INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS

The AI Revolution: the International Legal Perspective

Edited by Anne-Marie Pecoraro and Alexander Ross

When Imitation is Not the Sincerest Form of Flattery: Deepfakes and Personality Rights in the U.S.

By Marc Mayer

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» Introduction

Legal issues surrounding the use of generative AI tools to replicate or impersonate celebrity likenesses, acting performances, and voices have become among the most important topics among U.S. intellectual property and entertainment lawyers. Generative AI's capabilities already allow the production of deceivingly high-quality authorized content.

These range from the use of computer-generated models to replace live actors (especially voice actors), to the creation of "deepfake" photographs or videos that are intended to spread misinformation or to falsely depict celebrities or politicians in compromising situations or in pornographic content. Some of these uses have entered popular culture, such as a 2023 AI-generated recording that mimicked the voices of Drake and The Weeknd and became one of the most streamed singles in the U.S.[1] Far more insidious and disturbing are uses like the recent spate of fake pornographic images of music icon Taylor Swift that surfaced on the notorious 4Chan website.[2]

Regardless, the rapid evolution of generative AI tools has caused significant disruption in both traditional and interactive entertainment industries, prompting intense discussions about the potential necessity to update the current legal framework. In this article, I will briefly discuss current right-of-publicity law in the United States, the application of that law to AI deepfakes and impersonations, and some recent legislative developments in this area.

» Publicity and Personality Rights: a Patchwork of State Laws

In the United States, there is no federal right of publicity. The right of publicity originally was an outgrowth of state laws protecting an individual's right of privacy, or "right to be left alone". Over time, various states began to develop a set of legal regimes designed to protect against the commercial appropriation of an individual's name, image, and likeness.[3]

Among the first reported decisions to articulate a "right of publicity" as a quasi-property right was the 1953 decision *Haelen Laboratories v. Topps Chewing Gum, Inc.*[4] In Topps, the U.S. Court of Appeals for the Second Circuit held that major league baseball players possessed a proprietary interest in their names and likenesses, such that they could assert common-law legal claims against the use of their names and images on baseball cards without their consent. As the Court explained, "many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements popularizing their countenances."

Almost every U.S. state currently recognizes the existence of a right of publicity, either as a subset of common-law privacy rights or as a separate statutory or common-law property right. Approximately one-half of the states have passed statutes that explicitly protect a person's name, image, and likeness. However, in some states, protected aspects of identity may also cover voices, signatures or any other recognizable personality traits. California's right of publicity statute, Cal. Civ. Code § 3344, for example, provides:

> *"Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior*

> *consent… shall be liable for any damages sustained by the person or persons injured as a result thereof."*[5]

Those states without explicit right-of-publicity statutes generally recognize the right under common law, albeit to varying degrees. California affords particularly robust protection under both the common law and Section 3344. In fact, California courts have famously extended the common law right of publicity protection to almost any recognizable aspect of a person's "persona" -- finding, for example, that model Vanna White's likeness was appropriated in a Samsung advertisement featuring a robot wearing a blond wig;[6] that Bette Midler's and Tom Waits' distinctive vocal styles were appropriated by the use of sound-alikes in radio ads;[7] and that an individual could assert claims arising from a Cardi B. album cover depicting his distinctive tattoo.[8]

Perhaps the most critical difference among the states is how they treat post-mortem publicity rights. Because common-law publicity and privacy rights are personal (and therefore not descendible), it is up to each state to decide whether to allow heirs or assigns to assert publicity rights on behalf of a deceased individual or celebrity. Currently, 21 states have statutes that protect post-mortem rights of publicity. Protection in these states ranges from 10 years after death (Tennessee) to 100 years after death (Indiana and Oklahoma).[9] Most state statutes provide that only a deceased person who was domiciled in the state can be subject to the statutory postmortem publicity rights.[10]

State laws vary not only in terms of domicile and residence but also in other criteria, such as the commercial value of the deceased's name and likeness. Some states, like California and Texas, require commercial value at or after death. Utah mandates prior exploitation of publicity rights during the individual's lifetime, and some states require registration of the deceased's publicity rights with their Secretaries of State.

» Applying State Publicity Laws to Generative AI and Deepfakes

While there has been a great deal of discussion surrounding the need for more robust publicity laws in the wake of generative AI, for the most part existing right of publicity laws should be sufficient to protect celebrities from the most obvious or egregious unauthorized uses.

For decades courts have held that advertisers that use celebrity "impersonators" are subject to right-of-publicity laws.[11] Additionally, several courts have applied state right-of-publicity laws to digital versions of athletes, musicians, and celebrities in video games, finding that First Amendment free speech protections do not apply to instances

in which the developer has appropriated an economic opportunity that properly belongs to the celebrity or actor. For example, in 2010 a California court held that Activision's use in its game *Band Hero* of computer-generated versions of members of the band *No Doubt* outside the scope of its license was not a "transformative" use warranting First Amendment protection.[12] Three years later, a federal appeals court came to the same conclusion regarding game maker Electronic Arts' use in its *NCAA Football* games of student-athletes' likenesses.

The reasoning applied in these cases should apply equally to the deliberate use of AI imitations of actors, musicians and athletes in films, sound recordings, and interactive entertainment products. In other words, a sound recording featuring an AI sound-alike of a famous singer or a film featuring an AI version of a famous actor likely would give rise to a state right-of-publicity claim. (Though it is important to distinguish such "appropriative" uses from expressive, "transformative" uses of a celebrity likeness -- such as the depiction of Manuel Noriega in *Call of Duty: Black Ops 2* – that are protected by the First Amendment.)

However, it is noteworthy that right-of-publicity laws require that the plaintiff's image or voice be "recognizable", and many states do not offer as broad protection as California. Consequently, some uses – such as the use of AI to replace a voice actor's performance of an animated character (especially one that has been voiced by multiple people[13]) – may not be actionable. It thus is understandable that voice actors, extras, professional video game performers, and relatively unknown working actors have the greatest concerns about generative AI.

The issue of AI impersonations of deceased celebrities presents a discrete set of issues. As noted, since most states do not offer any post-mortem right of publicity protection for deceased celebrities, the heirs of those who resided in such states at the time of their death may have little recourse against the use of the celebrity's image, voice

> “Since most states do not offer any post-mortem right of publicity protection for deceased celebrities, the heirs of those who resided in such states at the time of their death may have little recourse against the use of the celebrity's image, voice and likeness, even when overtly commercial such as in advertising.”

and likeness, even when overtly commercial such as in advertising.[14] Additionally, state statutes (including California's statute) include explicit carve-outs for uses in audiovisual works. Understandably, artists, filmmakers, and other content creators have expressed concern that applying a post-mortem publicity right to expressive content could chill their right to include historical figures in documentaries, biographical films, and works of historical fiction. Thus, any consideration of future legislation must take these important free speech issues into account.

» Legislative Responses

At present, the vast majority of state legislative action has been focused on two specific uses of AI deepfakes: (1) the creation and distribution of deepfakes to spread misinformation and influence a U.S. election, and (2) the creation and distribution of deepfake pornography. Currently, California, Florida, Georgia, Hawaii, Illinois, Indiana, Minnesota, New York, South Dakota, Texas, Virginia and Washington have passed legislation either criminalizing or permitting civil claims against those who create and disseminate pornographic deepfakes without consent. Seven states – California, Texas, Michigan, Washington, Minnesota, New York and New Mexico – also have laws in place addressing the use of deepfakes in election-related materials, requiring content creators to reveal that such materials were made with the technology.

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In addition to these specific-use cases, there have been a few efforts at both the state and federal level to amend or strengthen state publicity laws to address the use of AI impersonators. Perhaps most notably, in early 2024 the Tennessee legislature passed the (cleverly named) Ensuring Likeness, Voice, and Image Security Act of 2024 (the “ELVIS Act”).[15] The ELVIS Act was specifically designed to protect against unauthorized AI impersonations of musicians. To do so, it added “voice” to the list of protected personality traits, and expanded liability to any person who “distributes, transmits, or otherwise makes available an algorithm, software, tool, or other technology, service, or device” for the “primary purpose” of creating an unauthorized reproduction of the voice or likeness.

Other states likewise have attempted to strengthen right of publicity laws in the wake of AI. For example, in California a bill was introduced in early 2024 to add a digital replica[16] provision to California's postmortem right of publicity, Cal. Civ. Code §

3344.1, to prevent unauthorized uses of a “digital replica of a deceased personality in an audiovisual work or sound recording, in any manner related to the work performed by the deceased personality while living”.

The rise of generative AI also has also sparked a renewed push for federal right-of-publicity legislation. The most significant legislative proposal is the Nurture Originals, Foster Art, and Keep Entertainment Safe (NO FAKES) Act of 2023. The proposed legislation would impose liability on individuals or entities creating unauthorized digital replicas of individuals in performances, as well as making platforms accountable for knowingly hosting unauthorized digital replicas (subject to certain First Amendment exceptions.)[17]

The Act also would extend rights postmortem to “executors, heirs, transferees, or devisees” for 70 years after the person’s death, even if the individual died before the bill’s effective date.[18] The proposed Act has faced some resistance, as there have been concerns as to its impact on free speech rights and on digital platforms and social media networks.[19] Whether or not the NO FAKES Act ultimately passes, the issue will almost certainly continue to percolate at a federal level, and federal legislators will undoubtedly face increased pressure from actors and other interest groups.

Notwithstanding the amount of public attention on generative AI, it is important to remember that the technology still is fairly novel and that its application continues to evolve. As is often the case with new technology, courts and legislators (especially at the federal level) may not catch up with the technology for years. Accordingly, some uncertainty is likely to remain. The next few years could be a critical time in the development of the law.

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[1] *See https://variety.com/2023/music/news/ai-generated-drake-the-weeknd-song-submitted-for-grammys-1235714805/*

[2] *See https://www.cbsnews.com/news/taylor-swift-artificial-intellignence-ai-4chan/*

[3] *Even though the right of publicity originated to protect individual persona with some commercial value, most states recognize the right of publicity regardless of celebrity status. See, e.g., KNB Enterprises v. Matthews, 92 Cal.Rptr.2d 713, 718, 78 Cal.App.4th 362, 368 (Cal. App. 2 Dist., 2000) (holding that non-celebrity models have the right to publicity in the commercial use of their likeness).*

[4] *202 F.2d 866, 868 (2d Cir. 1953)*

[5] *See, e.g. NY CLS Civ R § 51 (2000) (New York: "Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided… may also sue and recover damages for any injuries sustained by reason of such use");*

[6] *White v. Samsung Electronics America, Inc., 971 F. 2d 1395 (9th Cir. 1992)*

[7] *Midler v. Ford Motor Co., 849 F. 2d 460 (9th Cir. 1988); Waits v. Frito-Lay, Inc., 978 F. 2d 1093 (9th Cir. 1992).*

[8] *Brophy v. Almanzar, 359 F. Supp. 3d 917 (C.D. Cal. 2018).*

[9] *Most states offer protection for 50 years, but the term varies. (Alabama 55 years, Ala. Code § 6-5-771(2), Arkansas 50 years, A.C.A. § 4-75-1107, Florida, 40 years, Fla. Stat. Ann. § 540.08(5), Kentucky (50 years), Ky. Rev. Stat § 391.170, Nevada - 50 years Nev. Rev. Stat. Ann. §597.800, Texas- 50 years, Tex. Prop. Code § 26.012) with some states like Indiana and Oklahoma offer protection for publicity rights 100 years after a personality's death (see Ind. Code § 32-36-1-0.2 et seq, and Okla. Stat. tit. 21 §839.3), and Tennessee (10 years) Tenn. Code Ann. § 47-25-1103, Virginia (20 years) Virginia Code § 8.01-40).*

[10] *Some states, like Nevada and Hawaii, afford post-mortem protection for to non-domiciliaries.*

[11] *See, e.g., Allen v. Nat'l Video, Inc., 610 F. Supp. 612, 623 (S.D.N.Y. 1985) (advertisement featuring model impersonating Woody Allen); Allen v. Men's World Outlet, Inc., 679 F. Supp. 360, 361 (S.D.N.Y. 1988) (same); Onassis v. Christian Dior N.Y. Inc., 122 Misc.2d 603, 472 N.Y.S.2d 254 (S.Ct.N.Y.Co.1983) (ad featuring a model dressed as Jacqueline Kennedy Onassis); Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1098 (9th Cir. 1992) (ad featuring imitation of Tom Waits' distinctive voice.)*

[12] *No Doubt v. Activision Publishing, Inc, 192 Cal. App. 4th 1018 (2010)*

[13] *Bugs Bunny, for example, has been voiced by 47 people over his 84-year lifespan.*

[14] *In some circumstances, a celebrity's estate might be able to assert trademark or false advertising claims arising from the commercial use of the deceased celebrity's name or image. However, such claims likely would be available only for the most well-known celebrities or athletes.*

[15] *Voice is defined as "a sound in a medium that is readily identifiable and attributable to a particular individual, regardless of whether the sound contains the actual voice or a simulation of the voice of the individual." HB 2091/SB 2096 § 3.*

[16] *Digital replica is defined as "a simulation of the voice or likeness of an individual that is readily identifiable as the individual and is created using digital technology."*

[17] *https://www.coons.senate.gov/imo/media/doc/no_fakes_act_draft_text.pdf*

[18] *Id.*

[19] *See, e.g., https://www.theregreview.org/2024/01/02/rothman-digital-replica-bill-may-leave-performers-worse-off/*