THE RIGHT OF PUBLICITY CAN SAVE ACTORS FROM DEEPFAKE ARMAGEDDON

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ABSTRACT

The entertainment industry is being rocked by the potential of deepfakes. A deepfake of a performer can appear to be the performer in a way that no CGI or makeup-enhanced stunt double possibly could, potentially serving as direct competition for them or deceiving audiences. It is now possible to have dead actors star in new productions, to revise casting choices months after filming, and to simulate extras electronically. The law has not caught up with this technological revolution. This Article traces the ways in which right of publicity law struggles to control this new form of identity exploitation. Specifically, it examines how traditional protections for expressive uses—key for allowing the depiction of real-world figures in biopics and historical dramas—are too broad when applied to digital replicas like deepfakes. This Article proposes changes to how right of publicity law treats expressive uses and also considers the problems raised by current right of publicity licenses and the overbroad terms they regularly contain. In the past, the problems created by these broad licensing terms were limited by technology—one could only do so much with the film available. But now new canons of interpretation are needed to prevent the contracts being used to justify uses beyond what the contracting parties could have imagined.

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I. INTRODUCTION

Imagine you have just finished shooting a 10-episode season of a TV show for a leading streaming service. The media is abuzz with anticipation. Two weeks before the show's scheduled release, you find out that your lead actor has engaged in odious behavior. Every major news outlet is reporting on it, and influencers are calling for a boycott. The streaming service is threatening to drop the project, which would result in a staggering financial loss. To salvage the show, your only option is to recast the disgraced lead, spending millions to reshoot scenes.[1] Or at least that had been the case. But now there is a new solution in the form of deepfakes, also referred to as synthetic media. Deepfakes are a form of video editing technology that allows you to replace one person's appearance and voice with another's. Use of deepfakes would allow you to digitally recreate the entire season without reshooting a single scene. But what kind of permission do you need to do that? And what kind

1. For an example of this, see Kevin Spacey's removal from *All the Money in the World*. *See* Mark Brown, *Kevin Spacey Cut Out of Film and Replaced by Christopher Plummer*, GUARDIAN (Nov. 9, 2017), https://www.theguardian.com/culture/2017/nov/09/kevin-spacey-cut-out-of-film-and-replaced-by-christopher-plummer.

should you need? Should deepfakes be viewed differently than standard video editing?[2]

The Screen Actors Guild certainly thinks so. In July 2023, its members abandoned their sets, joining their compatriots in the Writers Guild of America in what threatened to be one of the most significant media-industry strikes in recent history.[3] The reason? A scenario much like the one just described, in which actors once tapped for starring leads could be relegated to mere extras, having lost their roles to their own digital doubles.[4] The demand? More rigorous protections against the threats posed by artificial intelligence.[5]

Deepfake regulation is an incredibly broad and diverse topic, with implications ranging into issues of harassment, intimidation, and sexual privacy.[6] Deepfakes can be used in overtly nefarious ways, including portraying celebrities engaging in taboo sexual acts, fabricating declarations of war or surrender by political leaders, or even feigning scientific breakthroughs or personal accomplishments.[7] Previous work has considered how deepfakes have been used both as tools for personal degradation as well as threats to democracy.[8]

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2. *See, e.g.*, Zack Sharf, *Keanu Reeves Says Deepfakes Are 'Scary,' Confirms His Film Contracts Ban Digital Edits to His Acting: 'They Added a Tear to My Face! Huh?'*, VARIETY (Feb. 15, 2013), https://variety.com/2023/film/news/keanu-reeves-slams-deepfakes-film-contract-prevents-digital-edits-1235523698/.

3. Lisa Richwine, *Hollywood Studios Race to Avoid Actors' Strike at Midnight*, REUTERS (July 12, 2023), https://www.reuters.com/world/us/hollywood-studios-racing-avoid-actors-strike-midnight-2023-07-12/; Lois Beckett & Kari Paul, *"Bargaining For Our Very Existence": Why The Battle Over AI Is Being Fought In Hollywood*, GUARDIAN (July 22, 2023), https://www.theguardian.com/technology/2023/jul/22/sag-aftra-wga-strike-artificial-intelligence.

4. *See* Beckett & Paul, *supra* note 3.

5. *See* Chris Isidore, *Actors Are Poised to Go On Strike Against Studios and Streaming Services*, CNN (July 12, 2023), https://www.cnn.com/2023/07/12/business/sag-aftra-actors-strike-deadline.

6. *See generally* Matthew B. Kugler & Carly Pace, *Deepfake Privacy: Attitudes and Regulation*, 116 NW. U. L. REV. 611 (2021).

7. *See id.*; Bobby Allyn, *Deepfake Video of Zelenskyy Could Be 'Tip of the Iceberg' in Info War, Experts Warn*, NPR (Mar. 16, 2022), https://www.npr.org/2022/03/16/1087062648/deepfake-video-zelenskyy-experts-war-manipulation-ukraine-russia; Yashraj Sharma, *Deepfake Democracy: Behind the AI Trickery Shaping India's 2024 Election*, ALI JAZEERA (Feb. 20, 2024), https://www.aljazeera.com/news/2024/2/20/deepfake-democracy-behind-the-ai-trickery-shaping-indias-2024-elections (describing the ways in which deepfakes are being used deceptively in Indian elections).

8. *See* Kugler & Pace, *supra* note 6; Danielle Citron & Bobby Chesney, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. 1753, 1766–1785 (2019).

But recent uses of generative artificial intelligence have prompted renewed interest in the use of deepfakes for traditional entertainment and advertising purposes. These are the deepfakes that keep Hollywood up at night. They feature celebrities engaging not in sexual acts, but instead using products they have never tried or in roles they have never played.[9] Rather than portraying a politician declaring war, they might instead depict a prominent leader giving a commencement speech. They might be commissioned by fandoms to portray alternative endings for television series whose actual finales left something to be desired, or by a major film studio to replace a disgraced lead actor on the fly. These deepfakes do not have the visceral harms of democracy destruction or sexual exploitation, but they have the potential to massively transform a major industry. Despite this, these types of videos have received very little discussion within the legal community. This is a glaring gap in legal scholarship, as deepfake creation and use are poised to become increasingly common in the entertainment industry—something the Screen Actors Guild already correctly perceives.

Indeed, there are few tools as enticing as deepfakes in terms of their potential for content generation, and production companies have already recognized their utility.[10] Deepfakes are stunningly versatile. Just a few of their proposed uses include serving as a replacement for the clunky and unconvincing practice of "dubbing" foreign-language films,[11] reconstructing youthful versions of actors to "play" younger versions of themselves, and resurrecting venerated deceased talents.[12] Further, they allow for easier film editing, eliminate the need for costly re-shoots, and alleviate the pragmatic and logistical challenges of coordinating filming sessions among busy, highly sought-after actors.[13] Actors too may enjoy the increased flexibility that

9. *See* Beckett & Paul, *supra* note 3; Lisa Richwine, *Digital Doubles, Fake Trailers: AI Worries Hollywood Actors Before Labor Talks*, REUTERS (June 1, 2023), https://www.reuters.com/world/us/digital-doubles-fake-trailers-ai-worries-hollywood-actors-before-labor-talks-2023-06-01/.

10. Cooper Hood, *How Deepfake Technology Can Change The Movie Industry*, SCREENRANT (Aug. 2021), https://screenrant.com/movies-deepfake-technology-change-hollywood-how/.

11. Vejay Lalla, Adine Mitrani & Zach Harned, *Artificial Intelligence: Deepfakes in the Entertainment Industry*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (June 2022), https://www.wipo.int/wipo_magazine/en/2022/02/article_0003.html.

12. Hood, *supra* note 10.

13. *Id.*

deepfakes afford them, as they are able to participate in greater numbers of projects[14] and have new outlets for engagement with their fan bases.[15]

Far from being melodramatic, entertainers' speculation that companies may seek to contract with actors, musicians, and other talents for deepfake "rights" rather than for performances is all too real.[16] Such a prospect would likely be highly attractive to production companies, and indeed, some celebrities have already contracted to have their likeness reconstructed in lieu of an in-body performance.[17] Bruce Willis, for one, granted such a license to the media company Deepcake, which created his digital twin in an advertisement for a Russian telecommunications company.[18]

The resulting deepfake was an enormous success, and Willis himself praised the creation, admiring "the precision with which my character turned out."[19] He waxed lyrically about how his "digital twin" afforded him "a great opportunity to go back in time," perhaps referring to his recent aphasia diagnosis, which had caused his capacity for speaking to deteriorate and necessitated his retirement from acting.[20] And Willis is not the only one who has noticed that deepfakes have the power to compensate for deficits in performers' own capacities. Deepfakes have been used to restore performers' vocal abilities, as in the case of actor Val Kilmer, who sought the services of an artificial intelligence (AI) firm after losing his voice in a battle with throat cancer.[21] A team of the firm's audio-engineers created a voice clone for the actor, allowing him to take on speaking roles once again, and resume his career.[22]

Of course, screen performers are becoming all too aware of the dark side of such compelling AI-driven performances. While deepfakes may be used by

14. *See* Zack Sharf, *Deepfake Studio Used 34,000 Bruce Willis Images to Create the Actor's 'Digital Twin,' But It Doesn't Own the Rights to His Image,* VARIETY (Oct. 3, 2022), https://variety.com/2022/film/news/bruce-willis-sells-rights-deepfake-digital-twin-1235388442/ (quoting Bruce Willis, who lauded the "modern technology" of deepfakes for allowing him to participate in projects from afar).

15. Lalla, Mitrani & Harned, *supra* note 11 (commenting that deepfakes can be used by influencers to produce individualized messages for fans).

16. *See, e.g.*, Will Bedingfield, *The Bruce Willis Deepfake Is Everyone's Problem*, WIRED (Oct. 17, 2022), https://www.wired.com/story/bruce-willis-deepfake-rights-law/.

17. Sharf, *supra* note 14.

18. *Id.*

19. *Id.*

20. *See id.*; *A Statement from the Willis Family*, ASS'N FOR FRONTOTEMPORAL DEGENERATION (Feb. 16, 2023), https://www.theaftd.org/mnlstatement23/.

21. Dalvin Brown, *AI Gave Val Kilmer His Voice Back. But Critics Worry The Technology Could Be Misused*, WASH. POST (Aug. 18, 2021), https://www.washingtonpost.com/technology/2021/08/18/val-kilmer-ai-voice-cloning/.

22. *Id.*

actors to enhance their abilities, both in terms of artistic talent and availability for projects, they may also be used by production companies to bypass the inconvenience of dealing with human performers at all. Because an actor's "digital twin" is far more versatile than the living actor themselves, deepfakes may be used to do what living actors can or will not do—be it stunts, sex scenes, or low budget performances. Because deepfakes may be construed as "[one] person's face swapped into someone else's performance," a studio could cast celebrities based solely on their aesthetics and social appeal without regard to their talent, relying on artificial intelligence to account for any artistic deficits.[23]

In effect, this is the next evolution of having an actor in a sensor-suit perform the motions of an artificially generated dragon.[24] A performance exists, the sounds and motions of that performance are analyzed by a computer, and a new set of sounds and motions is overlaid on top. Except now: (1) the original actor does not need to wear a sensor suit since any high-definition footage will do, and (2) the created image or footage can be realistic enough to depict a human rather than limited to something as forgivingly artistic as a fantastical dragon.[25] So one could have a cheap extra perform a role, and then replace their image and voice with those of someone who is more expensive, dead, or otherwise unlikely to physically appear in the production. A production company only needs high resolution images and audio of a depicted individual, and these items are often publicly available for anyone remotely prominent. Companies like Disney have already capitalized on deepfake use to avoid paying for costly talent.[26] Rather than having to hire talented—and expensive—performers for each role, companies may instead employ only a handful of seasoned actors and use deepfake technology for the rest.[27]

23. Karen Hao, *Inside the Strange New World of Being a Deepfake Actor*, MIT TECH. REV. (Oct. 9, 2020), https://www.technologyreview.com/2020/10/09/1009850/ai-deepfake-acting/ (describing how deepfakes allow one performer to effectively puppet another's face and body).

24. *See* Cameron Frew, *Incredible Behind The Scenes Footage Shows Benedict Cumberbatch Acting Role of Smaugh Without CGI*, LADBIBLE, https://www.ladbible.com/entertainment/incredible-footage-shows-benedict-cumberbatch-as-smaug-without-cgi-20220402 (last updated Apr. 5, 2022).

25. A human face that looks slightly off may be instantly detected, whereas nonhuman or nonface images are not so quickly judged. *See, e.g.*, Gillian Rhodes, *Face Recognition*, OXFORD HANDBOOK OF COGNITIVE PSYCH. 46, 50 (Daniel Reisberg ed., 2013).

26. Robert Marks, *Can Deepfakes Substitute for Actors?*, MIND MATTERS (Jan. 26, 2021), https://mindmatters.ai/2021/01/can-deepfakes-substitute-for-actors/.

27. *Id.*

With the increasing ease of deepfake creation, which requires fewer resources and can be more broadly disseminated than earlier forms of appropriation of likeness, there is an increasing need to standardize how deepfakes are addressed within different contexts. In the entertainment production context, the central legal regime comes from right of publicity law, which has long allowed people to control the use of the name or likeness in the commercial arena.

The right of publicity faces two challenges in the deepfake context. First, when is a person's permission required to depict a person in a deepfake? Traditional "commercial" uses of likeness, such as uses in advertising or commercial products generally require a person's permission.[28] Such uses constitute exploitations of an individual's identity for the purposes of commercial gain, as the identity of an individual is used purely to generate interest in, and attract consumers to, an underlying product.[29]

But use of a person's likeness in an "expressive" product raises harder questions in the right of publicity context. Courts recognize sharp limitations on people's ability to control uses of their likeness when an individual's identity is incorporated into a work that is artistic or seeks to convey a particular idea.[30] Unlike commercial uses, which nearly always give rise to a finding of liability, expressive uses may enjoy First Amendment protection.[31] This protection for expressive uses creates a problem in the entertainment context because the vast majority of works at issue—movies, television shows, internet videos—are expressive in nature. Further, some right of publicity statutes, like those of Illinois, explicitly exempt impersonation in a film or tv show from their scope.[32]

Law has historically permitted unlicensed depictions of people by actors and impersonators and scholars have often called for even greater protection for such uses.[33] In our view, however, deepfakes are different than many of the depictions giving rise to that body of case law. There is a difference

28. *See* Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1208, 1212 (11th Cir. 2009) (finding that a magazine's publication of nude photographs constituted a commercial use of likeness given the tenuous relationship between the content of the magazine article, and the nature of the photographs).

29. *See* Comedy III, Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808 (Cal. 2001) (delineating the transformative use test and explaining that a permissible use of another's identity must do more than use the depicted person's likeness to draw attention to the product).

30. *Id.* at 799.

31. *See*, *e.g.*, Jennifer Rothman, THE RIGHT OF PUBLICITY 138–153 (2018).

32. *See* 765 ILL. COMP. STAT. 1075/35 (b)(1). *But see supra* note 310 and accompanying text on the recent amendment.

33. *See* Rothman, *supra* note 31 at 154–59.

between featuring a still image or clumsy avatar of a celebrity in a videogame and using their deepfakes in a movie or social media video. The dignitary and economic consequences of treating the deepfake as a protected use are far greater, yet the law has thus far not had an opportunity to recognize that.

This brings us to the second major issue presented by deepfakes: licensing. In addition to requiring permission for many expressive uses of deepfakes, we also believe that the kind of permission required should be more explicit than is required in other contexts, where an individual grants permission to use their likeness. And unlike those other contexts, such heightened standards should apply in the case of both expressive and commercial deepfakes. Appropriations of identity, or "uses of likeness" within right of publicity parlance, have long been recognized as taking many forms, ranging from literal photographs to more abstract evocations of identity. Actors know this, and they use it to their advantage, licensing their face, voice and other indicia of identity to film studios and advertising firms. But despite the myriad manners in which one's likeness can be appropriated, the law treats them all the same for purposes of liability for infringement upon an individual's right of publicity. Thus far, this practice has not been a problem, as one can only get so far in reconstructing someone's identity using static photographs, video footage, or voice recordings. As the acting community correctly perceives, however, these constraints no longer exist when AI enters the scene. For example, studios have allegedly proposed that they be allowed to scan the faces of "extras" in exchange for one day's wage, and then use them perpetually in different productions.[34]

Here, we argue that the creation of deepfakes ought to constitute a distinct type of "use of likeness" within the right of publicity context. Deepfakes can create greater commercial and reputational injury than traditional types of appropriations of likeness in two ways. First, they may serve as substitutions for the individuals in question in a commercial context. A deepfake can use a person's likeness to sell any kind of good or service or perform in any kind of scene. Why hire an extra repeatedly if you can own their likeness perpetually? Second, given deepfake's realism, they may threaten to undermine an individual's agency by functionally "hijacking" their record of behavior. Taylor Swift may be able to go on record regarding her negative perception of violence and automatic weapons, but a deepfake can still show her hawking AR-15s. A sufficiently powerful deepfake may cause reputational damage that even the most sophisticated public relations team cannot undo. And while a

34. Andrew Webster, *Actors Say Hollywood Studios Want Their AI Replicas — For Free, Forever*, VERGE (July 13, 2023), https://www.theverge.com/2023/7/13/23794224/sag-aftra-actors-strike-ai-image-rights.

successful lawsuit may provide monetary compensation and injunctive remedies, fan bases cannot magically "unsee" disturbing behavior.

These concerns give rise to two major proposals, namely, requiring specific rather than general licenses for commercial deepfakes, and requiring permission for some expressive uses. First, commercial uses of deepfakes should require a specific, rather than general, license. Many right of publicity licenses—even those written by major universities—are written extremely broadly.[35] At the time they were written, however, the contracting parties could not have imagined the current—or future!—types of possible uses. Repurposing someone's likeness in a deepfake is more akin to sublicensing it, which is already subject to a specificity requirement.[36] Rather than treating a deepfake as part of a general use of likeness, deepfake reconstruction ought to be a separately negotiated element of entertainment contracts. This approach will require contracting parties to contemplate the creation of deepfakes ex ante, ensuring parties do not inadvertently grant permission to create a deepfake while granting other permissions under the right of publicity. Imposing this restriction in the deepfake context would protect actors and performers who have previously signed broad releases without careful consideration of this new world.

Second, the expressive use defense—which avoids the need for any license at all—ought to be construed narrowly in the context of deepfakes. Some court decisions in this area have alluded to treating certain kinds of expressive uses as per se protected based on their plot or communicative elements.[37] Were this approach expanded into the world of deepfakes, it would permit nearly all television and movie uses. Instead, the better approach is a revised transformative use test, which appropriately accounts for the twin problems of reputation destruction and economic replacement.

This Article begins in Part II with an examination of the current state of right of publicity law, including the broad way it defines use of likeness. In this

35. *See, e.g.*, *Consent, License And Release Agreement*, PENNSTATE (2023) https://bpb-us-e1.wpmucdn.com/sites.psu.edu/dist/c/155813/files/2023/07/Consent-License-and-Release-Agreement.pdf (granting "irrevocable, world-wide, royalty-free right and license to Penn State and Penn State Representatives to use, exploit, adapt, [and] modify" media of the undersigned, and authorizing to the use of "name, image, likeness and voice in the Media for all Materials or any other purposes deemed appropriate by Penn State"); *see also infra* Part IV.A.1 (reviewing more of these licenses and the problems in them).

36. *See* Shamsky v. Garan, 167 Misc. 2d 149, 160 (N.Y. Sup. Ct. 1995) (finding that the grant of authorization to Major League Baseball team regarding the use of players' photos did not extend to team's sub-licensing of the images to a third-party commercial clothing company).

37. Champion v. Take Two Interactive Software, 64 Misc. 3d 530, 535 (N.Y. Sup. Ct. 2019).

review, we will first show that use of deepfakes easily counts as a use of likeness and then that deepfakes should be considered as a special use of likeness. Part III will then consider whether a given use of a deepfake falls within the scope of the right of publicity or whether it is instead a protected expressive use. Part IV will conclude with a proposal for enhanced protection for those depicted in deepfakes. It addresses both the issue of overbroad right of publicity licenses as well as overbroad protection of expressive works. Some of this proposal can be implemented by courts, changing their interpretations of contract provisions and their construal of the First Amendment's requirements, and some requires actions by state legislatures, reforming overly broad carveouts for certain kinds of artistic works.

II. FOUNDATIONS OF THE RIGHT OF PUBLICITY

The right of publicity is a synthesis of multiple approaches to protecting an individual's identity from exploitation. Initially, appropriation and exploitation of identity were viewed as a species of privacy rights, derived from "the right to be let alone."[38] Courts later embraced Prosser's four-tort framework,[39] conceptualizing the right of publicity as protecting against appropriation of an individual's name or likeness for the defendant's advantage in commercial contexts.[40] This articulation of a privacy-based interest in preventing nonconsensual commercial appropriation served as the foundation of common law publicity actions.[41] This section reviews the core elements of a right of publicity claim and its theoretical underpinnings. It then uses these foundations to serve as a basis for considering how deepfakes are regulated under the right of publicity, arguing that they should be treated as a special use of likeness.

A. PRIVACY VERSUS PROPERTY

The amorphous cause of action surrounding publicity rights was first dubbed the "right of publicity" in the decidedly economic context of a contract

38. J. THOMAS McCarthy, THE RIGHTS OF PUBLICITY AND PRIVACY 1:19 (2d ed. 2023); Kirby v. Sega of Am., Inc., 144 Cal. App. 4th 47, 55 (2nd Cir. 2006).

39. *See, e.g.*, Motschenbacher, v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 (9th Cir. 1974); Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400, 408 (2001).

40. Prosser conceptualized the right to privacy as protecting against a suite of four types of personal invasions: intrusion upon an individual's seclusion, solitude, or private affairs; public disclosure of private facts; publicity placing an individual in a false light within the public eye; and appropriation, for the defendant's advantage, of an individual's name or likeness. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

41. *Id.*

dispute.[42] The court in *Haelan Labs v. Tops Chewing Gum* considered the exploitation of an individual's identity in the context of property law, finding that the right to use photographs could be exclusively granted via contract.[43] The court attributed to such photographs a "pecuniary worth" that ought to be legally enforceable.[44] Such a property interest was construed by the *Motschenbacher* court as a legally cognizable "species of trade name" in which an individual had an exploitable commercial interest.[45]

In contrast to this economic framing, courts sometimes ground the right of publicity in terms of a person's interest in controlling their own identity.[46] Underlying this privacy-based rationale are concerns regarding the "natural rights" to human identity and allowing individuals to exert their own personal agency by retaining control over their representation in the public sphere.[47] This interpretation makes the right of publicity a "right of self-definition," as it prohibits unauthorized uses of an individual's identity that might "interfere with the meaning and values the public associates with that person."[48]

More frequently, however, courts and scholars have conceived of the right of publicity as a vehicle for protecting an individual's opportunities to profit from the commercial value of their identity.[49] This economic approach construes the commercial value derived from one's identity as a type of "property," accompanied by corresponding exclusionary rights.[50] Under this theory, personal identity is a scarce resource, and recognition of identity as a property right is justified by the economic interest in ensuring "the best and most efficient" way of allocating resources.[51] Absent the promise of an "exclusive grant" in a commercially exploitable identity, "many prominent persons…. would feel sorely deprived,"[52] and perhaps less inclined to participate in public life in a manner that would cause them to attain social prominence.[53]

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42. Haelan Labs v. Tops Chewing Gum, 202 F.2d 866, 868 (2d Cir. 1953); Daniel Gervais & Martin Holmes, *Fame, Property & Identity: The Purpose and Scope of the Right of Publicity*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 181, 188 (2014).

43. *Id.*

44. *Id.*

45. *See Motschenbacher*, 498 F.2d at 825.

46. *Id.* at 825.

47. McCarthy, *supra* note 38 § 2:2.

48. *Id.* at § 2:9.

49. *Gionfriddo*, 94 Cal. App. 4th at 408; *see, e.g.*, Richard Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 411–414 (1978).

50. McCarthy, *supra* note 38 § 2:7; *see also Haelan Labs*, 202 F.2d at 868.

51. McCarthy, *supra* note 38 § 2:7.

52. *Haelan Labs*, *supra* note 50.

53. *See* McCarthy, *supra* note 38 § 2:6.

Courts sometimes synthesize the two approaches by characterizing the right of publicity as a species of privacy right, that turns on whether there are "commercially exploitable opportunities embodied in [one's] likeness."[54] Under this formulation, economic losses accompanying commercial exploitation of one's identity are required to make a right of publicity claim actionable (the commercially exploitable side),[55] but dignitary concerns may be recognized in awards of damages (the privacy side).[56] So a right of publicity claim can only succeed where there's an injury to property, but damages can account for harms associated with "humiliation, embarrassment, or outrage."[57]

B. ELEMENTS OF RIGHT OF PUBLICITY CLAIMS

Right of publicity is a creature of state law, since each jurisdiction has a slightly different regime.[58] A handful of states, including most notably New York and California, have enacted statutes codifying the right of publicity, while others rely on common law.[59] Despite this rag-tag approach, right of publicity actions tend to share common elements. Central to the cause of action are the nonconsensual use of the plaintiff's identity, commercial exploitation, and resulting injury.[60] But states vary when they set the precise contours of the right. States also differ in their requirements for who can

54. Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979).

55. *Motschenbacher*, 498 F.2d at 824–825.

56. Waits v. Frito-Lay Inc., 978 F.2d 1093, 1103–04 (9th Cir. 1992).

57. *Motschenbacher*, 498 F.2d at 824–825; *Waits*, 978 F.2d at 1104.

58. International Trademark Association, *Right of Publicity State Law Survey* (2019), https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/INTA_2019_rop_survey.pdf.

59. Mark Roesler & Garrett Hutchinson, *What's in a Name, Likeness and Image? The Case for a Federal Right of Publicity Law*, ABA (2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/.

60. Thomas Phillip Boggess, *Cause of Action for an Infringement of the Right of Publicity* § 5, 31 COA 2d 121 (2006).

invoke the right,[61] whether they recognize post-mortem publicity rights,[62] as well as exceptions and affirmative defenses.[63]

California and New York offer useful models for understanding the right of publicity. California recognizes the right of publicity under both common law and state statute: sections 3344 and 3344.1 of the California Civil Code govern right of publicity among living and deceased persons, respectively.[64] To succeed in a common law cause of action in California, a plaintiff must prove: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.[65] Statutory causes of action require the additional elements of "knowing use" of the plaintiff's identity[66] in "direct connection" with a "commercial purpose."[67]

New York, alternatively, allows only statutory right of publicity claims through sections 50 and 51 of New York Civil Rights Law.[68] Section 50 renders it a misdemeanor to use "the name, portrait or picture of any living person without having first obtained the written consent of such a person" for either

61. International Trademark Association, *Right of Publicity State Law Survey* (2019), https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/INTA_2019_rop_survey.pdf (stating Arizona and Louisiana only recognize right of publicity claims for soldiers); *cf.* N.Y. CIV. RIGHTS L. § 50-f (McKinney 2022) (recognizing a post-mortem right of publicity for a "deceased performer" defined as a "deceased natural person domiciled in this state at the time of death who, for gain or livelihood, was regularly engaged in acting, singing, dancing, or playing a musical instrument;" and "deceased personality" who is "any deceased natural person domiciled in this state at the time of death whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death").

62. Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc., 270 F.3d 298, 326 (6th Cir. 2001) (reviewing cases and states).

63. New York State recognizes exceptions if the work is a play, book, magazine, newspaper, or other literary work; musical work or composition; work of art or other visual work; work of political, public interest, educational or newsworthy value, including comment, criticism, parody or satire; audio or audiovisual work, radio or television program, if it is fictional or nonfictional entertainment; or an advertisement or commercial announcement for any of the foregoing works. N.Y. CIV. RIGHTS § 50-f(2)(d)(ii). California recognizes as uses that are protected by the First Amendment as affirmative defenses, most notably the "transformative use test." Keller v. Elec. Arts Inc., 724 F.3d 1268, 1273 (9th Cir. 2013).

64. *Right of Publicity: Overview*, WESTLAW PRAC. L. INTELL. PROP. AND TECH.

65. White v. Samsung Electronics America, Inc., 971 F.2d 1395, 1397 (9th Cir. 1992).

66. Defined as an individual's "name, voice, signature, photograph or likeness." CAL. CIV. CODE § 3344(a).

67. CAL. CIV. CODE § 3344; *Abdul-Jabbar v. G.M. Motors*, 85 F.3d 407, 414 (9th Cir. 1996); CAL. CIV. CODE § 3344(a) ("commercial purposes" include: use "on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services").

68. *Right of Publicity: Overview*, *supra* note 64.

"advertising purposes or for the purposes of trade," by "any person, firm or corporation,"[69] while section 51 creates an analogous private right of action.[70]

New York's statutory right of publicity claims under sections 50 and 51 are broad, extending to both celebrities and non-celebrities alike.[71] The statute does include exceptions, however, including those for literary works, television and audio works, parody, and satire.[72] The recently passed section 50-f is more limited. The statutory provision covers only "deceased performers" and "deceased personalities" who were domiciled in the state at the time of their death and "regularly engaged in acting, singing, dancing, or playing a musical instrument" (deceased performers) or "whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death" (deceased personalities).[73] The statute is replete with exceptions, including those where the use is connected with a "literary work; musical work or composition; work of art or other visual work; work of political, public interest, educational or newsworthy value… audio or audiovisual work, radio or television program."[74] It also includes works of "parody, satire, commentary or criticism,… political or newsworthy value, or similar works,…a representation of a deceased performer as [themselves]… except in live performances, de minimis or incidental [use]," as well as "in connection with any news, public affairs or sports program or account or political campaign."[75]

Despite the differences between New York and California in theory, there are substantial commonalities in effect. Across jurisdictions, the "name or likeness requirement" has been interpreted broadly to include "any type of "indicia of identity" so long as it is distinctive, including voice and personal style.[76] The likeness need not be a literal depiction of an individual so long as the depiction renders the individual recognizable.[77] The definitions of "commercial advantage" and "advertising purposes or for the purpose of trade" have also both been broadly construed, with courts defining these types of appropriation as any use intended to gain an audience's attention.[78] Yet

69. N.Y. CIV. RIGHTS L. § 50 (McKinney 2023).

70. N.Y. CIV. RIGHTS L. § 51 (McKinney 2023).

71. *See* Stephano v. News Grp. Publ'ns, 64 N.Y.2d 174, 182 (1984) ("Section 51 of the Civil Rights Law has been applied in cases, such as the *Roberson* case, where the picture of a person who has apparently never sought publicity has been used without his or her consent for trade or advertising purposes.").

72. N.Y. CIV. RIGHTS L. § 50-f(2)(d)(ii) (McKinney 2023).

73. N.Y. CIV. RIGHTS L. § 50-f (McKinney 2023).

74. N.Y. CIV. CODE §§ 50-f(2)(d)(i)–(iii) (McKinney 2023).

75. *Id.*

76. *Waits*, 978 F.2d at 1102; *White*, 971 F.2d at 1399, *Abdul-Jabbar*, 85 F.3d at 415–416.

77. *See White*, 971 F.2d at 1399; *Abdul-Jabbar*, 85 F.3d at 415–416.

78. *Abdul-Jabbar*, 85 F.3d at 415–416.

differences do emerge once cases move away from direct advertising to consider more expressive uses. To avoid running afoul of the First Amendment, many states create either an exception or an affirmative defense regarding uses that are in the public interest or otherwise expressive works.[79] But the details of these exceptions vary markedly across jurisdictions.[80]

C. DEEPFAKES AS A SPECIAL TYPE OF USE OF LIKENESS

Deepfakes are a type of "digital replica" which may be defined as a "virtual replica of a living or non-living physical entity."[81] These include the types of media referenced by statutes such as that of New York, which pertains to a "computer-generated, electronic performance in which the person did not actually perform that is so realistic that a reasonable observer would believe it is a performance by the individual."[82] Deepfakes are created by AI tools which work by "finding and learning similarities" between images of a given individual's face, or audio clips of an individual's voice.[83] These "learned traits" are "reduced to their shared common features" and then superimposed on a second "body," which can then be made to do and say anything.[84]

1. Deepfakes as a Use of Likeness

Courts typically take a broad view of what should count as a use of likeness for right of publicity purposes, finding a use of likeness when a celebrity's highly distinctive traits are emulated.[85] Unless confined by a statutory definition,[86] courts generally construe likeness liberally and hold that "the right of publicity does not require that appropriations of identity be accomplished

79. *Right of Publicity: Overview*, *supra* note 64.

80. See *infra* Part III.C.

81. David Mailhot, *Digital Twins: How the Digital Replica Concept is Used by Robotic Systems*, MOBILITY ENG'G (June 1, 2020), https://www.mobilityengineeringtech.com/component/content/article/37096-digital-twins.

82. N.Y. CIV. CODE § 50-f(2)(b) (Consol. 2023).

83. *Deconstructing Deepfakes—How Do They Work and What Are the Risks?*, U.S. GOV'T ACCOUNTABILITY OFFICE (Oct. 20, 2020), https://www.gao.gov/blog/deconstructing-deepfakes-how-do-they-work-and-what-are-risks; Ethan Baker, *Deepfake Voice—Everything You Should Know in 2023*, VERITONE VOICE (Jan. 24, 2023), https://www.veritonevoice.com/blog/everything-you-need-to-know-about-deepfake-voice/.

84. *Id.*

85. *See, e.g.*, *White*, 971 F.2d at 1399 (holding that the defendant re-constructed a likeness of White by adorning a robot with White's signature hairstyle, dresses and jewelry); *see also* Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1989); *Waits*, 978 F.2d at 1093.

86. *White*, 971 F.2d at 1397 (finding that the use of a "robot with mechanical features" did not fall within the statutory definition of "likeness" under California right of publicity statute § 3344).

through particular means to be actionable."[87] For example, the use of a racecar driver-plaintiff's signature vehicle was sufficient for a finding of appropriation of identity, notwithstanding the fact that the driver's face was not actually visible, and his name was never used.[88]

Whether an impersonation, reconstruction, or other non-literal use of likeness constitutes appropriation of identity depends on the extent to which a commercially valuable "sign or symbol" associated with a celebrity distinctively evokes their identity, such that a user can exploit such a personal trait for personal financial gain.[89] In the seminal *Midler v. Ford* case, for example, the court found liability where an advertiser commissioned a "sound-alike" to replicate Bette Midler's distinctive voice for a car commercial.[90] After Midler declined to lend her voice to the car commercial, an actress was hired and given the instruction to "sound as much as possible like the [Midler] record.[91] The result was an impersonation so compelling that even Midler's "close personal friends" believed she had performed in the commercial.[92] Upon conferring liability, the court reasoned that the defendant's use of such an iconic feature inextricably linked to Midler's identity in the interest of evoking a "warm connection" with an advertised product functionally "pirated" her identity for commercial gain.[93]

Other non-literal representations and reconstructions of likeness have been held to a similarly forgiving standard.[94] This can be seen in the case of Samsung's infamous "Wheel of Fortune" VCR ad, featuring a blonde-wigged robot clad in a long gown and jewelry standing beside a Wheel of Fortune game-board.[95] The Ninth Circuit held that this was not a literal use of likeness, as required by California's statutory right of publicity,[96] but that the holistic representation of Vanna White's person—including the robot's highly evocative hairstyle and dress, and the presence of the iconic Wheel of Fortune Game Board—was a use of likeness under California common law, as, despite

87. *Id.* at 1398.
88. *Motschenbacher*, 498 F.2d at 821.
89. *Midler*, 849 F.2d at 463.
90. *Id.*
91. *Id.* at 461–62.
92. *Id.*
93. *Id.* at 463.
94. *White*, 971 F.2d at 1399 (explaining that actionability seems to be determined in large part by the circumstance of the use—both in terms of the composite picture conveyed by the representation); Faulkner v. Hasbro, 2016 WL 3965200 at *4 (D. N.J., July 21, 2016).
95. *White*, 971 F.2d at 1396–97.
96. *Id.* at 1397.

being a non-literal representation, a viewer would have no question about who was being depicted.[97]

Finally, likenesses constructed by computer generated imaging, more commonly referred to as "CGI," have come within the purview of right of publicity law. Courts continuously hold that CGI portrayals in video games count as uses of likeness when video game companies create "digital avatars" "that resemble their real-life counterparts."[98] Infringement liability is especially likely to be found where the digital avatars exist in similar contexts as their celebrity counterparts, and engage in analogous activities and pursuits.[99] Such protection extends beyond representations of the celebrities themselves, and also applies to the use of character "skins" which are "cosmetic add-ons that customize the look of game characters."[100] Such "skins" may change the "look" of a video game character such that they resemble a particular celebrity, even if the character is not originally designed to be a representation of the celebrity. In the context of sports video games, courts have found that "skins" that replicate an actual athlete's skin and hair colors, musculature, posture, "play style," and athletic accessories are all sufficiently evocative of the athlete themselves to constitute an impermissible appropriation of likeness.[101]

Ultimately, the crux of whether a representation is sufficient to confer liability seems to turn on identifiability, and whether that identifiable trait or feature is being "pirated" for commercial gain.[102] As a result, there may be somewhat of a sliding scale regarding the precision of the non-literal likeness or impersonation, and the fame of the individual whose identity is being appropriated. The more famous a person is, the more readily elements of their identity will be recognized, resulting in a greater likelihood of finding liability for even non-literal appropriations of likenesses.[103] Conveniently, the AI tools used to create deepfakes work by "learning" and then reconstructing these very same defining features of individuals, including, for example, the smooth

97. *Id.* at 1396–98.

98. Hart v. Elec. Arts, Inc., 717 F.3d 141, 147 (3d Cir. 2013).

99. Robert Cumbow, *What They Do for a Living: The Right of Publicity in Video Games and Movies*, ABA (Sept. 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/september-october/right-of-publicity-video-games-movies/.

100. Dean Takahashi, *Newzoo: U.S. Gamers Are In Love With Skins And In-Game Cosmetics*, VENTUREBEAT (Dec. 18, 2020), https://venturebeat.com/games/newzoo-u-s-gamers-are-in-love-with-skins-and-in-game-cosmetics/.

101. Vikki Blake, *League Of Legends Developer Loses Lawsuit To Soccer Player*, IGN, https://www.ign.com/articles/2017/08/14/league-of-legends-developer-loses-lawsuit-to-soccer-player (last updated Aug. 16, 2021).

102. Cumbow, *supra* note 99.

103. *White*, 971 F.2d at 1399.

baritone timbre of Morgan Freeman's voice, Jim Carrey's exaggerated facial features, and Donald Trump's signature tangerine pallor.[104] By definition, deepfakes are no more than replications of those characteristic traits that make a person most recognizable—and most "like themselves."

2. Why Deepfakes are "Special"

In its current form, right of publicity law would almost certainly characterize the creation of a deepfake as an appropriation of likeness. What it would fail to do, however, is recognize that deepfakes are a distinctive form of "likeness," unlike any other the law has yet addressed. Deepfakes are fundamentally different from other forms of "likeness" in two ways. First, deepfakes can be made without consent and still serve as perfect commercial substitutes for the actual person, replacing their labor directly in commercial contexts. Second, deepfakes provide a unique vehicle for reputational damage, taking away a person's control of their image in a way that goes beyond what was previously possible.

Deepfakes have the power to supplant an individual. No existing type of use of likeness carries the same potential for allowing production companies to replace talent in such a comprehensive way. Traditional CGI is far more limited than deepfakes.[105] For one thing, CGI reconstructions of humans often result in artificial, synthetic-looking images.[106] Its renderings of faces and skin are particularly unconvincing, with viewers readily able to spot the differences between a CGI human and a live one.[107] Deepfakes do not suffer this deficit, and instead are lauded for their astoundingly life-like quality.[108] A second glaring shortcoming of CGI relative to deepfakes is that CGI only creates

104. *See* Diep Nep, *This Is Not Morgan Freeman – A Look Behind the Deepfake Singularity*, YOUTUBE (July 29, 2021), https://youtu.be/F4G6GNFz0O8; *The Shining Starring Jim Carry: Episode 1 – Concentration*, YOUTUBE (July 8, 2019), https://youtu.be/HG_NZpkttXE; *Donald Trump in Toddlers and Tiaras Deepfake,* YOUTUBE (June 16, 2019), https://youtu.be/i9KrJFLYxTI; Ian Sample, *What are Deepfakes and How Can You Spot Them*, GUARDIAN (June 13, 2020), https://www.theguardian.com/technology/2020/jan/13/what-are-deepfakes-and-how-can-you-spot-them.

105. *3 Differences Between CGI and Deepfake,* THISANSWER (Aug. 11, 2022), https://thisanswer.com/3-differences-between-cgi-and-deepfake/.

106. Martin Anderson, *Disentanglement is the Next Deepfake Revolution*, UNITE.AI, https://www.unite.ai/disentanglement-is-the-next-deepfake-revolution/ (last updated Dec. 9, 2022).

107. Natalie Wolchover, *Why CGI Humans are Creepy and what Scientists Are Doing About It*, LIVE SCI. (Oct. 18, 2011), https://www.livescience.com/16600-cgi-humans-creepy-scientists.html.

108. Peter Suciu, *Deepfake Star Wars Videos Portent Ways The Technology Could Be Employed For Good And Bad*, FORBES (Dec. 11, 2020), https://www.forbes.com/sites/petersuciu/2020/12/11/deepfake-star-wars-videos-portent-ways-the-technology-could-be-employed-for-good-and-bad/.

images; it does not generate audio.[109] Other forms of likeness appropriation, including manipulation of photographs or use of impersonators, are more limited still in their capacity to entirely replace their subjects. A deepfake of a performer can replace the performer in a way that no 1990s CGI or makeup-enhanced stunt double possibly could.

Given that actors can command tens of millions of dollars for a single film role,[110] and well over a million dollars per episode for television series,[111] the prospective economic loss to those actors is astounding. These types of losses are precisely the type of commercial harm contemplated by right of publicity law and are thus squarely within its purview.

Further, deepfake creation does not just threaten direct commercial interests. Deepfakes have the potential to fundamentally re-write a social narrative regarding a public (or private) figure's behavior, proclivities, and associations. Consider how this could play out in the context of a biopic. Some political figure, perhaps President Obama, would traditionally be depicted by an actor. Some archival footage from public archives that depicts real events would be interspersed between live-action scenes featuring the actor. But there would be clear separation between the fictionalized actor scenes and the real archival scenes. The audience would intuitively know whether they are looking at real or interpreted history. Not so with deepfakes. With deepfakes, the actor-recreated scenes could look just as authentic as the real archival footage.

Deepfake technology is also far more sophisticated and convincing than existing forms of manipulated media.[112] Unlike the teenagers who photoshop the heads of female celebrities onto the bodies of porn stars, the technology produces extraordinarily lifelike depictions, which may be difficult to distinguish from reality.[113] Deepfake content thus has a far greater capacity for

109. THISANSWER, *supra* note 105.

110. Travis Clark & Kirsten Acuna, *27 of the Highest-Paid Movie Roles of All-Time, Including Tom Cruise's Massive Pay Day for 'Top Gun: Maverick'*, BUS. INSIDER (Dec. 26, 2022), https://www.businessinsider.com/16-of-the-highest-paid-movie-roles-of-all-time-2018-5?op=1.

111. Jamie Burton, *14 TV Shoes Where the Cast Got More Than $ 1 Million Per Episode,* NEWSWEEK (Sept. 14, 2021), https://www.newsweek.com/14-tv-shows-cast-paid-more-1-million-per-episode-actor-salary-1628870.

112. Korey Clark, '*Deepfakes' Emerging Issue in State Legislatures*, STATE NET CAPITAL J. (June 4, 2021), https://www.lexisnexis.com/en-us/products/state-net/news/2021/06/04/Deepfakes-Emerging-Issue-in-State-Legislatures.page.

113. Rikki Schlott, *It's Not Just Taylor Swift 'Nudes': Millions of Teen Girls Victimized As Classmates Turn Them Into Deepfake Porn*, N.Y. POST (Feb. 2, 2024), https://nypost.com/2024/02/02/news/teen-girls-turned-into-deepfake-porn-like-taylor-swift/; Ian Sample, *What Are Deepfakes – And How Can You Spot Them?*, GUARDIAN (Jan. 13, 2020), https://www.theguardian.com/technology/2020/jan/13/what-are-deepfakes-and-how-can-you-spot-them.

deception, to the point where—as one software executive observed—it may become impossible "to distinguish fact from fiction," regarding portrayals of an individual.[114]

Given such realism, deepfakes can hijack an individual's entire persona and fundamentally alter how they are perceived. If those depictions show the individual engaging in behavior that is criminal, socially taboo, or, at a minimum, misaligned with that person's values, the individual's reputation may be permanently tarnished, as the public has no assurance other than the individual's word that the acts in question never happened.[115] Though Bette Midler and Vanna White may have resented their "appearances" in unauthorized commercials, these types of appropriations lack the gravity of the consequences that Alexandria Ocasio-Cortez could face as result of a pornographic deepfake "AOC Do Anything for Congressional Votes."[116]

III. COMMERCIAL AND EXPRESSIVE DEEPFAKES

Not every use of likeness is actionable under right of publicity law. Written into most right of publicity statutes is the qualifier that the use of a person's likeness is actionable only when used "in any manner, on or in products, merchandise, or goods or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services,"[117] or "for advertising purposes or for the purposes of trade."[118] Liability for use of likeness thus essentially comes down to two types of uses: "on or in a product," for example by "placing a celebrity's name on a 'special edition' of a [product]," or "in advertising or selling a product," such as by "using that name in a commercial to endorse the [product]."[119]

114. Aayushi Pratap, *Deepfake Epidemic Is Looming—And Adobe Is Preparing For The Worst*, FORBES (June 29, 2022), https://www.forbes.com/sites/aayushipratap/2022/06/29/deepfake-epidemic-is-looming-and-adobe-is-preparing-for-the-worst/?sh=5048d2445b81.

115. *See* Tom Chivers, *What Do We Do About Deepfake Videos*, GUARDIAN (June 23, 2019), https://www.theguardian.com/technology/2019/jun/23/what-do-we-do-about-deepfake-video-ai-facebook (commenting that some public figures have even proposed creating "authenticated alibis" by filming themselves at all times to be able to disprove any deepfakes that might later surface).

116. Abigail Loomis, *Deepfakes and American Law*, DAVIS POL. REV. (Apr. 20, 2022), https://www.davispoliticalreview.com/article/deepfakes-and-american-law.

117. CAL. CIV. CODE § 3344.

118. N.Y. CIV. RIGHTS § 50 (Consol. 2023).

119. Einstein v. Baby Einstein Co., LLC, 2009 WL 10670676 at *8 (citing *Comedy III* at 801).

This is an area where state laws meaningfully differ. Though the right of publicity does not cover noncommercial or personal uses in most states, California's common law right of publicity does extend to these uses. Under California law, a defendant may be found liable where the appropriation of name or likeness is "to the defendant's advantage, commercially or otherwise."[120] The language "or otherwise" creates what is seemingly the only avenue for a finding of infringement upon an individual's right of publicity in cases where money is not at least indirectly changing hands. For example, a California court found liability where a political campaign "ad" for then-Senator John McCain incorporated a song by well-known songwriter and ardent member of the Democratic party, Jackson Browne.[121] The court found the use was an "advantage" to McCain's candidacy, albeit a noncommercial one, as the use may have "benefitted" his campaign through "increased media attention."[122] Such a finding suggests that courts might extend this reasoning to include other uses where appropriation of likeness may result in increased publicity or visibility on social media, as well as possible reputational benefits.

This Part considers how the right of publicity will serve to regulate deepfakes in three separate contexts. The first context is direct commercial advertising: deepfakes used to sell products. These deepfakes raise highly traditional issues under the right of publicity and will very often require the consent of the person depicted.

The second kind of deepfakes are deepfakes that are produced in noncommercial settings, such as for distribution on social media, and when the deepfake itself is a product. Ultimately, whether the right of publicity will require the consent of the depicted individual here will turn on the commercial nature of the enterprise, and this will lead to some difficult line-drawing questions.

The third and final kind of deepfakes are ones created for commercial distribution as expressive products. While this category of deepfakes is central to our consideration of the use of deepfakes in entertainment, it unfortunately presents the least clear doctrinal answer. Whether these deepfakes require the consent of the person depicted will depend on whether they receive constitutional protection as expressive uses. We will argue that many of these commercially oriented expressive deepfakes should require the permission of the depicted individuals. This will lead into our discussion in Part IV on how

120. *White*, 971 F.2d at 1397.
121. Browne v. McCain, 611 F. Supp. 2d 1062 (2009).
122. *Id.* at 1070.

that permission should be obtained and how the law of expressive uses should be clarified to strengthen this conclusion.

A. USE OF DEEPFAKES TO SELL PRODUCTS

Though there are some edge cases, an appropriation of likeness for use in advertising is one of the most straightforward and common types of cases addressed by right of publicity law.[123] The general answer is simple: right of publicity law—under both statutory and common law—prohibits the unauthorized use of likeness "for advertising purposes."[124]

Courts characterize uses for advertising purposes as those bearing "not the slightest semblance of an expression of an idea, a thought, or an opinion,"[125] but instead "merely advertise another unrelated product."[126] Examples of such verboten "uses in advertising" have included the incorporation of Tom Waits' throaty rasp in a Doritos advertisement,[127] the depiction of a professional racecar driver's signature car in a cigarette commercial, [128] and the aforementioned prominent appearance of an evocative, wig-and-dress wearing robot flipping Wheel-of-Fortune tiles in a promotion for Samsung VCRs.[129] While courts tolerate using a celebrity or other famous figure's likeness in material that is "commercially sponsored" or "involves paid advertising"—for example, accompanying an article in a magazine—such uses must have a bona fide connection to the purpose of the use.[130]

Some uses of deepfakes can unambiguously be characterized as uses in advertising. The use of celebrity deepfakes in promotional materials has already proven attractive to businesses, as they provide a fast and relatively cheap way to generate the type of clout surrounding a product that's typically

123. *White*, 971 F.2d at 1401 n.3 (drawing a distinction between appropriation used in advertising, and appropriation in other contexts); Eric Johnson, *Disentangling the Right of Publicity*, 111 N.W. L. REV. 891, 923 (proposing that courts generally find liability for commercial exploitation of identity in the context of advertising).

124. N.Y. CIV. RIGHTS L. §§ 50, 51 (McKinney 2023).

125. *Toffoloni*, 572 F.3d at 1208.

126. Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 970 (10th Cir. 1996).

127. *Waits*, 978 F.2d at 1097.

128. *Motschenbacher*, 498 F.2d at 822.

129. *White*, 971 F.2d at 1396.

130. *See* Finger v. Omni, 77 N.Y.2d 126, 138 (1990) (describing the requirement of a nexus between the use of a photo and the content of a magazine article such that the photo is not merely an "advertisement in disguise"); Downing v. Abercrombie & Fitch, 265 F.3d 994, 1002 (9th Cir. 2001) (explaining that given the tenuous relationship between the use of a famous surfer's photograph and the content of a fluff piece, the photograph was "essentially window-dressing to advance the catalog's surf-theme, and thus functioned like an advertisement).

achieved only through celebrity endorsement.[131] For example, there is Elon Musk's role in the promotional video for the real estate investment group, reAlpha Tech Corp., which depicted him tied up in a chair pitching the company's mission of "democratizing real estate investing."[132] At first, the ad suggests Musk was kidnapped for the purposes of promoting the startup, but then quickly reveals itself to be a deepfake as the reconstructed Musk chides the company, "don't they know it would be easier to deepfake me?"[133] While Musk himself may literally not have been tied up and forced to do the commercial, his presence was nevertheless nonconsensual, as the iconoclastic billionaire never signed an endorsement agreement.[134]

Companies making this kind of use have acknowledged the risk of a right of publicity lawsuit, but they seem willing to embrace the possibility as a risk well-justified by the interest of generating publicity.[135] ReAlpha, for one, attempted to avoid liability by leaning heavily on the use of disclaimers that both disavowed any actual participation by Musk and emphasized the nature of the commercial as being satire, though ultimately conceded that the use might be actionable.[136] And indeed, the video is clearly exploiting Musk's identity to peddle an unrelated populistic real estate investment service, which is the essence of an actionable commercial use.[137]

B. USE OF DEEPFAKES IN PRODUCTS AND FOR NONCOMMERCIAL PURPOSES

Courts are somewhat less consistent when considering cases in which a person's likeness is used for something other than direct advertising. Though commercial uses of products that bear an appropriated likeness may be actionable, the mere fact that the use of the likeness is in the context of a commercial enterprise does not alone confer liability.[138] Still, how courts decide when involvement in a commercial enterprise confers liability varies tremendously.

131. *See* Patrick Coffee, "*Deepfakes" of Celebrities Have Begun Appearing in Ads, With or Without Their Permission*, WSJ (Oct. 25, 2022), https://www.wsj.com/articles/deepfakes-of-celebrities-have-begun-appearing-in-ads-with-or-without-their-permission-11666692003.

132. reAlpha, *Elon Musk Held Hostage in a Warehouse (Will He Comply?)*, YOUTUBE (Oct. 19, 2022), https://www.youtube.com/watch?v=UuszlOBKkrM.

133. *Id.*

134. Coffee, *supra* note 131.

135. *Id.*

136. *Id.*

137. *See id.; Comedy III*, 21 P.3d at 802.

138. *See Comedy III*, 21 P.3d.

Consider the question of the least commercial uses of deepfakes, such as the distribution of deepfakes on ad-revenue driven social media platforms. Most deepfakes are not produced by marketing firms to be used in advertising or by governments to undermine their adversaries but rather are generated by at-home users and posted to social media platforms.[139] For these recreational users, the value of deepfakes lies in their potential for personal amusement and entertainment or to drive traffic to their channels.[140]

Though social media sites like TikTok and YouTube are commercial enterprises that generate massive profit through advertising revenue,[141] their user-generated content is not rendered commercial merely by appearing there.[142] While courts have yet to explicitly address the issue in the context of the right of publicity, it is plausible that they might adopt approaches similar to those used in assessing whether social media posts constitute commercial speech under the Lanham Act. In that context, it appears that all Circuits require some type of reference to a commercial transaction within the posted content for the content to be deemed commercial.[143] For example, the Ninth Circuit deemed an artisan's Facebook photographs of whimsically designed brooms "unquestionably commercial speech."[144] This was not because they were posted on social media but instead because of the images' nature. The offending photographs all entailed "people trying to sell the brooms" and were captioned with messaging clearly intended to "influence consumers to buy their goods."[145]

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139. Mika Westerlund, *The Emergence of Deepfake Technology: A Review*, 9 TECH. INNOVATION MGMT. REV., 39, 40 (2019); Steven Zeitchik, *Ready or Not, Mass Video Deepfakes are Coming*, WASH. POST (Aug. 20, 2022), https://www.washingtonpost.com/technology/2022/08/30/deep-fake-video-on-agt/.

140. Zeitchik, *supra* note 139 (describing the proliferation of synthetic media and its capacity for viral viewership).

141. Business Model Toolkit, *TikTok*.

142. *See* Yurish v. Sinclair Broadcast Group Inc., 866 S.E.2d 156, 168 (W. Va. 2021) (declining to characterize an audio recording as commercial speech, notwithstanding the fact it was posted to social media).

143. *See* ADB Interest, LLC v. Wallace, 606 S.W.3d 413, 422–28 (2020) (holding that the defendant's social media post to be non-commercial in nature, despite the fact it was both about a product, and posted on defendant's business's Facebook page, as it failed a four-part test inquiring whether the statements were in the context of a sale, arising out of a commercial transaction, or if the intended audience of the content are actual or potential consumers); *Yurish*, 866 S.E.2d at 167 (reiterating the definition of commercial speech as that which does "no more than propose a commercial transaction"); Ariix, LLC v. NutriSearch Corporation, 985 F.3d 1107, 1115 (2021) (describing the Ninth Circuit's test for commercial speech, which requires that the speech at issue is intended "for the purpose of influencing consumers to buy defendant's goods or services").

144. H.I.S.C., Inc. v. Franmar International Importers, Ltd., 2022 WL 104730, at *5.

145. *Id.* at *5–6.

But most common deepfakes are not that. Consider the innumerable high-profile deepfakes of former President Donald Trump. The real estate mogul-turned-reality-television-star-turned-president has been depicted exchanging trash talk with President Joe Biden while playing the first-person shooter game *Overwatch*,[146] giving advice on money-laundering as crooked lawyer Saul Goodman in the acclaimed television series *Breaking Bad*,[147] and mocking the Belgian government for their continued membership in the Paris climate agreement.[148] None of these have direct connections to any commercial transaction. Though one could *make* such videos commercial—for instance, by selling them as products or coupling them with donation requests—they are not inherently so.

This is not to say there is no economic benefit to these "free" videos. Though Chris Ume initially created his TikTok series of Tom Cruise deepfake videos for personal amusement, his account quickly went viral and established a massive following.[149] The flurry of attention was arguably what caught the eyes of entrepreneurs and investors, who supplied Ume with the capital needed to create the generative AI company Metaphysic.[150] Further, one could plausibly argue that the notoriety he gained alone might be adequate for a finding of personal advantage under California common law. Given that "increased media attention" has already proven to be grounds for such a finding of personal benefit in the context of political campaigns, courts might apply the same logic where such attention may lead to other types of visibility and professional opportunities.[151]

In sum, noncommercially oriented deepfake videos are likely outside the scope of most right of publicity statutes in most states. But edge cases, where the deepfake videos directly lead to commercial advantage, and the vagaries of California common law, make this just unclear enough to cause issues.

Deepfake videos as products raise a different set of questions. Consumer products incorporating a person's likeness have long been held to be

146. Allegra Rosenberg, *AI-Generated Audio of Joe Biden and Donald Trump Trash Talking While Gaming is Taking Over TikTok*, BUS. INSIDER (Mar. 1, 2023), https://www.businessinsider.com/voice-ai-audio-joe-biden-donald-trump-tiktok-2023-3.

147. Victor Tangermann, *Someone Deepfaked Trump into Breaking Bad and It's Horrifying*, BYTE (Sept. 23, 2019), https://futurism.com/the-byte/deepfake-trump-breaking-bad.

148. Hans Von Der Burchard, *Belgian Socialist Party Circulates 'Deep Fake' Donald Trump Video*, POLITICO (May 21, 2018), https://www.politico.eu/article/spa-donald-trump-belgium-paris-climate-agreement-belgian-socialist-party-circulates-deep-fake-trump-video/.

149. Zeitchik, *supra* note 140.

150. *Id.;* Dean Takahashi, *Metaphysic, AI Startup Behind Tom Cruise Deepfakes, Raises $7.5M*, VENTUREBEAT (Jan. 25, 2022), https://venturebeat.com/games/metaphysic-ai-startup-behind-tom-cruise-deepfakes-raises-7-5m/.

151. Browne v. McCain, 611 F. Supp. 2d 1062, 1070 (2009).

actionable.[152] For example, in *Comedy III*, a court held that t-shirts depicting an original rendering of the Three Stooges violated the plaintiff's statutory and common law right of publicity under California law.[153] While the shirts were decidedly not advertising, they nevertheless entailed "use within a product " as the shirts were "tangible personal property" that were "made as products to be sold," and thus constituted the type of commercial use contemplated by California's right of publicity statute.[154] Similar commercial use has been found in *Uhlaender v. Henricksen*, in which a board game company incorporated retired professional baseball players' professional statistics into a "parlor game,"[155] as well as in *Carson v. Here's Johnny Portable Toilets*, in which Carson's signature introductory phrase "Here Comes Johnny" was adopted as the double-entendre name of a portable toilet company.[156] Unlike other advertising cases, in which an individual's identity is exploited for the purposes of selling an unrelated product, in *Uhlaender* and *Carson*, the exploitation was embedded in the product itself.[157]

Deepfakes could be used to incorporate celebrities into a variety of products. Content creators have already been tapped to produce celebrity deepfakes to be used for commercial purposes other than advertising.[158] For example, Slack Shack Films, the firm behind reAlpha's Musk commercial, is frequently asked to produce celebrity deepfakes to be used internally by businesses for "training, communications, parties or other purposes."[159] Slack Shack, which describes itself as "a group of creative storytellers" who "exercise our creativity on any platform that doesn't kick us off first" is blatantly a commercial service, marketing itself to those "on any budget."[160] In these cases, the deepfakes themselves are the commodity.

This type of deepfake use may be common in the future. Commentators have already speculated that deepfakes may prove popular as educational tools.[161] Indeed, teachers have already taken advantage of the opportunity to revive long-deceased historical figures to add a splash of "relevancy" to history

152. *Comedy III*, 21 P.3d at 802.
153. *Id.*
154. *Id.*
155. Uhlaender v. Henricksen, 316 F. Supp. 1277, 1278 (D. Minn. 1970).
156. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983).
157. *Comedy III*, 21 P.3d at 802.
158. *See* Coffee, *supra* note 131.
159. *Id.*
160. Slack Shack, Slackshack.tv.
161. Jessica Ice, *Defamatory Political Deepfakes and the First Amendment*, 70 CASE W. RES. L. REV. 417, 428 (2019).

lessons,[162] and it is easy to imagine educators sourcing deepfakes of more contemporary public figures in the interest of making otherwise dry course material more engaging. While educational uses qualify for the fair use exception in the copyright context, there does not appear to be an analogous carve-out in the right of publicity framework.[163] Consequently, a firm like Slack Shack may be confronted with liability for commissioning a celebrity deepfake, regardless of whether their client is Salesforce or the Chicago Public Schools.

With all this in mind, actually selling deepfakes is likely to cause issues under existing right of publicity law frameworks, both statutory and common law. Yet there is substantial overlap between the types of deepfakes that might be sold and those that verge most closely on First Amendment values. A deepfake of a political candidate embedded in a rival's campaign donation solicitation is likely commercial enough to qualify as a use in trade or advertising. But is it protectable, nonetheless?

C. EXPRESSIVE USES OF DEEPFAKES

If a deepfake that puts a well-known person in a new video is created, the video could escape liability because it is not a commercial use.[164] But what if the video is plainly commercial? Courts are in agreement that the right of publicity, though broad, is not absolute.[165] Given their prominence in society, "celebrities take on public meaning" such that the use of their identity or likeness may be unavoidable.[166] This recognition that appropriation of celebrity likeness can have a valuable role in fostering "an uninhibited marketplace of ideas" has given rise to broadly recognized public interest or expressive use exceptions to right of publicity claims.[167] Unfortunately, outcomes of right of publicity actions pertaining to unauthorized use of likeness in expressive works—including in fiction, film, television and other artistic works—are far more difficult to predict than those brought in the cases of advertising or consumer products, as such uses are subject to a byzantine set of exceptions

162. *See* Erik Ofgang, *How to Teach With Deep Fake Technology*, TECH & LEARNING (Nov. 21, 2022), https://www.techlearning.com/news/how-to-teach-with-deep-fake-technology.

163. *See* Boggess, *supra* note 60 at 31.

164. *See supra* Part III.B.

165. No Doubt v. Activision Publ'g, Inc., 192 Cal. App. 4th 1018, 1030 (2011).

166. *Id.*

167. *Id.*; Redish & Shust, *Right of Publicity and the First Amendment in the Modern Age of Commercial Speech*, 56 WM. & MARY L. REV. 1443, 1443 (2015). Additionally, claims brought in California courts may also be subject to an anti-SLAPP motion to strike. Such motions arise when a use of likeness is "in furtherance of a person's right of petition or free speech," and where the plaintiffs are "unlikely to prevail on their claim." CAL. CIV. PROC. § 425.16(a), (e).

and affirmative defenses designed to protect content creators' First Amendment rights.

To understand the complexity surrounding how right of publicity law would approach "expressive" deepfakes, one must first consider the existing schemes for assessing when an expressive use of likeness is actionable, and when it is shielded from liability by the First Amendment, including those under common law, and various state statutes.

1. Contemporary Approaches to Expressive and Protected Uses

Noted right of publicity scholar Jennifer Rothman titles her chapter on expressive uses as "The Black Hole of the First Amendment" and describes the doctrine as "the current mess."[168] She ultimately categorizes five different approaches for determining whether a particular use is protected by the First Amendment.[169] Two of these approaches, both used by the Ninth Circuit, are variants of a transformative use balancing test.[170] The other three—despite Rothman's heroic efforts—are not especially coherent, considering variously the "predominant purpose" of the work, the "relatedness" of the work to the person depicted, and an ad-hoc balancing of interests between the person depicted and the creator of the expressive work.[171]

Since the transformative use approach has generated the largest and most coherent body of case law, we will examine it in detail. This approach considers whether an unauthorized appropriation of likeness is sufficiently "transformative." [172] A court fundamentally asks, "whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness."[173] In short, is this art a picture of Barack Obama, or is it a work of the artist?

In the Ninth Circuit, this transformative use test is comprised of five inquiries.[174] First, whether "the celebrity likeness is one of the 'raw materials' from which an original work is synthesized."[175] If not, the rest of the test is not considered relevant. Second, whether the work "is primarily the defendant's own expression . . . [and also is expression of] something other than the

168. Rothman, *supra* note 31 at 138.
169. *Id.* at 145.
170. *See id.* at 146.
171. *See id.* at 145–48.
172. *See Comedy III*, 21 P.3d at 809.
173. *Id.* at 809.
174. Keller v. Elec. Arts Inc.,724 F.3d 1268, 1274 (9th Cir. 2013); *see* Hamilton v. Speight, 827 F. App'x 238, 240 (3d Cir. 2020) for application of transformative use test by the Third Circuit; *Comedy III*, 21 P.3d at 808.
175. *Comedy III*, 21 P.3d at 809.

likeness of the celebrity."[176] Third, "whether [quantitatively] the literal and imitative or creative elements predominate in the work."[177] Fourth, whether "the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted."[178] Finally, the work is deemed less likely to be transformative if "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 his or her fame."[179]

The outcome of the transformative use test seems to turn on different factors depending on the specific nature of the unauthorized use. In *Comedy III*, which pertained to the use of likeness on articles of clothing, the court reasoned that the t-shirts might qualify for protection under the First Amendment if the use of the likeness in the product transcended a "conventional depiction" of the Three Stooges that was being exploited for commercial gain.[180] Unfortunately for the defendant, the court found that "the marketability and economic value of [defendant's] work derives primarily from the fame of the celebrities depicted" rather than any unique expression of his own, and found in favor of the plaintiff's right of publicity claim.[181]

In the context of literature, courts appear to emphasize the extent to which the use of likeness was one of the "raw materials" from which the work was created. When the test was applied in the case of a comic book featuring characters bearing striking likeness to acclaimed musicians Johnny and Edgar Winter, for example, courts emphasized the extent to which the representations were enhanced by the author to create "fanciful, creative characters."[182] Though the depictions of the brothers were highly evocative, prominently featuring the "long white hair and albino features" that made the musicians so recognizable, they were in the context of "half-human, half-worm" creatures, rendering them non-literal depictions that were "distorted for purposes of lampoon, parody or caricature."[183] These differences, according to the court, rendered the use of the likenesses to be a "raw material" used in the composition of "a larger story, which itself is quite expressive" and

176. *Keller*, 724 F.3d at 1274.
177. *Id.*
178. *Id.*
179. *Id.* (citing *Comedy III*, 21 P.3d at 809).
180. *Comedy III*, 21 P.3d at 811.
181. *Id.*
182. Winter v. D.C. Comics, 134 Cal. Rptr. 2d 634, 642 (2003).
183. *Id.* at 638.

predominately the work of the author.[184] The court therefore afforded the comic books First Amendment protection and declined to extend liability.[185]

Conversely, the inquiry as applied to toys seems to rest primarily on the third inquiry, which is whether the toy would "threaten the market for celebrity memorabilia that the right of publicity is designed to protect."[186] This was seen in a case that confronted the question of whether a popular line of dolls bearing a striking resemblance to members of well-known female pop group OMG Girlz constituted expressive speech protectable under the First Amendment.[187] While the court acknowledged that the dolls had some transformative qualities, including "designs and looks that differ greatly" from the OMG members, it found that the dolls' "musical theme" mirrored the "public depictions" of the group. Such similarity led the court to "believe that the OMG Girlz market overlaps with the potential purchasers of the OMG Dolls," and caused concern that the dolls might supplant the market for sanctioned OMG Girlz products.[188] Perhaps, had the manufacturer chosen a different profession for the dolls, say, as athletes, visual artists, or doctors, the court may have found the toys sufficiently transformed from their real-life counterparts.

Contrasted with this transformative use approach, some other jurisdictions, including New York state courts, take a more "medium-centric" approach.[189] Potentially expressive uses are assessed based on whether they constitute trade or advertising, or instead may be construed as a form of art, news, or social commentary.[190] Unfortunately for litigants, this approach is much less developed than the transformative use test. Whereas the toy manufacturer in California could point to the altered physical characteristics of the toy relative to the person, or call attention to the fact that the doll exists within a different fictional world (e.g., a "musician" version of a political figure, etc.) and have their work deemed "expressive," a New York toy manufacturer would have to first convince the court that the dolls, despite being commercial products, are also artistic works to which right of publicity claims do not apply.[191] The manufacturer might, for example, call the toys "sculptures," in

184. *Id.* at 641.

185. *Id.* at 642.

186. MGA Entertainment, Case No. 2:20-cv-11548-J VS (AGRx), 2022 WL 4596697, at *16 (quoting *Comedy III*, 25 Cal. 4th at 405).

187. *Id.* at *15.

188. *Id.* at *16.

189. *See* Dryer v. National Football League, 55 F. Supp. 3d 1181, 1188 (D.Minn. 2014).

190. Champion v. Take Two Interactive Software, Inc., 64 Misc. 3d 530, 535 (Sup. Ct. 2019).

191. Burk v. Mars, Inc., 571 F. Supp. 2d 446, 451 (S.D.N.Y. 2008).

which case they may be entitled to sell copies.[192] Unfortunately for the toy manufacturer, courts scrutinize such purportedly artistic works closely, considering the "underlying nature of the work"[193] and whether it possesses certain key defining attributes of the artistic medium.[194] While courts have not clearly delineated the criteria for work to be properly characterized as "sculpture" in the same manner that they have alluded to the criteria required for a work to be "literary," even if the dolls did qualify as art, the mass distribution of dolls would exceed the sale of only a "limited number of copies," which courts condone.[195]

Complicating matters, that same toy manufacturer, regardless of the circuit, could prevail in a right of publicity suit by claiming the toy constituted social commentary or criticism. The beloved merchandise retailer Target found great success using this approach after being sued for producing and selling an informational plaque engraved with the image of civil rights icon Rosa Parks.[196] Despite the fact the plaques were mass-produced and sold at one of the nation's most prominent department stores, the courts excused the product on the grounds that the plaques "communicate[ed] information, express[ed] opinion[s], recite[ed] grievances, [and] protest[ed] claimed abuses," and was "necessary to chronicling and discussing the history of the Civil Rights Movement."[197]

In the context of literary works, these medium-centric jurisdiction courts have held that "works of fiction do not fall within the narrow scope of the statutory definitions of advertising or trade,"[198] regardless of their purpose, or the scale of their production and distribution.[199] Such fictional works have been held to include novels and films based on public figures, which depict fictionalized accounts of actual events,[200] as well as television shows with

192. *See* Simeonov v. Tiegs, 159 Misc. 2d 54, 58–59 (Civ. Ct. 1993).

193. *See* Hoepker v. Kruger, 200 F. Supp. 2d 340, 352 (S.D.N.Y. 2002).

194. *Champion*, 64 Misc. 3d at 535 (commenting that video game in question lacked certain defining literary features including narrative plot and character development).

195. *Hoepker*, 200 F. Supp. 2d at 349.

196. Rosa Parks Inst. for Self-Development v. Target Corp., 812 F.3d 824 (11th Cir. 2016).

197. *Id.* at 831–32.

198. Costanza v. Seinfeld, 279 A.D.2d 255, 255 (2001) (internal quotation marks omitted).

199. Hicks v. Casablanca Records, 464 F. Supp. 426, 432 (S.D.N.Y. 1978).

200. *Id.* at 433 (holding that, "the Court finds that the right of publicity does not attach here, where a fictionalized account of an event in the life of a public figure is depicted in a novel or movie, and in such novel or movie it is evident to the public that the events so depicted are fictitious.").

entirely fictional characters.[201] Courts have, however, suggested that the permissibility of fictionalized portrayals may be contingent upon the content creators' providing disclaimers regarding the content, such that it becomes clearly "evident to the public" that such elements are fictitious.[202]

2. Deepfakes in the Expressive Use Context

In many cases, deepfake videos may take the form of political speech or social commentary, thus qualifying as a form of speech protected under the First Amendment under any test.[203] Political figures have become popular targets of deepfakes, which range from whimsical TikTok reels of Biden, Trump, and Obama playing video games,[204] to more nefarious portrayals, such as the doctored clip of an ostensibly inebriated Nancy Pelosi, in which she appears to be slurring her words.[205] Deepfakes seem to provide potent forms of social commentary, given the wide publicity and media attention surrounding videos such as the fabricated CBS interview with Mark Zuckerberg. The counterfeited interview was clearly intended as a derisive commentary on the social media platform's disregard for, and malfeasance regarding, user privacy and autonomy, as the tech mogul alluded to having the power to control the future by manipulating "billions of people's stolen data."[206]

While some uses of politicians and other prominent figures within deepfake videos are clearly social commentary—such as the 2018 video depicting former President Obama calling then-President Trump a "dipshit" and warning the audience about the potential for deepfakes to interfere with democratic processes[207]—others are more ambiguous. Such uncertainty is

201. *Costanza*, 279 A.D.2d at 255 (finding no liability for Seinfeld creators, despite the fact the name of the fictional character "George Costanza" belonged to an actual man).

202. *Hicks*, 464 F. Supp. At 433.

203. Gloria Franke, *The Right Of Publicity Vs. The First Amendment: Will One Test Ever Capture The Starring Role?*, 79 S. CAL. L. REV. 945, 960–61 (2006).

204. Tmparagon, *Trump Plays Destiny with Biden and Obama*, TIKTOK (Feb. 19, 2023), https://www.tiktok.com/@tmparagon/video/7202039315461917994.

205. Simon Parkin, *The Rise of the Deepfake and the Threat to Democracy*, GUARDIAN (June 22, 2019), https://www.theguardian.com/technology/ng-interactive/2019/jun/22/the-rise-of-the-deepfake-and-the-threat-to-democracy.

206. Samantha Cole, *This Deepfake of Mark Zuckerberg Tests Facebook's Fake Video Policies*, VICE (June 11, 2019), https://www.vice.com/en/article/ywyxex/deepfake-of-mark-zuckerberg-facebook-fake-video-policy.

207. James Vincent, *Watch Jordan Peele Use AI to Make Barack Obama Deliver a PSA About Fake News*, VERGE (Apr. 17, 2018), https://www.theverge.com/tldr/2018/4/17/17247334/ai-fake-news-video-barack-obama-jordan-peele-buzzfeed.

especially acute in cases where the public figures in question wear multiple hats, such as in the case of celebrity politicians.

Though the majority of current expressive uses of deepfakes fit into this category of short-form comedy entertainment, the future could be far different. What about the hypothetical from our introduction, of a deepfaked TV star? TV shows and movies are expressive works, the same as literature. Scripted TV shows and movies have long incorporated some real-world footage of actual persons and events, but these uses have been constrained by the requirement that the footage actually exist. Deepfakes remove that restriction. Could someone deepfake a presidential address to announce a Martian invasion? Could they otherwise deepfake a noteworthy person into a movie as a cameo? Or replace an actor entirely? Could they create a deepfake of a person to star in a biopic of their own life?

The 2023 amendments to the Screen Actors Guild contract struggled with these questions. Under that contract, the use of "independently created digital replicas" requires explicit consent and compensation, except when either the person depicted is playing themselves or the use is "protected by the First Amendment (e.g., comment, criticism, scholarship, satire or parody, use in a docudrama, or historical or biographical work, to the extent protected by the First Amendment.)"[208] So the contract would prohibit a production from using a guild member to play a role without their consent, but it would allow the production to create a deepfake of people playing themselves. Does the right of publicity provide a remedy for someone not party to the contract or insufficiently protected by it? A recent spate of cases pertaining to use of likeness within video games may provide clues as to how courts would address the matter. Like deepfakes, video games involve the use of digital replicas that depict individuals doing things their real-life counterparts have not done. Unfortunately, use of likeness within video games is itself a murky class of right of publicity litigation that has only started developing over the past twenty years. In general, courts have found that unauthorized importation of athletes into sporting games is not a protected expressive use, but the law is less clear for other sorts of applications.[209]

208. SAG-AFTRA, *TV/Theatrical Contracts 2023: Summary of Tentative Agreement* 3, https://www.sagaftra.org/files/sa_documents/TV-Theatrical_23_Summary_Agreement_Final.pdf.

209. *See* Davis v. Elec. Arts, Inc., 775 F.3d 1171, 1181 (9th Cir. 2015); *see* Keller, 724 F.3d at 1270, 1276; *see* Dryer, 55 F. Supp. 3d. at 1204.

3. Deepfakes in Transformative-Use Jurisdictions

Generally speaking, jurisdictions using the transformative use test recognize video games as being inherently expressive works entitled to the full protections of the First Amendment pending their satisfaction of the transformative use test.[210] While not a traditional form of creative expression, video games, nevertheless, are classified among "books, plays and movies" based on their capacity to "communicate ideas and even social messages," and are thus assessed accordingly.[211]

So too with deepfakes. While a Trump vs. Obama *Fortnite* battle may not contain the most sophisticated "social message," it nevertheless communicates an idea: how would two of the most radically different former Presidents' personas manifest themselves in a virtual video game battle?[212] Like video games, then, "the pivotal issue is whether the work is transformative."[213]

Cases seem to turn on whether the celebrities are portrayed in the professional and physical contexts in which they are known in real life. While courts acknowledge that the capability to alter celebrity avatars may add new expression beyond "celebrity's literal likeness," such transmutability is viewed as a sideshow rather than main feature.[214] What courts consider more relevant is whether "the appeal of the game lies in the user's ability to play as or alongside" the celebrities depicted.[215] If playing as the celebrity is the primary draw of the game, "the graphics and other background content of the game" are akin to an artist's skill and talent which are "subordinated to the overall goal of creating a conventional portrait of a [celebrity] so as to commercially exploit [its] fame."[216] Such lines of reasoning can be distilled to two fundamental inquiries, which seem to be dispositive. First, are the characters in the game doing the "same activity for which they are known in real life?"[217] Second, is the context in which the activity in the game occurs the same setting as where the public would actually encounter the celebrity?[218] When the

210. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011).

211. *Id.*; *see also* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977). ("broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer").

212. Realbekfast09, *Trump and Obama 1v1 on Fortnite,* TIKTOK (Feb. 17, 2023), https://www.tiktok.com/@realbekfast09/video/7201351989286980907.

213. *Kirby*, 144 Cal. App. 4th at 60.

214. *No Doubt*, 192 Cal. App. 4th at 1034.

215. *Hart*, 717 F.3d at 168.

216. *No Doubt*, 192 Cal. App.4th at 1035.

217. *Keller*, 724 F.3d at 1276.

218. *Id.*

answers to these questions are both yes, any other creative elements of a game, no matter how fanciful, will not militate against a finding of non-transformativeness.[219]

Applying this reasoning to deepfakes, the greater the extent to which a celebrity or public figure is transposed into a different role, the more transformative the video. For example, the TikTok video series depicting Trump, Obama, and Biden in spirited *Fortnite* battles would likely qualify as transformative based on the courts' current approach.[220] First, none of the Presidents participating in the first-person-shooter game competitions appear to have an affinity for video games, nor do they participate in para-military tactical operations of the sort depicted in the games themselves. Trump is well-known to have evaded military service,[221] Obama has gone on record encouraging children to "put down the video games and do something with your life,"[222] and Biden has championed bills banning assault-style weapons of the sort prominently featured in the games.[223] Similarly, the context in which the activity occurs—the presidents competing amongst themselves after-hours and from their respective homes—is decidedly *not* where the public would encounter these prominent public figures. In fact, arguably, the entire appeal of the videos turns upon the juxtaposition of the gravitas of the U.S. Presidency, with the banal triviality of a gaming competition,[224] essentially putting the politicians in a role in which they've never been seen before.

Conversely, consider the Zuckerberg deepfake video, depicting the Facebook founder giving an interview and speaking about the potentially sinister uses of customer data. Unlike Obama, Trump and Biden, who have never been known to play Fortnite, Zuckerberg regularly conducts interviews

219. *No Doubt*, 192 Cal. App. 4th at 1034 (finding that a game was non-transformative despite allowing players to place celebrity avatars in unusual settings "surrounded by unique, creative elements, including in fanciful venues such as outer space").

220. Realbekfast09, *supra* note 212.

221. Mariana Alfaro, *Donald Trump Avoided the Military Draft Five Times but It Wasn't Uncommon for Young Men from Influential Families to Do So During the Vietnam War*, INSIDER (Dec. 26, 2018), https://www.businessinsider.com/donald-trump-avoided-the-military-draft-which-was-common-at-the-time-vietnam-war-2018-12?op=1.

222. Brian Crecente, *Video Games Owe a Lot to President Obama's Administration*, POLYGON (Jan. 20 2017), https://www.polygon.com/2017/1/20/14335040/barack-obama-gaming-president.

223. John Yoon, *Shootings Revive Push for an Assault Weapons Ban*, N.Y. TIMES (Jan. 2023), https://www.nytimes.com/2023/01/24/us/california-assault-weapon-ban.html.

224. Ana Diaz, *TikTok Videos are Using AI Tools to turn Biden, Trump and Obama into Discord Goblins*, POLYGON (Feb. 22, 2023), https://www.polygon.com/23610381/presidents-play-minecraft-ai-voice-meme-joe-biden-trump.

in which he speaks about the collection and use of customer data.[225] In fact, the deepfake was released on the heels of the 2018 scandal regarding Facebook's negligence surrounding the harvesting and exploitation of millions of users' data by a political consulting firm, an event which prompted Zuckerberg to give numerous highly publicized interviews about Facebook's data collection practices.[226] So both the content and context of the video—Zuckerberg apparently giving an interview on the hot-button issue of data protection to a news outlet—reflect Zuckerberg's real-life activities. As such, a California court might not characterize the video as transformative.

Moving into the world of longer-form entertainment, nonconsensual deepfakes would likely often violate the right of publicity. Deepfaking a presidential address to add an air of authenticity to an alien invasion movie is likely not transformative in the sense of the *Overwatch* videos; we expect presidents to give addresses. Nor is it social commentary. The movie makers would have a difficult time claiming that they intended to opine on Biden, Trump, or Obama's approach to extraterrestrial life.

Using deepfakes to put an actor into a work—or to add scenes with an actor—would likely also violate the right of publicity. As in *OMG Girlz* dolls case, the deepfake would introduce a directly competing product, infringing on what is traditionally licensed.

4. Deepfakes in Medium-Centric Jurisdictions

Medium-centric jurisdictions will face greater challenges here. Though New York recognizes that some video games may be within the ambit of the First Amendment protection, coverage is contingent upon the nature of the video game, as "not every video game constitutes fiction or satire."[227] This logic may be extended to deepfakes, which, like video games, may be required to have a "unique nature" and contain characteristics such as "a story, characters, dialogue and environment," to qualify as a work of art.[228] The problem here is that the elements that make video games fall out of protection

225. *See* Kevin Roose & Sheera Frenkell, *Mark Zuckerberg's Reckoning: 'This Is a Major Trust Issue'*, N.Y. TIMES (Mar. 21, 2018), https://www.nytimes.com/2018/03/21/technology/mark-zuckerberg-q-and-a.html; *see* Arjun Kharpal, *Facebook CEO Mark Zuckerberg's Key Comments On the Data Scandal*, CNBC (Mar. 22, 2018); *see* Ana Alexandre, *Mark Zuckerberg Considers Blockchain Authorization of Data in Recent Interview*, COINTELEGRAPH (Feb. 2019), https://cointelegraph.com/news/mark-zuckerberg-considers-blockchain-authorization-of-data-in-recent-interview.

226. Roose & Frenkel, *supra* note 225.

227. Champion, 64 Misc. 3d at 51.

228. *Id.* at 541.

in New York are precisely the same elements that make movie and television deepfakes especially dangerous.

In the context of video games, New York courts suggest that the existence of a "plot created by game designers" as well as the presence of pre-defined characters may bring a game within the realm of protected speech, whereas games where " the users create the plot, storyline and […] character" enjoy no such status.[229] For example, in *Take Two v. Champion*, decided under New York law, the video game at issue was the first-person player basketball game *NBA2K18*, in which users "play basketball as an avatar in a virtual world."[230] The game involved users controlling certain "playable […] characters" in multiple story modes, including a "MyCAREER" mode in which "the goal of the user is to take their self-created avatar through the process of becoming an National Basketball Association player."[231] Given this user-directed nature of the game's progression, the court dismissed the game's inherent protectability, stating that "a determination the NBA2K18 is protected fiction or satire as a matter of law is untenable."[232] Under New York law, certain games are not recognized as speech inherently by their nature, and thus any appropriated likenesses within them would not qualify for protection, regardless of how transformative they were. Conversely, once a video game is deemed as being within the realm of the Free Speech clause of the First Amendment, it would appear that any use of likeness becomes acceptable, no transformation required.[233]

As far as deepfakes are concerned, whether the deepfake constitutes art, and would thus be deemed protectable may turn on whether the video has whatever qualities or elements of an audiovisual work that the court characterizes as essential to the work's nature as a film. Just as the court refused to view NBA2K18 as art because its user-directed nature rendered it insufficiently plot-driven, so too might the court decline to recognize certain

229. *Id.* at 531.

230. *Id.* at 532.

231. *Id.* at 532–33.

232. *Id.* at 541.

233. Gravano v. Take-Two Interactive Software, Inc., 142 A.D.3d 776, 777, 37 N.Y.S.3d 20, 22 (2016) ("[P]laintiffs' claims should be dismissed because this video game does not fall under the statutory definitions of 'advertising' or 'trade'. . . . [Grand Theft Auto V's] unique story, characters, dialogue, and environment, combined with the player's ability to choose how to proceed in the game, render it a work of fiction and satire."); *see also* Burck, 571 F. Supp. 2d at 457 (noting that parody can be of a hybrid nature and include both artistic expression and commercial promotion); Simeonov, 159 Misc. 2d at 54 ("An artist may make a work of art that includes a recognizable likeness of a person without her or his written consent and sell at least a limited number of copies thereof without violating Civil Rights Law sections 50 and 51.").

deepfakes as "works of fiction," despite them being inventive. For example, consider the popular "Deepfake Roundtable," featuring the likes of Tom Cruise, George Lucas, and Ewan McGregor, who have convened to discuss the relative merits of different streaming platforms, the inspiration behind some of their most famous works, and their smartphone applications of choice.[234] While the video expertly captures the dynamic nature of a group conversation, it also reconstructs the chaos, non-sequiturs, and tangential ramblings that are intrinsic to such multi-party discussions. Just as the *Champion* court concluded that the lack of a pre-constructed game-play narrative was enough to remove the game from the purview of fiction,[235] a court might find the confab devoid of the type of plot arc expected of fictional cinematic works. Conversely, a deepfake like the Trump *Breaking Bad* clip, in which Trump's character advises his hapless drug dealer client to purchase a nail salon for use as a front in a money-laundering operation, has a more clearly delineated story, developed characters, and takes place in the distinct setting of a nail salon.[236]

Core entertainment uses, such as replacing actors in movies and creating fake scenes involving real people, are literary works in a way that video games are not. They have plots and character arcs. In a medium-centric jurisdiction, real people can quite possibly be deepfaked into movies and TV shows. There is limited guidance from New York courts on this question, with most relevant opinions coming from lower courts in that jurisdiction. The logic of the above cases indicates that such deepfaking should be permitted so long as the movies are works of art. We, therefore, may have an outcome-determinative split between jurisdictions. In the 9th Circuit, such uses are very likely not protected speech. In New York, they very well might be protected.

IV. PROPOSAL FOR NEW RIGHT OF PUBLICITY SCHEME AS APPLIED TO DEEPFAKES

Currently there is no systematic legal framework to address deepfakes or provide redress to individuals suffering reputational or commercial harms as a

234. Collider Video, *Deepfake Roundtable with George Lucas, Tom Cruise, Robert Downey Jr. and More,* COLLIDER (Nov. 14, 2019), https://collider.com/deepfake-roundtable-george-lucas-tom-cruise-robert-downey-jr/.

235. Champion v. Take Two, 64 Misc. 3d at 540–41.

236. *Better Call Trump: Money Laundering 101[Deepfake]*, YOUTUBE (Sept. 18, 2019), https://www.youtube.com/watch?v=Ho9h0ouemWQ.

result of their creation and dissemination.[237] Some states have recognized the unique character of deepfakes and incorporated special provisions surrounding their use into their right of publicity and privacy laws. In most cases, however, the laws are cabined to address the use of deepfakes in specific contexts. New York makes deepfake creation actionable in cases where the deepfake is either a "digital replica" of a "deceased personality"[238] or constitutes nonconsensual pornography.[239] Other states, including California and Texas, have introduced laws barring the creation or distribution of a deepfake with the intent to harm a political candidate within a limited period prior to an election.[240] In 2023, Illinois enacted a law that allows civil actions against distributors of unauthorized pornographic deepfakes.[241] It then enacted a pair of laws regulating commercial use of deepfakes in 2024.[242]

While right of publicity law has been invoked as one possible avenue for pursuing claims against deepfake creators,[243] there is substantial uncertainty on several key questions. Two demand attention. First, does a broad grant of publicity rights automatically include deepfakes? This is a question of special importance as many actors who are famous now—or will become famous in the next few decades—signed such releases prior to the advent of deepfakes. Second, how are we to draw the line demarcating expressive uses? Some use of public figures should be allowed, even in commercialized works. It would be truly strange to say that an actor could not play former President Obama in a movie about his own life. But does that also imply that it should be permissible to deepfake Obama for that purpose?

We propose addressing these concerns by characterizing deepfake creation as a special type of use of likeness. Specifically, we propose both requiring explicit and detailed consent to acquire license rights by contract and a more

237. Robert C. Post & Jennifer E. Rothman, *The First Amendment And The Right(s) Of Publicity*, 130 YALE L.J. 89, 127–28 (2020); Carolyn Pepper, Peter Raymond, Jonathan Andrews, & Talia Fiano, *Reputation Management and the Growing Threat of Deepfakes*, BLOOMBERG LAW (July 9, 2021), https://news.bloomberglaw.com/us-law-week/reputation-management-and-the-growing-threat-of-deepfakes.

238. Clark, *supra* note 112.

239. N.Y. CIV. CODE § 52-c(1)(a).

240. Clark, *supra* note 112.

241. ILL. PUB. ACT 103–0294, https://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=103-0294. To be codified at 720 ILL. COMP. STAT. 5/11-23.5.

242. *See infra* note 290 on licensing; *see infra* note 310 on entertainment uses.

243. Pepper et. al., *supra* note 237.

limited scope of permissible expressive uses. By drawing a distinction between deepfakes and other uses of likeness, contracting parties will have to seek separate licenses to create a deepfake, allowing individuals to retain more control. And by holding expressive uses of deepfakes to a higher standard to receive First Amendment protection, deepfake creators would need to exercise greater care in their representations should they choose to create and publish deepfakes, thus militating against the most dangerous dignitary harms that deepfakes pose.

A. COMMERCIAL USES—A REVISED LICENSING SCHEME

To avoid running afoul of right of publicity laws, those hoping to use a celebrity's likeness in a commercial context typically seek a license from the individual depicted.[244] The scope of such licenses varies tremendously, and previously entertainers (and their lawyers) did not have significant occasion to consider whether deepfakes fall within the suite of rights such licenses may grant.

Right of publicity clauses embedded within a performance contract can be extraordinarily broad. Consider several university examples. Pennsylvania State University's license form for speakers and presenters affirmatively grants to the university "irrevocable, world-wide, royalty-free right and license" to "adapt, modify, reproduce, distribute, publicly perform, and display" "photographs, video, and/or audio."[245] Stanford's equivalent form grants simply "permission to use my name, likeness and biographic information and the Materials to use, promote or exploit the Recording or any derivative work of the Recording."[246] One of Yale's speaker release forms grants Yale the "right to copy, reproduce, photograph, distribute, transmit, broadcast, exhibit, transcribe, digitize, display, copyright, license, transfer, reproduce, translate, edit or otherwise use perpetually throughout the world in all media now existing and hereinafter developed all or a portion of the recording of such Performance and my name and biographical information, for educational,

244. *Publicity Rights: Artists vs. Celebrities*, LICENSE GLOBAL (2018), https://www.licenseglobal.com/reports/publicity-rights-artists-vs-celebrities.

245. *Consent, License And Release Agreement*, *supra* note 35.

246. *Release for Speakers/Presenters/Performers*, STANFORD UNIV., https://ucomm.stanford.edu/wp-content/uploads/sites/15/2021/10/speakerrelease_final.pdf.

promotional or other purposes that support Yale's mission." [247] It also expressly releases Yale "from any claims arising from the use of the Performance including any claims that Yale has defamed me, invaded my privacy, or infringed my moral rights, rights of publicity or copyright."[248] What is a deepfake, but a derivative or edited work? An adaptation? Courts have proven to honor such sweeping grants pertaining to the specific types of likeness covered, interpreting affirmative grants to use a party's likeness "without limitation" to indeed be limitless.[249]

Provisions pertaining to particular uses of likeness and assignment and sub-licensing of publicity rights can be equally extreme, with agreements requiring parties to authorize uses of likeness for "promotional, educational, informational, advertising or commercial materials and communications in any form now known or later developed" "in the Media for all Materials or any other purposes deemed appropriate." [250] Such language gives licensing agreements vast reach, frequently resulting in bewilderment on the part of the individual contracting, who may discover they have unwittingly granted consent to be depicted in a video game after signing what was ostensibly a sports contract.[251]

Yet granting the right to create and use a deepfake may have far greater implications than licensing the right to use other forms of likeness. To recognize it as such, courts ought to construe the grant of license to create a deepfake as separate from any other type of waiver. Much like the right to sub-license or assign a right of publicity, courts ought to construe entertainment contracts as prohibiting use of a form of likeness, absent a specific provision. Further, where the right is granted, the grant ought to presumptively extend to a single use, absent language specifically naming and describing a particular set of uses. Even "unlimited" grants ought to be subject to a limitation period,

247. *Speaker's Permissions Form*, YALE UNIV., https://celebratewomen.yale.edu/sites/default/files/files/Yale-Speakers-Permission-Form.pdf.

248. *Id.*

249. Neal v. Elec. Arts, Inc., 374 F. Supp. 2d at 577–79 (allowing use of college football player's likeness in a video game based on the player's contract with the sports league, assigning "to the NFLPA and its licensing affiliates, if any, the exclusive right to use and to grant to persons, firms or corporations (collectively 'licensees') the right to use his name, signature facsimile, voice, picture, photograph, likeness, and/or biographical information (collectively 'image') in group licensing programs").

250. *Consent, License And Release Agreement*, *supra* note 35.

251. Neal, 374 F. Supp. 2d 574.

such as the seven-year limitation that applies to personal service contracts in California's entertainment industry.[252]

Requiring such specificity would be consistent with the provisions of the 2023 Screen Actors Guild contract.[253] The contract requires fresh consent to reuse a person's likeness in a new motion picture unless "a reasonably specific description of the intended use is provided for each identified project" is included in the initial license.

Courts have already proven willing to stretch the doctrinal limits of right of publicity law in cases where appropriations of likeness pose an existential threat to one's livelihood. In the only right of publicity case to reach the Supreme Court, it held that such threats were special and worthy of additional protection.[254] It held that a news report of a human cannonball act that showed the entire short act could give rise to liability even though the report was both newsworthy and brief.[255] Given deepfakes' potential to significantly impinge upon opportunities for performers to generate income, these unique forms of likeness ought to be viewed with the same scrutiny, including in contexts where uses of likeness might otherwise be authorized, such as when the right to use of likeness is licensed in performance contracts and entertainment agreements.

1. Limitations of Existing Licensing Scheme

Publicity rights have been construed as being alienable since their inception, with individuals having the right and power to contract around the right to use their likeness.[256] Waivers of publicity rights already feature prominently in film and media contracts, and "use of likeness" is heavily

252. CAL. LAB. CODE § 2855(a).

253. *See* SAG-AFTRA, *supra* note 208 at 2.

254. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 575 (1977) (holding that the First Amendment did not block a right of publicity action brought by an entertainer performing a "human cannonball" since "[t]he broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance").

255. *See id.* at 574–75 (finding what might otherwise be a wholly protected "newsworthy" use—a television broadcast of man shooting himself from a cannon—to be an "unlawful appropriation" of the Plaintiff's identity, because, despite being a matter of legitimate public interest the media might otherwise be free to report on, the cannon-ball performance constituted plaintiff's "entire act," which, given its availability on television, the public would be less willing to pay to see the live, depriving the plaintiff of the "economic benefit of cultivating his own talent").

256. *See Haelan Labs*, 202 F.2d at 868.

negotiated.[257] Currently, as used in such agreements, performers would likely presume the term "likeness" to have its traditional meaning, entailing the use of photograph, video, voice, or, perhaps, an impersonation or non-literal recreation.[258] In the deepfake era, however, "use of likeness" may be interpreted to include an additional use that has not been contemplated by performers, namely, the freedom for rightsholders to create and use digital reconstructions of performers without additional consent.[259]

Because liability regarding infringement upon one's right of publicity is found only when rightsholders have exceeded the scope of their license to use a likeness,[260] parties receiving broad waivers regarding "use of likeness" have significant leeway regarding depictions of the contracting individual. For example, one court found that a football player's "NFL Player's Contract" granting the "exclusive right to use and to grant to persons, firms or corporations (collectively "licensees") the right to use his name, signature, facsimile, voice, picture, photograph, likeness and/or biographical information" was sufficient to defeat right of publicity claims arising from his subsequent depiction in a video game licensed by the NFL.[261] Such sweeping grants to use of likeness come standard in media contracts, meaning that companies—as well as any parties those companies contract with[262]—have vast ownership rights over performers' likenesses.[263]

257. *See* Lalla, Mitrani & Harned, *supra* note 11. Sample right of publicity clauses include sweeping language, granting producers the right to "unrestricted, worldwide, royalty-free right to use, reproduce, publish and otherwise distribute your name, photograph, video presence, personal story and/or likeness," and "use Narrator's name, likeness, and biographical information, within reasonable commercial standards and in good taste." Right of Publicity *Sample Clauses*, Law Insider.

258. *See* Lalla, Mitrani & Harned, *supra* note 11 (saying that "it is unlikely that talent releases or agreements generally contemplate the right to use likeness rights as a wrapper to generate a potentially infinite number of lifelike deepfakes.").

259. *See* Lalla, Mitrani & Harned, *supra* note 11.

260. Miller v. Glenn Miller Prods., 318 F. Supp. 2d 923, 939 (finding that defendant's sub-licensing the use of deceased musician's name exceeded the scope of their licensing agreement regarding permitted uses of likeness, and was thus infringement of right of publicity).

261. *Neal*, 374 F. Supp. 2d at 577–79.

262. Delaney v. Newsday, Inc., 1991 WL 95125 (1991), at *2 (concluding that when a release is sufficiently broad, it can apply to "any persons acting with the permission" of the licensee, or third party for whom a licensee "might be acting" indicating virtually limitless scope for purposes of use).

263. *See* Marks, *supra* note 26.

The monetary losses to performers as the result of such expansive ownership rights could be staggering. Assuming broad right of publicity grants have been given to studios by virtue of signing an entertainment contract, studios would "own" the performances of actors—and all of their derivatives. Entire films and television series could be updated as "reboots" without replacing cast members, or, alternatively, a single cast member could be swapped out and replaced, perhaps in light of a scandal or dispute that tainted a single actor.[264] This would not require the use of motion capture suits or similar bits of physical technology; software alone could make a stunt double pass for the real thing. Given the extraordinary salaries that actors are offered to reprise roles in reboots and spinoffs, the loss of such opportunities to deepfakes represents massive economic losses.[265] Thus far, however, the issue has only just now been recognized by the media industry and has yet to be systematically addressed by state legislatures.[266]

Consider again Bruce Willis' commercial.[267] Willis was savvy and created a narrow agreement, ensuring he granted the company the right to reconstruct his "digital twin" for the limited purpose of a single advertisement only.[268] But because there is currently no system in place to ensure footage, including any consensually created deepfakes, will not be abused or exploited, contracting parties are left "flailing about," trying to protect their economic and reputational interests.[269] Actors unions have already warned about the potential for "actors' bodies, voices, and personalities" to be "lifted from their screen work and manipulated into footage they do not approve of and don't get any compensation for."[270] Lawsuits have also been filed regarding the reputational damage wrought by deepfakes.[271]

264. *See* Hood, *supra* note 10.

265. *See* Jason Pham, *And Just Like That Cast Salary: The Highest-Paid Cast Member Isn't the Same as SATC*, STYLE CASTER (June 23, 2023), https://stylecaster.com/entertainment/tv-movies/1241011/and-just-like-that-salaries/.

266. *See* Marks, *supra* note 26. New York is a notable exception, and the only state whose right of publicity laws specifically addresses deepfakes outside the context of either nonconsensual pornography, or election-tampering.

267. Sharf, *supra* note 14.

268. *Id.*

269. Hao, *supra* note 23.

270. Marks, *supra* note 26.

271. *See* Pepper et. al., *supra* note 237.

Current trends surrounding contracting—both procedural and substantive—leave performers especially vulnerable to this type of exploitation. Contracting has become a precarious affair, as terms and provisions are increasingly less personalized,[272] and parties are increasingly less inclined to carefully read and asses them.[273] Contract scholars have pointed out that with the rise of the internet, contracting parties—particularly those with enhanced bargaining power—have increased access to cheap, boilerplate contracts that include disproportionately favorable provisions.[274] Indeed, free, open-source resources offer sample right of publicity clauses that can be easily incorporated into more comprehensive entertainment contracts.[275] These clauses are almost laughably broad, including language like right to use likeness "in all media, whether now known or hereafter devised" and "in all forms including, without limitation, digitized images or video, throughout the universe in perpetuity."[276] While such clauses appear hyperbolic, they in fact do appear in real consent agreements and liability waivers, such as the university ones cited above.[277] The ubiquity of such provisions creates a normative force regarding performers and entertainers' expectations when contracting, eroding entertainers' bargaining power, such that they grant far more valuable rights than what they are ostensibly contracting for.[278]

Courts have generally enforced broadly written right of publicity licenses, even ones granting assignability of the right, broad uses of the likeness itself, and waivers of dignitary rights associated with such uses.[279] This is particularly concerning in the deepfake era, as releases from ancillary claims that might otherwise be invoked to combat the creation and dissemination of particularly

272. *See* David Hoffman, *Defeating the Empire of Forms*, 109 VIR. L. REV. 1367, 1382 (2023) (discussing the increasing prevalence of boilerplate contracts pulled from open-source online resources).

273. *Id.* at 1379–86.

274. *Id.*

275. *See Right of Publicity Sample Clauses*, LAW INSIDER, https://www.lawinsider.com/clause/right-of-publicity.

276. *Id.*

277. *Consent, License And Release Agreement*, PENN STATE UNIV. (2023); *Speaker's Permissions Form*, YALE UNIV., https://celebratewomen.yale.edu/sites/default/files/files/Yale-Speakers-Permission-Form.pdf.

278. *See* Hoffman, *supra* note 272 at 16.

279. Krupnick v. NBC Universal, Inc., 2010 WL 9013658 (SC NYC 2010) at *4, 5. *Neal*, 374 F. Supp. 2d at 579.

offensive unauthorized deepfakes, including invasion of privacy or libel, have been honored by courts as sufficient to avoid liability.[280]

2. Proposal for Separate "Deepfake License"

While savvy performers may certainly address the production and use of deepfakes, and establish precise parameters regarding such uses,[281] greater protection is warranted to protect less sophisticated parties because of the power and versatility of deepfakes. Rather than assuming deepfakes are encompassed within a "use of likeness" clause unless otherwise stated or separately addressed, there ought to be a default assumption that the right to digitally reconstruct and use a performer's likeness is inherently outside the scope of "use of likeness" clauses, and instead requires a separately negotiated provision.

Under this scheme, deepfake rights may be granted only as a specific form of license, separately negotiated from the traditional suite of right of publicity rights. This license should speak specifically about "digital replicas," "deepfakes," or similar, and not stretch terms like "adaptation," "derivative work," or "image" to include these new types of uses. In the absence of such a license, nearly any creation or use of a deepfake in a commercial context may be considered a *per se* infringement of right of publicity. While studios may have many legitimate reasons to wish to create deepfakes, for example, in the interest of streamlining editing, or even reconstructing a younger version of the actor for a given role, contracting parties will be forced to negotiate the parameters of permitted deepfake uses.[282] This would be similar to the contractual riders created for actors and actresses who are asked to do nude scenes.[283]

Such a proposal is in keeping with courts' current approach regarding certain facets of right of publicity licensing. Where contracts are completely silent regarding the nature of the likeness that may be created and the scope of

280. *Krupnick* at *4, 5.

281. Lalla, Mitrani & Harned, *supra* note 11; SAG-AFTRA, *supra* note 208 at 2.

282. Lalla, Mitrani & Harned, *supra* note 11.

283. *See, e.g.*, Gordon Firemark, *Nudity Riders – What They Are, Why You Need Them*, FIREMARK (Nov. 2, 2015), https://firemark.com/2015/11/02/nudityrider/; Anthony Ferranti, *Everything You Ever Wanted to Know about Nudity Clauses but Were too Shy to Ask*, FILM INDEP. (Aug. 18, 2017), https://www.filmindependent.org/blog/everything-you-ever-wanted-to-know-about-nudity-clauses-but-were-too-shy-to-ask/.

its use, courts are reluctant to impute any specific authorization on the part of a plaintiff.[284] For example, courts draw a distinction between a plaintiff's grant of consent for the purposes of having likeness reproduced, and their authorization regarding the distribution or sale of such reproductions or representations. [285] Similarly, absent explicit provisions pertaining to a licensee's right to assign granted publicity rights, courts typically construe agreements as precluding such transfers and sublicenses.[286] Finally, courts are likewise wary of exclusive licenses, and require exclusivity grants to be express and unqualified before granting a licensee party standing to challenge a third-party's use of the contracting individual's likeness as infringing upon their contracted-for right of publicity.[287]

Conveniently, these heightened standards could be implemented through common law alone, as courts appear not to have had occasion to consider whether the creation or use of a deepfake was covered by a publicity rights waiver. While courts have concluded that use of likeness in video games—which involves an imitation of likeness using CGI technology—is included within broad grants of the right to use "likeness,"[288] the creation of an AI-generated deepfake is different in-kind.[289] So courts already have tools to construe right of publicity clauses in media, entertainment, sports, and other performance contracts to inherently exclude the right to create deepfakes, absent explicit waiver.

In addition to implementing this in the common law, statutes could achieve the same result. A simple addition to a right of publicity statute could add this term under transferability: "A written transfer of publicity rights—or a waiver of publicity claims—shall not be read to license the creation of

284. Brinkley v. Casablancas, 438 N.Y.S.2d 1004, 1008–09 (1981).

285. *Id.* at 1008–09 (drawing a distinction between a model's legitimate grant of approval regarding participation in a "poster project," and lack of consent regarding the ensuing distribution of the photos that resulted as the final product.).

286. *See*, *e.g.*, HBC Ventures, LLC v. Holt MD Consulting, Inc., 2011 WL 13233177, at *18 (finding against the right to grant a sublicense to use an author's likeness in the marketing and promotion of book, as "one must have express permission to sublicense intellectual property rights such as trademark and the right to publicity."); Shamsky v. Garan, Inc.,167 Misc. 2d 149 (N.Y. Sup. Ct. 1995) (finding that grant of authorization to major league baseball team regarding the use of players' photos did not extend to team's sub-licensing of the image to a commercial clothing company).

287. Fighters Inc. v. Elec. Arts Inc., 2009 WL 10699504 (C.D. Cal.), at *6.

288. *See supra* Part II.

289. *See supra* Part IV.

realistic digital replicas unless the transfer specifically mentions digital replicas, deepfakes, or similar term." Digital replica could be defined as "a computer-generated representation of speech or conduct that has been materially manipulated or altered to falsely appear to a reasonable person to be an authentic record of an act, a statement, or the conduct." This would include, for example, anything that appeared to be a live video of George Clooney doing something. It would not, however, include a digital George Clooney avatar playing professional football as part of a video game—that would not falsely appear to a reasonable person to be an authentic record. Further, it would not include a cartoon of George Clooney, a comic of George Clooney, or a doll of George Clooney. Those would all be handled as before.

Such a scheme may have exceptions, including in cases of "de minimis" uses. For example, a license that permits dubbing into a foreign language may also be fairly read to allow deepfakes to be used to match the performer's lips to the already-authorized new dialogue. But such editing should not be used to create entirely new dialogue or scenes without the consent of the depicted individual. And that consent may be freely granted in many cases regardless. Given the choice between allowing deepfake editing for a scene or reshooting it, the actor may be quite happy to forgo the extra hours in the makeup chair.

The state of Illinois enacted a law in the summer of 2024 that would do much of this reform work. It creates a new provision on "unenforceable agreements" that would hold contrary to public policy any contract provision that "allows for the creation and use of a digital replica of the individual's voice or likeness in place of work the individual would otherwise have performed in person" if the provision does not "include a reasonably specific description of the intended uses of the digital replica" unless the individual was represented by counsel or a union who negotiated the digital replica provision.[290]

B. EXPRESSIVE USES—HEIGHTENED STANDARDS FOR FIRST AMENDMENT PROTECTION

In cases where permission is required, the major question for the law is the scope of the license. But where is permission required? Can a studio deepfake a public figure into a cameo appearance even without permission? This returns us to the issue of expressive uses. Many of the kinds of deepfakes considered

290. Digital Voice and Likeness Protection Act Public Act 103-0830, ILL. GEN. ASSEMBLY, https://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=103-0830&GA=103.

here—TV shows, movies, commissioned digital videos—are potentially expressive.

In jurisdictions applying the transformative use test, whether a would-be infringing use may receive this protection is conditioned upon whether the work adds "significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation."[291] Such a standard reflects a compromise between society's interest in freedom of expression and dissemination of information, and an individual's right to control the uses of their identity and benefit from the exploitation of their persona.[292] In jurisdictions that take a more medium-centric approach, uses in certain expressive works fall entirely outside of the types of uses in trade and advertising that are subject to liability.[293] Such an exemption is an attempt to strike a "careful balance of a person's right to privacy against the public's right to a free flow of ideas."[294]

Unfortunately, the current right of publicity framework is constructed in a manner that unintentionally incentivizes the production of deepfakes over other types of appropriations of likeness. The existing articulation of the transformative use test, which grants protection where "a celebrity's likeness is so transformed that it has become primarily the defendant's own expression," means that many deepfakes may clear the transformative use threshold.[295] Because deepfakes inherently transform the source material and lend themselves especially well to use in artistic expression, satire and social commentary, existing approaches actually award their creators *greater* protection than creators who employ other uses of likeness, despite their significantly greater capacity to harm the individuals they depict.

The outcome is even bleaker in jurisdictions such as New York, which instead rely on sweeping categorical exemptions from liability for infringement for appropriations of likeness in the context of art and satire.[296] Because New York courts have cleared nonconsensual uses of likeness in film and television as being non-implicative of "use for advertising and trade," a production

291. *Comedy III*, 21 P.3d at 799.
292. *No Doubt*, 192 Cal. App. 4th at 1029–31.
293. *Dryer*, 55 F. Supp. 3d at 1188.
294. *Foster*, 7 N.Y.S.3d at 104.
295. *Comedy III*, 21 P.3d at 809.
296. *Dryer*, 55 F. Supp. 3d at 1197–99; *Simeonov*, 159 Misc. 2d at 59–60.

company could very plausibly substitute a deepfake for a live actor with no liability.[297] Additionally, because uses in "satire and parody" are similarly exempted, an argument could be made in favor of the majority of deepfakes that their content is intended to lampoon, and thus may be characterized as protected social commentary.[298]

Such misalignment calls for a re-evaluation of how deepfakes are approached and underscores the need for developing a more rigorous approach for this special type of use of likeness. For transformative use jurisdictions, this may take the form of a revised transformative use test addressing whether the deepfake is so overwhelmingly transformative as to offset the risk that the deepfake may be construed as an actual representation of the individual or substantially undermine their economic interests. In medium-centric jurisdictions, it may look like passing laws similar to New York's posthumous right of publicity statute, prohibiting uses of digital replicas in contexts where the public is likely to be deceived. By establishing such a standard, the law can ameliorate the risk deepfakes pose to an individual's economic and reputational interests, while still preserving the public's right to engage with this form of creative expression.

1. Revising the Transformative Use Test

For transformative use jurisdictions, re-tooling the law's approach to deepfakes may be as simple as re-defining the standard by which transformativeness is assessed. In its current form, the transformative use test is primarily content-focused, emphasizing the degree to which the content was the creator's own expression versus a mere capitalization on the identity of another.[299] This may be a helpful inquiry in most contexts of appropriation of likeness, which entail exploiting "literal depiction or imitation of a celebrity for commercial gain . . . without adding significant expression" such that the works become "likely to interfere with the economic interest protected by the right of publicity."[300] Such an assumption is based on the premise that transformative elements widen the gap between how the depicted individual may present themselves and their representation in the challenged work,

297. Sondik v. Kimmel, 131 A.D.3d 1041, 1042 (N.Y. 2015).

298. *See* Sam Gregory & Katerina Cizek, *Just Joking, Deepfakes, Satire and the Politics of Synthetic Media*, MIT (2023).

299. Post & Rothman, *supra* note 237 at 129.

300. *Comedy III*, 21 P.3d at 808.

making that representation less threatening.[301] Unfortunately, in the case of deepfakes, these assumptions are simply not correct. For example, if deepfakes' greatest commercial threat to actors is their potential to eliminate the need for the actor themselves, ensuring that deepfakes add adequate "creative expression" around the depictions of the actor does nothing to mitigate this harm. In fact, adding "additional creative expression" to the depiction of an actor is inherent to the process of filmmaking. Facilitating the addition of such creative expression is precisely what the actor is being compensated for.

Rather than scrutinizing the added original expressive content, in cases involving deepfakes, it is more useful to examine how the work will be perceived by the viewer and its effect on the economic interests of the person depicted. The effect on the viewer portion of this inquiry would turn on whether the deepfake subject was depicted in a manner that would suggest to the viewer either that (1) the video is genuine, rather than generated, or (2) the video was authorized, rather than made without permission. The second portion of the inquiry would consider whether the use in question is one for which people would normally be paid.

Let us consider the viewer perception portion first. Imagine a TikTok creator famous for deepfakes produces a mashup of *Seinfeld* and *Pulp Fiction*, in which Jerry Seinfeld is recast in an iconic scene in which he unsuccessfully attempts to ward off the film's two hitmen protagonists, portrayed by John Travolta and Samuel L. Jackson.[302] The banal travails of the middle-aged Manhattanites in *Seinfeld* never entailed Jerry flailing a revolver,[303] and the comedian himself has expressed a personal distaste for violence and violent behavior,[304] making the representation immediately appear somewhat fake.

301. *Id.*

302. DesiFakes, *Jerry Seinfeld in Pulp Fiction [Deepfake]*, YOUTUBE (Feb. 6, 2022), https://www.youtube.com/watch?v=S1MBVXkQbWU.

303. While an episode of *Seinfeld* does address Jerry's apartment getting robbed, it does not involve any type of confrontation between Jerry and the invaders, who snuck in through an open door. *Seinfeld: The Robbery* (NBC television broadcast June 7, 1990).

304. Matt McGloin, *Jerry Seinfeld Thought Man Of Steel Had Too Much Violence,* COSMIC BOOK NEWS (Jan. 6, 2014), https://cosmicbook.news/jerry-seinfeld-thought-man-steel-had-too-much-violence.

But actors routinely engage with vastly divergent types of roles.[305] One would therefore need to look to the video's context. Seinfeld is an established character being injected into a single highly recognizable scene from *Pulp Fiction*, [306] which is well-known and widely regarded as a cinematic masterpiece.[307] And the video is being displayed on a channel where one would not expect authorized works. No reasonable person would assume that Seinfeld has agreed to such a role or to hold him reputationally responsible for it. The use would then seem substantially transformative.

Imagine instead that a movie studio wishes to create a novel action movie. As before, they decide to cast a deepfake of Jerry Seinfeld in a role. Here, we have a vastly different set of circumstances. Movie studios generally produce real and authorized content, and this work is not spoofing a well-known and well-established cultural icon with a single minor change; it is doing something entirely new. Normally this "entirely new" aspect would help the transformativeness of the work, but here it should not. We expect live actors to create entirely new content. The novelty of the work is precisely why we would think it was real or authorized. It would now be the kind of work that would be incorporated into the broader "Seinfeld" image.

These two examples underscore the economic interest point. In the case of the TikTok video, the economic effect on Jerry Seinfeld is likely zero. It is arguably even slightly positive, as it might raise his profile among TikTok users who are too young to readily recall his signature show's decade-long run. A Coasian bargain[308] between Seinfeld and the creator would result in either a nominal fee or no fee at all. In the case of the new action movie, however, things would be very different. Seinfeld is an award-winning performer with numerous TV and movie appearances. He is normally well-compensated for such work, and it would cause him serious economic damage to be so completely replaced, as in *Zacchini's* human cannonball.

305. *See* Johnny Brayson, *24 Actors & The 2 Most Extremely Different Roles They've Ever Played*, BUSTLE (Sept. 17, 2019), https://www.bustle.com/p/24-actors-the-2-most-extremely-different-roles-theyve-ever-played-18741414.

306. Ben Sherlock, *10 Best Pulp Fiction Scenes that Fans Still Think About Today*, SCREENRANT (May 8, 2021), https://screenrant.com/most-memorable-scenes-pulp-fiction/.

307. Tom Brook, *Pulp Fiction at 20: How a Phenomenon Was Born*, BBC CULTURE (May 13, 2014), https://www.bbc.com/culture/article/20140514-how-pulp-fiction-shook-up-film.

308. A bargain which assumes low to no transaction costs.

2. New Statutory Provisions

In addition to asking courts to adopt a different test in the First Amendment context, a statutory solution is also necessary in some states. Consider Illinois' Right of Publicity Act, which – up until 2024 – included an exception to liability for the "use of an individual's identity in an attempt to portray, describe, or impersonate that individual in a live performance, a single and original work of fine art, play, book, article, musical work, film, radio, television, or other audio, visual, or audio-visual work."[309] This provision goes beyond the First Amendment in that it appears to simply exempt such works from the right of publicity altogether.

In August of 2024, Illinois amended this exception to not apply to digital replicas. It defined digital replica as: "a newly created, electronic representation of the voice, image, or likeness of an actual individual created using a computer, algorithm, software, tool, artificial intelligence, or other technology that is fixed in a sound recording or audiovisual work in which that individual did not actually perform or appear, and which a reasonable person would believe is that particular individual's voice, image, or likeness being imitated."[310] Digital replicas can be used without permission under certain circumstances, for instance in a news, public affairs, or sports broadcast, in a political campaign, or for parody, satire, or commentary. But broad exemptions for educational and newsworthy uses, or uses in docudramas, are contingent on not giving a reasonable viewer or listener the false impression that the replica is the genuine article.[311]

Other states could adopt similar provisions. If they do not wish to follow the example of Illinois, they could either prohibit the use of digital replicas outright or otherwise subject their use to the same transformative use standard as transformative use jurisdictions: requiring that no reasonable person would believe it was an actual representation. Courts may then use similar inquiries as invoked by the transformative use test to establish whether the deepfake in question meets this standard.

Such a heightened standard is particularly warranted in the context of deepfakes that might be characterized as satire, commentary, or that may

309. 765 ILL. COMP. STAT. 1075/35(b)(1) (1999).
310. ILL. PUB. ACT 103-0836, to be codified at 765 ILCS 1075/5.
311. *Id.*

otherwise fall under the "public interest" umbrella.[312] Because deepfakes are so realistic, they have the potential to blur the line between satire and misinformation.[313] This creates an added need for people to be clear about what is and is not a deepfake. A depiction of former President Trump being brutalized by the police is only socially valuable political commentary if people know it is intended to be a dramatization rather than a depiction of actual events. Obscuring what is real and fake turns the definition of "newsworthiness" on its head, such that the content becomes a greater and greater threat to shared social reality the more ostensibly "newsworthy" its content.

Consider how this interacts with traditional cameo depictions of political figures. Imagine a film scene in which an actor is depicted meeting the president. The president is shown from the back, and he is plainly a thin black man with short hair. A voice is heard that sounds much like that of former President Obama. Or the wall of a post office is shown, and on that wall is the official portrait of then-President Obama. Both of these uses would conjure the image of the former president, but neither would imply to a reasonable viewer that he had been involved in the movie. A deepfake of Obama that shows his face, speaks with something indistinguishable from his voice, and can interact directly with the actors in the movie conveys a very different impression to the viewer. A reasonable viewer would think the former president had been involved, and that he was perhaps paid a fee. Were the movie something offensive, this false impression could easily damage his reputation. And, notably, this would be entirely permissible, even under the 2023 Screen Actors Guild contract.

3. Implications of a New Approach

Applying this heightened standard, either through the application of a specialized transformative use test or through new legislation, has several benefits. To start, it comports with social expectations and desires regarding the use of deepfakes. The overwhelming majority of individuals support the regulation of deepfakes,[314] and are opposed to even nonpornographic

312. N.Y. CIV. CODE § 50-f(2)(d)(i).

313. Hao, *supra* note 23.

314. Jeffrey Gottfried, *About Three-Quarters of Americans Favor Steps to Restrict Altered Videos and Images*, PEW RESEARCH CENTER (June 14, 2019), https://www.pewresearch.org/short-

deepfakes absent a disclaimer or other clear acknowledgement of their falsehood.[315] Subjecting expressive deepfakes to the heightened standard of no reasonable person believing their veracity may prove more useful than merely requiring such deepfakes to contain a disclaimer or "truth label" regarding their authenticity.[316] First, such disclaimers may be readily overlooked by viewers who have only limited "fast interactions" with content, and may not even notice the label denoting the content as false.[317] Second, given that deepfakes are highly susceptible to being shared and reposted on social media,[318] it is plausible that disclaimers might get lost as the deepfake migrates from one platform to another. Consider how movie and tv show clips are often taken out of context and reposted on TikTok, for instance. Finally, and perhaps most pressingly, many viewers engage with deepfake content because at some level they may want to believe it is genuine, and they thus may be prone to overlooking anything indicating otherwise, including disclaimers. Given such constraints, it is possible that the most effective way to disclaim a deepfake's portrayal would be to embed the disclosure within the deepfake itself, in the form of content that is so clearly distorted that even the most cursory viewer would realize it is not true.[319]

Applying this standard has the collateral benefit of conferring additional protection for private persons that become targets of a deepfake. While private persons are less likely to suffer the same staggering commercial losses as celebrities, the risk of irreparable personal harm in the form of reputational damage and enduring psychological distress is just as profound.[320] The "no reasonable person" standard provides extra protection for private persons because unlike celebrities, who are "known" for particular attributes, private individuals are not widely known for anything at all. Consequently no

reads/2019/06/14/about-three-quarters-of-americans-favor-steps-to-restrict-altered-videos-and-images/.

315. Kugler & Pace, *supra* note 6 at 660.

316. *See* David Elder, *Applicable First Amendment Standards, Privacy Torts* § 4:14 (2022).

317. *Id.*

318. *See* Nicole Brown Chau, "*Emotional Skepticism" Needed to Stop Spread of Deepfakes on Social Media, Expert Says*, CBS NEWS (Nov. 12, 2019), https://www.cbsnews.com/news/deepfakes-on-social-media-users-have-responsibility-not-to-spread-fake-content-expert-says/.

319. Elder, *supra* note 8.

320. *See* Nina Jankowicz, *The Threat From Deepfakes Isn't Hypothetical. Women Feel It Every Day*, WASH. POST (Mar. 25, 2021), https://www.washingtonpost.com/opinions/2021/03/25/threat-deepfakes-isnt-hypothetical-women-feel-it-every-day/.

"reasonable person" could say with any certainty whether a deepfake of a stranger accurately mimics their behavior. This is especially true in the context of the insidious pornographic class of deepfakes, as subjects are depicted engaging in intimate acts to which the public would never be privy. Such a heightened protection for private individuals is appropriate based on the traditional precepts of privacy law, which draw a distinction between private and public figures regarding reasonable expectations of privacy.[321]

Instituting this approach would also, of course, present certain challenges. First, implementing such a revised standard would have the effect of pushing deepfake uses that might otherwise be permissible into the realm of uses requiring a license. For example, certain deepfakes created for purposes of education might pose challenges, particularly where the subject of the deepfake is living, or has only recently died. While a deepfake of Albert Einstein teaching physics would not be problematic,[322] as no reasonable person would believe he has been resurrected, a deepfake of the President of the United States giving a civics lecture might be problematic, as presidents have been known to make classroom visits from time to time.[323]

Second, such a scheme would require certain jurisdictions, like New York, to pass additional legislation regulating deepfakes. Lawmakers are sometimes wary of deepfake regulation, which has been construed as limiting freedom of expression.[324] Recent legislation in Illinois that proposed granting civil recourse to victims of "digital forgeries" faced opposition, with objectors citing First Amendment concerns and fears that protection for works of parody and social commentary would be eroded.[325]

Finally, as of now, many deepfakes are beyond the reach of right of publicity laws in most jurisdictions, as the majority of deepfakes are posted and

321. Elder, *supra* note 316.

322. Ashish Jaiman, *Positive Use Cases of Synthetic Media (aka Deepfakes)*, TOWARDS DATA SCI. (Aug. 14, 2020), https://towardsdatascience.com/positive-use-cases-of-deepfakes-49f510056387.

323. Mike Allen, *Many Presidents Spoke in Schools*, POLITICO (Sept. 7, 2009), https://www.politico.com/story/2009/09/many-presidents-spoke-in-schools-026829.

324. Tiffany Hsu, *As Deepfakes Flourish, Countries Struggle with Response,* N.Y. TIMES (Jan. 22, 2023), https://www.nytimes.com/2023/01/22/business/media/deepfake-regulation-difficulty.html.

325. Patrick M. Keck, *Digital Forgeries Bills Advance out of House, Senate Committees*, STATE JOURNAL-REGISTER (Mar. 9, 2023), https://www.sj-r.com/story/news/politics/state/2023/03/09/bills-allowing-deepfake-victims-to-sue-pass-committee-votes/69968885007/.

shared on social media, rather than commissioned in a commercial sale.[326] While certain right of publicity frameworks such as California's common law cause of action may construe a content creator's reputational benefit as being a sufficient "personal advantage" for purposes of conferring liability, the overwhelming majority of jurisdictions would likely characterize viral social media posts as "noncommercial" and thus outside the scope of a right of publicity cause of action.[327] Addressing such uses would require the application of either defamation law, or criminal laws targeting nonconsensual pornography.

V. CONCLUSION

Right of publicity law has always been informed by the means of appropriation available to would-be infringers. In fact, it is itself a response to the threats posed by increasingly sophisticated modes of invoking another's likeness.[328] Among the theoretical underpinnings of the right of publicity, particularly in the Warren and Brandeis-era privacy-based context, was concern regarding the potential dignitary harms made possible by the burgeoning mass-media industry, and increasing ease by which one could capture an individual's likeness.[329] While Warren and Brandeis may have had concerns regarding the speed with which a snap of a photograph could capture a subject's image relative to sitting for a portrait,[330] the existence of deepfake technology means one's likeness can now be appropriated without the presence or knowledge of a subject at all.

The ability to create deepfakes represents the next quantum leap in the potential to easily appropriate another's likeness in a manner that profoundly undermines both the economic and reputational interests that right of publicity law seeks to protect. Deepfakes are uniquely threatening in the commercial context, as they are veritable substitutes for their subjects. In the reputational context, by nature of their uncanny resemblance to reality, deepfakes threaten to confuse even those closest to the depicted individual, and in doing so

326. For where deepfakes appear, see Jeffery T. Hancock & Jeremy N. Bailenson, *The Social Impact of Deepfakes*, 24 CYBERPSYCHOLOGY, BEHAVIOR AND SOCIAL NETWORKING 149 (2021).

327. *See supra* Part III.

328. Eric Johnson, *Disentangling the Right of Publicity*, NU. L. REV. 891–98 (2017).

329. *Id.* at 898–99.

330. *Id.*

undermine their subjects' capacity for self-definition and autonomy.[331] The new magnitude of personal damage deepfakes may wreak demands the law take a commensurately significant leap in approach.

Right of publicity law must be prepared to confront this peculiar form of likeness, and by doing so, venture toward its next frontier. Indeed, that seems to be the conclusion reached by the actors participating in the AFTRA strike. After a long 118-days, the actors finally won the hard-fought concession requiring studios first obtain actors' consent before using AI-generated images, and then compensate those actors at a rate commensurate with their living performance.[332] Though this contract helps with some of their concerns, it is only a start. The question of how to address recreational use of deepfakes, how to protect people outside of the guild system, and other circumstances in which there was never a contract to begin with remain open. Our proposals, both in common law and new legislation provide answers to these outstanding questions, by imposing more concrete limits on when deepfakes can be construed as transformative art versus when they begin to encroach upon an individual's right to privacy and self-determination.

331. Bernard Marr, *Deepfakes – The Good, The Bad, and The Ugly*, FORBES (Jan. 11, 2022), https://www.forbes.com/sites/bernardmarr/2022/01/11/deepfakes--the-good-the-bad-and-the-ugly.

332. Megan Cerullo, *The SAG-AFTRA Strike Is Over. Here Are 6 Things Actors Got In The New Contract*, CBS NEWS (Nov. 14, 2023).