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Rothman, *New York*, *supra* note 68.

Communications Decency Act.⁷⁵ Thus, a social media company's liability shield remains in place for postings of digital replicas.

B. California

California's right of publicity originated with the right of privacy, but it has since been recognized as distinct and has a different statutory basis.⁷⁶ The right is both a statutory and common law right.⁷⁷ The common law elements for a right of publicity claim are the unauthorized use of plaintiff's identity by appropriating their name, voice, or likeness for the defendant's benefit, commercial or otherwise, which results in injury.⁷⁸ The California Civil Code does not replace or codify the common law; it is a complement to it.⁷⁹ The statutory elements for a claim are the knowing use of "another's name, voice, signature, photograph, or likeness, in any manner" for commercial reasons without consent resulting in injury.⁸⁰ The damages are recoverable for the greater of \$750 or actual damages suffered and any profits from use.⁸¹ The key difference between the common law cause of action and the statutory cause of action is that the statutory cause requires knowing use of the likeness.⁸² The statutory rights extend for seventy years after death for use on products or merchandise or advertising related to such items.⁸³

California courts also found that right of publicity claims would be subject to the Communications Decency Act § 230 bar on third-party liability.⁸⁴ Additionally, to determine pre-emption by the Copyright Act, California courts examine the nature of the claim and when claims are not equivalent to the exclusive rights contained in the Copyright Act, the claims under state law are able to proceed.⁸⁵ Defenses to the statutory right of action include use by the news and lack of knowledge.⁸⁶

⁷⁵ *Ratermann v. Pierre Fabre, Inc.*, 651 F. Supp. 3d 657, 669 (S.D.N.Y. 2023).

⁷⁶ *Timed Out, LLC v. Youabian, Inc.*, 177 Cal. Rptr. 3d 773, 777 (Ct. App. 2014).

⁷⁷ *Id.* at 776.

⁷⁸ *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 612 (Ct. App. 2006).

⁷⁹ *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001).

⁸⁰ CAL. CIV. CODE § 3344(a) (West 2025).

⁸¹ *Id.*

⁸² *Kirby*, 50 Cal. Rptr. 3d at 612–13.

⁸³ Jennifer E. Rothman, *California*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, UNIV. PENN. CAREY L. SCH. [hereinafter Rothman, *California*], https://www.rightofpublicityroadmap.com/state_page/california [<https://perma.cc/K8FH-YPCM>] (last visited Feb. 19, 2025).

⁸⁴ *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1067 (N.D. Cal. 2016), *aff'd*, 700 F. App'x 588 (9th Cir. 2017).

⁸⁵ *Young v. NeoCortex, Inc.*, 690 F. Supp. 3d 1091, 1102–03 (C.D. Cal. 2023) (holding a claim that went beyond "seeking to 'merely' restrict the reproduction or distribution of the original photographs/works" was not preempted by § 106 of the Copyright Act).

⁸⁶ Rothman, *California*, *supra* note 83.

C. Georgia

Georgia's right of publicity is rooted purely in the common law.⁸⁷ The right is derived from the tort of invasion of privacy and is framed as "appropriation, for the defendant's advantage, of the plaintiff's name or likeness."⁸⁸ There is no prior requirement of monetized interest in one's identity that is being usurped; but, any claim *must* involve the financial gain of the appropriator.⁸⁹ The appropriation of one's name or likeness can be in the form of a photograph or other reproduction.⁹⁰ The distinction between the tort of invasion of privacy and that of misappropriation of identity (right of publicity) is that the former "involv[es] injury to feelings, sensibilities or reputation" while the latter involves "rights in the nature of property rights for commercial exploitation," and, thus, the two have a different damages and statute of limitations structure as well.⁹¹ Any right of publicity claim must have a financial element to it, but it is not required that the financial element be commercial speech.⁹² Damages are measured by the value of the appropriation to the user.⁹³

The courts recognized an exception to Georgia's right of publicity for newsworthiness, which protects the use of a person's identity in news reporting, entertainment, works of fiction, or non-fiction.⁹⁴ This exception is distinguished from unauthorized commercial use in advertising and merchandising.⁹⁵ Additionally, the Northern

⁸⁷ 1 MCCARTHY & SCHECHTER, *supra* note 57, § 6:5 n.1. Georgia has a provision in the state trademark scheme making it a misdemeanor to knowingly use the "name or seal of any other person, firm, corporation, or association, in and about the sale of goods or otherwise" without authorization and with "intent to deceive the public." GA. CODE ANN. § 10-1-453 (West 2025). However, Georgia courts and cases do not rely on nor mention this statute in the discussion of claims regarding the right of publicity. *See, e.g.*, *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 700–03 (Ga. 1982).

⁸⁸ *Bullard v. MRA Holding, LLC*, 740 S.E.2d 622, 626 (Ga. 2013) (quoting *Martin Luther King, Jr.*, 296 S.E.2d at 704).

⁸⁹ *Id.* at 626.

⁹⁰ *Andrews v. D'Souza*, 696 F. Supp. 3d 1332, 1357–58 (N.D. Ga. 2023).

⁹¹ *Posada v. Parker Promotions, Inc.*, No. 4:22-CV-121 (CDL), 2023 WL 3295172, at *2 (M.D. Ga. May 5, 2023) (quoting *Martin Luther King, Jr.*, 296 S.E.2d at 703).

⁹² Jennifer E. Rothman, *Georgia*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, UNIV. PENN. CAREY L. SCH. [hereinafter Rothman, *Georgia*], https://www.rightofpublicityroadmap.com/state_page/georgia [<https://perma.cc/R5M4-4E55>] (last visited Feb. 19, 2025); *see also* *Somerson v. World Wrestling Ent., Inc.*, 956 F. Supp. 2d 1360, 1366 (N.D. Ga. 2013) ("It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right [of publicity] is invaded." (internal quotation marks and citation omitted)).

⁹³ *Bell v. Foster*, No. 1:13-CV-405-TWT, 2013 WL 6229174, at *6 (N.D. Ga. Dec. 2, 2013).

⁹⁴ *Brown v. Showtime Networks, Inc.*, 394 F. Supp. 3d 418, 440–41 (S.D.N.Y. 2019) (discussing merits of claim for misappropriation of Bobbi Kristina Brown's likeness and name in a Showtime film under Georgia's right of publicity case law).

⁹⁵ *Id.* at 440.

District of Georgia has suggested that any use of likeness in an expressive work would be protected by the First Amendment.⁹⁶

III. THE STATE RIGHT OF PUBLICITY AND THE FIRST AMENDMENT

The patchwork that is the state-granted right of publicity may serve as an interim gap-filler while the federal government comes to terms with the ever-changing internet landscape; that is, of course, if the claim is not barred by the First Amendment. In the context of unauthorized AI-generated content of celebrities, there is still a series of hurdles plaintiffs would have to overcome even in the most-friendly of jurisdictions.

When weighing the First Amendment protections of speech and the array of each state's provisions for their grant of the right of publicity, there are several considerations: one of the most crucial determinations is whether the AI-generated speech is commercial speech or expressive speech.⁹⁷ On its face, media generated by AI likely has free speech protections.⁹⁸ This is complicated by the fact that state courts promulgated their own distinct tests for challenges to free speech.⁹⁹ Further, deepfakes are not likely to be created by reputable companies out of fear of a lawsuit, public backlash, or other negative responses, limiting the instances of commercialization of deepfakes. However, non-commercial use for online engagement is out of reach of this reduced First Amendment–challenge scrutiny¹⁰⁰ or protections from some states' right of publicity statute all together.¹⁰¹

The California courts determined there are free speech protections when a celebrity's image is adapted through AI by individual consumers, though the depth of those protections has not been fully addressed by the courts.¹⁰² The “creative

⁹⁶ *Thoroughbred Legends, LLC v. Walt Disney Co.*, No. 1:07-CV-1275-BBM, 2008 WL 616253, at *12 (N.D. Ga. Feb. 12, 2008) (dismissing appropriation claim as “[t]he use of Plaintiffs’ likenesses in advertising the film is protected because the film itself is protected”).

⁹⁷ *See Post & Rothman, supra* note 9, at 138.

⁹⁸ Richard Stengel, *The Case for Protecting AI-Generated Speech with the First Amendment*, TIME (May 9, 2023, 12:03 PM), <https://time.com/6278220/protecting-ai-generated-speech-first-amendment/> [<https://perma.cc/22JR-46RT>] (“[C]ontent created by generative AI probably has free speech protections. It is speech. It is speech that is created out of the raw material of human speech. It is created from code made by humans. It certainly contributes to the marketplace of ideas . . .”).

⁹⁹ *Post & Rothman, supra* note 9, at 127–28, 127 n.167. Furthermore, Post and Rothman argue that “[t]he unpredictability caused by the ‘courts’ sloppy and often inconsistent tests for weighing the right of publicity and First Amendment rights’ chills speech and incentivizes jurisdictional gamesmanship.” *Id.* at 127–28 (citation omitted).

¹⁰⁰ *See id.* at 147.

¹⁰¹ *See Posada v. Parker Promotions, Inc.*, No. 4:22-CV-121 (CDL), 2023 WL 3295172, at *2 (M.D. Ga. May 5, 2023) (discussing commercial exploitation within Georgia’s right of publicity case law).

¹⁰² *See Young v. NeoCortext, Inc.*, 690 F. Supp. 3d 1091, 1099–100 (C.D. Cal. 2023).

appropriation of celebrity images can be an important avenue of individual expression” and the use of artificial intelligence in that expression is “conduct in furtherance of users’ free speech rights.”¹⁰³ However, in the instance of deepfakes or inherently false AI-generated content of celebrities, there may well be “reckless disregard of whether [the content] was false or not.”¹⁰⁴

A. New York

In New York, right of publicity claims on expressive (non-commercial) work must overcome only the newsworthy and public concern exception.¹⁰⁵ Courts examine the relationship between the use of the name or likeness and what it is being used to demonstrate, and if there is no real relationship between the likeness and the commercial purpose, then there is no use of those exemptions.¹⁰⁶ A public figure cannot succeed on a claim of the right of publicity unless they demonstrate that the creator acted with knowledge of the falsity or willful disregard of the truth.¹⁰⁷ For commercial deepfakes, plaintiffs face lower barriers from the First Amendment and need only demonstrate that the likeness was used without consent for commercial purposes and no exception applies.¹⁰⁸

To illustrate, suppose a deepfake of Tom Hanks appears on Reddit, then Twitter, Facebook, and so on. In this deepfake, Mr. Hanks is ranting on divisive topics, which leads to public uproar. However, there is no commercial purpose to the deepfake. Under New York’s interpretation of the right of publicity’s interaction with the First Amendment, Mr. Hanks is unquestionably a public figure and, therefore, must demonstrate that the creator of the deepfake acted with knowledge of the falsity.¹⁰⁹ He could succeed on this point given the nature of the deepfake: the content is premised on duplicity, aiming to trick the viewer into believing the person in the video is Tom Hanks himself. The right of publicity claim would then be decided on the merits.

B. California

In balancing the First Amendment with the state right of publicity, the California Supreme Court has explicitly designated the use of the transformative-work test.¹¹⁰

¹⁰³ *Id.* at 1100 (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 803 (Cal. 2001)).

¹⁰⁴ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

¹⁰⁵ *Foster v. Svenson*, 7 N.Y.S.3d 96, 102–03 (App. Div. 2015).

¹⁰⁶ *Id.*

¹⁰⁷ *Man v. Warner Bros. Inc.*, 317 F. Supp. 50, 51 (S.D.N.Y. 1970).

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*

¹¹⁰ Malla Pollack, *Litigating the Right of Publicity: Your Client’s Face Was on the News, Now It’s on T-Shirts and Video Games*, 119 AM. JUR. TRIALS 343, § 16 (2011).

The test is derived from fair use doctrine and weighs whether the new work “adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.”¹¹¹ This test hinges on whether the content created is expressive, rather than primarily relying on the likeness of the celebrity.¹¹² If the likeness is the sum of the created work, not just a raw material from which the work is derived, transformative use is less likely to be found.¹¹³ The Ninth Circuit, in three different “name, image, and likeness” cases, has also determined that the relevance of the identity to the use and marketability of the identity were essential considerations to the level of scrutiny then applied for right of publicity statutes.¹¹⁴ While the California right of publicity does not require commercial benefit as an element of a violation,¹¹⁵ commercial speech receives fewer free speech protections as the First Amendment does not protect false or misleading commercial speech.¹¹⁶ Therefore, the First Amendment may protect the AI-image even when all the elements of a common law violation of the right of publicity are met: if the plaintiff’s likeness has been misappropriated through artificial intelligence software and disseminated on social media without a commercial benefit. That speech may be afforded even more protections if the figure is a celebrity.¹¹⁷ If the deepfake or the speech contained therein is in the public interest, both the statutory and the common law cause of action for the right of publicity will not be successful.¹¹⁸ In sum, without newsworthiness and with commercial gain, California’s “state law interest

¹¹¹ Post & Rothman, *supra* note 9, at 129 (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 803 (Cal. 2001)).

¹¹² See Schuyler Moore, *Can the Law Prevent AI from Duplicating Actors? It’s Complicated*, FORBES (July 13, 2023, 10:52 PM), <https://www.forbes.com/sites/schuylermoore/2023/07/13/protecting-celebrities-including-all-actors-from-ai-with-the-right-of-publicity/?sh=1bc7399759ec> [<https://perma.cc/CV94-SEJQ>]; see also Pollack, *supra* note 110, § 16.

¹¹³ See *De Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625, 640 (Ct. App. 2018).

¹¹⁴ CRS REPORT, *supra* note 5, at 6. *Compare In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013) (finding that use of college athletes’ likeness in video games is not transformative), with *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1243 (9th Cir. 2013) (finding that a professional athlete’s likeness was artistically relevant and not violative of the Lanham Act and was entitled to First Amendment protections), and *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016) (finding that a film about an Iraqi War veteran was not subject to the transformative use test because the veteran had not built up a marketable identity).

¹¹⁵ *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 612–13 (Ct. App. 2006); see also *supra* Section II.B.

¹¹⁶ *Comedy III Prods.*, 21 P.3d at 802.

¹¹⁷ *Id.* at 803–04 (“Giving broad scope to the right of publicity has the potential of allowing a celebrity to accomplish through the vigorous exercise of that right the censorship of unflattering commentary that cannot be constitutionally accomplished through defamation actions.”).

¹¹⁸ *Elliott v. Lions Gate Ent. Corp.*, 639 F. Supp. 3d 1012, 1028 (C.D. Cal. 2022).

in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist” when “artistic expression [that] takes the form of a literal depiction or imitation of a celebrity . . . directly trespass[es] on the right of publicity without adding significant expression”¹¹⁹

California’s provision against SLAPP lawsuits creates an additional opportunity for pretrial dismissal.¹²⁰ If a case survives the first hurdle of the anti-SLAPP analysis, the burden shifts to the plaintiff to show a probability of prevailing on the claim.¹²¹ In AI-generated content of celebrities, the closeness in appearance and believability that the content may, in fact, have been created involving the actual person in some manner is precisely what allows the right of publicity claim to survive the transformative defense at the motion to dismiss stage.¹²² Claims would, therefore, most likely prevail over the anti-SLAPP threshold and proceed to the analysis of actual malice as inherent in the intention of a deepfake.¹²³

For Mr. Hanks in our hypothetical, the right of publicity claim would survive the first portion of an anti-SLAPP motion analysis because a deepfake is not in furtherance of the right of free speech.¹²⁴ Instead, the deepfake is a “mere celebrity likeness or imitation.”¹²⁵ In the second stage of the anti-SLAPP motion analysis, Mr. Hanks could demonstrate the probability he wins on the merit of his claim.¹²⁶ The deepfake is not entitled to the transformative use defense utilized by the California courts for right of publicity claims as the likeness of Mr. Hanks is the sum of the

¹¹⁹ *De Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625, 640 (Ct. App. 2018) (quoting *Comedy III Prods., Inc.*, 21 P.3d at 808).

¹²⁰ *Nunes v. Meredith*, No. 1:21-cv-00078-JLT-BAM, 2022 WL 2214205, at *2 (E.D. Cal. June 21, 2022) (“Under California law, ‘SLAPP’ lawsuits refer to ‘strategic litigation against public participation,’ and they attempt ‘to chill or punish a party’s exercise of constitutional rights to free speech and to petition the government for redress of grievances.’” (quoting *Rusheen v. Cohen*, 128 P.3d 713, 717 (Cal. 2006))). Defendants may move to dismiss the claim against them when the underlying act was in “furtherance of the right to petition or free speech.” *Nunes*, 2022 WL 2214205, at *3 (quoting *Wilcox v. Super. Ct.*, 33 Cal. Rptr. 2d 446, 451 (Ct. App. 1994)).

¹²¹ The two steps of deciding an anti-SLAPP motion are (1) whether defendant has shown that the conduct underlying the case in furtherance of the right of free speech in connection with a public issue, and (2) if plaintiff has demonstrated a probability of prevailing on the claim. *Young v. NeoCortex, Inc.*, 690 F. Supp. 3d 1091, 1097 (C.D. Cal. 2023).

¹²² *Id.* at 1103–04 (“Indeed, the whole point of NeoCortex’s product is to ensure that the image of Young is not so transformed that it reduces the ‘shock value’ of the user’s face on Young’s body in a recognizable situation.”); *see also* *Hilton v. Hallmark Cards*, 599 F.3d 894, 910 (9th Cir. 2010) (finding that the mere “literal” depiction of a celebrity makes “no significant . . . or creative contribution” and therefore is not entitled to the affirmative transformative use defense (quoting *Comedy III Prods., Inc.*, 21 P.3d at 810)).

¹²³ *See* *Collins v. Waters*, 308 Cal. Rptr. 3d 326, 334 (Ct. App. 2023).

¹²⁴ *Young*, 690 F. Supp. 3d at 1098–100.

¹²⁵ *Post & Rothman*, *supra* note 9, at 128–29.

¹²⁶ *Young*, 690 F. Supp. 3d at 1100.

expressive work, not a raw material from which the work is composed.¹²⁷ The falsity of the deepfake also cuts against use of the newsworthiness defense, as creating and posting a deepfake is not “publication of truthful, lawfully obtained material of legitimate public concern,” and therefore is not “constitutionally privileged.”¹²⁸ Thus, Mr. Hanks would likely prevail in the California courts. Additionally, this privacy- or likeness-friendly structure may incentivize plaintiffs to file suits in California and defendants to move to change jurisdiction out of California.

C. Georgia

Georgia courts have not created a unique test for use in balancing the First Amendment and the right of publicity.¹²⁹ However, the courts recognize a newsworthiness exception to the right of publicity to balance the right of freedom of speech.¹³⁰ The courts consider three prongs when weighing the newsworthiness of a particular fact: “(1) ‘the depth of the intrusion into the plaintiffs private affairs’; (2) ‘the extent to which the plaintiff voluntarily pushed himself into a position of public notoriety’; and (3) ‘whether the information is a matter of public record.’”¹³¹ The Eleventh Circuit has also utilized the newsworthiness exception when considering the Georgia right of publicity.¹³² Georgia courts also recognize a commercial use caveat to the newsworthiness exception, under which “a publisher may be precluded from publishing [another’s] image for purely financial gain, such as in an advertisement.”¹³³

However, commercial use that is only incidental to the public’s interest in the facts, entertainment, or news does not in and of itself render the use of likeness actionable for a right of publicity claim.¹³⁴ The context in which any previously public facts are used is also evaluated for the newsworthiness.¹³⁵

For the purposes of a deepfake-based right of publicity claim, a non-commercial deepfake would survive the newsworthiness First Amendment challenge as it would be, by its very definition, neither factual nor a matter of the public record even if it

¹²⁷ See, e.g., *De Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625, 640 (Ct. App. 2018).

¹²⁸ *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 487 (Cal. 1998).

¹²⁹ Rothman, *Georgia*, *supra* note 92.

¹³⁰ *Brown v. Showtime Networks, Inc.*, 394 F. Supp. 3d 418, 440 (S.D.N.Y. 2019) (analyzing Georgia law).

¹³¹ *Somerson v. World Wrestling Ent., Inc.*, 956 F. Supp. 2d 1360, 1367 (N.D. Ga. 2013) (quoting *Toffoloni v. LFP Publ’g Grp., LLC*, 572 F.3d 1201, 1205 (11th Cir. 2009)).

¹³² Rothman, *Georgia*, *supra* note 92; *Toffoloni*, 572 F.3d at 1208 (“[W]here a publisher may be precluded by the right of publicity from publishing one’s image for purely financial gain, as in an advertisement, where the publication is newsworthy, the right of publicity gives way to freedom of the press.”).

¹³³ *Somerson*, 956 F. Supp. 2d at 1369.

¹³⁴ *Id.* at 1370.

¹³⁵ *Id.* at 1371.

relates to the most notorious social persona. For those who never commercialized a public persona while living, their estate is eligible to challenge a deepfake on a right to publicity claim post-mortem.¹³⁶ To return to the hypothetical Tom Hanks deepfake controversy, any non-commercial deepfake would not survive a newsworthiness challenge as the statements purported to belong to Mr. Hanks are false or, at very least, falsely attributed. Mr. Hanks would need to prove that the appropriator of his identity did receive some financial benefit as a result.¹³⁷

IV. POTENTIAL INTELLECTUAL PROTECTIONS FOR AI-CONTENT

There are two phases to analyze intellectual property rights and challenges for AI-content: (1) either protecting (or not) the AI-creation through current trademark or copyright;¹³⁸ or (2) challenging the source material on which the content is either generated or replicating.¹³⁹ Courts considered the AI-creation's ability to receive copyright protections,¹⁴⁰ and across the country they are currently weighing generative source material questions.¹⁴¹ However, for deepfakes and the purposes of this Note, the most crucial question is whether the persona or likeness that is being imitated has intellectual property protections.

Thaler v. Perlmutter weighed the sole issue of “whether a work autonomously generated by an AI system is copyrightable” and reiterates that U.S. copyright law protects only works of human creation.¹⁴² Though the Copyright Act¹⁴³ is malleable for new methods of creation, there was no human creative guidance in the generation of the AI work, and therefore no human authorship.¹⁴⁴ The Copyright Office has also similarly denied applications for copyrights on images generated through AI when “the system was part of [the artist’s] creative process.”¹⁴⁵ However when

¹³⁶ *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 704, 705 (Ga. 1982).

¹³⁷ *Bullard v. MRA Holding, LLC*, 740 S.E.2d 622, 626 (Ga. 2013) (quoting *Martin Luther King, Jr.*, 296 S.E.2d at 704).

¹³⁸ *Thaler v. Perlmutter*, 687 F. Supp. 3d 140, 144 (D.D.C. 2023).

¹³⁹ See, e.g., Blake Brittain, *More Writers Sue OpenAI for Copyright Infringement Over AI Training*, REUTERS (Sept. 11, 2023, 3:33 PM), <https://www.reuters.com/technology/more-writers-sue-openai-copyright-infringement-over-ai-training-2023-09-11/> [<https://perma.cc/D3K8-KWAT>].

¹⁴⁰ See, e.g., *Thaler*, 687 F. Supp. 3d at 142, 144.

¹⁴¹ See, e.g., Michael M. Grynbaum & Ryan Mac, *The Times Sues OpenAI and Microsoft Over A.I. Use of Copyrighted Work*, N.Y. TIMES (Dec. 27, 2023), <https://www.nytimes.com/2023/12/27/business/media/new-york-times-open-ai-microsoft-lawsuit.html> [<https://perma.cc/9L2L-F8HE>]; Brittain, *supra* note 139.

¹⁴² 687 F. Supp. 3d at 142, 144.

¹⁴³ See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101–1151).

¹⁴⁴ *Thaler*, 687 F. Supp. 3d at 145–46.

¹⁴⁵ Blake Brittain, *AI-Generated Art Cannot Receive Copyrights, U.S. Courts Say*,

someone's image is used in a photograph, the Copyright Act does not protect the likeness of that other person.¹⁴⁶

When AI-content was analyzed in context with celebrity images and commercial purposes, the protections of the Copyright Act were found to not be equivalent to the California right of publicity, and therefore the right of publicity was not preempted by the Act.¹⁴⁷ As the Copyright Act protects control of images, claims that relate to "likeness on advertising and merchandise when it allows users to create a product containing [the celebrity's] image" are valid.¹⁴⁸ Confusion to the consumer is also considered in the context of the intellectual property rights.¹⁴⁹ Given the nature of deepfakes, the inherent goal of the deception is confusion.

Regarding the protections against false endorsement or affiliations in the Lanham Act,¹⁵⁰ the Second Circuit has asserted that in balancing free speech, the Act should only be applied to artistic work "where the public interest in avoiding consumer confusion outweighs the public interest in free expression."¹⁵¹ States, of course, may have their own deceptive trade practices acts that may also be grounds for action against deepfakes, again only when related to commercial activity.¹⁵² Some industry concerns mirror this commercial impact focus, including testimony provided to the Senate Subcommittee on Intellectual Property.¹⁵³ Jeff Harleston, General Counsel

REUTERS (Aug. 21, 2023, 2:29 PM), <https://www.reuters.com/legal/ai-generated-art-cannot-receive-copyrights-us-court-says-2023-08-21/> [<https://perma.cc/A8M2-D7XE>].

¹⁴⁶ *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1103–04 (9th Cir. 2001) (quoting 1 NIMMER ON COPYRIGHT § 1.01[B][1][c] at 1–23 (1999)).

¹⁴⁷ *Young v. NeoCortex, Inc.*, 690 F. Supp. 3d 1091, 1101 (C.D. Cal. 2023).

¹⁴⁸ *Id.* at 1101–03.

¹⁴⁹ *Brown v. Showtime Networks, Inc.*, 394 F. Supp. 3d 418, 442 (S.D.N.Y. 2019).

¹⁵⁰ 15 U.S.C. § 1125 (2012). The statute provides in part:

Any person who . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, . . . his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Id. § 1125(a)(1).

¹⁵¹ *Brown*, 394 F. Supp. 3d at 442 ("[T]he Lanham Act is inapplicable to 'artistic works' as long as the defendant's use of the mark or other identifying material is (1) 'artistically relevant' to the work and (2) not 'explicitly misleading' as to the source of content of the work." (quoting *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989))).

¹⁵² See, e.g., GA. CODE ANN. § 10-1-370 to -375 (West 2025) ("Uniform Deceptive Trade Practices Act").

¹⁵³ *AI and IP Copyright Senate Committee Hearing*, *supra* note 43, at 45–50 (written testimony of Jeff Harleston, General Counsel and Executive Vice President of Business and Legal Affairs, Universal Music Group).

for Universal Music Group, highlighted several industry concerns regarding “AI-generated, mimicked vocals trained on vocal recordings extracted from . . . copyrighted recordings [as they] go beyond Right of Publicity violations and concerns about consumer deception, unfair trade practices, and privacy-copyright law has clearly been violated.”¹⁵⁴ Challenges against deepfakes and other AI-generated content would likely find success under this protection when used in commercial and advertising settings; however, photos and videos created without a commercial purpose would still remain uncaptured by protections against false endorsement or affiliations. Crucially, the Lanham Act requires an element of deception that is related to endorsement or association with a product, which is not a requirement of in right of publicity claims.¹⁵⁵ Thus, a challenge of a deepfake that is not tied to a product would fail to rise as a claim under the Lanham Act.

In contrast, the absence of intellectual property rights allows for the success of some publicity claims. Many courts held that there is no copyright protection for celebrity personas.¹⁵⁶ While the absence of intellectual property rights would limit a claim under the Copyright Act, that also avoids an express Copyright Act preemption challenge for right of publicity claims.¹⁵⁷ Similarly, intellectual property rights may provide another layer of protections in states like New York, where the right of publicity is rooted in the right to privacy rather than intellectual property rights, thus, online materials that would give rise to a right of publicity claim do not fall within the intellectual property exception to Communication Decency Act § 230.¹⁵⁸ The Ninth Circuit has expressly ruled that, absent a “definition from Congress,” the intellectual property exception in § 230 only applies to federal intellectual property, and therefore, no exemption applies for claims of right of publicity rooted in state (California) law.¹⁵⁹ In *Perfect 10, Inc. v. CCBill LLC*, the Ninth Circuit held that the lack of clarity and uniformity across state intellectual property laws was prohibitive of the express goal of § 230 and therefore blocked immunity.¹⁶⁰ The Eleventh Circuit has not addressed the question of § 230 and the interaction of the right of publicity. The issue arose only once and the court declined to rule on the topic as “it was unnecessary for the district court to determine whether the CDA preempts [the] state law right of publicity claim, and we do not reach any of [plaintiff’s] challenges to the district court’s application of the CDA here.”¹⁶¹

¹⁵⁴ *Id.* at 48.

¹⁵⁵ Vick & Jassy, *supra* note 59, at 15.

¹⁵⁶ See, e.g., Pollack, *supra* note 110, § 52.

¹⁵⁷ See, e.g., *id.*

¹⁵⁸ *Ratermann v. Pierre Fabre USA, Inc.*, 651 F. Supp. 3d 657, 669–70 (S.D.N.Y. 2023).

¹⁵⁹ *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118–19 (9th Cir. 2007).

¹⁶⁰ *Id.*; Samantha P. McCaleb, *Paws off My Profile: Protecting the Persona in the Modern Digital Age*, 27 MARQ. INTEL. PROP. & INNOVATION L. REV. 107, 117–18 (2023).

¹⁶¹ *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1324 (11th Cir. 2006) (discussing a claim based on section 540.08 of the Florida Statutes).

V. FEDERAL RIGHT OF PUBLICITY

An answer to the incomplete and limited set of state laws and growing Congressional and Executive concerns of the use of artificial intelligence is the introduction of a federal right of publicity as part of intellectual property rights. A national framework for publicity rights could provide a more even approach to the borderless spreading of false media.¹⁶² As states differ on requirements of harm, commercial interests of the defendant, and pre-emption;¹⁶³ a federal framework would encourage more truth in media through national clarity.

As evidenced in the three approaches and scopes of the states' rights of publicity examined here, the decision to frame a federal right of publicity as either a civil right or a property right will be highly significant in analyzing the First Amendment, the Copyright Act, and § 230 questions as well as the finer nuances of the right itself. There are also considerations as to where the authority would come for such federal legislation.

For a federal right of publicity rooted in intellectual property, there is a stronger foundation of authority for action. Patent and copyright laws are under the express authority of Congress, and trademarks and other IP are derived from the authority of Congress to regulate interstate commerce.¹⁶⁴ Current federal intellectual property frameworks have similar intentions to the aims of the right of publicity and the right of publicity can supplement to protect the qualities and likeness not currently protected by trademark or copyright law.¹⁶⁵

A statute rooted in privacy may pose a legislative challenge, as there is no analogous federal privacy right that seeks to protect the same interests as a potential federal right of publicity.¹⁶⁶ The privacy-based right would not extend as far as a property-based right with regards to transferability and enforcement.¹⁶⁷ It also may face more challenges in both Copyright Act pre-emption and § 230 exemptions.¹⁶⁸

For the content of the statute itself, using the shared attributes of the various states' right of publicity, a federal right should include protections against non-consensual use of a person's name, image, voice, or likeness (in which the person

¹⁶² See Roesler & Hutchinson, *supra* note 11, at 129–32.

¹⁶³ See Vick & Jassy, *supra* note 59, at 15 (“Each [right of publicity] statute is really ‘one of a kind’ in that it is largely a product of its time and place.” (quoting THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 6.6 (2011))).

¹⁶⁴ CRS REPORT, *supra* note 5, at 5.

¹⁶⁵ See Toni-Ann Hines, *The Right of Publicity in the Age of Technology, Social Media, and Heightened Cultural Exchange*, 23 WAKE FOREST J. BUS. & INTELL. PROP. L. 164, 183–84 (2022).

¹⁶⁶ *Id.* at 183.

¹⁶⁷ *Id.* at 181–83 (discussing how classifying the right of publicity as a privacy right creates a negative right, rather than creating a positive right by classifying publicity as a property right).

¹⁶⁸ See *infra* Sections VI.B–C.

is identifiable) that results in reputational—and resulting monetary—harm to the depicted person. For a statute rooted in intellectual property, there may also be a consideration to allow the right to be transferable or continue for a certain period post-mortem. For deepfakes and other non-commercial uses of AI to replicate celebrities, an injury requirement more in line with the California or Georgia models, which requires benefit to the user of the image rather than requiring the use be for trade purposes as in New York,¹⁶⁹ would allow for a more flexible framework for claims regarding harmful deepfakes that are not attempting to market a product.

VI. APPLYING A FEDERAL RIGHT OF PUBLICITY

Part VI will first analyze what a federal right of publicity may look like, then explore the balancing of a federal right of publicity with the First Amendment, Copyright Act pre-emption questions, and immunity issues under § 230 of the Communications Decency Act.

A. Balancing with the First Amendment

An effective federal right of publicity would be consistently analyzed under the same First Amendment framework. The statute could include defined parameters of application such as the transformative use test used in California requiring the addition of “significant creative elements” to the new work,¹⁷⁰ or it could be the more restrictive limited exemptions of Georgia for newsworthiness.¹⁷¹ Following the intellectual property model, it would be consistent to carry over the California test for the claims under the federal statute. The California test is derived from the fair use doctrine,¹⁷² and the case law from Copyright Act–based challenges on the limits of fair use could easily be analogized to right of publicity claims.

Under this framework, a deepfake raised on a federal right of publicity claim would be subject to the same First Amendment balancing analysis no matter the

¹⁶⁹ Compare *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001) (noting California’s common law right requires “appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise” (emphasis added)), with N.Y. CIV. RIGHTS LAW § 50 (McKinney 2024) (“A person, firm or corporation that uses for *advertising purposes, or for the purposes of trade*, the name, portrait, picture, likeness, or voice of any living person . . .” (emphasis added)), and *Bullard v. MRA Holding, LLC*, 740 S.E.2d 622, 626 (Ga. 2013) (“[A]n appropriation of likeness claim in Georgia consists of the following elements: ‘[1] the appropriation of another’s name and likeness, whether such likeness be a photograph or [other reproduction of the person’s likeness], [2] without consent[, and] [3] for the financial gain of the appropriator.’” (emphasis added) (quoting *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 704 (Ga. 1982))).

¹⁷⁰ Post & Rothman, *supra* note 9, at 129.

¹⁷¹ Rothman, *Georgia*, *supra* note 92.

¹⁷² Post & Rothman, *supra* note 9, at 129.

jurisdiction. As the transformative use test requires more than just mere replication of a celebrity's likeness,¹⁷³ a deepfake would by its very nature not be entitled to an affirmative transformative use defense. Additionally, if the newsworthiness exemption was also written into the statute,¹⁷⁴ a right of publicity claim against deepfakes could still proceed because a deepfake does not "publish or report information," and, therefore, it is not likely to be of the public interest.¹⁷⁵ Even if the substance or opinions of the deepfake are not discernable as truly belonging to the mimicked celebrity, the Supreme Court has held that false "attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude" not held by the actual person in the context of a falsely attributed quote.¹⁷⁶ When a statement "purports to be nonfiction," a reasonable reader is led to potentially "understand the quotation[] to be nearly verbatim reports."¹⁷⁷ This precedent would encapsulate the underlying and overt falsity in deepfake video or audio content. Deepfakes rely on an appearance of participation by the celebrity and purport to share that celebrity's viewpoint similar to a false quote attribution in an article, as the deepfakes hold multiple levels of falsity.¹⁷⁸ Therefore, a federal right of publicity would not create additional conflict points with the First Amendment, it would provide a consistent cause of action nationally that would fold into a current exclusion for First Amendment protections.

Moreover, a federal right of publicity would streamline standards for public figure analysis. With the concept of 'celebrity' more fluid in the age of social media, influencers with deep reach across niche audiences can become "'public figures' on social media overnight."¹⁷⁹ As almost anyone can reach public notoriety to a large but specific audience, being within the strata of public figures can leave many influencers without redress.¹⁸⁰ A federal right of privacy can build into the statute a recognition of the impact of a deepfake and name victims beyond the current public figure frameworks, as the victim is not even truly the subject of the contested speech—a mimicry of them is. Thereby relieving the courts of the burden to determine what follower count across which social media channels makes one any strata

¹⁷³ See Pollack, *supra* note 110, § 16.

¹⁷⁴ E.g., *NO FAKES Act Draft*, *supra* note 49 (including draft language for an exception to a violation for a public affairs, news, or parody purpose).

¹⁷⁵ *Hilton v. Hallmark Cards*, 599 F.3d 894, 912 (9th Cir. 2010) (applying California law, the court concluded that defendant was not entitled to the newsworthiness or public interest defense because the product did "not publish or report information").

¹⁷⁶ *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 511 (1991) (holding that a falsely attributed quote was not protected by the First Amendment when applying California law).

¹⁷⁷ *Id.* at 513.

¹⁷⁸ Garon, *supra* note 1, at 433.

¹⁷⁹ *Berisha v. Lawson*, 141 S. Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting).

¹⁸⁰ See *id.* (finding the actual malice requirement for libel actions by public figures "has come to leave far more people without redress than anyone could have predicted" due to the rise of immediate, "overnight" fame).

of public figure. Again, there is no true creation of conflict between this proposal and the First Amendment precedent as it currently stands—where public figures can only prevail when they provide that the material was published with knowledge of falsity “or with reckless disregard of whether it was false,”¹⁸¹ which is inherent in the creation and posting of any deepfake. The federal right of publicity would provide even ground for claims nationally and rectify the widespread disparities of state law without creating instant constitutional conflict with the First Amendment.

B. Copyright Act Potential Conflicts

Current states’ right of publicity are subject to pre-emption by the Copyright Act—or exempted if the courts have found that the particular state’s right of publicity is not an equivalent right to the rights held by a copyright holder.¹⁸² In creating a federal right of publicity, Congress can write into the statute a variety of provisions to balance the Copyright Act and publicity protections. One possible framework would be a fair use exemption which would be consistent with the fair-use-derived potential First Amendment balancing test of transformative use.¹⁸³

Another method would be to limit the scope of the federal right or, rather, to define clearly that name, likeness, image, and voice are not works of authorship as defined in § 102 of the Copyright Act, and thus are not creating additional conflicts between the federal right and the Copyright Act.¹⁸⁴ Plaintiffs under this method could analogize current copyright case law. If the deepfake relied on copyrighted images, the likeness drawn from that image is still not considered a work of authorship.¹⁸⁵ Copyright holders of the source images—for instance, the photographer or publisher of a celebrity image—may have a claim when their images are used in training and for AI-image generation.¹⁸⁶ In the last few years, there has been an increase in litigation initiated by photographers and paparazzi to maintain copyrights over the images they take of celebrities.¹⁸⁷ This trend, under the limited scope approach to the federal right of publicity, would give photographer recourse under the Copyright Act and give the celebrities recourse under the federal right of publicity without infringing on the current balance of rights in the paparazzi-celebrity relationship.

¹⁸¹ N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

¹⁸² CRS REPORT, *supra* note 5, at 3.

¹⁸³ See *supra* notes 110–13 and accompanying text.

¹⁸⁴ Downing v. Abercrombie & Fitch, 265 F.3d 994, 1003–04 (9th Cir. 2001).

¹⁸⁵ *Id.* at 1004.

¹⁸⁶ See, e.g., Andersen v. Stability AI Ltd., 700 F. Supp. 3d 853, 860 (N.D. Cal. 2023).

¹⁸⁷ See, e.g., Winston Cho, *Emily Ratajowski Lawsuit Over Paparazzi Photo Settles*, HOLLYWOOD REP. (Apr. 13, 2022, 5:52 PM), <https://www.hollywoodreporter.com/business/business-news/emily-ratajowski-lawsuit-over-paparazzi-photo-settles-1235130004/> [https://perma.cc/9VA3-TWJ3].

C. Section 230

An expressed provision in a federal right of publicity, cementing publicity as an intellectual property right will provide clear guidelines to litigants and the courts on the applicability of § 230's intellectual property exception.¹⁸⁸ Once the ambiguity of the category of the right is removed, social media companies will be much more motivated to monitor and remove deepfakes from their platforms.¹⁸⁹ Additionally, for celebrities with a high-value brand for whom deepfakes crop up with such volume that litigating against each creator would be cost-prohibitive, a federal right of publicity and exceptions under § 230 will encourage more websites to remove the content without costly court proceedings.¹⁹⁰ Categorization as a property right also allows for the transferability of the right and its exercise post-mortem. A federal right of publicity would work in harmony with the trademarks protecting a person's name.¹⁹¹ Should the *NetChoice* cases resolve the open questions on the boundaries of editorial discretion from the First Amendment on apps with expressive-elements,¹⁹² a property-based right of publicity will avoid open questions facing other content.

D. Intellectual Property Rights Categorization

False endorsement claims under the Lanham Act have been seen by some as a method to address the same underlying acts as the right of publicity; however, deepfakes do not necessarily relate to the sale of any particular good, while the Lanham Act requires that some deception or confusion over the plaintiff's connection to a product.¹⁹³ Returning to the deepfake of Tom Hanks, this falsely attributed opinion could cause harm to the real Mr. Hanks's reputation regardless of both his actual opinion on the matter and if the video is later clarified as a deepfake. Under

¹⁸⁸ McCaleb, *supra* note 160, at 135.

¹⁸⁹ See CRS REPORT, *supra* note 5, at 4–5 (discussing current divides between courts on the treatment of states' right of publicity statutes and § 230).

¹⁹⁰ See Maia Spoto & Isaiah Poritz, *MrBeast, Tom Hanks Stung by AI Scams as Law Rushes to Keep Pace*, BLOOMBERG L. (Oct. 11, 2023, 5:02 AM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/BNA%25200000018b0166d364afb1666ab00001?bna_news_filter=bloomberg-law-news [<https://perma.cc/G9WY-3H6A>] (discussing that less reputable and international websites are often more challenging to remove deepfakes based on violations of state right of publicity or deceptive advertising claims).

¹⁹¹ *Right of Publicity*, INT'L TRADEMARK ASS'N, <https://www.inta.org/topics/right-of-publicity/> [<https://perma.cc/E228-PVXW>] (last visited Feb. 19, 2025) (endorsing enactment of a federal right of publicity in conjunction with current trademark frameworks which can protect celebrities' names).

¹⁹² Liptak, *supra* note 32.

¹⁹³ Brett Wood, *We Are All Famous Now: Unraveling the Right of Publicity and Its Role in an Age of Commercialization*, 53 CUMB. L. REV. 173, 211–12 (2023).

the Lanham Act, Mr. Hanks would not have a valid claim: the video and resulting harm do not relate to a product or perceived connection to any such product. Under a federal right of publicity, Mr. Hanks's likeness was used without his consent, which resulted in reputational (and likely resulting monetary) injury to Mr. Hanks. To continue with this hypothetical past the distinction between false endorsement and the federal right of publicity—the right of publicity claim would survive a First Amendment defense as any deepfake would not be significantly creative to overcome a mere imitation under the transformative use test. The deepfake would not be in the public interest as it is a false statement that does not report information, and even more so as a false attribution of an idea; the deepfake is not protected as established in *Masson*.¹⁹⁴ Mr. Hanks's *federal* claim would not be pre-empted by copyright law. Finally, the federal right of publicity defined as a federal property right, would fall under the exemption for intellectual property in the § 230 liability shield allowing Mr. Hanks to bring action against all those social media sites as well to take the posts down.

E. Public Policy Benefits

Another consideration for the creation of a federal right of publicity is the reduction of forum shopping that would occur.¹⁹⁵ Deepfakes are largely shared on social media or other internet sites which would open a significant opportunity for parties to carefully select which court and laws they argue should have jurisdiction. Not only would parties (or potential deepfake creators) have the opportunity to shop for states that do or do not have a right of publicity; but, within those states that recognize a right of publicity, litigants could forum shop for which states have the most favorable First Amendment tests, find the Copyright Act pre-empts right of publicity claims, or apply § 230 of the Communications Decency Act to right of publicity cases.¹⁹⁶ If the hypothetical Tom Hanks deepfake reached all corners of the internet, there is likely a case for multiple states to have jurisdiction over any resulting claim. He could file his claim in California, where he would be subject to the additional burden of an anti-SLAPP motion.¹⁹⁷ Or, Mr. Hanks could file in a state with similar provisions to Georgia, requiring him to prove as an element of his claim that the appropriator of his identity received some financial benefit as a result.¹⁹⁸ Beyond the three states discussed in this Note, there are a number of variations between the thirty states that have some form of cause of action for a right to

¹⁹⁴ *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 511 (1991).

¹⁹⁵ *Roesler & Hutchinson*, *supra* note 11.

¹⁹⁶ *Id.*

¹⁹⁷ *See Young v. NeoCortext, Inc.*, 690 F. Supp. 3d 1091, 1096–97 (C.D. Cal. 2023).

¹⁹⁸ *See Bullard v. MRA Holding, LLC*, 740 S.E.2d 622, 626 (Ga. 2013) (quoting *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 704 (Ga. 1982)).

publicity,¹⁹⁹ and any one of those factors may change the outcome over a deepfake that was posted globally.

When the value of a persona relies so completely on control of their brand²⁰⁰ and almost anyone can establish a brand “overnight,”²⁰¹ protections from the insidious co-opting of identity online grow more important by the minute. A deepfake in the current legal framework, whether used for the creator’s commercial gains or not, can cause damage to their brands and reputations in a manner that the inconsistent protections do not protect them from. A uniform and evenly applied federal statute with at least limited protection could serve as a deterrent factor and even allow those with more limited resources to protect their likeness when they would otherwise need to litigate through complex hoops and potentially multiple jurisdictions to address deepfake fabrications of themselves.²⁰²

CONCLUSION

The right of publicity remains unreliable as a mechanism to catch the types of content it supposes to limit. The structure and intent of the right as it stands is ripe for tackling deepfakes. Yet, the inconsistency in provisions and treatment in balancing with the First Amendment leave much to be desired. There are no geographic boundaries to the virality of a salacious post online. The development of a federal right to publicity should be more than simply floated by Congress²⁰³ or the Executive branch.²⁰⁴ A singular, national framework with consistent treatment for First Amendment balancing, burdens of proof and harm, and guidelines for pre-emptions will create a clear path forward as deepfakes continue to become more realistic and duplicitous.

¹⁹⁹ See 1 MCCARTHY & SCHECHTER, *supra* note 57, § 1:2.

²⁰⁰ Roesler & Hutchinson, *supra* note 11.

²⁰¹ *Berisha v. Lawson*, 141 S. Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting).

²⁰² Hines, *supra* note 165, at 188.

²⁰³ See generally No AI Fraud Act, H.R. 6943, 118th Cong. (2024).

²⁰⁴ See generally Exec. Order No. 14110, 88 Fed. Reg. 75191, 75192–93 (2023).