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## Warhol, Drake, and Deepfakes: Monetizing the Right of Publicity in the Generative AI Era

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## WARHOL, DRAKE, AND DEEPPAKES: MONETIZING THE RIGHT OF PUBLICITY IN THE GENERATIVE AI ERA

Reid M. Koski\*

### ABSTRACT

*The ability to easily recreate another's face or voice and digitally superimpose it on one's own has led to a surge in face and voice swapping using deepfakes and deep voices. This technology uses artificial intelligence to create digital replicas with hyperreal accuracy. These digital replicas challenge the underlying premise of the transformative use test that courts use to determine whether a right of publicity infringement merits First Amendment protection. This Note finds a win-win scenario where a stricter test combined with a likeness licensing repository may both allow for public figures to monetize their likeness and provide digital replica creators legal protections over their works.*

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## INTRODUCTION

In 2021, a TikTok account began posting short day-in-the-life videos of the actor Tom Cruise.<sup>1</sup> For a little over a year, the page uploaded seemingly innocuous videos of Cruise playing golf, singing along to his guitar, dancing, and even hanging out with Paris Hilton.<sup>2</sup> Despite the unnerving realism, the real Cruise had no affiliation with the account. Instead, Miles Fisher, an actor and noted Cruise look-alike, had used face swapping technology to transform his likeness.<sup>3</sup> His first video went from “zero to 4 million views in less than two days.”<sup>4</sup>

Soon thereafter, a song titled “Heart on My Sleeve,” by the artist Ghostwriter, took the music industry by storm.<sup>5</sup> However, Ghostwriter

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1. @DeepTomCruise, TIKTOK, <https://www.tiktok.com/@deepptomcruise> [<https://perma.cc/Y7SV-4JEL>].

2. *Id.* But Paris Hilton was not a deepfake. Nadja Sayej, *The Story Behind Paris Hilton’s Viral TikTok with DeepTomCruise*, FORBES (Nov. 22, 2022, 9:00 AM), <https://www.forbes.com/sites/nadjasayej/2022/11/22/the-story-behind-paris-hiltons-viral-tiktok-with-deeptomcruise/?sh=17490cc07180> [<https://perma.cc/9BJL-BZXX>].

3. Miles Fisher, *How I Became the Fake Tom Cruise*, HOLLYWOOD REP. (July 21, 2022), <https://www.hollywoodreporter.com/feature/deepfake-tom-cruise-miles-fisher-1235182932/> [<https://perma.cc/3DZZ-XT42>]. Fisher had already grown a following on YouTube for Tom Cruise impersonations when he discovered a deepfake video superimposing Cruise’s face on one of his own videos made by a Belgian visual effects artist named Chris Umé. *Id.* Even before the project launched, a “massive data set had . . . been established and mapped to [Fisher’s] face [and] was getting smarter and more realistic by the day.” *Id.*

4. *Id.*

5. ghostwriter, *ghostwriter - heart on my sleeve (Drake x The Weeknd AI) Official Audio*, YOUTUBE (May 31, 2023) [hereinafter *Heart on My Sleeve*], <https://www.youtube.com/watch?v=6FapwxsbkLs> (video unavailable “due to a copyright claim by Universal Music Group”); Mia Sato & Richard Lawler, *What’s Really Going on with ‘Ghostwriter’ and the AI Drake Song?*, THE VERGE, <https://www.theverge.com/2023/4/18/23688141/ai-drake-song-ghostwriter-copyright-umg-the-weeknd> [<https://perma.cc/YP4S-FA8J>] (Apr. 19, 2023, 3:08 PM); see also ghostwriter, *ghostwriter - MIKE VICK FREESTYLE (21 Savage x Drake x Lil Wayne AI)*, YOUTUBE (Sept. 16, 2023), <https://www.youtube.com/watch?v=wGfPIpkzQDA> [<https://perma.cc/H9U5-GW97>]; ghostwriter, *ghostwriter - WHIPLASH (official snippet) Travis Scott x 21 Savage AI*, YOUTUBE (Sept. 8, 2023), <https://www.youtube.com/watch?v=K7RkPfZaU58> [<https://perma.cc/37ZS-3W6M>].

was not audible in the track.<sup>6</sup> Instead, the singers unmistakably sound like Drake and The Weeknd, two of the best-selling artists of the past decade.<sup>7</sup> Ghostwriter made his own beat, wrote his own words, performed the song himself, and then superimposed Drake's and The Weeknd's "performances" on top.<sup>8</sup> "Heart on My Sleeve" immediately gained traction, "rack[ing] up millions of views and streams" within forty-eight hours before its ultimate removal from digital signal processors (DSPs) (such as Spotify and Apple Music), TikTok, and YouTube.<sup>9</sup>

The ability for a person to easily recreate another's face or voice and superimpose it on their own has led to a surge in face and voice swapping using "deepfakes" and "deep voices." This technology uses artificial intelligence (AI) to create digital replicas with hyperreal accuracy.<sup>10</sup> Many of these deepfakes are harmful, especially those

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6. Joe Coscarelli, *Ghostwriter Returns with an A.I. Travis Scott Song, and Industry Allies*, N.Y. TIMES (Sept. 5, 2023), <http://nytimes.com/2023/09/05/arts/music/ghostwriter-whiplash-travis-scott-21-savage.html>. Ghostwriter wrote the track and even submitted it for Grammy consideration. *Id.* (explaining that the Grammy submissions were made for "best rap song and song of the year, both of which are awarded to a track's writers," not the performing artist). Recording Academy chief Harvey Mason Jr. initially said that the "Heart on My Sleeve" song was "absolutely eligible [for its composition] because it was written by a human." *Id.* Mason later walked back his statement and clarified that the song was in fact *not eligible* because it did not meet the Grammy's "general distribution" requirements. Jem Aswad, *AI-Generated Drake and Weeknd Song 'Heart on My Sleeve' Is Not Eligible for a Grammy*, *Recording Academy Chief Clarifies*, VARIETY (Sept. 8, 2023, 8:40 AM), <https://variety.com/2023/music/news/drake-weeknd-heart-on-my-sleeve-not-eligible-for-grammy-1235717602/> [<https://perma.cc/56WE-UBLD>] (explaining that the "Grammy rules stat[e] that a track must have 'general distribution,' meaning 'the broad release of a recording, available nationwide via brick-and-mortar stores, third-party online retailers and/or streaming services'").

7. *It's Here: The Top Songs, Artists, Podcasts, and Listening Trends of 2022*, SPOTIFY (Nov. 30, 2022), <https://newsroom.spotify.com/2022-11-30/the-top-songs-artists-podcasts-and-listening-trends-of-2022/> [<https://perma.cc/L4J5-G2YN>] (listing Drake and The Weeknd as the first and fifth most streamed artists in the U.S., respectively, on Spotify in 2022); Zach Frydenlund, *Here's Spotify's Top Artists, Songs, and Albums of 2015*, COMPLEX (Dec. 1, 2015), <https://www.complex.com/music/a/zach-frydenlund/spotify-top-artists-songs-and-albums-of-2015> [<https://perma.cc/HX44-44DA>] (listing Drake and The Weeknd as the first and second most streamed artists in the U.S., respectively, on Spotify in 2015).

8. Coscarelli, *supra* note 6.

9. Sato & Lawler, *supra* note 5; Nilay Patel, *AI Drake Just Set an Impossible Legal Trap for Google*, THE VERGE (Apr. 19, 2023, 2:11 PM), <https://www.theverge.com/2023/4/19/23689879/ai-drake-song-google-youtube-fair-use> [<https://perma.cc/X6G4-XK73>].

10. See *infra* Section I.A.

targeted at non-famous persons, used for pornography, or created to spread misinformation.<sup>11</sup> Other uses are clearly fake<sup>12</sup> or are obviously in jest and place celebrity likenesses on bodies to which they do not belong.<sup>13</sup> Meta has even released social media accounts of AI-generated influencers who look and sound exactly like real celebrities but are completely computer-generated.<sup>14</sup> This Note concerns homemade deepfakes depicting famous persons so realistically that, without a disclaimer, a viewer or listener might not know that what they see is artificial.<sup>15</sup> At issue is how the right of publicity can balance the need to protect art and the need to compensate the famous individuals that art imitates.

First, Part I of this Note explains how deepfakes<sup>16</sup> and deep voices work.<sup>17</sup> It also provides an overview of the right of publicity—the pseudo-intellectual property rights people have over the monetization of their public personas.<sup>18</sup> Next, Part II analyzes how the current framework for First Amendment protection of “transformative” appropriations of celebrity personas may not be suited for deepfake

11. See Quentin J. Ullrich, *Is This Video Real? The Principal Mischief of Deepfakes and How the Lanham Act Can Address It*, 55 COLUM. J.L. & SOC. PROBS. 1, 5 (2021) (identifying “a taxonomy of deepfakes”: “(i) deepfakes that are harmful due to their ability to confuse viewers, (ii) deepfakes that are not confusing but are harmful to individuals’ dignity and privacy, and (iii) deepfakes that are non-harmful or even socially productive”). This Note only concerns the latter category.

12. See, e.g., Kristin Corry, *Kendrick Lamar’s New Deepfake Video Is a Masterpiece. That’s Exactly the Problem*, VICE (May 12, 2022, 5:32 PM), <https://www.vice.com/en/article/akvxwa/kendrick-lamar-deepfake-music-video-the-heart-part-5> [<https://perma.cc/W5RV-5K3J>].

13. See, e.g., Zack Abrams (@ZackDAbrams), X (Oct. 20, 2023, 5:13 PM), <https://twitter.com/ZackDAbrams/status/1715476259558289436> [<https://perma.cc/K4AA-6K5A>] (depicting former President Barack Obama as Ice Spice, a female hip-hop artist with red, curly hair and a shirt that reads “Hot Person at Work,” explaining her lyrics).

14. Alex Heath & Nilay Patel, *Mark Zuckerberg on Threads, the Future of AI, and Quest 3*, THE VERGE (Sept. 27, 2023, 2:00 PM), <https://www.theverge.com/23889057/mark-zuckerberg-meta-ai-elon-musk-threads-quest-interview-decoder> [<https://perma.cc/6MY-Y-BENU>]; *Introducing New AI Experiences Across Our Family of Apps and Devices*, META (Sept. 27, 2023) <https://about.fb.com/news/2023/09/introducing-ai-powered-assistants-characters-and-creative-tools> [<https://perma.cc/V3Y5-H47P>].

15. See *infra* text accompanying notes 29–30.

16. See *infra* Section I.A.i.

17. See *infra* Section I.A.ii.

18. See *infra* Section I.B.

AI<sup>19</sup> and how the recent Supreme Court decision in *Andy Warhol Foundation for the Visual Arts v. Goldsmith* could lead to a stricter test.<sup>20</sup> Last, Part III proposes creating an entity to issue blanket licenses for famous likenesses.<sup>21</sup>

## I. BACKGROUND

### A. Artificial Intelligence

#### i. Face Swapping

Deepfakes are video, audio, or photographic representations of an individual that appear legitimate<sup>22</sup> but are, in fact, AI or digital manipulations.<sup>23</sup> Creators can use deepfakes to convincingly swap the face of one individual with the likeness of another.<sup>24</sup> Artists and brands

19. See *infra* Section II.A.

20. See *infra* Section II.B.

21. See *infra* Section III.

22. Or at least attempts to appear legitimate. A video representation of an individual that approaches accurate human likeness but does not completely match human features and movement can appear quite unsettling. Rina Diane Caballar, *What Is the Uncanny Valley?*, IEEE SPECTRUM, <https://spectrum.ieee.org/what-is-the-uncanny-valley> [<https://perma.cc/MV6N-V2BZ>] (Feb. 9, 2023); see, e.g., THE POLAR EXPRESS (Warner Bros. Pictures 2004); CATS (Universal Pictures 2019). Deepfakes help solve this problem by using photographs and live video footage as the basis for generated human faces and facial movements, instead of artist renditions. Sophie J. Nightingale & Hany Farid, *AI-Synthesized Faces Are Indistinguishable from Real Faces and More Trustworthy*, 119 PNAS, no. 8, 2022, at 1, 2 (“Synthetically generated faces are not just highly photorealistic, they are nearly indistinguishable from real faces and are judged more trustworthy.”); *Bridging the Uncanny Valley: What It Really Takes to Make a Deepfake*, FOUNDRY (Dec. 9, 2019), <https://www.foundry.com/insights/film-tv/digital-humans> [<https://perma.cc/FQV2-BFZY>]. If a digital artist cannot achieve perfect human likeness, they often embellish their characters with creative flourishes and stylized or childish features to avoid the uncanny valley. Valentin Schwind, Katrin Wolf & Niels Henze, *Avoiding the Uncanny Valley in Virtual Character Design*, 25 INTERACTIONS 45, 46–47 (2018).

23. *Deconstructing Deepfakes—How Do They Work and What Are the Risks?*, U.S. GOV’T ACCOUNTABILITY OFF.: WATCHBLOG (Oct. 20, 2020) [hereinafter *Deconstructing Deepfakes*], <https://www.gao.gov/blog/deconstructing-deepfakes-how-do-they-work-and-what-are-risks> [<https://perma.cc/J4FP-2WCU>].

24. Ian Sample, *What Are Deepfakes – And How Can You Spot Them?*, THE GUARDIAN (Jan. 13, 2020,

can use these tools to tell stories they would not otherwise be able to.<sup>25</sup> Purveyors of misinformation and explicit content can likewise use deepfake tools to accomplish more mischievous ends.<sup>26</sup> Regardless of the creator's intentions, convincing deepfake content can rapidly reach a large audience thanks to the "velocity and accessibility of social media."<sup>27</sup>

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5:00 AM), <https://www.theguardian.com/technology/2020/jan/13/what-are-deepfakes-and-how-can-you-spot-them> [<https://perma.cc/GVJ5-QQEL>] ("The 21st century's answer to Photoshopping, . . . [d]eepfake technology can create convincing but entirely fictional photos from scratch."); Paramount Plus, *iCarly* | *What Is a Deepfake?* (S3, E5) | *Paramount+*, YOUTUBE, at 0:43 (Oct. 2, 2023), <https://www.youtube.com/watch?v=s0eh6NylRLQ> [<https://perma.cc/QR2Y-D9EU>] ("Deepfake[s] . . . swap faces to make realistic looking fake media.").

25. Patrick Coffee, *'Deepfakes' of Celebrities Have Begun Appearing in Ads, with or Without Their Permission*, WALL ST. J., <https://www.wsj.com/articles/deepfakes-of-celebrities-have-begun-appearing-in-ads-with-or-without-their-permission-11666692003> (Oct. 25, 2022, 2:24 PM); see Corridor Crew, *Did We Just Change Animation Forever . . . Again?*, YOUTUBE (Aug. 13, 2023), <https://www.youtube.com/watch?v=FQ6z90MuURM> [<https://perma.cc/R9Y9J-QWYW>] (explaining how a small team of visual effects artists used iPhone footage and innovative AI techniques to quickly create a full-length anime episode, which are traditionally drawn by hand); Jack King, *Deepfake Luke Skywalker Is Another Step Down a Ghoulish CGI Path*, GQ (Feb. 10, 2022), <https://www.gq-magazine.co.uk/culture/article/boba-fett-luke-skywalker> [<https://perma.cc/3LJU-V5KN>] (explaining that following Disney's poorly received attempt to recreate a young Mark Hamill for a streaming show, Disney hired a YouTube deepfake creator to improve the visual effects for a second series).

26. Jim Saksa, *AI Deepfakes in Campaigns May Be Detectable, but Will It Matter?*, ROLL CALL (Sept. 5, 2023, 5:31 AM), <https://rollcall.com/2023/09/05/ai-deepfakes-in-campaigns-may-be-detectable-but-will-it-matter/> [<https://perma.cc/UG2G-JGPZ>]; Rob Toews, *Deepfakes Are Going to Wreak Havoc on Society. We Are Not Prepared*, FORBES (May 5, 2020, 11:54 PM), <https://www.forbes.com/sites/robtoews/2020/05/25/deepfakes-are-going-to-wreak-havoc-on-society-we-are-not-prepared/?sh=759b64497494> [<https://perma.cc/9TQ4-Q42Q>]. Pornography remains the most prevalent form of fraudulent deepfakes; however, bad actors have used deepfakes to create political misinformation as well. *Id.*; Anne Pechenik Gieseke, "The New Weapon of Choice": Law's Current Inability to Properly Address Deepfake Pornography, 73 VAND. L. REV. 1479, 1486 (2020). But "[m]ore terrifying use cases include the use of deepfakes for fake alibis in courtrooms, extortion, or terrorism." 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/> [<https://perma.cc/6JBK-GKK9>]; see also Rebecca A. Delfino, *Deepfakes on Trial: A Call to Expand Trial Judge's Gatekeeping Role to Protect Legal Proceedings from Technological Fakery*, 74 HASTINGS L.J. 293, 306 (2023).

27. Saddam Hossain Mukta, Jubaer Ahmad, Mohaimenul Azam Khan Raiaan, Salekul Islam, Sami Azam, Mohammed Eunus Ali & Mirjam Jonkman, *An Investigation of the Effectiveness of Deepfake Models and Tools*, 12 J. SENSOR & ACTUATOR NETWORKS, 2023, at 1, 1, <https://www.mdpi.com/2224-2708/12/4/61> [<https://perma.cc/2RD7-V33W>].



While the process may seem complex, most AI operations happen on their own, with limited direction from a user.<sup>28</sup> In fact, compared to computer generated character renderings—which may take thousands of hours of skilled labor to achieve a lifelike appearance<sup>29</sup>—anyone with access to a computer and some basic knowledge can produce a realistic face swap in less time and with greater accuracy.<sup>30</sup> Even smartphone apps can perform basic face swapping and likeness manipulation techniques within minutes.<sup>31</sup> The following discussion presents an overview of how deepfakes, and their audio counterparts known as deep voices, work under the hood; however, once someone trains a model, they can integrate it into a user interface for use by less tech-savvy creators.<sup>32</sup>

To create a deepfake, an artist inputs thousands of training images of an individual into an artificial neural network software programmed

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28. *DeepFaceLab 2.0 Guide*, MRDEEPFAKES FS. (Feb. 5, 2020), <https://mrdeepfakes.com/forums/threads/guide-deepfacelab-2-0-guide.3886/> [https://perma.cc/SJ9D-73H6] (providing detailed instructions for how to create deepfakes using one of the more popular software, “DeepFaceLab,” and explaining that while the program is training, all a user needs to do is periodically check for mistakes); see also iperov, *DeepFaceLab*, GITHUB (Apr. 9, 2020), <https://github.com/iperov/DeepFaceLab> [https://perma.cc/G74H-AKEL] (providing links to download the software and tutorials for how to use deepfake software via cloud computing, which erases the need for the user to own a high-quality computer themselves). “DeepFaceLab is used to make more than 95% of deepfake videos [on the internet] and is used by well-known YouTube and TikTok channels.” Mukta et al., *supra* note 27, at 33.

29. Dave Itzkoff, *How ‘Rogue One’ Brought Back Familiar Faces*, N.Y. TIMES (Dec. 27, 2016), <https://www.nytimes.com/2016/12/27/movies/how-rogue-one-brought-back-grand-moff-tarkin.html>; Adam Satariano & Paul Mozur, *The People Onscreen Are Fake. The Disinformation Is Real*, N.Y. TIMES (Feb. 7, 2023), <https://www.nytimes.com/2023/02/07/technology/artificial-intelligence-training-deepfake.html> (“[T]he software can also create characters out of whole cloth, going beyond traditional editing software and expensive special effects tools used by Hollywood . . .”).

30. Shannon Bond, *It Takes a Few Dollars and 8 Minutes to Create a Deepfake. And That's Only the Start*, NAT'L PUB. RADIO (Mar. 23, 2023, 5:00 AM), <https://www.npr.org/2023/03/23/1165146797/it-takes-a-few-dollars-and-8-minutes-to-create-a-deepfake-and-thats-only-the-start> [https://perma.cc/MB9C-FLJ9] (“It was quick, easy and cheap. [The creator] spent \$11 and just eight minutes making [the deepfake].”).

31. Arjun Sha, *12 Best Deepfake Apps and Websites You Can Try for Fun*, BEEBOM, <https://beebom.com/best-deepfake-apps-websites/> [https://perma.cc/U83F-2HXC] (Jan. 30, 2024); Satariano & Mozur, *supra* note 29 (“A.I. software, which can easily be purchased online, can create ‘videos in a matter of minutes and subscriptions start at just a few dollars a month.’”).

32. See, e.g., *infra* text accompanying notes 57–58.

to identify and reconstruct patterns in data.<sup>33</sup> A program, known as a “generative adversarial network” (GAN), competes two neural networks against each other.<sup>34</sup> The process of each network repeatedly attempting to fool the other trains the deepfake algorithm.<sup>35</sup> The first network—the “generator”—attempts to recreate a realistic image from a randomly generated seed resembling static.<sup>36</sup> The second—the “discriminator”—predicts whether the image created by the generator is real or fake based on the training input.<sup>37</sup> Each GAN improves throughout the adversarial process until the generator can create lifelike images that repeatedly fool the discriminator.<sup>38</sup> The finished model is a “prediction machine” that is able to take facial expressions from one individual and predict how the individual the model trained on would appear instead.<sup>39</sup> The process has been described as training a million monkeys to write Shakespeare: at first they will only type gibberish, but with enough Pavlovian conditioning, they could write something that resembles Hamlet—albeit with no understanding of its

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33. *Deconstructing Deepfakes*, *supra* note 23.

34. Ian Goodfellow, *NIPS 2016 Tutorial: Generative Adversarial Networks* 17–18, ARXIV (2017), <https://arxiv.org/pdf/1701.00160.pdf> [<https://perma.cc/B5BQ-3VSL>] (“The basic idea of GANs is to set up a game between two players.”).

35. *Id.*

36. *Id.*; Jason Brownlee, *A Gentle Introduction to Generative Adversarial Networks (GANs)*, MACH. LEARNING MASTERY (June 19, 2019), <https://machinelearningmastery.com/what-are-generative-adversarial-networks-gans/> [<https://perma.cc/J6ES-KFMX>]; *How AI Image-Generators Work*, THE ECONOMIST (July 10, 2023), <https://www.economist.com/the-economist-explains/2023/07/10/how-ai-image-generators-work> [<https://perma.cc/SD4U-NFMX>]. The generator program “add[s] distorting visual ‘noise’ to images in the dataset—making them look like an analogue TV still disrupted by static—until the pictures are completely obscured. By learning how to undo the mess, the [discriminator] can produce an image that is similar to the original.” *How AI Image-Generators Work*, *supra*. As each model becomes better at recognizing “groups of pixels that correspond to particular visual concepts, it starts to compress, categori[z]e and store this knowledge in a mathematical pocket of code known as the ‘latent space.’” *Id.*

37. Brownlee, *supra* note 36.

38. Goodfellow, *supra* note 34, at 17–19; Mukta et al., *supra* note 27, at 4–5 (“The discriminator tries to detect whether the image is generated, while the generator generates new images using the latent representation of the original material. As a result, the generator produces incredibly realistic images because any flaws would be detected by the discriminator.”).

39. AJAY AGRAWAL, JOSHUA GANS & AVI GOLDFARB, PREDICTION MACHINES: THE SIMPLE ECONOMICS OF ARTIFICIAL INTELLIGENCE 2–3 (2022).

meaning.<sup>40</sup> With a trained artificial neural network, an artist can now input frame-by-frame images of an actor's face from a source video.<sup>41</sup> The algorithmic model attempts to generate a face of whomever the artist trained it on to match the actor's expressions and superimpose the generated footage on top.<sup>42</sup>

Today, many deepfakes have obvious defects that render them recognizable as computer generated.<sup>43</sup> This is often a result of prioritizing training speed over quality; however, programmers frequently release updates to their deepfake models that enable quicker training and produce higher quality results.<sup>44</sup> Thus, deepfakes get exponentially easier to make and convey increasingly convincing likenesses within short amounts of time.<sup>45</sup>

## ii. Vocal Replication

AI vocal replication—or deep voices, a subcategory of deepfakes—comes in two categories: traditional text-to-speech synthesis (TTS) and voice-to-voice conversion (VTV).<sup>46</sup> Popular TTS examples

40. Lance Eliot, *Generative AI ChatGPT Versus Those Infinite Typing Monkeys, No Contest Says AI Ethics and AI Law*, FORBES (Mar. 5, 2023, 8:00 AM), <https://www.forbes.com/sites/lanceeliot/2023/03/05/generative-ai-chatgpt-versus-those-infinite-typing-monkeys-no-contest-says-ai-ethics-and-ai-law/> [https://perma.cc/39HE-RWN5].

41. Corridor Crew, *We Made the Best Deepfake on the Internet*, YOUTUBE, at 04:11 (June 20, 2019), <https://www.youtube.com/watch?v=3vHvOyZ0GbY> [https://perma.cc/2YM7-ANCQ].

42. *Id.* at 05:09.

43. See *Deconstructing Deepfakes*, *supra* note 23. Defects can include lack of definition in an individual's features, mismatched jewelry, and unnatural movement. *Id.*

44. Mukta et al., *supra* note 27, at 26–31 (analyzing accuracy, speed, usability, and other limitation factors of current deepfake tools and their predecessors); see, e.g., STUART RUSSELL & PETER NORVIG, *ARTIFICIAL INTELLIGENCE: A MODERN APPROACH* 46 (4th ed. 2022) (“Training time for [an AI image repetition task has] dropped by a factor of 100 in just the past two years. The amount of computing power used in top AI applications is doubling every 3.4 months.”).

45. Amal Naitali, Mohammed Ridouani, Fatima Salahdine & Naima Kaabouch, *Deepfake Attacks: Generation, Detection, Datasets, Challenges, and Research Directions*, 12 *COMPUTS.*, 2023, at 6, 20, <https://www.mdpi.com/2073-431X/12/10/216> [https://perma.cc/YE35-5CKQ] (additionally concluding that “deepfake videos will get harder to detect as AI algorithms become more sophisticated”).

46. bycloud, *The Secrets Behind Voice Cloning & AI Covers*, YOUTUBE, at 0:41 (Aug. 8, 2023), <https://www.youtube.com/watch?v=vhArHsfLAQ> [https://perma.cc/R5M9-8UUX].

include voice assistants such as Siri, Alexa, and Spotify's DJ.<sup>47</sup> VTV allows creators to record their own voice and, like a deepfake, "replace" it with a realistic sounding voice of another person.<sup>48</sup>

Accessible, user-programmable software allows users to upload audio of their own—or someone else's—voice to train TTS and VTV models.<sup>49</sup> TTS models, such as Google's Tacotron 2, take user input as text and phoneme symbols to generate spectrograms—a visual representation of sound.<sup>50</sup> Next, a vocoder,<sup>51</sup> such as NVIDIA's WaveGlow or HiFi-GAN, "consumes the . . . spectrograms to generate speech" as audio waveforms in an ordinary filetype such as .wav or

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47. See *Behind the Scenes of Spotify's New AI DJ*, SPOTIFY (Mar. 8, 2023), <https://newsroom.spotify.com/2023-03-08/spotify-new-personalized-ai-dj-how-it-works/> [https://perma.cc/BK8W-8S92].

48. Berrak Sisman, Junichi Yamagishi, Simon King & Haizhou Li, *An Overview of Voice Conversion and Its Challenges: From Statistical Modeling to Deep Learning* 1, ARXIV (Nov. 17, 2020), <https://arxiv.org/pdf/2008.03648.pdf> [https://perma.cc/7A6A-XA84].

49. See, e.g., SPEECHIFY, <https://speechify.com/> [https://perma.cc/PL8N-KNSY]; Azure, MICROSOFT, <https://azure.microsoft.com/en-us/products/ai-services/text-to-speech> [https://perma.cc/JGM2-YCNE]; *Text-to-Speech AI*, GOOGLE CLOUD, <https://cloud.google.com/text-to-speech> [https://perma.cc/C2GR-8FK2].

50. Jonathan Shen & Ruoming Pang, *Tacotron 2: Generating Human-Like Speech from Text*, GOOGLE RSCH. BLOG (Dec. 19, 2017), <https://blog.research.google/2017/12/tacotron-2-generating-human-like-speech.html> [https://perma.cc/3MWF-YURS]; Yao-Yuan Yang & Moto Hira, *Text-to-Speech with Tacotron2*, PYTORCH, [https://pytorch.org/audio/stable/tutorials/tacotron2\\_pipeline\\_tutorial.html](https://pytorch.org/audio/stable/tutorials/tacotron2_pipeline_tutorial.html) [https://perma.cc/Y6SH-MW8C]; Jonathan Shen, Ruoming Pang, Ron J. Weiss, Mike Schuster, Navdeep Jaitly, Zongheng Yang, Zhifeng Chen, Yu Zhang et al., *Natural TTS Synthesis by Conditioning Wavenet on Mel Spectrogram Predictions* 1, ARXIV (Feb. 16, 2018), <https://arxiv.org/pdf/1712.05884.pdf> [https://perma.cc/7W8R-2SCR]; Cheryl Tipp, *Seeing Sound: What Is a Spectrogram?*, BRITISH LIBR. SOUND & VISION BLOG (Sept. 19, 2018, 9:04 AM), <https://blogs.bl.uk/sound-and-vision/2018/09/seeing-sound-what-is-a-spectrogram.html> [https://perma.cc/VW9A-TVA7] ("Spectrograms map out sound in a similar way to a musical score, only mapping frequency rather than musical notes."). Spectrogram maps that depict "frequency energy distributed over time . . . allow[] us to clearly distinguish each of the sound elements in a recording, and their harmonic structure. . . . [N]ot only do these graphs look really cool, but they can tell us a lot about the sound without even listening." Tipp, *supra*.

51. A vocoder is an audio effect that imposes the dynamics and waveform content from one sound (the "modulator") to another (the "carrier"). Alicyn Warren & John Gibson, *Reason: Using the Vocoder*, IND. UNIV. BLOOMINGTON CTR. FOR ELEC. & COMPUT. MUSIC, <https://cecm.indiana.edu/361/rsn-vocoder.html> [https://perma.cc/4ERG-JSTH]. In music, the modulator is often a human voice; the carrier is often a synthesizer or guitar. *Id.* A prominent example of a vocoder in music is the intro to "Livin' on a Prayer" by Bon Jovi. BON JOVI, *LIVIN' ON A PRAYER*, at 00:22 (Mercury 1986).

.mp3.<sup>52</sup> These vocoders use similar GAN architecture to other AI neural network software (including those used in creating deepfakes) to reproduce the vocal quality of whomever its training data originated from.<sup>53</sup> VTV conversion uses vocoders in the same way.<sup>54</sup> However, instead of using a spectrogram generated from text, VTV conversion runs a recording of a real voice through a vocoder to change its timbre.<sup>55</sup> Because VTV starts with a live performance, the output sounds more realistic: it shares the original's vocal inflections, imperfections, and rhythm that make it sound like a real human is talking or singing.<sup>56</sup>

Without any knowledge of how the underlying AI algorithms work, users of paid platforms such as FakeYou and UberDuck have access to thousands of already-generated models of voice actors and celebrities.<sup>57</sup> Creators simply upload their own vocal performance, choose a voice model, and download the deep voice output. Other platforms, such as ElevenLabs, allow users to create voice models of their own by uploading audio.<sup>58</sup> Alternatively, more “do-it-yourself”

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52. NVIDIA, *Waveglow*, PYTORCH, [https://pytorch.org/hub/nvidia\\_deeplearningexamples\\_waveglow/](https://pytorch.org/hub/nvidia_deeplearningexamples_waveglow/) [https://perma.cc/4QP7-Q93T]; see Jungil Kong, Jaehyeon Kim & Jaekyoung Bae, *HiFi-GAN: Generative Adversarial Networks for Efficient and High Fidelity Speech Synthesis 2*, ARXIV (Oct. 23, 2020), <https://arxiv.org/pdf/2010.05646.pdf> [https://perma.cc/MQ6E-37HB].

53. Kong et al., *supra* note 52, at 2–4; see *supra* text accompanying notes 34–40 (explaining the fundamentals of generative AI).

54. bycloud, *supra* note 46, at 4:48.

55. svc-develop-team, *SoftVC VITS Singing Voice Conversion*, GITHUB, <https://github.com/svc-develop-team/so-vits-svc> [https://perma.cc/XQ7Q-6Z7E]. Timbre is “the quality given to a sound by its overtones: such as . . . the resonance by which the ear recognizes and identifies a voiced speech sound [or] the quality of tone distinctive of a particular singing voice or musical instrument.” *Timbre*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/timbre> [https://perma.cc/ETQ2-HNEZ].

56. svc-develop-team, *supra* note 55.

57. *Voice to Voice*, FAKEYOU, <https://fakeyou.com/voice-conversion> [https://perma.cc/6YFK-EMMC]; *Voice to Voice*, UBERDUCK, <https://app.uberduck.ai/voice-to-voice> [https://perma.cc/YT5C-4TW5].

58. *AI Voice Cloning: Clone Your Voice in Minutes*, ELEVENLABS, <https://elevenlabs.io/voice-cloning> [https://perma.cc/4ZGB-QTUQ]. ElevenLabs claims that even thirty minutes of training data can create “ultra-realistic” and “identical” voice cloning, whereas the free and “instant” model, which can work with less than one minute of training data, has a lower quality output. *Id.*

minded creators can download models linked on crowd-sourced spreadsheets<sup>59</sup> and process their performances through pre-built graphical user interfaces (GUIs) running on cloud computing platforms such as Google Colab.<sup>60</sup> Some singers, such as Grimes, have even made open-source models and accompanying GUIs of their own voice free to the public.<sup>61</sup>

AI vocal replication has many practical applications. It enables users to speak languages they do not speak in their own voice.<sup>62</sup> Film studios have begun experimenting with using AI to redub movies in other languages in the original actor's voice.<sup>63</sup> Additionally, several documentaries have used voice actors and VTV conversion to generate

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59. See, e.g., *RVC Models Archive Sheet*, GOOGLE DOCS, <https://docs.google.com/spreadsheets/d/1tAUaQrEHYgRsm1Lvrnj14HFHDwJW10Bd9x0QePewNco/edit#gid=1227575351> [<https://perma.cc/S9LL-D444>].

60. See, e.g., *Easy GUI (for RVC v2, with Crepe) (with Improved Downloader)*, GOOGLE COLAB, [https://colab.research.google.com/drive/1Gj6UTf2gicndUW\\_tVheVhTXIIYpFTYc7](https://colab.research.google.com/drive/1Gj6UTf2gicndUW_tVheVhTXIIYpFTYc7)

[<https://perma.cc/7RCT-DNHW>]. This GUI not only allows users to process their vocals into another voice, but also includes detailed guides on how to prepare vocals for training, how to train an AI voice model, and how to run the GUI. *Id.*

61. Joe Coscarelli, *Grimes Invited Anyone to Make A.I. Grimes Songs. Here Are Her Reviews.*, N.Y. TIMES (May 24, 2023), <https://www.nytimes.com/2023/05/24/arts/music/grimes-ai-songs.html>; Grimes (@Grimezs), X (Apr. 23, 2023, 9:02 PM), <https://twitter.com/Grimezs/status/1650304051718791170> [<https://perma.cc/4ZFF-FV6J>] (tweeting that she would “split 50% royalties on any successful AI generated song that uses my voice” and commenting that “I think it’s cool to be fused [with] a machine and I like the idea of open sourcing all art and killing copyright”); Grimes (@Grimezs), X (Apr. 23, 2023, 9:02 PM), <https://twitter.com/Grimezs/status/1650304205981089793> [<https://perma.cc/P456-E8F7>]. Users can use VTV conversion on Grimes’s custom platform, Elf.Tech. ELF.TECH, <https://elf.tech/connect> [<https://perma.cc/ME3C-JJD2>].

62. *Global Speech Synthesis*, ELEVENLABS, <https://elevenlabs.io/languages> [<https://perma.cc/9AK6-3F4B>]; *Spotify’s AI Voice Translation Pilot Means Your Favorite Podcasters Might Be Heard in Your Native Language*, SPOTIFY (Sept. 25, 2023), <https://newsroom.spotify.com/2023-09-25/ai-voice-translation-pilot-lex-fridman-dax-shepard-steven-bartlett/> [<https://perma.cc/S8SM-KGQ8>] (announcing a pilot program which uses OpenAI’s voice generation technology to match podcaster’s voice and style in other languages).

63. Cliff Weitzman, *AI Dubbing: Transforming Movie Localization with Cutting-Edge Technology*, SPEECHIFY (Aug. 12, 2023), <https://speechify.com/blog/ai-dubbing-movies/> [<https://perma.cc/GKD4-TZSW>] (“AI can emulate the original actors’ voices and performances, and synchronize the dubbed voice with the actors’ mouth movements . . . This innovative dubbing process utilizes technologies such as deepfake, generative AI, and neural networks to ensure accurate lip sync, retaining the essence of the original performance.”).

narration that sounds like the deceased subjects.<sup>64</sup> Vocal replication technology has also enabled artists to record original songs using celebrity voices and to mix-and-match celebrity voices onto already-existing songs they did not create.<sup>65</sup> The latter use case includes mostly parodic examples—such as face-swapping a famous individual into a movie they did not originally appear in<sup>66</sup>—and voice “borrowing” by original songwriters such as the aforementioned Ghostwriter.<sup>67</sup>

### B. Right of Publicity

The right of publicity protects an individual’s right to profit from their own personality.<sup>68</sup> It provides relief against the unauthorized use

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64. *How Resemble AI Created Andy Warhol Docu-Series Narration Using 3 Minutes of Original Voice Recordings*, RESEMBLE.AI (Mar. 9, 2022), <https://www.resemble.ai/andy-warhol/> [<https://perma.cc/MF4W-ZKYZ>] (explaining how Resemble.AI used three minutes of voice recordings of Andy Warhol and a voice actor to recreate the deceased artist’s voice for a Netflix documentary series, *The Andy Warhol Diaries*); Julia Jacobs, *Bourdain Documentary’s Use of A.I. to Mimic Voice Draws Questions*, N.Y. TIMES (July 16, 2021), <https://www.nytimes.com/2021/07/16/movies/anthony-bourdain-ai-voice.html> (contemplating ethical discussions and public discourse surrounding forty-five seconds of AI generated vocals of Anthony Bourdain in the documentary *Roadrunner*).

65. Joe Coscarelli, *An A.I. Hit of Fake ‘Drake’ and ‘The Weeknd’ Rattles the Music World*, N.Y. TIMES, <https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html> (Apr. 24, 2023).

66. See, e.g., Haxenkoff, *Donald Trump - Do I Wanna Know?(AI COVER)*, YOUTUBE (Aug. 9, 2023), <https://www.youtube.com/watch?v=QSo0Q5fdCgM> [<https://perma.cc/K7V5-XRLM>]; breezy, *Bohemian Rhapsody - Frank Sinatra (AI COVER) Queen / Marc Martel*, YOUTUBE (June 28, 2023), <https://www.youtube.com/watch?v=VNWudHD3Kt8> [<https://perma.cc/N62G-62GR>]; Musical Imagination, *Skyfall - Freddie Mercury (AI Cover)*, YOUTUBE (July 24, 2023), [https://www.youtube.com/watch?v=Tx\\_nltXJwJo](https://www.youtube.com/watch?v=Tx_nltXJwJo) [<https://perma.cc/E6NW-5MYJ>]; YeezyBeaver, *Hey There Delilah but It’s Kanye’s Voice (So Vits SVC)*, YOUTUBE (Mar. 27, 2023), <https://www.youtube.com/watch?v=-9Ado8D3A-w> [<https://perma.cc/EF5L-8LW6>].

67. See discussion *supra* notes 5–9 and accompanying text.

68. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216–17 (1954); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995) (“One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability . . .”); RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977) (“One who appropriates to [their] own use or benefit the name or likeness of another is subject to liability to the other for invasion of [their] privacy.”); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 569 (1977) (defining the right of publicity as providing

of one's identity.<sup>69</sup> As such, the right of publicity ensures that those who can capitalize on their name, likeness, voice, and image<sup>70</sup> retain exclusive control over their likeness and "prevent others from unfairly appropriating this value for their [own] commercial benefit."<sup>71</sup> Often justified on labor-reward grounds, the right of publicity protects the "merchandising and advertising values" that attach to likenesses "society deems to have some social utility."<sup>72</sup>

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"personal control over commercial display and exploitation of [a performer's] personality and the exercise of his talents"); *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 700 (Ga. 1982) ("The right of publicity may be defined as a celebrity's right to the exclusive use of his or her name and likeness."); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978) (describing the right of publicity as "analogous to a commercial entity's right to profit from the 'goodwill' it has built up in its name" (citing *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 879 (S.D.N.Y. 1973); then *Chaplin v. Nat'l Broad. Co.*, 15 F.R.D. 134, 140 (S.D.N.Y. 1953); and then *Ettore v. Philco Broad. Corp.*, 229 F.2d 481, 490 (3d Cir. 1956))).

69. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995); RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977); *Zacchini*, 433 U.S. at 569; *Martin Luther King, Jr., Ctr. for Soc. Change, Inc.*, 296 S.E.2d at 700; *Ali*, 447 F. Supp. at 728.

70. These individuals include public figures, celebrities, and the more than fifty million people who consider themselves "influencers." Joe Gagliese, *The Rise of the Influencer: Predictions for Ways They'll Change the World*, FORBES (July 8, 2022, 7:30 AM), <https://www.forbes.com/sites/theyec/2022/07/08/the-rise-of-the-influencer-predictions-for-ways-theyll-change-the-world/?sh=47e1ce8e43a7> [https://perma.cc/6275-L2VR]. But see JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 183 (2018) ("Distinctions between public and private figures make little sense today as so-called private figures increasingly live public or quasi-public lives on . . . online fora . . .").

71. *Est. of Elvis Presley v. Russen*, 513 F. Supp. 1339, 1353 (D.N.J. 1981); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 145 (1993). According to Michael Madow's influential article on celebrity publicity rights, "the power to license is the power to suppress." Madow, *supra*. Accordingly:

When the law gives a celebrity a right of publicity, it does more than funnel additional income her way. It gives her (or her assignee) a substantial measure of power over the production and circulation of meaning and identity in our society: power, if she so chooses, to suppress readings or appropriations of her persona that depart from, challenge, or subvert the meaning she prefers; power to deny to others the use of her persona in the construction and communication of alternative or oppositional identities and social relations; power, ultimately, to limit the expressive and communicative opportunities of the rest of us.

*Id.* at 145–46.

72. Madow, *supra* note 71, at 130; *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 804 (Cal. 2001); Nimmer, *supra* note 68, at 216 (expressing that "persons who have long and laboriously nurtured the fruit of [their] publicity values" deserve judicially recognized rights "to control and profit from the publicity values which he has created or purchased.").



Publicity rights grew out of the “right of privacy,” which protects individuals from the public disclosure of private facts.<sup>73</sup> Early twentieth-century cases,<sup>74</sup> statutes,<sup>75</sup> and influential law review articles<sup>76</sup> led to the incorporation of the right of privacy into the Restatement of Torts.<sup>77</sup> Following pressure from Hollywood’s movie studios, courts began to recognize a distinct privacy right that one could license away.<sup>78</sup> In the 1977 case *Zacchini v. Scripps-Howard Broadcasting Co.*, the Supreme Court recognized the existence of a right of publicity in holding that a local news channel could not

73. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (AM. L. INST. 1995); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 392–94 (1960).

74. *See Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 71 (Ga. 1905) (“The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this state . . .”). Foreshadowing the later defined right of publicity, the Georgia Supreme Court added that:

The right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law, is also embraced within the right of personal liberty. Publicity in one instance, and privacy in the other, are each guaranteed.

*Id.* at 70. *See generally* *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902)

75. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (AM. L. INST. 1995) (explaining that following *Roberson*, “the New York legislature enacted a statute imposing criminal and civil liability for unauthorized use of a person’s name, portrait, or picture for ‘advertising purposes or for the purposes of trade.’”).

76. *See generally* Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

77. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (AM. L. INST. 1995); *Cabaniss v. Hipsley*, 151 S.E.2d 496, 500 (Ga. Ct. App. 1966). The Georgia Court of Appeals stated:

[T]he invasion of privacy is in reality a complex of four loosely related torts . . . . These four torts may be described briefly as: (1) intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; (4) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.

*Cabaniss*, 151 S.E.2d at 500; RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977); Prosser, *supra* note 73. The latter of these torts forms the basis for the right of publicity. “[T]he main distinction between this aspect of privacy and the other three is the distinction between causes of action involving injury to feelings, sensibilities or reputation and those involving an appropriation of rights in the nature of property rights for commercial exploitation.” *Cabaniss*, 151 S.E.2d at 504.

78. *See Haelan Lab’ys, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (acknowledging that “in addition to and independent of that right of privacy” one has “a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture . . . . This right might be called a ‘right of publicity’”).

broadcast the entire performance of a “human cannonball” performer.<sup>79</sup> The Court likened the protection of entertainers’ “exclusive control over the[ir] publicity” to an intellectual property right.<sup>80</sup> Accordingly, *Zacchini* “broke the right free of privacy law, broadened out the right, and legitimized it in jurisdictions that had not yet adopted it.”<sup>81</sup> Today, publicity rights exist as a patchwork of state legislation and case law that borrows aspects from some jurisdictions and discards others.<sup>82</sup>

In contexts where one might expect to see a particular well-known individual, the imitation or even evocation of a celebrity’s persona can raise right-of-publicity issues.<sup>83</sup> Former First Lady Jacqueline Kennedy Onassis can successfully sue Christian Dior for advertising its products using images of a look-alike model when the ad portrays a group of wealthy individuals as “legendary.”<sup>84</sup> Muhammad Ali can

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79. 433 U.S. 562, 563–66 (1977).

80. *Id.* at 573, 575–76 (noting that the State’s interest in promoting the right of publicity is “closely analogous to the goals of patent and copyright law” because publicity rights “provide[] an economic incentive for [entertainers] to make the investment required to produce a performance of interest to the public”).

81. ROTHMAN, *supra* note 70, at 76.

82. See Paul Czarnota, *The Right of Publicity in New York and California: A Critical Analysis*, 19 VILL. SPORTS & ENT. L.J. 481, 519 (2012); Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891, 907–09 (2017) (analogizing the right of publicity jurisprudence to a marble sculpture—where an overly-broad legal theory must be whittled down to shape—and most other legal theories to clay sculptures which are created with piecemeal additions). Individual state differences particularly concern aspects of postmortem rights and descendibility. Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 203–04 (2012).

83. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992). The court highlighted this point:

Advertisers use celebrities to promote their products. The more popular the celebrity, the greater the number of people who recognize her, and the greater the visibility for the product. The identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice.

*Id.*

84. *Onassis v. Christian Dior-N.Y., Inc.*, 472 N.Y.S.2d 254, 256, 258, 262 (N.Y. Sup. Ct. 1984) (finding a right of publicity violation under New York law because the Christian Dior advertisement

sue *Playgirl* magazine for a drawing that depicts his image in a boxing ring along with the phrase “the Greatest.”<sup>85</sup> Former *Wheel of Fortune* hostess Vanna White can even sue Samsung for advertisements that include a robotic game show host dressed up to resemble White.<sup>86</sup>

Additionally, the right of publicity protects against the imitation of an individual’s well-known and distinctive voice.<sup>87</sup> In *Midler v. Ford Motor Co.*, for example, an advertising agency hired one of Bette Midler’s former backup singers to sing a cover Midler was known for.<sup>88</sup> The Ninth Circuit held that “when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs. . . .”<sup>89</sup> Later, in *Waits v. Frito-Lay*, singer Tom Waits successfully sued for the misappropriation of his voice in a Doritos commercial.<sup>90</sup> Similar to *Midler*, an advertising company found a

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characterized a group of people as “legendary” and used look-alike Barbara Reynolds “with the appropriate makeup, hairdo, accessories and expression and behold—she is the very image of one of the most instantly recognizable and most respected women in the world—a legend in her own time”). “We are dealing here with actuality and appearance, where illusion often heightens reality and all is not quite what it seems. Is the illusionist to be free to step aside, having reaped the benefits of his creation, and permitted to disclaim the very impression he sought to create?” *Id.* at 261.

85. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 727, 729 (S.D.N.Y. 1978) (holding that because of the visual similarities between Ali and the drawing, along with the characterization of the drawn character as “the Greatest,” “[t]here can be little question that defendants’ unauthorized publication of the portrait of Ali amounted to a wrongful appropriation of the market value of plaintiff’s likeness”). The court notes that “[t]he cheekbones, broad nose and wideset brown eyes, together with the distinctive smile and close cropped black hair” were all recognizable features of Muhammad Ali, “one of the most widely known athletes of [the] time.” *Id.* at 726. Furthermore, the court observed that the ad depicted the figure “seated on a stool in the corner of a boxing ring with both hands taped and outstretched resting on the ropes on either side.” *Id.*

86. *White*, 971 F.2d at 1396. The commercial in *White* “depicted a robot, dressed in a wig, gown, and jewelry which [the creators] consciously selected to resemble White’s hair and dress.” *Id.* Moreover, the court noted that “[t]he robot was posed next to a game board which is instantly recognizable as the *Wheel of Fortune* game show set, in a stance for which White is famous.” *Id.*

87. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (“The human voice is one of the most palpable ways identity is manifested.”).

88. *Id.* at 461–62.

89. *Id.* at 463.

90. 978 F.2d 1093, 1097–98 (9th Cir. 1992) (explaining that “Waits has a raspy, gravelly singing voice . . . ‘like how you’d sound if you drank a quart of bourbon, smoked a pack of cigarettes and swallowed a pack of razor blades. . . . Late at night. After not sleeping for three days.’”).

singer with a “near-perfect imitation” of Waits to sing “ad copy” in a way that would “capture the feeling” of Waits’s song “Step Right Up.”<sup>91</sup> Unlike in *Midler*, the song in the ad was original, but the court still found a jury decision in favor of Waits reasonable because of “injury to Waits’ goodwill and future publicity value.”<sup>92</sup>

## II. ANALYSIS

Most jurisdictions apply a “transformative use” test to determine whether the appropriation of a star’s publicity rights receives First Amendment protections.<sup>93</sup> The transformative use test—which incorporates other free speech defenses such as parody into its rationale<sup>94</sup>—finds a difference between a “literal depiction or imitation of a celebrity for commercial gain” and one that takes the raw materials of another’s identity and adds original elements.<sup>95</sup> For every unauthorized ad evoking a celebrity’s likeness to sell merchandise, there is a Warhol painting selling a First Amendment protected “ironic social comment.”<sup>96</sup> The transformative use test thus seeks to

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91. *Id.* Why create a deep voice when you can do a pitch-perfect imitation? According to the court, the singer’s imitation was so good that the “creative team ‘did a double take’” when they first heard it. *Id.* at 1097.

92. *Id.* at 1104.

93. The transformative test originated in the California Supreme Court case *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, but other state and federal courts have applied it to their own right of publicity doctrines. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808–11 (Cal. 2001); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 934–37 (6th Cir. 2003); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 163–65 (3d Cir. 2013); *World Wrestling Fed’n Ent., Inc. v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413, 444–45 (W.D. Pa. 2003).

94. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579–81 (1994) “[P]arody has an obvious claim to transformative value” and, thus, First Amendment protection.” *Id.* at 579. Furthermore, “[l]ike less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.” *Id.*; *World Wrestling Fed’n Ent., Inc.*, 280 F. Supp. 2d at 445–46 (“[T]he right to publicity should not be used as a shield to caricature, parody and satire.”).

95. *Comedy III Prods., Inc.*, 21 P.3d at 808–09.

96. *Id.* at 811. For an example of transformative representations of a star’s persona in a still image,

differentiate works that go beyond the realm of merchandising and advertising and into entertainment.<sup>97</sup>

In *Comedy III Productions v. Gary Saderup, Inc.*, the California Supreme Court first formulated “a balancing test between the First Amendment and the right of publicity based on whether [a] work . . . adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.”<sup>98</sup> The court itself appropriated the transformative test from the first factor of the fair use doctrine, which assesses “the purpose and character of the use.”<sup>99</sup> *Comedy III* instructs courts to decide whether the literal or imitative elements of the work “predominate.”<sup>100</sup> Where an artist adds

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courts often direct us to Andy Warhol: “the avatar of transformative copying.” Andy Warhol Found. for the Visual Arts v. Goldsmith, 143 S. Ct. 1258, 1293 (2023) (Kagan, J., dissenting). According to the *Comedy III* court, Warhol’s portraits used “distortion and the careful manipulation of context” to “convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself.” *Comedy III Prods., Inc.*, 21 P.3d at 811; Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1203 (2021) (“[W]e have used the word ‘transformative’ to describe a copying use that adds something new and important. An ‘artistic painting’ might, for example, [be transformative] even though it precisely replicates a copyrighted ‘advertising logo to make a comment about consumerism.’” (citations omitted) (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13F.05 (2022))).

97. *Comedy III Prods., Inc.*, 21 P.3d at 811.

98. *Id.* at 799, 810 (holding “that when an artist’s skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit [their] fame, then the artist’s right of free expression is outweighed by the right of publicity”). “[A] tension frequently exists between the First Amendment’s goal of fostering a marketplace of ideas and respect for individual expression, and a celebrity’s right of publicity.” Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607, 615 (Cal. Ct. App. 2006).

99. *Comedy III Prods., Inc.*, 21 P.3d at 807–08 (quoting 17 U.S.C. § 107(1)) (concluding “that a wholesale importation of the fair use doctrine into right of publicity law would not be advisable,” but that the first fair use factor “does seem particularly pertinent to the task of reconciling the rights of free expression and publicity”). For a statutory recitation of the fair use factors, see 17 U.S.C. § 107. The court pointed to the Supreme Court’s analysis of the factor in *Campbell v. Acuff-Rose Music, Inc.*:

[T]he central purpose of the inquiry into this fair use factor “is to see . . . whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”

*Comedy III Prods., Inc.*, 21 P.3d at 808 (alteration in original) (citations omitted) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

100. *Comedy III Prods., Inc.*, 21 P.3d at 809 (“The inquiry is in a sense more quantitative than qualitative . . .”).

“creative elements [that] significantly transform the celebrity depiction,” the artist has a First Amendment right to the work’s financial benefit.<sup>101</sup> In short, a work is made transformative—and defensible against a right of publicity claim—by adding a “new expression.”<sup>102</sup>

AI digital replicas fall in between the outright appropriation of an individual’s image and the evocation of their persona. Unlike a photoshopped image, deepfakes and deep voices do not use any preexisting images or audio in their output, but the result is often indistinguishable from if they had. However, because a computer regenerates an exact replication of the celebrity’s face, this distinction from outright appropriation is a mere technicality. Even though the creator uses images and recordings of the individual to train the model on which the AI runs, the AI generates every frame of a deepfake and each waveform of a deep voice from scratch. Even more “head-turning” than the Tom Waits impersonator, a deepfake is a clear-cut imitation.<sup>103</sup> This “robot” is not just a dressed-up characterization that evokes a celebrity’s likeness as in *White*; it fully and accurately replicates the celebrity’s likeness.<sup>104</sup> Most courts will likely find that digital replicas violate publicity rights.

Yet, deepfake and deep voice creations are expressive works, and courts should afford them the same First Amendment speech protections as other appropriations of famous likenesses.<sup>105</sup> Broadly, “celebrity personas may be freely appropriated for what are deemed to be primarily ‘informational’ and ‘entertainment’ purposes” regarding

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101. *Id.* at 808 & n.10.

102. *Id.* at 808; *Kirby*, 50 Cal. Rptr. 3d at 617 (“That expression alone is sufficient; it need not convey any ‘meaning or message.’”).

103. *See supra* text accompanying notes 90–91.

104. *See supra* note 86 and accompanying text.

105. Johnson, *supra* note 82, at 904 (“The right of publicity is utterly dependent upon the First Amendment and other subtrahends to give it its essential shape.”); *see* *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65–67 (1981) (finding any entertainment—including video, musical, and dramatic works—protected by the First Amendment unless “sufficient justification [exists] for the exclusion of a broad category of protected expression”).

that individual's own life.<sup>106</sup> But many artists may use digital replicas for purposes entirely outside the scope of traditional protections. The following discussion assesses how courts have applied the transformative use test in the past and attempts to predict how they will apply the test to digital replicas.<sup>107</sup>

#### A. *Digital Replicas and the Transformative Use Test*

Artists that use a celebrity likeness as the “raw materials” to synthesize an original work have a better claim to transformativeness than those whose “depiction or imitation of the celebrity is the very sum and substance of the work in question.”<sup>108</sup> For example, one California court has extended the transformative test to the appropriation of an individual's name and public image to a real-life, pseudo-fictional celebrity persona.<sup>109</sup> In *Ross v. Roberts*, a former cocaine kingpin alleged that William Leonard Roberts II, a famous rapper, stole his name and identity for Roberts's own commercial advantage.<sup>110</sup> Both went by the name “Rick Ross.”<sup>111</sup> The court found

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106. Madow, *supra* note 71, at 130 (“Except in unusual circumstances, permission need not be obtained, nor payment made, for use of a celebrity's name or likeness in a news report, novel, play, film, or biography. Under current law, the ‘life stories’ of celebrities are, for all intents and purposes, common property—available to be told and retold at the pleasure, and for the profit, of the teller.”).

107. This discussion is organized around the five factors for determining whether a work receives protection as “transformative” as described in *Comedy III. Comedy III Prods. Inc.*, 21 P.3d at 808–10.

108. *Id.* at 809.

109. *Ross v. Roberts*, 166 Cal. Rptr. 3d 359, 367–68 (Cal. Ct. App. 2013); *see also* Justine Geiger, *The Cult of Personality: The Use of Intellectual Property to Protect Publicity Rights in a Digital World*, 17 TUL. J. TECH. & INTELL. PROP. 275, 288–89 (2014).

110. *Ross*, 166 Cal. Rptr. 3d at 362–63, 365.

111. *Id.* at 363; *see also* Jesse Katz, *The Rise and Fall and Rise and Fall of Ricky Ross*, TEX. MONTHLY (July 1998), <https://www.texasmonthly.com/news-politics/the-rise-and-fall-and-rise-and-fall-of-ricky-ross/> [<https://perma.cc/6VWF-3P8L>]. During the 1980's, Rick Ross amassed a fortune organizing a vast cocaine empire, selling upwards of three million dollars of cocaine a day at its peak. *Ross*, 166 Cal. Rptr. 3d at 363. Because of his prolific drug network, public arrest, and peripheral ties to the Iran-Contra scandal, Ross received widespread press coverage and became subject to numerous documentaries. *Id.* Several decades later, Roberts established himself as a successful recording artist with lyrics portraying

that despite Roberts's public portrayal of an "essentially fantasized version" of the kingpin, his depiction was transformative and worthy of First Amendment protection.<sup>112</sup> The court characterized Ross's life as "raw materials" from which Roberts synthesized a music career.<sup>113</sup> Unlike a mere imposter who seeks to capitalize off the name and reputation of another, the court reasoned that Roberts created wholly original artistic works that added "new expression" to the name "Rick Ross."<sup>114</sup>

Additionally, works that subordinate "an artist's skill and talent" for "the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit [their] fame" are not transformative.<sup>115</sup> In *No Doubt v. Activision Publishing, Inc.*, the Gwen Stefani-fronted rock band sued the creators of the video game *Band Hero* for depicting the band members performing over sixty songs by other artists.<sup>116</sup>

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fictional tales of life running a cocaine enterprise; his "celebrity identity" was Rick Ross: "a cocaine kingpin turned rapper." *Id.* at 363, 368 (characterizing Roberts's former employment as a correctional officer "a piece of information not conducive to his career as a 'drug-dealing rapper,' and one that he has attempted to hide"). Ross's story had apparently "grabbed" Roberts early in his career; however, Roberts has denied that his stage name originated from the former kingpin. *Id.* at 363.

112. *Ross*, 166 Cal. Rptr. 3d at 369.

113. *Id.* at 368.

114. *Id.* Moreover, Roberts's success arose from the sale of his music and celebrity, not the appropriation of Ross's story. *Id.*

115. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809–10 (Cal. 2001) (holding that transformativeness requires works to be "primarily the [artist's] own expression" rather than a mere replication of the celebrity's likeness); see also *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1274 (9th Cir. 2013) ("This factor requires an examination of whether a likely purchaser's primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of that artist.").

116. 122 Cal. Rptr. 3d 397, 400 (Cal. Ct. App. 2011); Eriq Gardner, *No Doubt, Activision Settle Lawsuit over Avatars in 'Band Hero'*, HOLLYWOOD REP. (Oct. 3, 2012, 3:38 PM), <https://www.hollywoodreporter.com/business/business-news/no-doubt-activision-lawsuit-band-hero-376217/> [<https://perma.cc/RQD5-XHJ4>]. The final version of the game allowed players to use the No Doubt "avatars to perform any of the songs included in the game," which allowed players to make Stefani sing in a male voice and make the male members of the band perform "kooky dance moves" and sing in female voices. *No Doubt*, 122 Cal. Rptr. 3d at 402; Gardner, *supra* (quoting Gwen Stefani as being "a fan of the Rolling Stones," but having not authorized Activision "to have her 'boasting about having sex with prostitutes'"). The band spent a day playing their songs in a motion capture studio so that the in-game avatars "would accurately reflect their appearances, movements, and sounds." *No Doubt*, 122 Cal. Rptr. 3d at 402. Evidently, however, Activision had "hired actors to impersonate No Doubt" while performing the additional musical works. *Id.*



Applying the transformative use framework, the California court determined that *Band Hero* did not acquire First Amendment protection as a transformative work.<sup>117</sup> The in-game avatars depicted “precise computer-generated reproductions of the band members.”<sup>118</sup> In a video game like *Band Hero*, players have little control over the celebrity avatars beyond what song they appear to sing and the ability to make the avatars dance.<sup>119</sup> And no matter what song users chose to play as the avatars, “they remain[ed] at all times immutable images of the real celebrity musicians.”<sup>120</sup> The court reasoned that because users could not “alter the [appearance of the] No Doubt avatars in any respect,” and because the game did not “meld” their likenesses with other elements of the game to form a unique artistic expression, the game was not transformative under the *Comedy III* standard.<sup>121</sup> The court reasoned that the game only depicted No Doubt avatars in the same context for which they achieved and maintained their fame: performing rock songs on stage.<sup>122</sup>

Further, courts consider whether “the marketability and economic value of the challenged work derive[s] primarily from the fame of the celebrity depicted.”<sup>123</sup> In *ETW Corp. v. Jireh Publishing Inc.*, the Sixth Circuit found a painting that prominently featured golfer Tiger Woods

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117. *No Doubt*, 122 Cal. Rptr. 3d at 410.

118. *Id.* at 415.

119. *Id.* at 410.

120. *Id.*

121. *Id.* at 410, 415.

122. *Id.* at 410–11. The Third and Ninth Circuits came to similar conclusions in a pair of cases revolving around a college football video game. The courts found that digital versions of athletes do what actual athletes do: they “play[] college football, in digital recreations of college football stadiums, filled with all the trappings of a college football game.” *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 166 (3d Cir. 2013); *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1276 (9th Cir. 2013) (“[T]he game’s setting is identical to where the public found [Keller] during his collegiate career: on the football field.” (quoting *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108, at \*5 (N.D. Cal. Feb. 8, 2010) (alteration in original))).

123. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1274 (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (Cal. 2001)). This factor matches the Supreme Court’s explanation in *Campbell* for assessing the “purpose and character” in fair use copying cases: the more transformative a new work, the less courts should consider its commercial nature. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994) (quoting 17 U.S.C. § 107(1)).

had “substantial transformative elements.”<sup>124</sup> According to the court, the work did not “capitalize solely” on its depiction of Woods.<sup>125</sup> It artistically collaged multiple images to “convey a message about the significance of Woods’s achievement[s].”<sup>126</sup>

Lastly, to “avoid making judgments concerning ‘the quality of the artistic contribution,’ a court should conduct an inquiry ‘more quantitative than qualitative’ and ask ‘whether the literal and imitative or the creative elements predominate in the work.’”<sup>127</sup> Thus, courts have found depictions of singers Johnny and Edgar Winter as worm-creatures in the *Jonah Hex* comic book series<sup>128</sup> and a “fanciful” video game character resembling the lead singer of 90’s band Deee-Lite (Kierin Kirby, also known as Lady Miss Kier) transformative.<sup>129</sup>

In the current state of the transformative test, courts must apply an ad hoc analysis to each deepfake portrayal. One commentator has described the “fuzzy boundaries” of the right of publicity as creating an “analytical complexity” that “makes right-of-publicity problems more prone to erratic results.”<sup>130</sup> In Professor Rothman’s<sup>131</sup> critique of

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124. 332 F.3d 915, 938 (6th Cir. 2003); see *The Masters of Augusta*, RICK RUSH ART, <https://rickrushart.com/products/the-masters-of-augusta-1> [<https://perma.cc/T6BU-K863>].

125. *ETW Corp.*, 332 F.3d at 938.

126. *Id.*

127. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1274 (quoting *Comedy III Prods., Inc.*, 21 P.3d at 809).

128. *Winter v. DC Comics*, 69 P.3d 473, 476, 479–80 (Cal. 2003). In the comic book series, *Jonah Hex*, DC Comics’ artists depicted Johnny and Edgar Winter as Johnny and Edgar Autumn: “villainous half-worm, half-human offspring born from . . . a supernatural worm creature that had escaped from a hole in the ground. At the end of volume 5, Jonah Hex and his companions shoot and kill the Autumn brothers in an underground gun battle.” *Id.* at 476. Comic books, the court reasoned, used “distorted” depictions “for purposes of lampoon, parody, or caricature” as part of a “larger story” even if the artist’s evocations were “less-than-subtle.” *Id.* at 479.

129. *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 609, 613, 617–18 (Cal. Dist. Ct. App. 2006) (holding that although the game character’s “facial features, [] clothing, hair color and style, and use of certain catch phrases are sufficiently reminiscent enough of Kirby’s features and personal style to suggest imitation,” and that “the differences are not trivial,” the game character “is not a literal depiction of Kirby” and “the imitation is part of the raw material from which the [game’s] character . . . [was] synthesized”).

130. Johnson, *supra* note 82, at 908.

131. Professor Rothman is a scholar of publicity rights.

the transformative use test, Rothman notes that perhaps the Three Stooges drawing from Comedy III “would have been allowed if an art critic had praised [Saderup’s] skill and his overlay of seriousness and sadness on the comics’ faces to comment on the facade of comedy,”<sup>132</sup> or perhaps if the drawing “had simply been [by] Warhol—a famous, sought-after, successful and celebrated artist.”<sup>133</sup> If Ghostwriter, the AI song creator, becomes celebrated for songs that take on a unique cultural meaning—as did Warhol and his portraits—the loose transformative test risks the legal justification of such songs without compensation to the likeness-holder.

When, then, would a digital replica become transformative? A deepfake or deep voice portrayal is nothing more than a “precise computer-generated reproduction,” and made with even greater imitative accuracy than a video game render.<sup>134</sup> But, a deepfake creator can choose to portray the likeness in either an imitative context or a creative context.<sup>135</sup> Take, for example, Fisher’s deepfake of Tom Cruise singing and playing guitar.<sup>136</sup> A court should find this transformative; instead of portraying the cinematic, high-octane rendition of Cruise the public knows him for, it adds a unique musical expression in a mundane selfie video.

What if, however, the same deepfake actor using the same deepfake Cruise model instead dresses up in a suit, puts his arms around real life celebrity Paris Hilton, and says “we’re going to skydive into this [movie premiere as a couple].”<sup>137</sup> This seems less transformative than the guitar example, because the public knows Cruise as a movie star

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132. ROTHMAN, *supra* note 70, at 148.

133. *Id.*

134. No Doubt v. Activision Publ’g, Inc., 122 Cal. Rptr. 3d 397, 415 (Cal. Ct. App. 2011).

135. Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 809 (Cal. 2001).

136. @DeepTomCruise, TIKTOK (Apr. 29, 2021), <https://www.tiktok.com/@deeptomcruise/video/7001976758710848774> [https://perma.cc/3CXD-VFU9].

137. @DeepTomCruise, TIKTOK (June 14, 2022), <https://www.tiktok.com/@deeptomcruise/video/7109293771686186246> [https://perma.cc/L5GW-PRAL].

who does his own stunts. One could easily foresee Cruise attending a movie premiere by skydiving with another celebrity, like Paris Hilton. But by the time Fisher made this particular video, he had garnished his *own* clout as “DeepTomCruise.”<sup>138</sup> Perhaps his “essentially fantasized version” of Cruise uses the original’s persona as raw materials to synthesize an influencer career detached from Cruise’s own fame.<sup>139</sup>

Likewise, a song that sounds like Drake in the genre of Drake does not appear transformative on its face. But a court applying the transformative test could determine otherwise.<sup>140</sup> The Drake deep voice in “Heart on My Sleeve” uses Drake’s own vocal performances as nothing more than raw materials to power an AI model. Because Ghostwriter wrote the lyrics, composed the instrumentals, and performed the original vocals—prior to the application of the Drake and The Weeknd AI models—“Heart on My Sleeve” is primarily his own expression; the creative elements outweigh the imitative elements.<sup>141</sup> Unlike in *No Doubt*, where game players could make Stefani’s avatar sing covers that she could otherwise choose to do herself, Ghostwriter uses Drake’s voice to sing his own original song.

On the other hand, a court might be persuaded that the marketability and economic value of “Heart on My Sleeve” depend mostly on its depiction of Drake and The Weeknd. Even if a version of the song—without any deep voice—could have become a hit on its own, so too could advertisements that depict Tom Waits and Bette Midler soundalikes.<sup>142</sup> However, in contrast with *Waits* and *Midler* (and even *Onassis*), Ghostwriter did not (necessarily) attempt to trick his audience into believing that the song was by Drake and The Weeknd. Ghostwriter published it under his own name and, at least in the

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138. See Sayej, *supra* note 2 and accompanying text.

139. See *Ross v. Roberts*, 166 Cal. Rptr. 3d 359, 369 (Cal. Ct. App. 2013).

140. See *supra* text accompanying notes 108–29 for a discussion on the *Comedy III* factors.

141. See *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 937–38 (6th Cir. 2003) (finding a work transformative when an artist “added a significant creative component of his own” to the depiction of a celebrity’s identity).

142. See *supra* text accompanying notes 87–92.

YouTube version, noted that it was an AI song in the title.<sup>143</sup> Lastly, “Heart on My Sleeve” does not “subordinate” Drake or The Weeknd’s artistic skill or talent. Ghostwriter did not need either artist’s skill or talent, just a glorified filter replicating their voices. Because the transformative use test is vague enough that a court could swing its decision either way, there are no bright lines for determining whether original content featuring deepfake and deep voice depictions warrants First Amendment protection.

Allowing the public free reign over celebrity personas for transformative purposes has obvious drawbacks.<sup>144</sup> Primarily, the celebrity lacks the opportunity to consent, compensation, and credit for creative works that look and sound like them.<sup>145</sup> Moreover, when a deep voice creator makes a song in a style the celebrity has not explored—for example, imagine a Taylor Swift song in an unexpected style—the artist becomes, essentially, preempted from entering that genre. Or, consider a situation where an artist properly licenses their likeness to a deep voice creator, but their label does not approve.<sup>146</sup> Many recording contracts require the artist to grant the label exclusivity over any copyrightable content using their voice.<sup>147</sup>

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143. *Heart on My Sleeve*, *supra* note 5.

144. *But see* Madow, *supra* note 71, at 148 (explaining that throughout the eighteenth and nineteenth centuries, the practice of “large-scale commercial exploitation of famous persons” was “supported by a widely shared conception of famous persons as a kind of communal property, freely available for commercial” and cultural use).

145. In her July 12 testimony to the U.S. Senate Subcommittee on Intellectual Property, artist Karla Ortiz framed the debate over the AI appropriation of intellectual property as needing to address “consent, credit, [and] compensation.” “*AI and Copyright*” *Before the U.S. Senate Judiciary Subcomm. on Intell. Prop.* (July 7, 2023) (statement of Karla Ortiz, Concept Artist, Illustrator, and Fine Artist), [https://www.judiciary.senate.gov/imo/media/doc/2023-07-12\\_pm\\_-\\_testimony\\_-\\_ortiz.pdf](https://www.judiciary.senate.gov/imo/media/doc/2023-07-12_pm_-_testimony_-_ortiz.pdf) [<https://perma.cc/PHX6-QS79>].

146. *See* Suzanne Kessler, *The Non-Recording, Non-Artist “Recording Artist”: Expanding the Recording Artist’s Brand into Non-Music Arenas*, 20 VAND. J. ENT. & TECH. L. 515, 534 (2017) (“Labels traditionally exercise maximum control over the use of artists’ names, likenesses, photographs, voices, biographies, and other personal indicia (including, when commercially exploited, the artists’ ‘right of publicity’) in connection with that artist’s musical recordings and the advertising and marketing related thereto.” (footnote omitted)).

147. DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 177 (11th ed. 2023).

### B. A Stricter Transformative Test

In *Andy Warhol Foundation for the Visual Arts v. Goldsmith*, the Supreme Court reframed how courts should assess the transformative nature of derivative works in fair use cases.<sup>148</sup> The Court redirected the “transformativeness” for fair use in copyright from a contextual analysis to a purpose-based analysis. Jurisdictions that apply *Comedy III*’s transformative use test—already premised on fair use in copyright—should adopt the *Goldsmith* framework to ask not *why* an artist adds new expression, but *how* the work interacts in the marketplace of ideas.

In 1984, *Vanity Fair* ran a story on the singer Prince’s impact on popular culture.<sup>149</sup> For the spread, the magazine licensed a portrait photograph of Prince—“for use as an ‘artist reference’”—from rock-and-roll photographer Lynn Goldsmith.<sup>150</sup> *Vanity Fair* then commissioned Andy Warhol—“a major figure in American art”—to produce his own portrait of Prince using Goldsmith’s source photograph.<sup>151</sup> Warhol created sixteen total works using Goldsmith’s photo of Prince, known as the “Prince Series,”<sup>152</sup> and *Vanity Fair*

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148. The Court notes that *Campbell*—the case from which *Comedy III* premises its transformative test for the right of publicity on—“cannot be read to mean that [the first fair use factor assessing the ‘purpose and character of use’] weighs in favor of *any* use that adds some new expression, meaning, or message.” *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1282 (2023) (emphasis added). Compare the Supreme Court’s reasoning in *Andy Warhol Foundation* to the *Comedy III* court’s. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (requiring that a transformative interpolation of a celebrity’s persona need only add “something new, with a further purpose or different character, altering the first with new expression, meaning, or message” (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994))).

149. See Tristan Vox, *Purple Fame*, VANITY FAIR (Nov. 1984), at 66, 120 (“Has a kinkier figure ever captured the American imagination? It is not likely. The well-born and the well-bred will turn away in disgust.”); *Andy Warhol Found.*, 143 S. Ct. at 1266.

150. *Andy Warhol Found.*, 143 S. Ct. at 1266 (noting that “Goldsmith agreed, on the condition that the use of her photo be for ‘one time’ only” and was paid \$400 for the photograph); see Vox, *supra* note 149, at 66, 121 (crediting Warhol for the “special portrait” and Goldsmith for the “source photograph”).

151. *Andy Warhol Found.*, 143 S. Ct. at 1266–67.

152. *Id.* at 1268, 1287–88 (showing all sixteen of Warhol’s Prince portraits—fourteen silkscreen prints and two pencil drawings—in the appendix). Goldsmith allegedly did not know about the full Prince Series created from her image until 2016 when she saw another version on the cover of *Condé Nast*. *Id.* at 1268.

chose the “Purple Prince” to accompany its article.<sup>153</sup> Following Prince’s death in 2016, *Condé Nast* approached the Andy Warhol Foundation (AWF) “about the possibility of reusing the 1984 Vanity Fair image for a special edition magazine that would commemorate Prince.”<sup>154</sup> Upon discovering that Warhol produced additional versions, *Condé Nast* obtained a license to publish “Orange Prince.”<sup>155</sup> When Goldsmith saw the magazine cover, she recognized the image as her own photograph and sued for copyright infringement.<sup>156</sup>

Justice Sotomayor held that the first fair use factor—the same factor *Comedy III* appropriated—weighed in favor of First Amendment protections when “the use [of the secondary work] has a purpose and character that is sufficiently distinct from the original.”<sup>157</sup> “Many secondary works add something new,” the Court repeated throughout its decision,<sup>158</sup> however, a secondary work which adds a “new expression” alone “is not, without more, dispositive of the first factor.”<sup>159</sup> Instead, Sotomayor said, courts must “ask[] ‘whether *and to*

153. *Id.* at 1267; *id.* at 1295 (Kagan, J., dissenting).

154. *Id.* at 1269.

155. *Id.*

156. *Id.* at 1270–71.

157. *Andy Warhol Found.*, 143 S. Ct. at 1287; *id.* at 1275 (“A use that has a further purpose or different character is said to be ‘transformative.’” (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994))); *see also* 17 U.S.C. § 107.

158. *Andy Warhol Found.*, 143 S. Ct. at 1275, 1279 n.11 (arguing that a “new aesthetic and message” on its own is not enough to weigh in favor of fair use protection); *id.* at 1282 (“*Campbell* cannot be read to mean that § 107(1) weighs in favor of *any* use that adds some new expression, meaning, or message.” (emphasis added)); *id.* at 1284 (“[T]he meaning of a secondary work, as reasonably can be perceived, should be considered to the extent necessary to determine whether the purpose of the use is distinct from the original, for instance, because the use comments on, criticizes, or provides otherwise unavailable information about the original.”); *id.* at 1275 (“To preserve [the copyright owner’s exclusive right to create derivative works], the degree of transformation required to make ‘transformative’ use of an original must go beyond that required to qualify as a derivative.”).

159. *Id.* at 1273. The *Campbell* Court’s analysis, Sotomayor explained, did not stop after finding that “2 Live Crew transformed Orbison’s song by adding new lyrics and musical elements, such that ‘Pretty Woman’ had a different message and aesthetic than ‘Oh, Pretty Woman.’” *Id.* at 1263. The Court went further, finding “it necessary to determine whether 2 Live Crew’s transformation . . . [had] a distinct purpose” independent from the original. *Id.*

*what extent*’ the use at issue has a purpose or character different from the original.”<sup>160</sup>

A work that “achieve[s] a purpose that is the same as, or highly similar to, that of the original work is more likely to substitute for, or ‘supplan[t]’ it.”<sup>161</sup> Hence, the justification for how an artist uses their work—not the work’s meaning—determines whether it has a transformative purpose or character. Instead, the Court said, an analysis of a secondary work’s “meaning or message” should only be “relevant to whether [its] new use serve[s] a purpose distinct from the original, or instead supersede[s] its objects.”<sup>162</sup> As an example of a secondary work serving a different purpose than an original, the Court pointed to Warhol’s *Campbell’s Soup Can* series, which “uses Campbell’s copyrighted work for an artistic commentary on consumerism, a purpose that is orthogonal to advertising soup.”<sup>163</sup>

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160. *Id.* at 1275 (quoting *Campbell*, 510 U.S. at 579); *id.* (“The larger the difference, the more likely the first factor weighs in favor of fair use. The smaller the difference, the less likely.”).

161. *Id.* at 1274 (alteration in original) (quoting *Campbell*, 510 U.S. at 579). According to Sotomayor, the goal of copyright is to protect creators against competing with substantial substitutes to their own work. *Id.* (noting that “the problem of substitution [is] copyright’s bête noire”); *see also* 17 U.S.C. § 106(2) (“[T]he owner of copyright . . . has the exclusive rights to . . . prepare derivative works based upon the copyrighted work.”).

162. *Andy Warhol Found.*, 143 S. Ct. at 1282–83. Many secondary works, such as parodies and commentaries, require an original work to serve its distinct function. Parodic songs, like those by Weird Al Yankovich, or critiques utilizing the text or images of an original work, receive fair use protection against copyright infringement. The Court, as an example, compares “a film adaptation of *Gone With the Wind*”—the producers of which would require a license from the author’s estate even though it adds visual and dramatic elements not present in the original book—with “a novel, *The Wind Done Gone*, that ‘inverts’ the original’s ‘portrait of race relations’ to expose its ‘romantic, idealized’ portrayal of the antebellum South” as a more illustrative example of when commentary does exist. *Id.* at 1285 n.21 (quoting *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1270, 1280 (11th Cir. 2001)). In these situations, “the meaning of a secondary work, as reasonably can be perceived, should be considered to the extent necessary to determine whether the purpose of the use is distinct from the original, for instance, because the use comments on, criticizes, or provides otherwise unavailable information about the original.” *Id.* at 1284. As simple examples of copied works with messages that do “not suffice under the first factor,” the Court provides: “[A] musician who finds it helpful to sample another artist’s song to make his own, a playwright who finds it helpful to adapt a novel, or a filmmaker who would prefer to create a sequel or spinoff. . . .” *Id.* at 1286.

163. *Id.* at 1281; *Andy Warhol: Campbell’s Soup Cans 1962*, MUSEUM OF MOD. ART, <https://www.moma.org/collection/works/79809> [<https://perma.cc/J7XX-KG7G>].



Moreover, the character of any work includes its commercial nature.<sup>164</sup> “The commercial nature of the use is not dispositive” to determining whether a secondary work’s use is transformative, Sotomayor emphasized, “[b]ut it is relevant.”<sup>165</sup> Thus, to determine the “degree of difference” between a secondary work’s purpose and character and that of the original, a court must further “balance[] [the difference] against the commercial nature of the use.”<sup>166</sup> “[A] use’s transformativeness may outweigh its commercial character,” and artists may nonetheless profit from works which posit commentary, critique, or parody on the original work or extoll an altogether different purpose from the original.<sup>167</sup>

In short, the *Goldsmith* test asks: (1) does the *use* of the secondary work supplant the original work in the marketplace, and (2) if so, is the use of the secondary work of a commercial nature?<sup>168</sup> Transformativeness exists on a spectrum—“transformative uses of original works and derivative works that transform originals”—but fair use only protects the former.<sup>169</sup> The artist’s intended purpose and the character of the work itself are distinct from, and legally irrelevant to, an objective assessment of how the copyright owner uses and distributes the work.

Applying these two elements to the case at hand, the Court found that “Goldsmith’s photograph and AWF’s 2016 licensing of Orange Prince share substantially the same purpose, and that AWF’s use of Goldsmith’s photo was of a commercial nature.”<sup>170</sup> The Court

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164. *Andy Warhol Found.*, 143 S. Ct. at 1280 n.14 (noting that in *Sony Corp. of America v. Universal City Studios Inc.*, 464 U.S. 417, 448–49 (1984), the Court held that character of a work under 17 U.S.C. § 107(1) includes “the commercial or nonprofit character of an activity”).

165. *Id.* at 1276.

166. *Id.* at 1277.

167. *Id.* at 1280.

168. *Id.* at 1274. According to the Court, “[t]o hold otherwise would potentially authorize a range of commercial copying of photographs, to be used for purposes that are substantially the same as those of the originals.” *Id.* at 1285 (noting that human faces are especially “open to interpretation” and “reasonably can be perceived as conveying several possible meanings”).

169. *See id.* at 1286.

170. *Andy Warhol Found.*, 143 S. Ct. at 1280.

continued that “although a use’s transformativeness may outweigh its commercial character, here, both elements point in the same direction.”<sup>171</sup> Any use of Prince on a magazine cover following his death—featuring works by any number of copyright holders—served “the same essential purpose of depicting Prince in a magazine commemorating his life and career.”<sup>172</sup> Although AWF argued that Warhol’s image depicted Prince as an “icon” whereas Goldsmith’s photograph portrayed him as a “vulnerable, uncomfortable person,”<sup>173</sup> the Court pushed back. In this context, the Court said, Warhol and Goldsmith’s images share substantially the same purpose: to illustrate a magazine about Prince with a portrait of Prince.<sup>174</sup> The Court seems more comfortable judging whether a work’s use in commerce interferes with its source material rather than comparing two works’ artistic qualities.<sup>175</sup>

Were courts to readdress transformative uses of celebrities’ right of publicity under a *Goldsmith*-like test, famous likenesses would have far greater protection from deepfake and deep voice infringement. Unlike the *Comedy III* test, which searches for a new expression in the work itself, applying *Goldsmith* to the right of publicity would require that a deepfake not compete with its original persona in the marketplace of ideas. This would keep intact parody uses, such as replacing an actor in a movie trailer with another, and uses that make obvious artistic statements, while preventing the instances which confuse consumers.

A song like “Heart on My Sleeve” both supplants the artists whose voices it mimics and has a commercial nature. Its purpose—like any

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171. *Id.*

172. *Id.* at 1279 n.11.

173. *Id.* at 1271, 1289.

174. *Id.* at 1278–79 & n.11. The Court further noted that “[b]oth Goldsmith and AWF sold images of Prince (AWF’s copying Goldsmith’s) to magazines to illustrate stories about the celebrity, which is the typical use made of Goldsmith’s photographs.” *Id.* at 1281 n.15. Goldsmith, in fact, did license photographs of Prince to *People*, *Readers Digest*, *Guitar World*, and *Musician* magazines between 1981 and 2016. *Id.* at 1269.

175. *See id.* at 1283–84.

song—is to collect listeners, make revenue from their streams, and indirectly grow the creator’s fanbase. Given the ubiquity and nature of streaming,<sup>176</sup> listeners may not need to choose—as a magazine editor might choose between alternate portrayals of their cover artist—between listening to “Heart on My Sleeve” versus an actual Drake song.<sup>177</sup> But in a digital economy where attention is everything,<sup>178</sup> Ghostwriter collects valuable (and monetizable) data on his Drake and The Weeknd “collaboration” that they otherwise could not. Moreover, because Drake and The Weeknd have no creative control over the song, the potential for backlash from fans who do not like the song and do not understand that it is a deepfake may impact their outside branding opportunities.<sup>179</sup>

Thus, by *Goldsmith*’s interpretation, “Heart on My Sleeve” does not serve a distinct purpose or character. Like Warhol’s “Orange Prince,” a deep voice song may add original creative expression and new meaning to its source. But—without evidence of parody, critique, or other specific commentary on Drake and The Weeknd as artists or celebrities—it does not serve a distinct and transformative purpose.<sup>180</sup> Using an established performer’s voice to create original music is a

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176. Today’s primary form of music consumption is where listeners can play unlimited songs for a flat fee. PASSMAN, *supra* note 147, at 240–41.

177. See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (characterizing parody and transformative “distortions of the celebrity figure” as a poor market substitute for the celebrity’s authentic works and memorabilia). But even if a few AI songs here and there do not decrease their victims’ overall streaming revenue, a torrent of AI music will. PASSMAN, *supra* note 147, at 141–43 (explaining that “every AI music stream reduces what goes to the labels and artists, who have spent years and sweat building their careers” because of the average rate per user (ARPU) dilution it will cause).

178. Curt Steinhorst, *Lost in the Scroll: The Hidden Impact of the Attention Economy*, FORBES (Feb. 6, 2024, 12:28 PM), <https://www.forbes.com/sites/curtsteinhorst/2024/02/06/lost-in-the-scroll-the-hidden-impact-of-the-attention-economy/> [<https://perma.cc/2FTY-2EEN>] (“The value of attention has never been more apparent than in the staggering \$853 billion in global net advertising revenue generated in 2023 alone.”).

179. See *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003) (noting that most “celebrities with commercially valuable identities . . . reap substantial financial rewards” from activities unrelated to their right of publicity, such as authorized appearances and endorsements).

180. *Andy Warhol Found.*, 143 S. Ct. at 1282–83.

“derivative work[] that transform[s],” not a transformative work of its own.<sup>181</sup>

If “the problem of substitution [is] copyright’s *bête noire*,” then it must be repugnant to an individual’s inherent uniqueness.<sup>182</sup> In instances where a deepfake serves as a substitute for the original persona, the person and team who created the persona should have a way to monetize the public use of its likeness. However, the law should still allow for the higher bar of *truly* transformative uses that extend far beyond the context for which a celebrity is known for by permitting works to show what that persona signifies in society.<sup>183</sup>

### III. PROPOSAL

Digital replicas challenge the underlying premise of the transformative use test. Creators may remove the likeness-holder beyond the context from which they are known and add new expressions. But the pristine accuracy with which digital replicas render a likeness risks the likeness-holder’s ability to capitalize on their own appearance or voice. Individuals whose personas become accessible for use by the public should receive compensation regardless of a court holding on whether a work transformed the likeness.

Much commentary on the potential liability surrounding publicity rights and digital replicas has revolved around misinformation and

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181. *Id.* at 1286.

182. *Id.* at 1274.

183. *Comedy III Prods., Inc.*, 21 P.3d at 803 (“[T]he very importance of celebrities in society means that the right of publicity has the potential of censoring significant expression by suppressing alternative versions of celebrity images that are iconoclastic, irreverent, or otherwise attempt to redefine the celebrity’s meaning.”). The Tenth Circuit has described the role of celebrities in society as “‘common points of reference for millions of individuals who may never interact with one another, but who share . . . a common experience and a collective memory.’ Through their pervasive presence in the media, sports and entertainment celebrities come to symbolize certain ideas and values.” *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 972 (10th Cir. 1996) (citations omitted) (quoting JOHN B. THOMPSON, *IDEOLOGY AND MODERN CULTURE: CRITICAL SOCIAL THEORY IN THE ERA OF MASS COMMUNICATION* 163 (1990)).

pornography.<sup>184</sup> Some commentators have proposed government regulation over deepfake dissemination.<sup>185</sup> Little commentary has focused on how individuals can monetize their digital likenesses or how the law will *protect* AI work. This Note proposes a win-win scenario where celebrities can monetize their likeness in new ways and creators using digital replicas can receive legal protections. Content platforms that distribute the videos and songs profit by selling ads and subscriptions around the content.<sup>186</sup> A nonprofit likeness repository organization, modeled after performance rights organizations (PROs) such as Broadcast Music, Inc. (BMI) and the American Society of Composers, Authors, and Publishers (ASCAP), should monitor, allocate, and distribute a percentage of these funds when they attach to works using a digital replica.

First, however, a short allegory. The music industry's struggles with online piracy in the early 2000's provide an illuminating analogy to the current usage of digital replicas. Just as the music industry experimented with different business models for distributing its content before settling on a method that sanctioned a derivative of the

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184. See, e.g., Russell Spivak, "Deepfakes": *The Newest Way to Commit One of the Oldest Crimes*, 3 GEO. L. TECH. REV. 339, 345–48 (2019); Benjamin T. Suslavich, *Nonconsensual Deepfakes: A "Deep Problem" for Victims*, 33 ALB. L.J. SCI. & TECH. 160, 164–66 (2023). Some states have addressed these issues by updating their existing criminal laws. Virginia, for example, updated its code to prohibit nonconsensual pornography depicting another's "likeness" to address deepfakes. VA. CODE ANN. § 18.2-386.2(A) (West 2019). To prevent misinformation during election campaigns, California banned the creation of malicious or deceptive content using politicians' likenesses within sixty days of an election. CAL. ELEC. CODE § 20010 (West 2023).

185. See Elizabeth Caldera, "Reject the Evidence of Your Eyes and Ears": *Deepfakes and the Law of Virtual Replicants*, 50 SETON HALL L. REV. 177, 193–97 (2019) (proposing regulation by the Federal Trade Commission, the Federal Communications Commission, or a new agency altogether).

186. See Caitlin Huston, *YouTube Ads Are Back on an Upswing as Revenue Hits \$7.7B*, HOLLYWOOD REP. (July 25, 2023, 1:16 PM), <https://www.hollywoodreporter.com/business/business-news/youtube-revenue-alphabet-earnings-1235544833/> [<https://perma.cc/5J2E-NKRL>] ("YouTube brought in \$7.7 billion in advertising revenue" during the second quarter of 2023 with its "Shorts" feature alone "watched by more than 2 billion logged-in users every month."); Salvador Rodriguez & Georgia Wells, *Rare Look Inside TikTok Parent's Finances Shows Slowing Revenue Growth*, WALL ST. J., <https://www.wsj.com/business/tiktok-parent-bytedance-turns-operating-profit-sees-revenue-slow-bb270bc8> (Oct. 3, 2023, 4:11 AM) ("TikTok parent ByteDance turned an operating profit of nearly \$6 billion in the first quarter of 2023, nearly double its haul from the previous year . . .").

very platforms the record labels sought to destroy,<sup>187</sup> public figures, collectively, should experiment with methods for using digital replicas to further leverage their already famous faces and voices.

At the turn of the century, many online platforms facilitated peer-to-peer (P2P) file sharing, enabling users to transfer MP3 music files between their respective computers.<sup>188</sup> Most prominently, Napster caught the ire of the record industry.<sup>189</sup> Napster “host users” could create a library of MP3 files on their own computers and upload the necessary metadata associated with each track.<sup>190</sup> So long as the host user remained logged onto the Napster system, anyone could use the platform to download the files directly from the host user’s computer.<sup>191</sup> In *A&M Records v. Napster*, the Ninth Circuit held Napster liable for the violation of song copyright holders’ distribution and reproduction rights.<sup>192</sup> Following *A&M Records* and other lawsuits, Napster eventually shuttered.<sup>193</sup> Music piracy, however, remained prevalent. As a result, U.S. recorded music revenues fell from \$23.7 billion in 1999 to a nadir of \$7.7 billion in 2014.<sup>194</sup> Paid music downloads never took off like previous music listening methods

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187. Dan Kopf, *Napster Paved the Way for Our Streaming-Reliant Music Industry*, QUARTZ (Oct. 22, 2019), <https://qz.com/1683609/how-the-music-industry-shifted-from-napster-to-spotify> [https://perma.cc/RQ6B-9H3G].

188. Stephen Witt, *Going for a Song: The Hidden History of Music Piracy*, THE GUARDIAN (June 7, 2015, 2:00 AM), <https://www.theguardian.com/books/2015/jun/07/stephen-witt-how-music-got-free-music-piracy-files-sharing> [https://perma.cc/XKM7-7F3P]; *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

189. Eamonn Forde, *Oversharing: How Napster Nearly Killed the Music Industry*, THE GUARDIAN (May 31, 2019, 5:00 AM), <https://theguardian.com/music/2019/may/31/napster-twenty-years-music-revolution> [https://perma.cc/6VTX-QDKS]; Witt, *supra* note 188.

190. *A&M Records, Inc.*, 239 F.3d at 1012. MP3 files are created by “ripping” the audio files on a compact disk (CD) onto a computer hard drive in a “compressed format [that] allows for rapid transmission . . . from one computer to another.” *Id.* at 1011.

191. *Id.* at 1012.

192. *Id.* at 1014–17.

193. *The Death Spiral of Napster Begins*, HISTORY, <https://www.history.com/this-day-in-history/the-death-spiral-of-napster-begins> [https://perma.cc/3WE8-XJKZ] (July 27, 2019).

194. Felix Richter, *From Tape to Tidal: 4 Decades of U.S. Music Sales*, STATISTA (June 24, 2022), <https://www.statista.com/chart/17244/us-music-revenue-by-format/> [https://perma.cc/J7S9-QJ2V].

had.<sup>195</sup> Not only did paid music downloads cost money, but accessing their content was about as easy as using P2P sharing platforms.<sup>196</sup>

Perhaps other “changes in technology, economics, and consumer preferences” had a larger impact on declining music sales.<sup>197</sup> Some economists have found that file sharing had a statistically insignificant effect on music sales.<sup>198</sup> Regardless, the emergence of music streaming platforms such as Spotify offered a lifeboat to an “inefficient” music industry.<sup>199</sup> According to Spotify founder Daniel Ek, the music industry was “ignoring a huge revenue opportunity” by offering consumers a flawed choice: “to pay \$15 for one CD versus paying zero dollars for all the (illegally downloaded) music in the world.”<sup>200</sup> Instead, Spotify and other music streaming services offer unlimited music to those willing to pay either a monthly subscription fee or endure short advertisements.<sup>201</sup>

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195. *See id.*

196. *See A&M Records, Inc.*, 239 F.3d at 1017 (“Having digital downloads available for free on the Napster system necessarily harms the copyright holders’ attempts to charge for the same downloads.”).

197. Stephen J. Dubner, *How Spotify Saved the Music Industry (But Not Necessarily Musicians)*, MEDIUM (Apr. 15, 2019), <https://gen.medium.com/how-spotify-saved-the-music-industry-but-not-necessarily-musicians-473f01e37136> [<https://perma.cc/27KD-EZ6Y>].

198. *See generally* Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1 (2007).

199. Dubner, *supra* note 197. Spotify founder Daniel Ek has pointed out that “the [music] industry’s model had always been inefficient: charging relatively high prices to capture only the top layer of the listening market. Most people got the majority of their music on the radio, which was free.” *Id.*

200. *Id.* Ek states:

[W]hat the music industry did fairly well was they priced a product at a premium for an audience that was willing to pay for it. But it only captured a very, very small portion of the revenues. . . . So what was obvious to me as I started using Napster back in the day, it was just like, this is a way better product than going to a record store. . . . There ought to be a way where you can give consumers what they want and, at the same time, make it work for artists.

*Id.* (alteration in original).

201. *Spotify Premium*, SPOTIFY, <https://www.spotify.com/us/premium/> [<https://perma.cc/J9D3-ND6C>] (listing pricing plans).

Since its widespread adoption, the streaming model has significantly displaced music piracy.<sup>202</sup> Although piracy remains an issue, the music industry now has the platforms to capitalize on larger numbers of listeners who listen for longer than ever.<sup>203</sup> Music streaming platforms provide a “more convenient alternative to piracy.”<sup>204</sup> Even though it costs some money, streaming does not require any file management and can play songs instantaneously. Users no longer need to peruse illegal websites and risk downloading a virus.<sup>205</sup> Nor must they risk fines as high as \$22,500 per illegally downloaded song.<sup>206</sup> Best of all, consumers no longer must break the law.<sup>207</sup> In this vein, I propose that instead of threatening AI creators with lawsuits, a more convenient alternative to AI-driven likeness piracy should exist.

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202. LUIS AGUIAR & JOEL WALDFOGEL, EUR. COMM’N, STREAMING REACHES FLOOD STAGE: DOES SPOTIFY STIMULATE OR DEPRESS MUSIC SALES? 21 (2015), <https://joint-research-centre.cc.europa.eu/system/files/2015-10/JRC96951.pdf> [<https://perma.cc/4SJC-NHX3>]. According to one 2015 study, every forty-seven streams displaced one illegal download. *Id.*

203. Richard Smirke, *IFPI Finds Music Listeners Are Adding Minutes Each Week, but Piracy Persists*, BILLBOARD (Dec. 12, 2023), <https://www.billboard.com/business/business-news/ifpi-2023-music-consumer-study-listening-habits-piracy-ai-1235552024/> [<https://perma.cc/E3R8-59YT>]. In 2022, global music revenues had grown to \$26.2 billion, surpassing the peaks of the CD era. Richard Smirke, *IFPI Global Report 2023: Music Revenues Climb 9% to \$26.2 Billion*, BILLBOARD (Mar. 21, 2023), <https://www.billboard.com/pro/ifpi-global-report-2023-music-business-revenue-market-share/> [<https://perma.cc/QYJ6-EVXG>]; Richter, *supra* note 194.

204. Molly McHugh, *Indie Labels Say There Is ‘No Upside’ to Spotify*, DIGIT. TRENDS (Sept. 20, 2011), <https://www.digitaltrends.com/music/indie-labels-say-there-is-no-upside-to-spotify/> [<https://perma.cc/H9X4-BX3F>].

205. Jack Goodwillie, *The History of LimeWire: How It Worked and What Happened to It*, SLASH GEAR (July 25, 2023, 4:30 PM), <https://www.slashgear.com/1348377/history-limewire-explained-what-happened/> [<https://perma.cc/6LQK-AHA7>] (“Towards the end of [P2P platform] Limewire’s lifecycle, it was estimated that one out of every three files on the service contained a virus or some form of malware or spyware.”); Russ Crupnick, *Twenty Years On, Record Labels Won the Music Piracy Battle with Fans, but May Be Losing the War*, BILLBOARD (Sept. 7, 2023), <http://billboard.com/pro/music-piracy-record-labels-won-battle-losing-war/> [<https://perma.cc/5KZG-YZWR>] (“The P2P file sharing experience was awful for users, fraught with spoofed files, pop-ups, malware, incomplete and incorrect files, and other maladies.”).

206. Sony BMG Music Ent. v. Tenenbaum, 719 F.3d 67, 71 (1st Cir. 2013) (finding jury-awarded damages of \$675,000 reasonable for illegally downloading thirty songs).

207. Crupnick, *supra* note 205 (“The vast majority of downloaders knew it was illegal. If there was any uncertainty in consumer’s minds, the RIAA litigation helped to clear it up.”).



Fundamentally, when someone uses a digital replica to swap faces or voices with someone else, they have pirated the other's likeness with alarming precision. That is what the right of publicity is all about: preventing the monetization of a pirated likeness.<sup>208</sup> The difference, however, between likeness swapping and downloading illegal music is that deepfakes have creative applications. Pirated music does not.<sup>209</sup> This is what the transformative test seeks to protect: creative works, even when they use another's likeness.<sup>210</sup>

To ensure celebrity consent and compensation, representatives of well-known figures should establish a nonprofit organization tasked with regulating the distribution and use of AI likenesses. It would keep a repository of AI-generated likenesses and administer and monetize their use among online platforms. The organization would scan and record entertainers, athletes, and influencers to produce state-of-the-art digital replicas.<sup>211</sup> Web platforms, such as TikTok, YouTube, and Instagram, could then pay for blanket licenses that give their users access to the entire bank of replicas.<sup>212</sup> When creating content with a digital replica received from the platform, individuals would select the likeness used from a dropdown menu when uploading. Users would also consent to providing the original likeness holder a portion of the ad revenue and viewer data collected from their content. Additionally, the user would consent to any derivative use of their content by the

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208. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 804 (Cal. 2001) (“The right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility.”).

209. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (explaining that merely transmitting a copyrighted song from one medium to another does not “transform” the work in a fair use analysis).

210. *See supra* text accompanying notes 93–102.

211. Access to high quality replicas will disincentivize homemade versions. Similarly, music streaming services provide high quality and easily accessible music, which has decreased the market for pirated music. *See supra* text accompanying notes 208–10.

212. In the context of music publishing, a blanket license “means a non-exclusive license that authorizes a music user to perform [music represented by a performance rights organization], the fee for which does not vary depending on the extent to which the music user in fact performs [music represented by that performance rights organization].” *United States v. ASCAP*, No. 41-1395 (WCC), 2001 U.S. Dist. LEXIS 23707, at \*4 (S.D.N.Y. June 11, 2001).

copied likeness holder. Individuals who do not wish for the distribution of their likenesses could also sign up with the organization, which would track unauthorized uses and provide legal services if necessary. This organization could model itself after the music industry's PROs.<sup>213</sup>

As the music industry began to commercialize in the early twentieth century, “music publishers and songwriters recognized that no single composer or music publisher had the resources to monitor music performances in every venue and in every available medium.”<sup>214</sup> To avoid the need for each music publisher<sup>215</sup> to issue thousands of individual licenses to each user, songwriters rely on PROs to issue blanket licenses and distribute royalties.<sup>216</sup> Today, PROs track worldwide public performances of song compositions and pay their member songwriters accordingly.<sup>217</sup> Music venues, radio and television stations, video and audio streaming services, bars, restaurants, hotels, social media platforms, and anywhere that plays music pay a blanket license fee to each PRO for the use of its repertoire

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213. The Copyright Act defines a PRO as “an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.” 17 U.S.C. § 101. Note that the Copyright Act uses the term “performing rights society” synonymously with “performance rights organization.” *See id.*

214. COREY FIELD, ENTERTAINMENT LAW: FUNDAMENTALS AND PRACTICE 257 (rev. 1st ed. 2020). Anytime someone plays a song in public, including over the internet, they need the creator’s permission. PASSMAN, *supra* note 147, at 229. Every song has an associated copyright to its lyrics and composition. *What Musicians Should Know About Copyright*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/engage/musicians/> [<https://perma.cc/2MVV-5XZV>]. The Copyright Act affords creators the exclusive right to public performance. 17 U.S.C. § 106(4).

215. Music publishers are entities that manage song copyrights. PASSMAN, *supra* note 147, at 224–26. Some artists are self-published, but most license their copyrights to third-party publishers who work to monetize them. *Id.* at 228.

216. *Id.* at 230; FIELD, *supra* note 214, at 258 (“[T]hrough strength in numbers, [the PROs] have the business, accounting, and administrative resources to monitor public performances, issue licenses, collect license fees, and distribute those license fees to its publisher and songwriter members.”). The blanket license covers all the compositions controlled by all the publishers affiliated with the licensing PRO. PASSMAN, *supra* note 147, at 231. Because there are four major PROs in America, music users must receive a license from each to play the full gamut of songs. *Id.* at 230–31.

217. *ASCAP Payment System*, ASCAP, <https://www.ascap.com/help/royalties-and-payment/payment> [<https://perma.cc/FXP4-FMCW>].

of songs.<sup>218</sup> An algorithm then allocates royalties to songwriters based on the data collected from surveys and digital tracking.<sup>219</sup> Songwriters, in turn, receive quarterly checks.<sup>220</sup> The royalty calculation weighs factors such as how much a licensee uses the song and the type of use in its input.<sup>221</sup>

A likeness repository could function in a similar way as a PRO. After individuals sign up with the organization, they will immediately begin to profit from commercial use of their digital replicas. Creators will not need to pay directly for use. The organization will instead track usage and allocate the blanket license fees accordingly. It will, additionally, negotiate royalty sharing agreements on behalf of its members for content featuring digital replicas.<sup>222</sup> For example, when Spotify pays streaming royalties to the creator of a song featuring a deepfake voice, it will additionally pay royalties for the likeness to the organization. Likewise, when YouTube distributes ad revenue to the creator of a video with a deepfake, it would also send a portion to the organization. Moreover, because platforms will track digital replica

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218. *ASCAP Payment System: Who Does ASCAP Collect from?*, ASCAP, <https://www.ascap.com/help/royalties-and-payment/payment/whocollect> [https://perma.cc/HMR4-W4NQ]; *BMI Royalty Policy Manual*, BMI, [https://www.bmi.com/creators/royalty\\_print](https://www.bmi.com/creators/royalty_print) [https://perma.cc/9GWB-YVHR] (Feb. 16, 2024). In America, movie theaters do not have to pay PROs, in part because the film producers have already paid the licensing fees to the songwriters directly. PASSMAN, *supra* note 147, at 234–35.

219. *ASCAP Payment System: The ASCAP Surveys*, ASCAP, <https://www.ascap.com/help/royalties-and-payment/payment/surveys> [https://perma.cc/HSU3-4JJA]; *ASCAP Payment System: Turning Performances into Dollars*, ASCAP, <https://www.ascap.com/help/royalties-and-payment/payment/dollars> [https://perma.cc/FH83-UTZZ]. ASCAP, for example, tracks “how the music is used (feature, theme, background, etc.), where the music is performed (network or local television, radio, cable, etc.), how much the licensee pays . . . , [and] [t]he time of day of the performance (with respect to television and cable).” *ASCAP Payment System: Turning Performances into Dollars*, *supra* (emphasis omitted).

220. PASSMAN, *supra* note 147, at 234.

221. *ASCAP Payment System: How ASCAP Calculates Royalties*, ASCAP, <https://www.ascap.com/help/royalties-and-payment/payment/royalties> [https://perma.cc/UJ8Z-YUS6].

222. This royalty percentage could fluctuate based on the prevalence of the digital replica in the content.

use and creators will self-report when uploading,<sup>223</sup> songs or videos that feature AI likenesses will easily be labeled as such to consumers.<sup>224</sup>

As noted by the Supreme Court in *Zacchini*, “[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.”<sup>225</sup> A free-for-all brought about by widespread digital replicas, like P2P file sharing two decades ago, benefits neither its victims nor consumers. Entertainers depend now more than ever on licensing their likenesses as “artist brand entrepreneurs.”<sup>226</sup> Collective blanket licensing for digital replicas will open opportunities for new revenue streams. Such a scheme would also take advantage of a stricter transformative use test.<sup>227</sup> If any digital replica use required a license, and creators could access these licenses easily and at a low cost, unauthorized uses would exist in fewer numbers and be easier to regulate.

Controlled digital replica usage, if widespread, may dilute the value for which a celebrity can license their likeness. If anyone can sound

223. When an artist uploads a cover to streaming platforms using a digital distributor such as DistroKid, they must mark it as such and note who the original songwriters are. *Can I Upload Cover Songs?*, DISTROKID, <https://support.distrokid.com/hc/en-us/articles/360013648953-Can-I-Upload-Cover-Songs> [https://perma.cc/RG5U-CTDC]. Additionally, YouTube has algorithms which identify covers or unlicensed inclusion of songs, such as in DJ sets. *See How Content ID Works*, GOOGLE, <https://support.google.com/youtube/answer/2797370> [https://perma.cc/JU8N-88NG]. These methods help PROs to track song usage and allocate royalties.

224. *See, e.g., FTC’s Endorsement Guides: What People Are Asking*, FED. TRADE COMM’N, <https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking> [https://perma.cc/QXN2-V68U] (requiring that influencers mark any paid advertising on social media as such); FED. TRADE COMM’N, DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS 2 (2019), [https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508\\_1.pdf](https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf) [https://perma.cc/LN4H-K5W2].

225. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

226. Kessler, *supra* note 146, at 524 (describing the rise of the “artist brand entrepreneur”—an artist who, in addition to the “creative aspects of music-making,” takes on “direct responsibility . . . for the business and marketing” of their career and the fostering of the “artist-consumer connection”—after major labels began to consolidate and became more risk averse in signing new artists”); *see also* text accompanying *supra* note 179.

227. *See supra* Section II.B.

like Drake or create an advertising campaign featuring an influencer's likeness, why would someone pay their high fees? On the contrary, ordinary creators wielding celebrity likenesses only increases the likenesses' visibility, potentially increasing demand for the original. In the same way Spotify's algorithms propagate the most popular songs, thereby making them more popular, a deluge of inauthentic Drake content may end up making Drake himself even more valuable.<sup>228</sup> Moreover, by collecting data on viewership patterns of digital replica uses, artists can better inform their own creative endeavors. The artist's fans can artistically experiment on their behalf.

Individuals who depend on advertising deals, meanwhile, could have veto power over which types of content their likenesses appear next to. Perhaps the licensing organization would require an extra—and stringent—approval step for endorsements using digital replicas. The Federal Trade Commission (FTC) has had some success in enforcing its requirement that influencers disclose when a social media post includes paid advertising.<sup>229</sup> The licensing collective could similarly issue takedown requests to platforms for content that goes beyond the scope of a celebrity's distribution intent. Additionally, content platforms themselves could use AI monitoring to flag content that is clearly an endorsement as well.<sup>230</sup>

Alternatively, Congress could regulate digital replicas. A draft of a bipartisan bill that circulated during the Senate's 2023 term envisioned a potential national right of publicity that specifically addressed AI

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228. Dubner, *supra* note 197; Maria Fomina, Triumph Kerins, Katie MacIntosh & Kaylee Somerville, *The Behavioral Science Behind Spotify Wrapped's Viral Success*, DECISION LAB (Dec. 16, 2021), <https://thedecisionlab.com/insights/consumer-insights/the-behavioral-science-behind-spotify-wrappeds-viral-success> [<https://perma.cc/AXC2-G7YY>] (explaining the bandwagon effect as “our inherent need to ‘fit in’ and feel like a part of the majority”).

229. Trudy Knockless, *FTC Preps for Crackdown on the Wild West of Social Media Influencers*, LAW.COM (Aug. 28, 2023, 12:20 PM), <https://www.law.com/corpocounsel/2023/08/28/ftc-preps-for-crackdown-on-the-wild-west-of-social-media-influencers/> [<https://perma.cc/XB2N-F9Z7>].

230. See *id.*; Sarah Dennis, *ASA Starts Using AI to Identify Influencers Who Fail to Disclose Ads in Posts*, PERFORMANCE MKTG. WORLD (May 20, 2022), <https://www.performancemarketingworld.com/article/1756677/asa-starts-using-ai-identify-influencers-fail-disclose-ads-posts> [<https://perma.cc/6QN7-MFQH>].

replicas.<sup>231</sup> The “Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2023”—or “NO FAKES Act”—provides any individual an exclusive right to “authorize the use of the image, voice, or visual likeness of [themselves] in a digital replica.”<sup>232</sup> Under the proposed NO FAKES Act, licensing one’s publicity rights would require either representation by counsel during the transaction or the agreement be governed by a collective bargaining agreement.<sup>233</sup> The proposed bill carves out liability exceptions for digital replicas used “as part of a news, public affairs, or sports broadcast or report” or in “a documentary, docudrama, or historical or biographical work” where the “representation of the applicable individual [is of] that individual.”<sup>234</sup>

A national right of publicity scheme that limits transferability would protect ordinary people from “unwittingly sign[ing] over those rights as part of online terms-of-service that they click approval of without even reading,” and potentially protect aspiring athletes and entertainers from signing away their publicity rights in perpetuity.<sup>235</sup>

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231. Emilia David, *No Fakes Act Wants to Protect Actors and Singers from Unauthorized AI Replicas*, THE VERGE (Oct. 12, 2023, 5:12 PM), <https://www.theverge.com/2023/10/12/23914915/ai-replicas-likeness-law-no-fakes-copyright> [<https://perma.cc/X52K-4PNZ>] (“Sens. Chris Coons (D-DE), Marsha Blackburn (R-TN), Amy Klobuchar (D-MN), and Thom Tillis (R-NC) sponsored the bill.”).

232. NO FAKES Act of 2023, S. DOC. NO. EHF23968 GFW (2023), [https://www.coons.senate.gov/imo/media/doc/no\\_fakes\\_act\\_draft\\_text.pdf](https://www.coons.senate.gov/imo/media/doc/no_fakes_act_draft_text.pdf) [<https://perma.cc/5GDU-VKLN>]. The proposed legislation defines a “digital replica” as:

[A] newly-created, computer-generated, electronic representation of the image, voice, or visual likeness of an individual that—

(A) is [nearly indistinguishable] from the actual image, voice, or visual likeness of that individual; and

(B) is fixed in a sound recording or audiovisual work in which that individual did not actually perform or appear.

*Id.* at 1 (alteration in original). The proposed right would extend to an individual’s heirs or assignees for seventy years following their death. *Id.*

233. *Id.* at 2.

234. *Id.* The draft additionally allows for digital replicas under traditional free speech bases such as those for the purpose of “comment, criticism, scholarship, satire, or parody.” *Id.* at 3.

235. Jennifer E. Rothman, *Considerations for Federal Right of Publicity and Digital Impersonation*

It does not, however, protect the creatives who use celebrity likenesses as a canvas for their own potentially “transformative” art. A national right of publicity act that bans digital replicas in most cases could result in countless lawsuits against creators and stifle the progress of digital art.

And how would hyperrealistic digital replicas be caught? Automatic scanning for deepfakes will not suffice. Platforms can create AI that attempts to scan for and remove deepfakes and deep voices. But creators train deepfake software by competing one network against the other until a “detector” is fooled.<sup>236</sup> Fooling an AI scanner is built into the system. Watermarking AI output has emerged as one possibility for creating detectable generative AI output, but many researchers have determined that this is not an effective solution.<sup>237</sup> An overly strict detector may even censor content originating from the original likeness-holder. Moreover, likeness swapping will likely bring about unforeseen and innovative creations that strict right of publicity enforcement would otherwise discourage.<sup>238</sup> Lastly, only artists with access to expensive legal teams or major label backing will have the resources to enforce their monopoly over their own likeness.

Another approach is for celebrities to individually license their likenesses to tech companies who will in turn provide AI platforms for users to experiment or interact with them. To date, platforms such as

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Legislation, U. PA. CAREY L. (Aug. 24, 2023), [https://rightofpublicityroadmap.com/wp-content/uploads/2023/09/Professor-Rothman-Two-Pager-on-Proposed-Federal-Right-of-Publicity-or-Digital-Replica-Law\\_August-24-2023.pdf](https://rightofpublicityroadmap.com/wp-content/uploads/2023/09/Professor-Rothman-Two-Pager-on-Proposed-Federal-Right-of-Publicity-or-Digital-Replica-Law_August-24-2023.pdf) [https://perma.cc/2AZU-KTNW] (“Creating a transferable right would strip individuals of the very protections the proposed legislation is supposed to provide.”).

236. See *supra* notes 33–40 and accompanying text.

237. Kate Knibbs, *Researchers Tested AI Watermarks—and Broke All of Them*, WIRED (Oct. 3, 2023, 6:00 AM), <https://www.wired.com/story/artificial-intelligence-watermarking-issues/> [https://perma.cc/4SH2-AFGD].

238. On the other hand, deepfake over-policing may result in a net-positive impact for society given the challenges deepfakes present to sustaining a healthy democracy and the prevalence of many harmful forms of the technology. See Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1776 (2019); Kate Kobriger, Janet Zhang, Andrew Quijano & Joyce Guo, *Out of Our Depth with Deep Fakes: How the Law Fails Victims of Deep Fake Nonconsensual Pornography*, 28 RICH. J.L. & TECH. 204, 206 (2021).

YouTube and Meta have begun experimenting with one-off licensing deals for celebrity replicas.<sup>239</sup> Although users can interact with these replicas via prompts, they have limited creative control. This may be a comfortable compromise for celebrities, but it will not stop the unauthorized use of homemade replica models for more creative works.

### CONCLUSION

With digital replicas already available to the public, celebrity personas have been devalued.<sup>240</sup> Likewise, digital replicas devalue anyone's online presence. Their eventual prevalence means that internet users will be unable to tell what is real and what is not. The likenesses they replicate should also profit from their use if possible, and perhaps a regulated system will filter out the bad use cases that are potentially harmful to society.

A system should exist where licenses for the likenesses of public figures who wish to capitalize off their likeness are readily accessible to creators. Celebrities can either use publicity rights to scare creators away from using deepfake technology, or they could embrace new revenue models that may even further propagate their fame.

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239. Alex Weprin, *The Rise of AI-Powered Stars: Big Money and Risks*, HOLLYWOOD REP. (Nov. 30, 2023, 5:23 AM), <https://www.hollywoodreporter.com/business/business-news/ai-powered-stars-youtube-meta-1235683894/> [<https://perma.cc/YU4Q-R3TC>].

240. In comparison, music streaming devalues music compared to CDs but upvalues music compared to illegal downloads.



