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## When Deepfakes Make Celebrities a Dime a Dozen Can the Right of Publicity Save Their Worth?

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WHEN DEEPPAKES MAKE CELEBRITIES A DIME A DOZEN  
CAN THE RIGHT OF PUBLICITY SAVE THEIR WORTH?

*Danielle A. Arnwine\**

Abstract

Recent advancements in deepfake technology exemplify Oscar Wilde’s counter to the traditional view of the relationship between reality and art in a way never before seen. The proliferation and sophistication of artificial intelligence and digital art create previously inconceivable opportunities for celebrity revenue streams and foster a fundamental shift in how society interacts with media online and the importance of truth. Such achievements, while impressive when considered on their own merits, illuminate known deficiencies in legal frameworks. With the potential for unique catastrophic consequences for individual victims and national security, deepfake technology cannot evolve uncontrolled within a black box as is typical for American regulatory regimes. Therefore, this article first critiques the current legal landscape as unprepared to meet the challenges of this technology and inadequate in protecting plaintiffs from their deepfake counterparts, assessing remedies to protect celebrities in the age of social media, where notoriety directly translates into economic opportunities. This Note focuses on celebrities because of the availability of case law, examples, and the protections applicable legislation currently offers. However, this focus on celebrities does not mean that the vulnerabilities and urgency presented by deepfakes are not generally applicable to regular people. Accordingly, a key focus is on the right of publicity, detailing its legal foundations, potential as a cause of action, and the obstacles it faces. Nevertheless, this Note proposes the right of publicity as the most well-suited tool currently available to address these issues without federal regulation and concludes with an evaluation of the recently proposed NO FAKES bill and recommendations for improving existing legislation that protect a celebrity’s image and likeness.

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#### INTRODUCTION

Oscar Wilde wrote in his 1889 essay *The Decay of Lying* that “Life imitates Art far more than Art imitates Life.”<sup>1</sup> His provocative challenge of the traditional assumption that life is art’s muse has never been more plainly illustrated than through the advent of deepfakes. Technological advancements in artificial intelligence (AI), epitomizes Wilde’s viewpoint of art (in this instance digital) as the creator rather than reflector of reality. Like Wilde’s suggestion that art influenced the admiration of sunsets no matter how mundane, so too have deepfakes influenced society’s perception of truth in media.<sup>2</sup> Consequently, deepfakes personify Wilde’s assertion that art (or digital fabrication) molds society’s idea of reality more than reality molds art. Accordingly, deepfakes are shaping politics, marketing, entertainment, and social interactions. For example, soccer superstar Lionel Messi brokered a deal with PepsiCo to use his deepfake lookalike in advertisements for Lay’s

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1. OSCAR WILDE, INTENTIONS: THE DECAY OF LYING: PEN, PENCIL AND POISON, THE CRITIC AS ARTIST, THE TRUTH OF MASKS 32 (Percival Pollard ed., Brentano’s 1905), <https://archive.org/details/cu31924079601617> [<https://perma.cc/Q97Y-J9R4>].

2. *Id.* at 42.

chips, monetizing his name, image, and likeness (NIL) through AI.<sup>3</sup> Messi is not alone in this trend, with some celebrities going so far as to sign away all their image rights for deepfake advertisements like Singaporean actress, model, and former radio DJ Jamie Yeo.<sup>4</sup> As a result, technological renditions of celebrity likenesses and voices are gaining their own followings.<sup>5</sup>

But what happens when someone else uses a celebrity's NIL to monetize an AI-generated lookalike? What recourse do celebrities have? For example, Miles Fisher, a Harvard alumnus with an uncanny resemblance to Tom Cruise, embraced his role as the celebrity's doppelganger, after years of resenting this quirk that overshadowed his accomplishments, by rebranding himself with the help of deepfake technology as "The Deep Tom Cruise" on TikTok.<sup>6</sup> Soon, Fisher's new persona amassed a large following and generated a fandom.<sup>7</sup> If Tom Cruise wanted to pursue legal action against Fisher, could he? How? Now suppose Fisher was maliciously personifying a private citizen, unequipped with social capital and an unlimited budget to hire experts to digitally track and stop his parody. What does the individual do then? Critics of First Amendment, privacy, and cybersecurity law worry that the legal system is unprepared to meet many of the challenges technology presents.<sup>8</sup> The legal system, as this Note will highlight, is taking a

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3. Nick Marsh, *Why some celebrities are embracing Artificial Intelligence deepfakes*, BBC (July 19, 2023), <https://www.bbc.com/news/business-65995089> [<https://perma.cc/Q6QU-NVU7>] (explaining actor Bruce Willis and soccer legend David Beckham using deepfake technology in advertisement deals).

4. *Id.*

5. See @DeepTomCruise on TikTok and "Digital Jack." Patrick Coffee, *Celebrities Use AI to Take Control of Their Own Images*, WALL ST. J. (June 18, 2023, 10:00 AM), <https://www.wsj.com/articles/ai-deepfakes-celebrity-marketing-brands-81381aa6> [<https://perma.cc/YSSU-97WT>].

6. Miles Fisher, *How I Became the Fake Tom Cruise*, THE HOLLYWOOD REP. (July 21, 2022), <https://www.hollywoodreporter.com/feature/deepfake-tom-cruise-miles-fisher-1235182932/> [<https://perma.cc/UJF9-2LC8>].

7. *Id.*

8. See Lyria Bennett Moses, *Recurring Dilemmas: The Law's Race to Keep Up with Technological Change*, 21 UNSW L. & JUST. 1, 5–6 (2007) (discussing the reasons for legal adaptation to new technological challenges and rejecting "technological neutrality" in future legislation); see also Danielle Citron & Robert Chesney, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. 1753, 1757–59 (2019) explores the potential of law in addressing the challenges posed by deepfakes, considering both criminal and civil liabilities. It argues against an outright ban on deepfakes, noting that not all digital manipulations are harmful and that a ban could stifle beneficial uses in various fields. Instead, it suggests a more nuanced approach, focusing on specific harmful uses of deepfake technology. The text also discusses the complexities of imposing civil liability on deepfake creators and distributors, highlighting the difficulties in attribution and jurisdiction, especially when dealing with online platforms. It examines the limitations of current laws, like Section 230 of the

reactionary approach to unprecedented problems—as it often does. However, the consequences of a passive approach to this novel, unbridled, and black-box industry might be the biggest risk the legal system has ever taken. Therefore, the goal of this Note is to highlight yet another reason why Congress must pass a federal right of publicity law, and recommend amendments to the current proposed legislation.

This Note will explore the pressing issue of deepfakes and their implications for individuals. Because of the available examples and the limited legislation often focusing on this demographic, it will focus on the unauthorized use of celebrity likenesses. It begins with an introduction to deepfakes, detailing their applications, including unauthorized celebrity representations and instances where celebrities themselves utilize this technology. The Note goes on to critically examine the right of publicity, the most relevant but currently inadequate legal remedy available for addressing these violations, along with an analysis of other potential torts and the challenges inherent in enforcing the right of publicity. Moving forward, this Note proposes actionable solutions, including an endorsement of using the defendant’s physical location for digital transgressions.<sup>9</sup> Finally, this Note emphasizes the urgent need for congressional action to create robust legal protections against the misuse of deepfake technology, providing recommendations for proposed legislation.

## I. DEEPFAKES EXPLAINED

Most people are now familiar with Photoshop and have seen a doctored image. But the art of photo manipulation started as early as the nineteenth century, when it was done by hand, progressing to the Photoshop graphics editing program, introduced in 1989, and the synthetic media applications of today.<sup>10</sup> While other synthetic media applications predated the term “deepfake,” a Reddit user of the same name coined the term in 2017 through sharing obscene images created

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Communications Decency Act, which shields online platforms from liability for user-generated content and suggests possible amendments to hold platforms more accountable. Finally, the text touches on the role of criminal liability, acknowledging its limitations but suggesting it could complement civil liability in addressing certain extreme cases of deepfakes.

9. See Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the Interwebs*, 100 Cornell L. Rev. 1129, 1162 (2015), <http://scholarship.law.cornell.edu/clr/vol100/iss5/3> [<https://perma.cc/S8SQ-9H4U>].

10. *Photoshopped: The Art of Early Photo Manipulation*, UC RIVERSIDE LIBR. (Mar. 24, 2023), [https://scua.ucr.edu/exhibits/photoshopped-art-early-photo-manipulation#:~:text=Al though%20Adobe%20Photoshop%20was%20not,printed%20appearance%20of%20a%20photo graph](https://scua.ucr.edu/exhibits/photoshopped-art-early-photo-manipulation#:~:text=Al%20though%20Adobe%20Photoshop%20was%20not,printed%20appearance%20of%20a%20photo%20graph) [<https://perma.cc/LQK5-KUFX>]; see also Companies History, *Adobe, COS. HISTORY.COM* (June 17, 2023), <https://www.companieshistory.com/adobe-systems/> [<https://perma.cc/Q8MH-SALX>].

using “open-source face swapping technology,”<sup>11</sup> and the term grew to encompass its predecessors and descendants, such as StyleGAN, which creates photorealistic images of fictional people.<sup>12</sup> The twenty-first century has seen image manipulation extend far beyond traditional media, introducing new complexities in assessing digital authenticity.<sup>13</sup> Deepfakes are created using artificial neural networks, which are computer systems inspired by the human brain that can recognize patterns in data.<sup>14</sup> To develop a deepfake photo or video, an artificial neural network is trained using a process called “deep learning,” in which hundreds or thousands of images are fed into the artificial neural network, training it to identify and replicate patterns, such as the features of a celebrity’s voice or face.<sup>15</sup> Deep learning for deepfakes employs various AI technologies, notably autoencoders and generative adversarial networks (GANs).<sup>16</sup> An autoencoder is an artificial neural network designed to reconstruct input from a simpler representation.<sup>17</sup> In contrast, a GAN consists of two competing neural networks—one generating a fake and the other attempting to detect it.<sup>18</sup> This competition, repeated over many cycles, produces more realistic renderings, eventually creating lifelike avatars of celebrities.<sup>19</sup>

While, in the past, creating deepfakes required extensive, specialized knowledge and software, apps are making it increasingly easier for

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11. Meredith Somers, *Deepfakes, explained.*, MIT SLOAN SCH. OF MGMT. (July 21, 2020), <https://mitsloan.mit.edu/ideas-made-to-matter/deepfakes-explained> [<https://perma.cc/P68S-ZM2E>].

12. *Id.* (discussing AI and deepfake technology expert Henry Ajder’s explanation of the evolution of the term. Ajder points out that while the term “deepfake” has a negative connotation, it has many beneficial uses in marketing and advertising, which are already being employed by major brands. He further explained that the term “artificial intelligence-generated synthetic media” is now preferred because it includes deepfakes but excludes computer-generated movie images and photoshopped pictures, which are also technically modified content).

13. Ian Sample, *What are deepfakes – and how can you spot them?*, THE GUARDIAN (Jan 13., 2020, 5:00 AM), <https://www.theguardian.com/technology/2020/jan/13/what-are-deepfakes-and-how-can-you-spot-them> [<https://perma.cc/6JK9-CF3B>].

14. *Science & Tech Spotlight: Deepfakes*, GAO (Feb. 2020), <https://www.gao.gov/assets/gao-20-379sp.pdf> [<https://perma.cc/LL49-8PZ8>]; Bloomberg Originals, *It’s Getting Harder to Spot a Deep Fake Video*, YOUTUBE (Sept. 27, 2018), <https://www.youtube.com/watch?v=gLoI9hAX9dw> [<https://perma.cc/JT6F-4T4J>].

15. *Science & Tech Spotlight: Deepfakes*, GAO (Feb. 2020), <https://www.gao.gov/assets/gao-20-379sp.pdf> [<https://perma.cc/57BV-TLXY>]; An avatar is “an electronic image (as in a video game) that represents and may be manipulated by a computer user”. *Avatar*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/avatar> [<https://perma.cc/BR7M-6L79>]. Throughout this Note, “avatar” is used interchangeably with “deepfakes.”

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

novices to make their own deepfakes.<sup>20</sup> One such app is DeepFaceLab, which prompts users to first select the source video containing the desired face and the target video to be edited.<sup>21</sup> Then, the software assists users break both videos into individual frames identifying the facial features in each frame to feed into the AI model, training it to understand and replicate the source face.<sup>22</sup> Finally, the software superimposes the source face onto the target video frames, resulting in the completed deepfake video.<sup>23</sup>

### A. How Deepfakes Are Used

While not all uses of deepfakes are harmful,<sup>24</sup> and in some cases are useful,<sup>25</sup> there is apparent use of the technology for nefarious activities.<sup>26</sup> As a result, deepfake technology poses significant threats and challenges to policy and legal issues.<sup>27</sup> Actor and comedian Jordan Peele illustrated how deepfakes can be abused through his rendition of a speech by Barack Obama as an avatar of the former President.<sup>28</sup> The video is utterly life-like and indistinguishable from former President Obama's authentic speech and image, making the use of deepfakes limitless and potentially perilous. From inception, deepfakes have been primarily used to insert female celebrities into pornographic videos.<sup>29</sup> In 2019, Deeptech, an AI company, identified 14,678 deepfakes online.<sup>30</sup> 96% of those videos were erotic, with 99% of those avatars resembling female celebrities.<sup>31</sup>

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20. Cliff Weitzman, *Free Deepfake Video Maker: How to Use AI For Fun And Creativity*, SPEECHIFY, <https://speechify.com/blog/free-deepfake-video-maker/> [https://perma.cc/F34L-CBEK]; see generally iperov et al., *iperov/DeepFaceLab*, GITHUB (Apr. 9, 2020), <https://github.com/iperov/DeepFaceLab> [https://perma.cc/Q8JZ-8293].

21. *Id.*

22. *Id.*

23. *Id.*

24. Sample, *supra* note 13 (deceased actor James Dean stars in Vietnam war movie Finding Jack).

25. See CereProc, a company that makes digital voices for those who have lost their voice due to illness. Henry Baker & Christian Capetany, *It's Getting harder to spot a deep fake video*, YOUTUBE (Sept. 27, 2018), <https://www.youtube.com/watch?v=gLoI9hAX9dw> [https://perma.cc/W2TX-WP7Z].

26. John Villasenor, *Artificial intelligence, deepfakes, and the uncertain future of truth*, BROOKINGS (Feb. 14, 2019), <https://www.brookings.edu/articles/artificial-intelligence-deepfakes-and-the-uncertain-future-of-truth/> [https://perma.cc/F3KS-GQ9H].

27. *Id.*

28. See Jordan Peele, *Deep Fake of Barack Obama*, UNIV. CAL. DAVIS INFO. & EDUC. TECH. (Feb. 22, 2021), [https://video.ucdavis.edu/media/Deep+Fake+of+Barack+Obama/1\\_6zmvebuf](https://video.ucdavis.edu/media/Deep+Fake+of+Barack+Obama/1_6zmvebuf) [https://perma.cc/96U8-UAJ3].

29. Sample, *supra* note 13.

30. *Id.*; Ajder, Henry et al., *The State of Deepfakes: Landscape, Threats, and Impact*, DEEPTRACE 1, 6–7 (Sept. 2019), [https://regmedia.co.uk/2019/10/08/deepfake\\_report.pdf](https://regmedia.co.uk/2019/10/08/deepfake_report.pdf) [https://perma.cc/Q3LY-GYUA].

31. *Id.*; Sample, *supra* note 13.

Because deepfakes can erode the public's trust in videos and images, bad actors can attempt to hide problematic behavior by claiming they were the victim of a deepfake.<sup>32</sup> These AI-generated synthetic media can be used to create convincing but entirely fabricated images or videos of individuals, leading to serious concerns about misinformation, privacy, and security.<sup>33</sup> Businesses also face risks, including corporate espionage and fraud, as deepfakes can be used to mimic executives or manipulate stock prices.<sup>34</sup> As this technology advances, it offers a dual-edged potential: on one hand, enhancing creative possibilities; and on the other, raising ethical concerns regarding consent and authenticity.

### 1. Celebrities Using Deepfakes

One such creative use is the trend of celebrities adopting deepfakes of themselves to capitalize on their image.<sup>35</sup> These virtual avatars allow public figures to appear in commercials, social media campaigns, or even

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32. Villasenor, *supra* note 26; Baker & Capetany, *supra* note 25; Citron & Chesney, *supra* note 8, at 1785–86 (discussing how deepfakes can ironically aid liars in avoiding accountability for their real words and actions. As the public becomes more aware of deepfakes, genuine video or audio evidence supporting accusations might be dismissed as fake. This growing skepticism about the authenticity of audio and video evidence, termed the “liar’s dividend,” increases as the public learns more about deepfake technology. The resulting erosion of trust and truth creates an environment more susceptible to authoritarianism).

33. Lu Zhang & Wei Wei, *Influencer Marketing: A Comparison of Traditional Celebrity, Social Media Influencer, and AI Influencer*, BU SCH. OF HOSP. ADMIN (Oct. 4, 2021), <https://www.bu.edu/bhr/2021/10/04/influencer-marketing-a-comparison-of-traditional-celebrity-social-media-influencer-and-ai-influencer/> [https://perma.cc/A4JR-Y3S4]; Dave Yost, *Consumer Advocate: Beware of deepfake celebrity-endorsement scams*, OHIO ATT’Y GEN. (Apr. 11, 2024), <https://www.ohioattorneygeneral.gov/Media/Newsletters/Consumer-Advocate/April-2024/Beware-of-deepfake-celebrity-endorsement-scams> [https://perma.cc/888B-4Y5M] (explaining, “Recent news reports have unveiled a concerning trend involving famous personalities such as Jennifer Aniston, Taylor Swift and Selena Gomez. They and others have been the subject of ‘deepfake’ celebrity endorsement videos spread on social media that have ensnared unsuspecting consumers. Aniston was supposedly giving away expensive Apple MacBook laptops, and Swift and Gomez appeared to be endorsing Le Creuset cookware. In reality, none of these celebrity endorsements was legitimate. All were faked, likely through artificial intelligence (AI) software.”).

34. See Catherine Stupp, *Fraudsters Used AI to Mimic CEO’s Voice in Unusual Cybercrime Case*, WALL ST. J. PRO CYBERSECURITY (Aug. 30, 2019, 12:52 PM), <https://www.wsj.com/articles/fraudsters-use-ai-to-mimic-ceos-voice-in-unusual-cybercrime-case-11567157402> [https://perma.cc/526E-K2FJ].

35. David G.W. Birch, *Celebrity Deepfakes Vs. Deepfake Celebrities And Valid Vs. Real Media*, FORBES (May 15, 2024, 5:28 AM), <https://www.forbes.com/sites/davidbirch/2024/05/15/celebrity-deepfakes-vs-deepfake-celebrities-and-valid-vs-real-media/> [https://perma.cc/WW7X-W6LQ] (describing a British pop star FKA Twigs who testified “...before a US Senate Judiciary subcommittee. She revealed that she has created a personalized deepfake version of herself, which is trained to mimic her personality and can speak French, Korean, and Japanese. This allows her to let the deepfake interact with journalists and fans, giving her more time to concentrate on her music.”).

entertainment content without having to be physically present, thus opening new revenue streams. Some celebrities have embraced AI and deepfake technology to ‘immortalize’ themselves, a trend that reflects the growing intersection of technology and personal legacy.<sup>36</sup> Through deepfake technology, celebrities can create digital replicas of themselves that can be used long after they have aged or even posthumously.<sup>37</sup> This application ranges from creating younger versions of themselves for movies or television series to preserving their youthful appearance for future projects.<sup>38</sup> Some celebrities use this to maintain control over their image and continue their artistic legacy indefinitely.<sup>39</sup>

In addition to the use of deepfakes as revenue tools for celebrities, these avatars are becoming personalities in their own right — distinct from their human muse, and gaining fans because they are synthetic.<sup>40</sup> The @deptomcruise account on TikTok created by Chris Umé’s company Metaphysic is one such example.<sup>41</sup> The account showcases Miles Fisher parodying Tom Cruise with his striking resemblance, well-practiced mannerisms, and entertainment value amassing a fanbase captivated by the technology.<sup>42</sup>

## 2. Unauthorized Celebrity Deepfakes

Conversely, deepfake technology has also spawned the polarizing practice of parodying celebrities’ likenesses, typically without permission.<sup>43</sup> Increasingly, celebrities discover their images used in

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36. See Samantha Dorisca, *Meet Digital Melo, NBA Star Carmelo Anthony’s Long-Lost Twin*, AFRO TECH (July 1, 2022), <https://afrotech.com/meet-digital-melo-nba-star-carmelo-anthonys-long-lost-twin/> [<https://perma.cc/SSM7-2EL5>].

37. See Justin P’ng, *The Resurrection Will Not Be Televised: Legal Remedies for Posthumous Deepfakes*, 8 GEO L. TECH. REV. 338, 340 (2024) (citing *Tupac Shakur Dies*, HISTORY (Nov. 13, 2009), <https://www.history.com/this-day-in-history/tupac-shakur-dies> [<https://perma.cc/HT8U-4V5U>] (describing an example of a posthumous celebrity deepfake of Tupac Shakur who died in 1996 but appeared on stage at Coachella Valley Music and Arts Festival in 2012)).

38. See Partner Content, *Celebrities Tap Digital Twins to Interact with Millions of Fans at Once*, VARIETY (July 6, 2022, 8:00 AM), <https://variety.com/2022/biz/news/soul-machines-digital-twin-jack-nicklaus-1235307106/> [<https://perma.cc/7G5F-9F85>].

39. *Id.*

40. See Rachel Metz, *How a Deepfake Tom Cruise on TikTok Turned into a Very Real AI Company*, CNN BUS. (Aug. 6, 2021, 8:00 AM), <https://www.cnn.com/2021/08/06/tech/tom-cruise-deepfake-tiktok-company/index.html> [<https://perma.cc/PWR3-7NK6>] (discussing the Tom Cruise deepfakes’ rise to fandom).

41. See @DeepTomCruise’s X (formerly Twitter) account with 5.1 million followers: @DeepTomCruise, X, <https://x.com/deptomcruise?lang=en> [<https://perma.cc/7MVX-R9WS>].

42. See Metz, *supra* note 40.

43. See Content, *supra* note 38 (explaining Katy Perry’s mother was duped by an AI photo of what looked like her daughter at the Met Gala but was really a deepfake).

unauthorized contexts, ranging from harmless spoofs<sup>44</sup> to damaging or defamatory scenarios, potentially harming their reputation and public image.<sup>45</sup> For example, Scarlett Johansson, an acclaimed actress, is reportedly suing Lisa AI: 90s Yearbook & Avatar for its use of her name—without her consent, to endorse the AI-generating app.<sup>46</sup> Notably, the ad clarified in fine print that Johansson was not affiliated with the video.<sup>47</sup>

While digital renditions of celebrities are not new, as seen in video games like NBA 2K24 and the soccer video game FIFA 23, deepfake technology and AI advancements have broken the fourth wall in a way never before seen.<sup>48</sup> The sophistication of deepfakes manufacture a synthetic sense of realism and intimacy between the public and the platform wherein the audience often directly engages with the avatar.<sup>49</sup> Furthermore, because the technology is so advanced, viewers are often dooped into thinking the artificial parody is reality creating the opportunity for meta-awareness similar to a nod to the audience.<sup>50</sup> Thus, viewers are becoming less passive consumers and more active co-creators transcending the boundary between media and audience. For example, Meta, the parent company of Instagram and Facebook, created AI chatbots to encourage dialogue between users and AI-generated celebrity

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44. Eriq Gardner, “Back to the Future II” From a Legal Perspective: Unintentionally Visionary, *THE HOLLYWOOD REP.* (Oct. 21, 2015, 3:51 PM), <https://www.hollywoodreporter.com/business/business-news/back-future-ii-a-legal-833705/> [<https://perma.cc/3FPT-FY9K>].

45. Nadeem Badshah, *Nearly 4,000 celebrities found to be victims of deepfake pornography*, *THE GUARDIAN* (Mar. 21, 2024, 5:18 PM), <https://www.theguardian.com/technology/2024/mar/21/celebrities-victims-of-deepfake-pornography> [<https://perma.cc/7EHV-JPK2>].

46. Ethan Shanfeld, *Scarlett Johansson Takes Legal Action Against AI app That Ripped Off her Likeness in Advertisement*, *VARIETY* (Nov. 1, 2023, 11:57 AM), <https://variety.com/2023/digital/news/scarlett-johansson-legal-action-ai-app-ad-likeness-1235773489/> [<https://perma.cc/LRC5-47H3>]; Cheyenne DeVon, *An AI app clones Scarlett Johansson’s voice for an ad—but deepfakes aren’t just a problem for celebrities*, *CNBC* (Nov. 3, 2023, 3:59 PM), <https://www.cnbc.com/amp/2023/11/03/why-deepfakes-arent-just-a-problem-for-celebrities.html> [<https://perma.cc/F2DE-PNQJ>].

47. *Id.*

48. *Fourth Wall*, *BRITANNICA*, <https://www.britannica.com/art/fourth-wall> (last visited Apr. 28, 2025) (explaining that Denis Diderot birthed this theatrical concept in the 1700s when he suggested actors should perform as if there was a wall—the fourth wall—between themselves and the audience to encourage a more natural performance, which grew in popularity in the 19<sup>th</sup>-century realistic theater and transformed in the 20<sup>th</sup> century when actors began talking directly to the audience “breaking the fourth wall.”).

49. See Tim Marcin, *What are Meta’s AI Personas, and how do you chat with them?*, *MASHABLE* (Oct. 15, 2023), <https://mashable.com/article/meta-ai-personas-explained> [<https://perma.cc/BLJ2-PUJL>].

50. John D. Dunne et al., *Mindful Meta-Awareness: Sustained and Non-Propositional*, 28 *CURRENT OPINION IN PSYCH.* 307, 308 (2019), <https://doi.org/10.1016/j.copsyc.2019.07.003> (defining “meta-awareness” as the sporadic conscious recognition of one’s thoughts).

bots.<sup>51</sup> Meta explained that its goal in this development is to increase user interaction with its platforms through personalized and curated celebrity-look-alike chatbots that can respond to users by mimicking the celebrity's tone, style, and speech patterns.<sup>52</sup> As a result, these AI-generated personas, created to portray realistic human traits and behaviors, are becoming increasingly popular, often acquiring a fanbase akin to that of real-life celebrities.<sup>53</sup> Notably, there are increasing concerns about how these artificial representations might affect the public perception of the actual celebrities, especially if the chatbot's behavior deviates from the celebrity's real-life persona.<sup>54</sup> Nevertheless, these AI-manufactured interactions with the public can be so convincingly realistic that they blur the line between truth and fabrication, making it increasingly difficult for individuals to discern real from fake media.<sup>55</sup>

### B. *Celebrity Defined*

As mentioned, this Note focuses on celebrities rather than the general public when assessing the need for a federal right of publicity law because most examples, laws, and cases tend to involve celebrities. However, that is not to say that private citizens are not similarly, if not moreso, vulnerable to the unauthorized use of their NIL through deepfake technology. That said, before moving forward, it is helpful to understand “celebrity” to distinguish this group from the general population better, who are also vulnerable to technological advancements but are afforded less protection. “The word celebrity traces its origins in a Latin word ‘celebritatem’ which means ‘the condition of being famous.’”<sup>56</sup> Celebrities are famous because of their accomplishments.<sup>57</sup> These individuals often possess exceptional talents, skills, or personalities that

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51. Pete Syme, *Meta is paying the celebrity faces behind its AI chatbots as much as \$5 million for 6 hours of work, report says*, BUS. INSIDER (Oct. 9, 2023, 5:53 AM), <https://www.businessinsider.com/meta-paying-celebrity-faces-of-ai-chatbots-as-much-as-5-million-2023-10> [<https://perma.cc/7W4T-TW8M>].

52. *supra* note 41; Tim Marcin, *What are Meta's AI Personas, and how do you chat with them?*, MASHABLE (Oct. 15, 2023), <https://mashable.com/article/meta-ai-personas-explained> [<https://perma.cc/BLJ2-PUJL>] (describing AI chatbot Billie, who has the face and voice of Kendall Jenner and acts as “...an older sister of sorts designed to give young folks life advice”).

53. *See supra* note 41.

54. *Id.*

55. Tiffany Hsu & Steven Lee Myers, *Can We No Longer Believe Anything We See?*, THE N.Y. TIMES (Apr. 8, 2023), <https://www.nytimes.com/2023/04/08/business/media/ai-generated-images.html> [<https://perma.cc/UW4Z-49ZB>].

56. Naman Jain & Sai Srinivas Reddy, *Authorship and Ownership in Respect of Celebrities and Cinematographic Work*, ALLIANCE U. 1, 7 (2021) (citing *White v. Samsung Elec. Am. Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992), cert denied 113 S. Ct. 2443 (1993) (defining the origin of “celebrity”).

57. *Id.* (discussing ways to characterize celebrities).

captivate the public's attention and contribute to their popular status.<sup>58</sup> Celebrities can emerge from various backgrounds, including acting, music, sports, and social media.<sup>59</sup> Their influence extends beyond their professional accomplishments, as they often become cultural icons and role models.<sup>60</sup> In fact, public perception is the primary criterion for determining whether an individual is considered a celebrity.<sup>61</sup> The public's fascination with celebrities is fueled by media coverage, social media, and the constant flow of information, creating a dynamic relationship between celebrities and their fans.<sup>62</sup>

The term "public figure" is more often used in the legal field than "celebrity" in fields such as First Amendment law whereas the right of publicity interchanges "celebrity" and "fame."<sup>63</sup> The law defines a "public figure" for liability purposes regarding torts involving free speech and freedom of the press as someone who has gained "general fame or notoriety in the community, and pervasive involvement in the affairs of society." For this Note, and the right of publicity specifically, the direct commercial exploitation of identity test is used to define a celebrity: when an unauthorized use of a person's identity is made that is both direct in nature and commercial in motivation, the person whose identity has been misappropriated is a celebrity.<sup>64</sup>

## II. RIGHT OF PUBLICITY IS THE BEST ILL-FITTING TORT AVAILABLE

As AI becomes increasingly adept at mimicking human behavior and appearance, blurring the lines between reality and fiction, there is a potential for confusion, manipulation, and misinformation.<sup>65</sup> Further exacerbating this phenomenon is the lack of cohesive and comprehensive regulation over this technology that is becoming increasingly accessible lifelike.<sup>66</sup> For celebrities, the proliferation of

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58. *Id.*

59. Tabrez Ahmad & Satya Ranjan Swain, *Celebrity Rights: Protection under IP Laws*, 16 J. INTELL. PROP. RTS. 7, 7 (2011).

60. *See id.* at 8; for example, Kobe Bryant, Taylor Swift, and Oprah Winfrey.

61. *Id.* at 7 (discussing definition of celebrity).

62. *Id.*

63. *See Gertz v. Robert Welch*, 418 U.S. 323 (1974); *see* Robert Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 Yale L.J. 86 (2020)..

64. Ahmad & Swain, *supra* note 59 (discussing the test for determining a celebrity)).

65. *See* Oscar Schwartz, *You thought fake news was bad? Deep fakes are where truth goes to die*, THE GUARDIAN (Nov. 12, 2018, 5:00 PM), <https://www.theguardian.com/technology/2018/nov/12/deep-fakes-fake-news-truth> [<https://perma.cc/BBT6-63Q5>]; *see also* Jordan Peele, *Star Uses AI, President Obama in Fake News PSA*, ABC NEWS (Apr. 18, 2018), <https://abcnews.go.com/GMA/News/video/star-ai-president-obama-fake-news-psa-54550809> [<https://perma.cc/7KAG-CQET>].

66. Lutz Finger, *Overview of How to Create Deepfakes – It's Scarily Simple*, FORBES (Sept. 8, 2022, 8:00 AM), <https://www.forbes.com/sites/lutzfinger/2022/09/08/overview-of-how-to-create-deepfakesits-scarily-simple/?sh=61395c702bf1> [<https://perma.cc/TDK7-LDRY>].

sophisticated deepfake software threatens their control and authenticity of their image and brand. Similarly, for private citizens, this technology increases the opportunity and potential devastating impact of online scams and identity theft. As a result, these artificial advancements exacerbate concerns about privacy and exploitation of one's identity online. Despite these concerns, people might opt to interact with and follow celebrity AIs rather than the celebrities themselves for several reasons. First, AI celebrities can offer a curated and idealized version of their human counterparts, free from the flaws and controversies often associated with real personalities. Additionally, interacting with AI celebrities provides a sense of novelty and escapism, offering a break from the mundane realities of everyday life. Furthermore, AI celebrities may offer a sense of control and predictability, as their behaviors and responses can be programmed and tailored to suit individual preferences. The potential for deepfake celebrities to eclipse their human counterparts raises questions about the impact on traditional entertainment industries and the livelihoods of real celebrities. If celebrity deepfakes gain a following and notoriety as a celebrity separate from their real-life muse, the legal system is the only means of recourse for Oscar Wilde's metaphor.

The internet has cemented itself as a central part of our society. However, safeguards for this digital world are severely lacking. One of the many reasons why this is troubling in the advent of deepfake technology is because nefarious users were already using social media to impersonate others at alarming rates<sup>67</sup>. Now, the tools are inconceivably sophisticated. Moreover, in this digital world, many users use other social media accounts as backup accounts and login credentials for other sites.<sup>68</sup> Moreover, in the internet age, the influencer was born—a new job market at the tips of everyone's fingertips with little barrier to access or glass

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67. Grace McKenzie, *Hiding In Plain (Web)Site*, CTR. FOR RSCH. & EVIDENCE ON SECURITY THREATS (Oct. 10, 2023), <https://crestresearch.ac.uk/comment/hiding-in-plain-site/> [<https://perma.cc/FU46-G23F>] (explaining that as of January 2023, about 4.76 billion people, or 59.4% of the global population, use social media. Facebook, with 2.59 billion users, estimates that 4–5% of its active accounts are fake, amounting to approximately 103.6 million to 129.5 million accounts; see also Martin Moore, *Fake accounts on social media, epistemic uncertainty and the need for an independent auditing of accounts*, INTERNET POL'Y REV. (Feb. 7, 2023), <https://policyreview.info/articles/analysis/fake-accounts-social-media-epistemic-uncertainty-and-need-independent-auditing> [<https://perma.cc/2ZAF-9Z5U>]).

68. Caroline Johnson, *SSO vs. Social Login: What's the Difference?*, MEDIUM (Oct. 7, 2022), <https://medium.com/@carolinejohnsonLA/sso-vs-social-login-whats-the-difference-3dafde1075c7> [<https://perma.cc/X36D-Y3RC>] (explaining that Single Sign-On (SSO) allows users to access multiple applications and software systems using a single set of login credentials, eliminating the need to authenticate separately for each platform. Social Login, a type of SSO, enables users to log into third-party websites using their existing social media accounts, such as Facebook, Twitter, or Instagram, rather than having to create a new account).

ceiling for earnings.<sup>69</sup> To effectively combat the challenges posed by deepfake technology, it is crucial to address the economic harm caused by the unauthorized use of an individual's NIL, which falls under the right of publicity.

### A. *Evaluating Other Torts*

At first blush, some might suggest other torts such as copyright, trademark, and passing off, given the obvious limitations of the right of publicities and the complexities of litigating this claim. However, these distinct torts fail to fully address the issue of celebrity deepfakes. Copyright law provides rights and remedies at the federal level.<sup>70</sup> This protection is intended to “promote the creation of original works of literature, art, music, and drama . . . to grant authors a limited intangible property right in their creative works.”<sup>71</sup> To bring a copyright suit, the plaintiff must establish that: “(1) the work is original, sufficiently creative and within the subject matter of copyright . . . ; (2) the plaintiff is the registered owner of a valid copyright . . . ; and (3) the defendant has wrongfully exercised one or more of the six exclusive rights granted to the copyright owner.”<sup>72</sup> Trademark law offers legal protection to words, symbols, phrases, logos, etc. by distinguishing them from other products on the market. However, “[r]egistration of a mark is not mandatory. The owner of an unregistered mark may still use it in commerce and enforce it against infringers.”<sup>73</sup> Moreover, “registration gives trademark owners valuable benefits . . . [including the] ‘prima facie evidence’ . . . and forecloses some defenses in infringement actions.”<sup>74</sup> “Generally, a trademark is eligible for registration, and receipt of benefits, if it is ‘used

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69. Influencer Marketing Hub, What is an influencer? – social media influencers defined [updated 2024] Influencer Marketing Hub (August 2024) (defining an influencer as an individual who can sway the purchasing choices of others due to their expertise, authority, or connection with their audience, often leveraging social media platforms like Instagram, TikTok, YouTube, Facebook, and X. They usually focus on a specific niche—such as fashion, travel, beauty, or fitness—creating content that resonates with followers interested in those topics.); What’s the value of a social media following?, Hook Agency (2023) (explaining that The value of a social media following is significant, with brands paying about \$10 per 1,000 Instagram followers and around \$20 per 1,000 YouTube subscribers. However, the influencer space is marred by fraudulent activities, costing advertisers an estimated \$1.3 billion annually due to fake followers and engagement. Historically, companies have leveraged individuals with followings for product promotions, and they calculate the worth of these engagements through Earned Media Value, using the CPM (Cost Per Thousand Impressions) metric. This allows advertisers to assess the financial potential of a following based on impressions relative to standard advertising rates.).

70. M. Elaine Buccieri, *Cause of Action for Copyright Infringement Under the Federal Copyright Act of 1976*, 9 CAUSE OF ACTION 2d (2013).

71. *Id.*

72. *Id.*

73. *Iancu v. Brunetti*, 588 U.S. 388, 391 (2019).

74. *Id.*

in commerce.”<sup>75</sup> “Passing off” is the act of imitating someone else’s work and portraying it as one’s own.<sup>76</sup> “Passing off typically occurs when someone seeks to imitate another’s property by means of similar labeling, packaging, or advertising, so as to deceive the public into confusing the goods or services of one party for those of the other.”<sup>77</sup> To bring a claim of passing off, one must prove either “(1) that the defendant has acted unfairly, or (2) that the defendant’s activities have caused confusion or are likely to cause confusion with the plaintiff’s product, terms, or activities because they have acquired what is called secondary meaning.”<sup>78</sup> Secondary meaning is derived from “the plaintiff’s identification in the public’s mind as the source of particular products or services.”<sup>79</sup> Finally, false endorsement under the Lanham Act shares a lot of elements with the right of publicity, and therefore, both torts are often brought together.<sup>80</sup> However, false endorsement requires evidence that the unauthorized use of the person’s likeness is misleading or false, giving rise to the inference that they endorsed a product when they did not.<sup>81</sup> Conversely, the right of publicity requires the unauthorized use of another’s identity irrespective of falsity or suggestion of endorsement.<sup>82</sup> While celebrity is not a formal element necessary to bring a false endorsement claim under the Lanham Act, it may be a barrier to success for private individuals.<sup>83</sup> A non-celebrity plaintiff, therefore, must establish that their identity is sufficiently recognizable and commercially relevant within the context it was used.<sup>84</sup> Thus, success hinges not necessarily on fame, but on the likelihood of consumer confusion and the level of recognition or value the non-celebrity’s identity has to mislead consumers into thinking they endorsed the product or service.<sup>85</sup>

State right of publicity laws and federal and state trademark laws both aim to protect individuals from unauthorized uses of their identity, particularly their name or likeness.<sup>86</sup> However, there are key differences

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75. *Id.*

76. A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495, 531–32 (1935).

77. THOMAS D. SELZ ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 18:5 (3d ed. 2024).

78. *Id.* (citing Renofab Process Corp. v. Renotex Corp., 158 N.Y.S.2d 70, 76 (N.Y. App. Div. 1956) and G. & C. Merriam Co. v. Saalfield, 198 F. 369 (6th Cir. 1912)).

79. *Id.*

80. J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 28:14 (5th ed. 2024).

81. *Id.*

82. *Id.*

83. J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 28:17 (5th ed. 2024).

84. *Id.*

85. *Id.*

86. Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark’s Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271, 1278 (2022).

between them. Trademark law safeguards individuals by preventing the unauthorized use of their identity in a way that could mislead consumers about source or sponsorship.<sup>87</sup> On the other hand, the right of publicity offers broader protection. It is not focused on identifying the source of products or services, but rather on preventing unauthorized use of an individual's identity regardless of whether it pertains to commercial activities.<sup>88</sup> This means the right of publicity can apply without considering issues like consumer confusion or dilution.<sup>89</sup> While the Lanham Act provides avenues for addressing trademark infringement and related claims—like false endorsement or dilution—these protections are rooted in the concept of a mark.<sup>90</sup> In contrast, state right of publicity laws exist solely to protect personal identity, extending protections that are not tied to the identity's status as a trademark or its connection to specific goods or services.<sup>91</sup> Additionally, the Sixth Circuit ruled in *ETW Corporation v. Jireh Publishing, Inc.* that a person's likeness or image cannot be considered a trademark.<sup>92</sup> As a result, the right of publicity provides more comprehensive coverage of an individual's identity than trademark and unfair competition laws.

### B. Right of Publicity Explained

The right of publicity can be defined as the right to control the commercial use of celebrities' NIL based on an economic interest.<sup>93</sup> Another way of defining this right is that it protects celebrity personas<sup>94</sup> from appropriation and economic exploitation. The right of publicity is derived from the right of privacy and is a property right.<sup>95</sup> “The right of publicity can be classified as a kind of ‘intellectual property’ and infringement of it as a form of ‘unfair competition.’”<sup>96</sup> “Publicity rights damages are calculated using (1) “the fair market value of the celebrity’s

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87. *Id.*

88. *Id.* at 1278–79.

89. *Id.* at 1279.

90. *Id.*

91. *Id.*

92. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F. 3d 915, 922 (6th Cir. 2003).

93. Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 232–33 (2005); Restatement (second) of Torts § 652C cmt. a (Am. Law Inst. 1977); The Am. Coll. of Trust & Estate Couns., *Understanding Rights of Publicity or Name, Image, Likeness (NIL)*, YOUTUBE (Apr. 5, 2022), <https://www.youtube.com/watch?v=1gQwRoKeN8c> [<https://perma.cc/C9NX-5MQH>].

94. Persona is defined as “the way you behave, talk, etc., with other people that causes them to see you as a particular kind of person.” *Persona*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/thesaurus/persona> [<https://perma.cc/8GZD-74WY>]. Throughout this Note, I will use “persona” interchangeably with NIL.

95. The Am. Coll. of Trust & Estate Couns., *supra* note 93.

96. J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *THE RIGHTS OF PUBLICITY & PRIVACY* (2d ed. 2023) (citing § 1 of the Lanham Act).

identity, (2) the profits of the person infringing on that right, and (3) damages to the celebrity's licensing opportunities because of that infringement."<sup>97</sup>

In the 1950s, the right of publicity was established in American common law in *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953) (The Second Circuit recognized that "infringement of this right causes economic harms that are entirely distinct from the type of harm caused when individuals have 'their feelings bruised through public exposure of their likeness.'").<sup>98</sup> After California statutorily codified the right of publicity in 1972, the right was later acknowledged by the United States Supreme Court in 1977.<sup>99</sup> Thereafter, the Court, for the first and last time, ruled on the right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*, holding that Zacchini, a "human cannonball" performer, could prohibit his complete live performance from being broadcasted on television against his wishes without violating the First and Fourteenth Amendments "based on Ohio's right of publicity."<sup>100</sup> Samuel Warren and Louis Brandeis can be credited with the genesis of privacy law in their article *The Right to Privacy*.<sup>101</sup> Their article highlighted concerns presented by technological advances responsible for the possibility of a person's photograph being used without the person's consent in an age of "[i]nstantaneous photographs and newspaper enterprise."<sup>102</sup> From there, American privacy law took shape, contouring the then-generalized field of privacy through scholarship such as William Prosser's article *Privacy*, which defined four distinct privacy torts one of which being the right of publicity.<sup>103</sup>

### 1. As a Cause of Action

To bring a right of publicity claim, a plaintiff must: (1) have jurisdiction based on their domicile states' laws; (2) demonstrate "the validity of the plaintiff's right of publicity; and (3) show that this right

97. The Am. Coll. of Trust & Estate Couns., *supra* note 93.

98. Mark Roesler & Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, A.B.A. (Sept. 16, 2020), [https://www.americanbar.org/groups/intellectual\\_property\\_law/resources/landslide/archive/what-s-name-likeness-image-case-federal-right-publicity-law/](https://www.americanbar.org/groups/intellectual_property_law/resources/landslide/archive/what-s-name-likeness-image-case-federal-right-publicity-law/) (last visited Feb. 26, 2025).

99. *Id.*; *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 579 (U.S. 1977) (holding that Ohio's Supreme Court does not have to give press the privilege of publishing a performance against the performer's will under the right of publicity because it does not run afoul of the First and Fourteenth Amendments).

100. *Id.*

101. *Id.*; Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193(1890).

102. *Id.* at 195.

103. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 407 (1960), <https://doi.org/10.15779/Z383J3C> [<https://perma.cc/HVJ4-528G>] (listing the four privacy torts and defining "[p]ublicity" [as] . . . plac[ing] the plaintiff in a false light in the public eye.").

has been infringed upon by the defendant.<sup>104</sup> To begin, the plaintiff must establish that the persona (living or late) was domiciled in a state that acknowledge the right of publicity as a cause of action.<sup>105</sup> Thereafter, the plaintiff must establish whether that jurisdiction has any additional stipulations such as the right being exclusively available to celebrities or for veterans.<sup>106</sup> Lastly, the plaintiff, if regarding a deceased persona, must determine the length of time after the celebrity's death that their persona is protected by the right of publicity (for example, California caps this right at seventy-five years post-death, Nevada at fifty, and Florida at forty).<sup>107</sup> Notably, Tennessee theoretically allows for the longest postmortem right of publicity protection provided the rights continue to be used beyond the initial ten year guarantee which will otherwise lapse after two-years of no commercial use.<sup>108</sup>

However, in determining whether the plaintiff's right of publicity is valid, the courts apply one of two tests usually based on the right's source in that jurisdiction.<sup>109</sup> Usually, where the right of publicity is found in common law, the plaintiff must establish: (1) the defendant used the plaintiff's identity or persona; (2) such appropriation was for the defendant's advantage, commercial or otherwise; (3) the plaintiff did not consent to the use of the plaintiff's identity; and (4) the appropriation is likely to cause injury to the plaintiff.<sup>110</sup>

On the other hand, the second, streamlined approach mirrors the *Third Restatement of Unfair Competition*, which requires the plaintiff to establish: "(1) the defendant, without permission, has used some aspect of the plaintiff's identity or persona in such a way that the plaintiff is identifiable from the defendant's use; and (2) the defendant's use is likely to cause damage to the commercial value of that persona."<sup>111</sup>

This second approach removes the additional element of proving the defendant gained commercial benefits.<sup>112</sup> This delineation of tests reflects a tailored approach to protecting the commercial interest of an individual's identity. By either demonstrating harm or unauthorized usage, plaintiffs have clear, albeit distinct, legal avenues to challenge the

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104. Roesler & Hutchinson, *supra* note 98; *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 704 (Ga. 1982); *Cabaniss v. Hipsley*, 151 S.E.2d 496, 499 (Ga. Ct. App. 1966) (describing that the plaintiff would be entitled to recovery if the jury found that the defendants had used her photo without her consent for financial gain).

105. *Id.*

106. *Id.*

107. *Id.*

108. Tenn. Code Ann. § 47-25-1104(a), (b)(2)(A) (2024).

109. Roesler & Hutchinson, *supra* note 98.

110. *Id.*

111. *Id.*; Restatement (Third) of Unfair Competition § 46 (AM. L. INST. 1995).

112. Roesler & Hutchinson, *supra* note 98.

misappropriation of their persona, ensuring their right to control the commercial use of their identity is upheld.

## 2. Challenges Posed by the Right of Publicity

While many states recognize the right of publicity, there is no uniform application of the right in the absence of a federal right to privacy.<sup>113</sup> As of 2020, roughly thirty-five of the fifty states recognize the right of publicity in some fashion.<sup>114</sup> Therefore, a celebrity's right to publicity depends on where they live, which poses significant challenges given that a celebrity's persona is not similarly confined to the boundaries of states.<sup>115</sup> Furthermore, given its similarities to other causes of action, the right of publicity is often misused due to its sophistication ("the right of publicity 'is not a form of trademark, copyright, false advertising, or right of privacy;' instead, the right of publicity 'declares its mandate, because no other area of the law addresses the needs and issues it encompasses.'").<sup>116</sup>

The right of publicity also poses challenges in determining liability. When determining liability, some courts have turned to one approach,

113. *Id.*

114. *Id.* ("As of 2020, the following states recognizing the right of publicity: Alabama (ALA. CODE § 6-5-770), Arizona (ARIZ. REV. STAT. ANN. § 12-761 (applies only to soldiers)) [Arizona courts have recognized a postmortem right of publicity (*See also In re Estate of Reynolds*, 1 CA-CV 13-0274, 2014 WL 1672958, at 10 ¶ 26 (Ariz. Ct. App. Apr. 24, 2014) ("We hold that Arizona recognizes a right of publicity.")], Arkansas (ARK. CODE ANN. § 4-75-1101), California (CAL. CIV. CODE § 3344), Colorado (*Donchez v. Coors Brewing Co.*, 392 F.3d 1211 (10th Cir. 2004)), Connecticut (*In re Jackson*, No. 19-480 (2d Cir. Aug. 19, 2020)), Florida (FLA. STAT. § 540.08), Georgia (*Bullard v. MRA Holding, LLC*, 740 S.E.2d 622 (Ga. 2013)), Hawaii (HAW. REV. STAT. § 482P-1), Illinois (765 Ill. Comp. Stat. 1075/1), Indiana (Ind. Code § 32-36-1-1), Kentucky (KY. REV. STAT. ANN. § 391.170), Massachusetts (Mass. Gen. Laws ch. 214, § 3A), Michigan (*Hauf v. Life Extension Found.*, 547 F. Supp. 2d 771 (W.D. Mich. 2008)), Minnesota (*Ventura v. Titan Sports, Inc.*, 65 F.3d 725 (8th Cir. 1995)), Missouri (*Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003)), Nebraska (NEB. REV. STAT. § 20-201), Nevada (NEV. REV. STAT. § 597.770), New Hampshire (*Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008)), New Jersey (*Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981)), New Mexico (*Moore v. Sun Publ'g Corp.*, 881 P.2d 735 (N.M. Ct. App. 1994)), New York (N.Y. Civ. Rights Law §§ 50–51 (applies only to living individuals)), Ohio (OHIO REV. CODE ANN. § 2741.01), Oklahoma (Okla. Stat. tit. 21, § 839.1), Pennsylvania (42 Pa. Cons. Stat. § 8316), Rhode Island (9 R.I. Gen. Laws § 9-1-28.1), South Carolina (*Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 684 S.E.2d 756 (S.C. 2009)), South Dakota (S.D. Codified Laws § 21-64-2), Tennessee (TENN. CODE ANN. § 47-25-1101), Texas (Tex. Prop. Code Ann. § 26.001), Utah (UTAH CODE ANN. § 45-3-1), Virginia (VA. CODE ANN. § 8.01-40), Washington (WASH. REV. CODE § 63.60.010), West Virginia (*Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70 (W. Va. 1983)), and Wisconsin (*Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979))."); Jennifer E. Rothman, *Right of Publicity State-by-State*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://rightofpublicityroadmap.com/> [<https://perma.cc/2PWE-Q8R8>] (detailing a state-by-state breakdown of the right of publicity).

115. *See, e.g., id.*

116. *Roesler & Hutchinson, supra* note 98.

which asks “whether the work sufficiently transforms the celebrity’s identity or likeness.”<sup>117</sup> The Third and Ninth Circuits embraced this approach, which stemmed from the California Supreme Court’s opinion in *Comedy III Products v. Gary Saderup*.<sup>118</sup> Furthermore, this approach “. . . draws from the ‘fair use’ defense in copyright law and is known as the ‘transformative use’ test.”<sup>119</sup> Conversely, the Rogers test, which the Second and Sixth Circuits adopted, examines “whether the use of a celebrity’s name or likeness was ‘wholly unrelated to the [defendant’s work] or was simply a disguised commercial advertisement for the sale of goods or services.’”<sup>120</sup> Alternatively, the Eight and Tenth Circuits adopted a balancing test between the “celebrity’s interest in his or her publicity [and] . . . the public’s interest in freedom of expression.”<sup>121</sup>

Another challenge presented by inconsistencies in the right of publicity as we know it is the “descendible right of publicity,” wherein the right to publicity can be inherited in a similar way as other property.<sup>122</sup> Most states recognize a postmortem right of publicity, but some states do not.<sup>123</sup> Additionally, what is available as a postmortem interest in persona rights is vaguely outlined and inconsistently applied, creating additional challenges.<sup>124</sup> An example of this difference in application of a postmortem right of publicity can be seen in the cases of the late Marilyn Monroe and Elvis Presley.<sup>125</sup> While the heirs of Monroe’s right of publicity interests were denied, the heirs of Presley maintained their claim to his right of publicity.<sup>126</sup> The difference? The specificities of the two late personalities’ domiciles.<sup>127</sup> In Monroe’s case, her heirs were denied their interests because Indiana, the place Monroe passed, did not have a retroactive postmortem right of publicity.<sup>128</sup> Therefore, the court held that she was not entitled to rights she lacked before her death.<sup>129</sup> On the other hand, Presley’s heirs maintained their interests in his persona

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117. Alex Wyman, *Defining the Modern Right of Publicity*, 15 TEX. REV. ENT. & SPORTS L., Sept. 26, 2014, at 2, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2500879](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500879) [<https://perma.cc/RDW6-GCBX>].

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 2–3.

125. Raymond J. Dowd, *Rights of Publicity: Elvis, Marilyn, and the Federal Courts*, THE FED. LAW. 13 (2007).

126. *Id.* at 12.

127. *Id.* at 13.

128. *Id.*

129. *Id.*

because he was domiciled in Tennessee, which lacked the confines of Indiana law.<sup>130</sup>

The clash between the right to privacy and the First Amendment has been an enduring challenge. When Samuel Warren and Louis Brandeis advocated for the recognition of the right to privacy in their 1890 article, they acknowledged the inherent tension between the right to speak and the “right to be let alone.”<sup>131</sup> Seven decades later, William L. Prosser described the relationship between privacy and free speech as a “head-on collision” that gradually evolved into a “slow compromise.”<sup>132</sup> Today, this compromise remains delicate, with courts grappling particularly with the concept of newsworthiness at the intersection of privacy and the First Amendment.<sup>133</sup> Essentially, courts aim to prevent the infringement of the right to privacy by the right to free speech.<sup>134</sup> Notably, in numerous cases involving the media, the courts have consistently tilted the balance in favor of the press.<sup>135</sup> In terms of determining the boundary between privacy and the First Amendment—specifically, how to define a “subject of legitimate interest” or “newsworthiness”—they openly admitted lacking a “wholly accurate or exhaustive definition.”<sup>136</sup>

The issue of deepfakes and the lack of a federal right of publicity statute is increasingly urgent, as these technologies are not limited to celebrities; everyday individuals are becoming targets of fake social media profiles and deceptive impersonations. The sophistication of deepfake video and voice technology exacerbates the risk of identity theft and reputational harm, particularly as facial recognition systems are increasingly used to safeguard sensitive information.<sup>137</sup> Without a clear legal framework, regular individuals face a significant threat without recourse, as existing torts fail to adequately address the unique harms caused by deepfakes. The absence of a right of publicity leaves them vulnerable, highlighting the need for immediate legislative action to protect all individuals from these emerging dangers.

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130. *Id.*

131. Erin C. Carroll, *Making News: Balancing Newsworthiness and Privacy in the Age of Algorithms*, 106 GEO. L.J. 69, 74 (2017).

132. *Id.* at 74–75.

133. *Id.* at 75.

134. *Id.*

135. *Id.*

136. *Id.* at 76

137. Jessica Hallman, *Deepfakes expose vulnerabilities in certain facial recognition technology*, PENN STATE (Aug. 11, 2022), <https://www.psu.edu/news/information-sciences-and-technology/story/deepfakes-expose-vulnerabilities-certain-facial> [<https://perma.cc/ZS6T-JE4S>] (explaining that many facial recognition technologies are vulnerable to deepfakes as they often fail to detect synthetic images).

### III. WHAT CAN WE DO?

In cases where a celebrity lacks access to a right of publicity statute, the options for recourse are severely limited. Many have advocated for the federal government to establish a comprehensive federal right of publicity to address these concerns and protect individuals from unauthorized use of their identities.<sup>138</sup> However, as deepfakes proliferate in the absence of such legislation, this Note will explore creative and ambitious solutions that, while potentially theoretical, could offer some protection for celebrities navigating this complex landscape. The proposed solutions include judicial activism and forum shopping.<sup>139</sup> Yet, in the absence of a federal right, there is nothing to lose.

#### A. *Recharacterization*

The suggestion to recharacterize the right of publicity is aimed at overcoming the significant challenge of personal jurisdiction, which often complicates a plaintiff's ability to bring a case in a favorable forum that has a right of publicity statute. Mary LaFrance puts forth such a solution by recharacterizing the right of publicity as an intellectual tort rather than a property interest.<sup>140</sup> The legal basis for conceptualizing the right of publicity as an intellectual tort is rooted in its origins in the

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138. See Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMM'N LAW. 14, 14 (2011); Mary LaFrance, "Choice of Law and the Right of Publicity: Rethinking the Domicile Rule", 2019 SCHOLARLY WORKS 1, 2; Jennifer E. Rothman, *Federal right of Publicity Takes Center Stage in Senate hearing on AI*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (July 27, 2023), [https://rightofpublicityroadmap.com/news\\_commentary/federal-right-of-publicity-takes-center-stage-in-senate-hearing-on-ai/](https://rightofpublicityroadmap.com/news_commentary/federal-right-of-publicity-takes-center-stage-in-senate-hearing-on-ai/) [<https://perma.cc/V3N8-Z2U5>]; Woods Drinkwater, *Personality Beyond Borders: The Case for a Federal Right of Publicity*, 3 MISS. L. REV. 115, 132 (2013); Alyssa Devine, *Why You Should Care About a Federal Right of Publicity*, IP WATCHDOG (Dec. 15, 2023, 8:15 AM), <https://ipwatchdog.com/2023/12/15/why-you-should-care-about-a-federal-right-of-publicity/id=170583/> [<https://perma.cc/H8RJ-W24L>]; *AI and the Right of Publicity: A Patchwork of State Laws the Only Guidance, For Now*, CROWELL (Dec. 12, 2023), [https://www.crowell.com/en/insights/client-alerts/ai-and-the-right-of-publicity-a-patchwork-of-state-laws-the-only-guidance-for-now#\\_ftn7](https://www.crowell.com/en/insights/client-alerts/ai-and-the-right-of-publicity-a-patchwork-of-state-laws-the-only-guidance-for-now#_ftn7) [<https://perma.cc/RNY7-LU3N>].

139. The decision to propose these solutions was reached after extensive research and deliberation of various options, including: (1) suing the federal government for abrogation of duty under the IP clause, ultimately abandoned due to its permissive nature and sovereign immunity; (2) bringing a claim against the federal government under the Federal Tort Claims Act, but dispensed with as unrealistic due to prima facie challenges, (3) pursuing remedies for regulatory takings related to celebrity rights of publicity, but this was set aside due to lack of government affirmative action; (4) creative pleading in state courts under the minimum contacts theory, abandoned due to case law requiring more substantial connections; and (5) revitalizing Professor Currie's conflict of laws theory, which was discarded over concerns regarding the Dormant Commerce Clause.

140. LaFrance, *supra* note 138, at 25–26.

intersection of privacy and intellectual property law.<sup>141</sup> Warren and Brandeis initially justified the right to privacy using common law copyright principles, and the Supreme Court's decision in *Zacchini v. Scripps-Howard Broadcasting* solidified this connection by placing the right of publicity within the intellectual property framework.<sup>142</sup> In *Zacchini*, the Court emphasized the need to protect individuals' proprietary interests in their performances, arguing that such protection serves as an economic incentive for creativity and production, like patent and copyright laws.<sup>143</sup> This shift in perspective allowed the right of publicity to extend beyond mere privacy concerns, providing broader protections that can even survive an individual's death and encompass various uses of a person's identity, thus framing it as a form of intellectual property.<sup>144</sup>

LaFrance grounds this proposal in the critique that courts, in applying the domicile rule to right of publicity choice of law cases, conflate the issue and subsequent legal analysis of cases of property ownership and liability with tortious injury to property.<sup>145</sup> LaFrance highlights that this reliance on domicile law contrasts sharply with the principles governing other tort cases, which typically emphasize *lex loci delicti* or the jurisdiction with the "most significant relationship" to the case.<sup>146</sup> LaFrance further underscores this point with examples of cases where courts ignored choice of law principles in right of publicity cases

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141. Jennifer E. Rothman, *The Right of Publicity's Intellectual Property Turn*, 42 COLUM. J.L. & ARTS 277, 280 (2019) (explaining the historical analogizing of the right of publicity as an intellectual property).

142. *Id.* at 302 ("In the Supreme Court's 1977 decision in *Zacchini v. Scripps-Howard Broadcasting*, the Court both created and cemented the right of publicity's break from the right of privacy and its placement into the intellectual property framework... *Zacchini* is often described as a quasi-copyright case."); Warren & Brandeis, *supra* note 101, at 200–09.

143. Rothman, *supra* note 141, at 302, 304 ("[Justice] Blackmun worried that if the news could broadcast performances like *Zacchini's* without permission, there was nothing to prevent broadcasts of entire symphonies or boxing matches or plays—if those performances were not protected by copyright laws.").

144. *Id.* at 305–06 ("The Court explicitly analogized the right of publicity to patent and copyright laws, and imported the justifications used for these IP laws, particularly the incentive rationale and the labor-reward rubric, to justify the state law.").

145. LaFrance, *supra* note 138, at 3; *see also id.* at 6 ("In the absence of a rule specific to the right of publicity, most courts have applied the default choice of law principles that apply to property disputes, on the theory that the right of publicity is a property interest.").

146. LaFrance, *supra* note 138, at 6 (citing Sonja Larsen & Karl Oakes, 16 AM. JUR. 2D CONFLICT OF LAWS § 99, at 164–66 (2018)); § 102, at 168–70 & RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 158, 145 (AM. L. INST. 1971).

involving non-domiciliaries wherein the place of injury forum's law was applied.<sup>147</sup>

Another solution could be recharacterizing the right of publicity tort as an intentional tort.<sup>148</sup> An intentional tort occurs because of the defendant's purposeful action (or inaction).<sup>149</sup> This Note suggests recharacterizing the right of publicity as an intentional tort because creating a deepfake is a deliberate act involving multiple steps that reflect a clear intention to manipulate and misrepresent an individual's likeness. The mental state required to produce a deepfake aligns with the essence of intentional harm, as it involves conscious decisions to deceive and exploit someone's image.<sup>150</sup> Recharacterizing the right of publicity as an intentional tort would emphasize the intentional nature of actions that infringe on a person's right to control the commercial use of their identity. By framing the right of publicity as an intentional tort, the focus shifts to deliberately exploiting an individual's persona for profit, aligning it more closely with other intentional torts that protect against harm caused by willful actions.

In framing the right of publicity in this way, the plaintiff may follow the established structure of litigating an intentional tort. While the elements of a right of publicity claim do not require proof of the defendant's mental state, the inherently complex nature of creating deepfakes suggests a deliberate intent aligned with the frameworks of intentional torts. This is particularly relevant when considering the nuances of privacy laws, such as those outlined in *Restatement of the Law, Second, Torts* § 652, which addresses intrusion upon seclusion.<sup>151</sup>

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147. LaFrance, *supra* note 138, at 18–19 (discussing cases where courts have ignored the plaintiff's domicile at the potential risk of altering the legal outcome for instance, in *Estate of Elvis Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981), the New Jersey District Court overlooked the implications of choice of law, applying only the law of where the infringement occurred. Similarly, in *Zacchini v. Scripps-Howard Broadcasting Co.*, No. 33713, 1975 WL 182619 (Ohio Ct. App. July 10, 1975), *rev'd*, 351 N.E.2d 454 (Ohio 1976), *rev'd*, 433 U.S. 562 (1977), the court's exclusive focus on Ohio law ignored the potentially more relevant Florida law, where Zacchini was likely domiciled and had existing right of publicity protections).

148. *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011) (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 61–62 (1998) where it is explained that intentional torts, unlike negligent or reckless torts, typically necessitate that the person intends the outcomes of their actions rather than just the actions themselves); *see also* RESTATEMENT (SECOND) OF TORTS § 870 cmt. b (AM. L. INST. 1979) (stating, “[a]n intentional tort is one in which the actor intends to produce the harm that ensues; it is not enough that he intends to perform the act. He intends to produce the harm when he desires to bring about that consequence by performing the act.”); *see also* RESTATEMENT (SECOND) OF TORTS § 8A(b) (AM. L. INST. 1965) (explaining, “[i]ntent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.”).

149. RESTATEMENT (SECOND) OF TORTS § 870(b) (AM. L. INST. 1979).

150. *Id.*, *supra* note 147.

151. RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977).

According to this section, an individual who intentionally intrudes upon another's solitude or private affairs can be held liable if such intrusion would be deemed highly offensive by a reasonable person.<sup>152</sup> Notably, this form of invasion does not rely on publicity given to the individual affected; rather, it emphasizes the intentional interference with one's privacy. William Prosser's classification of privacy torts further delineates the distinctions between appropriation and the right of publicity, noting that the latter primarily seeks to address economic harm.<sup>153</sup> Given the deliberate nature of deepfake creation, it is reasonable to conceptualize the right of publicity as an intentional tort, especially as it pertains to the psychological and financial harm inflicted upon individuals through these technologies. If the right of publicity were treated as an intentional tort, legal precedent would dictate that plaintiffs could bring suit in jurisdictions where the court has proper jurisdiction over the defendant, theoretically expanding the available forums for remedies. Accordingly, courts could definitively use the defendant's physical location as the proper jurisdiction to determine whether there is a right of publicity protection. Doing so would promote predictability and fairness and align with existing legal frameworks governing torts and online activity.<sup>154</sup>

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152. *Id.* § 652B cmt. a.

153. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389, 406 (1960) (detailing in his 1960 article *Privacy*, William Prosser identified four privacy torts: intrusion, disclosure, false light, and appropriation, a framework now widely accepted in legal circles. He defined "appropriation" as the unauthorized commercial use of a person's identity. Prosser synthesized the distinction between different uses of a person's name, image, and likeness from New York cases, which highlighted varying implications of such uses: economic exploitation and embarrassment from false light). Courts have also honed in on this delineation. *See, e.g.*, Thomas McCarthy & Roger E. Schechter, *Rights of Publicity and Privacy* § 5:56 (2d ed. 2024) (quoting *Scott v. Citizen Watch Co. of Am., Inc.*, 2018 WL 1626773, \*3 (N.D. Cal. 2018)) (recognizing both a common law right of publicity tort and a common law appropriation-privacy tort "with the difference being the harm the plaintiff suffers: lost opportunity to benefit commercially from his own public identity on the one hand, and injury to feelings or peace of mind on the other"); *Overhead Sols., Inc. v. A1 Garage Door Serv., L.L.C.*, 2022 WL 602864, \*2 (D. Colo. 2022) (holding that recovery in a privacy claim for appropriation is limited to damages for "mental anguish and injured feelings . . . [including] emotional injury, harm to reputation and related financial losses, but not damages based upon the commercial value of one's persona"); *see Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1446 (11th Cir. 1998) (quoting McCarthy and Schechter's view with approval); Comment, *Descendability of the Right of Publicity*, 1983 S. ILL. U. L.J. 547, 564 ("Where the right of privacy protects one's emotional psyche, the right of publicity guards against a purely pecuniary injury."); *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 541, 1993 (the court quotes with approval the distinction drawn by the treatise between appropriation privacy and the right of publicity. "The difference between the two is found not in the activity of the defendant, but in 'the nature of the plaintiff's right and the nature of the resulting injury.'").

154. *See Alan M. Trammell & Derek E. Bambauer, Personal Jurisdiction and the*

### B. *Friendly Forums*

A third potential solution to the challenge posed by the lack of right of publicity statutes available based on domicile is to bring the case in a state like Indiana,<sup>155</sup> which allows individuals to file a cause of action “regardless of a personality’s domicile, residence, or citizenship,” provided that the event occurred within the state.<sup>156</sup> This approach would require the plaintiff to demonstrate that the unauthorized use of their identity took place in Indiana. Here, the boundless nature of technology offers a unique opportunity to plead a case outside of the plaintiff’s domicile, but challenges remain.

The most obvious challenge is bypassing jurisdictional restraints to exercise these long-arm statutes.<sup>157</sup> A court cannot exercise jurisdiction over an individual unless that person voluntarily appears in the court, is

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*Interwebs*, 100 CORNELL L. REV. 1129, 1134 (2015) (arguing that the internet’s novelty highlights weaknesses in current personal jurisdiction jurisprudence but does not necessitate a complete overhaul of existing legal regimes. Instead, the authors advocate for a narrow, location-based approach to jurisdiction in cases involving intangible harms per their “...tripartite view of personal jurisdiction’s deep structure: constitutionally compelled restrictions (imposed by the Due Process Clauses); prudential common law restrictions (crafted by the Supreme Court); and state-specific restrictions (embodied in long-arm statutes)”).

155. Indiana law was proposed because, like Washington, it is broad and arguably the most accessible. Thus, this forum, similar to Washington, could potentially support plaintiffs in pursuing right of publicity cases if they can establish jurisdiction. Indiana’s statute includes a long-arm provision stating that any person engaging in prohibited conduct within the state submits to its jurisdiction if they create or transport goods or disseminate advertising in violation of the relevant provisions. *See* IND. CODE ANN. § 32-36-1-9 (West 2002); WASH. REV. CODE ANN. § 63.60.010 (West 2008) (“Every individual or personality, as the case may be, has a property right in the use of his or her name, voice, signature, photograph, or likeness, and such right shall be freely transferable, assignable, and licensable, in whole or in part, by any otherwise permissible form of inter vivos or testamentary transfer, including without limitation a will, trust, contract, community property agreement, or cotenancy with survivorship provisions or payable-on-death provisions, or, if none is applicable, under the laws of intestate succession applicable to interests in intangible personal property. The property right does not expire upon the death of the individual or personality, as the case may be. The right exists whether or not it was commercially exploited by the individual or the personality during the individual’s or the personality’s lifetime.”).

156. *See* IND. CODE ANN. § 32-36-1-1 (West 2002) (amended 2012) (this chapter applies to actions occurring within Indiana, regardless of a person’s domicile, while specifying that it does not affect existing rights related to news reporting or entertainment; it also outlines exceptions for various uses of a personality’s identity, such as in artistic works, newsworthy material, truthful identification in authored or recorded performances, and reporting on public interest topics, while noting that commercial value derived solely from criminal charges or convictions is also excluded).

157. A “long-arm” statute refers to a state’s ability to exercise jurisdiction over a non-domiciliary without violating the Constitution. *See e.g.*, CAL. CIV. PROC. CODE, § 410.10 (West 1970) (stating that California courts may exercise jurisdiction “on any basis not inconsistent with the Constitution of this state or of the United States”).

physically present in the state, resides there, or has property in the state that the court can seize.<sup>158</sup> The Due Process Clause mandates that for a court to impose a personal judgment on a defendant who is not physically present in the forum, there must be sufficient minimum contacts with that jurisdiction so as not to transgress “traditional notions of fair play and substantial justice.”<sup>159</sup> Washington attempted to extend protection under its right of publicity statute to non-domiciliary plaintiffs, but these efforts have faced constitutional challenges, suggesting that exceptions to the Dormant Commerce Clause or the Due Process Clause are unlikely to be upheld.<sup>160</sup>

The internet creates additional obstacles (or opportunities) regarding the utility of long-arm statutes. The legal framework for internet jurisdiction has evolved significantly since *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, which established a foundational approach to personal jurisdiction based on website operations.<sup>161</sup> This case, decided during the early days of widespread internet use, categorized websites into three types—commercial, passive, and interactive—and set the stage for determining jurisdiction based on their interactivity.<sup>162</sup> As nearly all modern websites incorporate interactive elements, this has broadened the potential for jurisdiction across state lines.<sup>163</sup> Subsequent cases, such as *Calder v. Jones*, further developed the concept by emphasizing the effects test, where jurisdiction is established based on the intentional actions of a defendant that target a specific state.<sup>164</sup> Moreover, simply posting

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158. *Pennoyer v. Neff*, 95 U.S. 714, 723–44 (1878) (describing how a court may exercise jurisdiction over a non-resident in accordance with the Due Process Clause).

159. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

160. *See, e.g., WASH. REV. CODE ANN.* § 63.60.010 (West 2008) (“This chapter is intended to apply to all individuals and personalities, living and deceased, regardless of place of domicile or place of domicile at time of death.” Constitutionality of the statute was assessed in *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.*, 762 F.3d 829, 836–37 (9th Cir. 2014) (explaining that the district court found that applying Washington’s Right of Publicity Act (WPRA) instead of New York law, where Jimi Hendrix was domiciled, violated choice-of-law principles under the Due Process and Full Faith and Credit Clauses. While the court acknowledged that Washington had relevant contacts due to lost sales of licensed goods, it also ruled that applying the WPRA could violate the Dormant Commerce Clause by potentially affecting transactions outside the state. However, the specific case did not involve such transactions, and there was no evidence that enforcing the WPRA would significantly burden interstate commerce).

161. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

162. *Id.*

163. Gretchen Yelmini, *Internet Jurisdiction and the 21st Century: Zippo, Calder, and the Metaverse*, 55 CONN. L. REV. 578, 584 (2023) (explaining “[a]s one court put it, *Zippo* ‘effectively removes geographical limitations on personal jurisdiction over entities that have interactive websites.’” (citing *Kindig It Design, Inc. v. Creative Controls, Inc.*, 157 F. Supp. 3d 1167, 1174 (D. Utah 2016))).

164. In *Calder v. Jones*, 465 U.S. 783, 789 (1984), the Supreme Court determined that California could exercise jurisdiction over *The National Inquirer*, a Florida-based corporation,

content available to other states not aimed at or connected to events or sources within the forum state is insufficient to establish personal jurisdiction.<sup>165</sup> The Supreme Court's ruling in *Ford Motor Co. v. Montana Eighth Judicial District Circuit* in 2021 reinforced that personal jurisdiction arises from a defendant's contacts with the forum state, maintaining a balance between broad jurisdictional reach and the need for relevant connections.<sup>166</sup> This ongoing development leaves plaintiffs with yet another legally ambiguous landscape.<sup>167</sup>

Unauthorized deepfakes are typically created by individuals or informal groups rather than incorporated businesses, making it challenging to bring legal action against them in their respective jurisdictions.<sup>168</sup> This difficulty is compounded by the need for plaintiffs

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because its national circulation and the alleged libel were directly related to the activities of a California resident. The Court emphasized that the defendant's deliberate actions targeting California meant they could reasonably expect to be sued there. Therefore, the central issue is whether the forum state acts as the focal point for both the tort and the resulting harm, allowing courts to establish jurisdiction based on the effects of the defendant's actions in that state.

165. *Revell v. Lidov*, 317 F.3d 467, 475–76 (5th Cir. 2002).

166. *Yelmini*, *supra* note 163, at 601; *Ford Motor Co. v. Mont. Eighth Jud. Distr. Ct.*, 141 S. Ct. 1017, 1026 (2021) (communicating that Ford's argument rests upon interpretations of *Bristol-Myers Squibb Co. v. Super. Ct. Cal.*, 137 S. Ct. 1773 (2017) and *Walden*, which, in Ford's view, support a causal approach to personal jurisdiction). *See id.* at 1026–27 (arguing that "[j]urisdiction attaches "only if the defendant's forum conduct gave rise to the plaintiff's claims." While unsuccessful, this argument is simply the other half of the causal connection articulated in *Calder*, concerning itself not with the effect, but the cause at issue in a particular lawsuit) (quoting Brief for Petitioner at 13, *Ford Motor Co. v. Mont. Eighth Jud. Distr. Ct.*, 142 S. Ct. 1773 (No. 19-368), 2020 WL 1154744, at \*13).

167. To solve this issue, Zoe Niesel proposed that personal jurisdiction be established when a defendant intentionally uses the internet, knowing their actions could affect the forum state. Zoe Niesel, *#PersonalJurisdiction: A New Age of Internet Contacts*, 94 INDIANA L.J. 104, 144 (2019). An even more ambitious approach might involve litigating against tech companies primarily based in California, a state with its own right of publicity statute. However, this strategy is complicated by the fact that the California statute limits protections to plaintiffs domiciled in the state, making it an unviable option for many. *See Cairns v. Franklin Mint Co.*, 120 F. Supp. 2d 880 (C.D. Cal. 2000) (holding that the California statute on post-mortem publicity rights is not a choice of law provision and does not change the rule that personal property rights are governed by the law of the person's domicile). Additionally, any attempt to target these companies could run into issues with Section 230 immunity, an area the Supreme Court has shown reluctance to address. *See Twitter, Inc. v. Taamneh*, 598 U.S. 471, 505–06 (2023) (holding a social media platform cannot be held civilly responsible under the Anti-Terrorism Act for assisting a user in carrying out an act of international terrorism, provided that the platform has treated this user in the same manner as its other users and that the user did not utilize the platform to organize the terrorist activity.); *see Gonzalez v. Google LLC*, 598 U.S. 617, 621–22 (2023) (referencing its ruling in *Twitter v. Taamneh*, the Court chose not to address the issue at hand in this case, vacating the Ninth Circuit's judgment and sending it back for further proceedings in line with that opinion. While this outcome may seem to benefit Gonzalez on the surface, it ultimately results in the dismissal of Gonzalez's claim upon remand.).

168. Quentin Ullrich, *Is This Video Real? The Principal Mischief of Deepfakes and How the*

to accurately identify and serve the creators of the deepfake within the statute of limitations.<sup>169</sup> Given that these deepfakes are posted online, they often involve interstate interests, necessitating the use of long-arm statutes to establish personal jurisdiction.<sup>170</sup> To effectively address these cases, the concept of personal jurisdiction must be reexamined, as plaintiffs may find themselves unable to sue the platforms hosting the infringing content while also lacking the means to pursue the unidentified defendants. This situation leaves plaintiffs vulnerable, especially if the forum state has a right of publicity statute that does not accommodate non-domiciliary plaintiffs.

#### IV. CONGRESS MUST ACT

Therefore, while states can take steps to address the gaps in protection for individuals affected by unauthorized deepfakes and identity misuse, these efforts are likely to fall short given the complexities of the internet and evolving technology.<sup>171</sup> In states without a right of publicity statute, the lack of legislative support can hinder the development of meaningful laws, making it difficult for plaintiffs to seek justice. Additionally, reliance on common law or existing torts in these states can lead to inconsistent case law, resulting in unpredictable outcomes for those trying to assert their rights. Plaintiffs may also face a higher burden of proof, as they would need to navigate existing tort categories—such as defamation or invasion of privacy—that often do not fully encompass the unique challenges posed by deepfakes.<sup>172</sup> Moreover, without a statutory

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*Lanham Act Can Address It*, 55 COLUM. J.L. & SOC. PROBS. 1, 20 (2021) (emphasizing that anonymous website users are the average unauthorized deepfake content creator, which creates a challenge for unauthorized deepfake victims seeking a legal remedy).

169. *Id.*

170. See Michael MacClary, *Personal Jurisdiction and the Internet*, 3 SUFFOLK J. TRIAL AND APP. ADVOC. 93, 95 (1998) (explaining that a party seeking relief in an interstate matter must obtain personal jurisdiction over an out-of-state defendant using a state long-arm statute). See generally Judith Mercier, *Bloggers Beware: Florida's Long-Arm Statute Reaches Nonresidents Who Post Material Online*, HOLLAND & KNIGHT (Nov. 2010), <https://www.hklaw.com/en/insights/publications/2010/09/bloggers-beware-floridas-quos-longarm-statute-reac> [<https://perma.cc/WBJ9-FAU4>].

171. See Paven Malhotra, *Report on deepfakes: what the Copyright Office found and what comes next in AI regulation*, REUTERS (Dec. 18, 2024, 8:55 AM), <https://www.reuters.com/legal/legalindustry/report-deepfakes-what-copyright-office-found-what-comes-next-ai-regulation-2024-12-18/> [<https://perma.cc/Y523-BB5M>]; see generally *AI and the Right of Publicity: A Patchwork of State Laws the Only Guidance, For Now*, CROWELL (Dec. 12, 2023), [https://www.crowell.com/en/insights/client-alerts/ai-and-the-right-of-publicity-a-patchwork-of-state-laws-the-only-guidance-for-now#\\_ftn7](https://www.crowell.com/en/insights/client-alerts/ai-and-the-right-of-publicity-a-patchwork-of-state-laws-the-only-guidance-for-now#_ftn7) [<https://perma.cc/PU4Q-RZJU>].

172. See Sarah Jodka, *Manipulating reality: the intersection of deepfakes and the law*, REUTERS (Feb. 1, 2024, 12:01 PM), <https://www.reuters.com/legal/legalindustry/manipulating-reality-intersection-deepfakes-law-2024-02-01/#:~:text=Defamation%20and%20false%20light>

framework, courts may be hesitant to establish new precedents that address these modern issues, further complicating the legal landscape.<sup>173</sup> Thus, while states can attempt to enact protections, they are unlikely to provide the comprehensive solutions necessary to effectively combat the widespread misuse of personal identity online.

Consequently, Congress must take action to establish a federal right of publicity law for several compelling reasons. First, the intersection of the right of publicity with free speech issues under the First Amendment necessitates a framework that balances personal identity protection with freedom of expression, clarifying how these rights can coexist.<sup>174</sup> Additionally, the Commerce Clause grants the federal government the authority to regulate interstate commerce, and a federal statute would provide the uniformity and predictability necessary for individuals and entities engaged in cross-state publicity rights issues.<sup>175</sup> Furthermore, the Fourteenth Amendment's Due Process and Equal Protection Clauses suggest that everyone should have a fair opportunity to safeguard their rights, including publicity rights, regardless of state jurisdiction.<sup>176</sup> By establishing a federal law, Congress would create a foundation for federal jurisdiction in disputes involving publicity rights, addressing the complexities that arise when individuals from different states are involved. Ultimately, a federal approach would ensure justice and consistency, mitigating the legal challenges varying state laws pose.

Encouragingly, the landscape regarding a federal right of publicity may be shifting, as indicated by the January 2024 Congressional Legal Sidebar titled *Artificial Intelligence Prompts Renewed Consideration of a Federal Right of Publicity*, which surveyed existing state right of publicity laws and their intersection with federal intellectual property torts suggesting that a more unified federal framework may be closer than not.<sup>177</sup> Most promisingly, the NO FAKES Act, introduced on July 31,

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%20laws&text=If%20a%20deepfake%20falsely%20represents,laws%20can%20offer%20some%20recourse [https://perma.cc/4Q2S-9GAS].

173. See generally Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers, Lie?*, 59 DEPAUL L. REV. 1091, 1091, 1101 (2010) (informing readers that when the lawfulness of a judge's decision is assessed the judge's reasoning is scrutinized. Thus, judges generally rely on a variety of sources like constitutional provisions, statutory texts, and case law to justify their decisions).

174. *Id.* at 6.

175. See *id.* at 5–6.

176. See Nathan Chapman & Kenji Yoshino, *Common Interpretation of The Fourteenth Amendment Due Process Clause*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701> [https://perma.cc/JBV6-XB9L].

177. CHRISTOPHER. T. ZIRPOLI, CONG. RSCH. SERV., LSB11052, *ARTIFICIAL INTELLIGENCE PROMPTS RENEWED CONSIDERATION OF A FEDERAL RIGHT OF PUBLICITY 1* (2024); other recently proposed federal legislation targeting deepfake content includes the Protecting Consumers from Deceptive AI Act, H.R. 7766, 118th Cong. (2024) (proposing that the National Institute of

2024, by Senators Chris Coons, Marsha Blackburn, Amy Klobuchar, and Thom Tillis, seeks to protect individuals from unauthorized digital replicas in audiovisual works by holding creators and platforms accountable for such violations.<sup>178</sup> While this legislation is a crucial first step toward safeguarding rights and balancing First Amendment concerns,<sup>179</sup> it still needs to pass to become effective. However, one notable critique of the legislation is its lack of provisions to help plaintiffs identify perpetrators, who are often technologically sophisticated and challenging to trace. While removal of unauthorized synthetic content is an important first step, the legislation must also prioritize deterrence which is only possible if wrongdoers cannot evade accountability simply because they are technologically savvier than their victim. Therefore, to increase its effectiveness, the NO FAKES Act should include support for plaintiffs in identifying deepfake creators such as reimbursement for hiring third-party forensic experts. Alternatively, it might be more effective and cost-efficient to build a dedicated task force within the Federal Trade Commission (FTC) to assist plaintiffs in identifying defendants. This approach would benefit individual plaintiffs and national security by enabling the development of a database of known offenders, potentially revealing patterns of illegal online behavior and helping the federal government stay ahead in detecting evolving synthetic content.

### CONCLUSION

In conclusion, the challenges posed by unauthorized deepfakes and identity theft highlight the urgent need for a comprehensive federal right of publicity statute. Existing legal frameworks and proposed workarounds fail to adequately protect all plaintiffs in an increasingly complex digital landscape. With the rise of social media and influencer culture, individuals' online identities hold significant value, yet they remain vulnerable to exploitation without effective legal recourse. As security measures evolve to safeguard sensitive personal information—like biometric data that cannot be altered once compromised—victims are left with insufficient protections.

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Standards and Technology (NIST) form task forces to develop a framework for identifying and labeling AI-generated or altered content and empowers the Federal Trade Commission (FTC) to enforce these regulations); the DEFIANCE Act of 2024, S. 3696, 118th Cong. (2024) (attempting to provide victims of non-consensual deepfake pornography a civil right of action through the expansion of legal definitions to include AI-created or doctored images); and the DEEPFAKES Accountability Act, H.R. 5586, 118th Cong. (2023) (proposing a requirement that deepfake-created content is clearly labeled as such, specifically targeting election interference, foreign influence, pornographic content, and harassment through civil and criminal penalties).

178. S. 4875, 118th Cong. (2024) (introduced July 31, 2024).

179. *Id.*

Moreover, deepfake creators often operate anonymously, complicating the process of identification and legal action.<sup>180</sup> The patchwork of state laws, which frequently favor celebrities and residents, does not account for the interconnected nature of the internet. Additionally, constitutional constraints such as the Dormant Commerce Clause and Due Process principles hinder state-based solutions. As the federal government delays action, wrongdoers are incentivized to exploit these gaps, targeting an increasingly vulnerable population. The complexity of current right of publicity claims further underscores the necessity for a unified federal statute that addresses these multifaceted issues, ensuring all individuals have the protection they deserve in the digital age.

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180. Danielle F. Bass & Nathaniel Penning, *The Legal Issues Surrounding Deepfakes*, HONIGMAN (July 25, 2023), <https://www.honigman.com/the-matrix/the-legal-issues-surrounding-deepfakes> [<https://perma.cc/3KME-LUVP>].